Ngai Tahu Land Report

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Te Wai Pounamu

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Waitangi Tribunal, Department of Justice, Wellington.

Preface

Thou hast it now! land, rents, and favouring aid
From sublunary powers; and should heaven grant
That no historic eye shall spy the matter,
The Maori wrongs shall vanish in the past,
As Maori lives in present. They depart
Like mist-wreaths of the morning; but a book
Which graves the stubborn facts on winged leaves;
Guard thou 'gainst that! for it shall tell the tale
To countless generations, and 'twere better
To do no wrong than let the wrong be proved
In the eternal blazon of the truth
(G N Rusden, Aurere-tanga, 1888)

The report which we here preface not only sets out the grievances of Ngai Tahu and the tribunal's findings on these grievances, it also explores Ngai Tahu's background and the tribe's relationship with its vast territory and its rich and diverse resources. It examines in detail the circumstances surrounding the Crown purchases, the impact of settlement and the consequences that flowed therefrom. It is the story of Ngai Tahu's search for redress, of their grievances over the past 150 years and how the Crown has responded, or more often, failed to respond.

The narrative that follows will not lie comfortably on the conscience of this nation, just as the outstanding grievances of Ngai Tahu have for so long troubled that tribe and compelled them time and again to seek justice. The noble principle of justice, and close companion honour, are very much subject to question as this inquiry proceeds. Likewise, the other important equities of trust and good faith are called into account and as a result of their breach sadly give rise to well grounded iwi protestations about dishonour and injustice and their companions, high-handedness and arrogance.

The claim is brought by Rakiihia Tau and the Ngai Tahu Maori Trust Board. They are the claimants. But the claim is really from and about Ngai Tahu, an amalgam formed from three main lines of descent which flowed together to make the modern tribe. The earliest of the three tribes was described as Waitaha, this being also a collective name given to a number of ancient tribal groups which occupied Te Waka o Aoraki (South Island). The claimant Rakiihia Tau referred to the founding ancestor as Rakaihautu o te Uruao canoe.

Archaeological evidence indicates that Maori people were in the South Island about 1000 years ago. The second tribe, known as Ngati Mamoe came from the Heretaunga (Napier) area, moved to the South Island area about the sixteenth century and gradually filtered down through the South Island to intermarry with Waitaha and to assume control. The third tribe, known as Ngai Tahu, also migrated from the eastern region of the North Island. From the seventeenth century Ngati Mamoe and Ngai Tahu tribes gradually united. We shall look at Ngai Tahu tribal structure in chapter 3 of this report.

In the opening chapter we explain the nature of the Ngai Tahu claim. In all, about 200 grievances were placed before the tribunal over the approximate two and a quarter years it took to hear the evidence. The hearings are not yet finished. There remains the task of hearing further sea-fisheries evidence before the tribunal can report on that important area of claim. It will be presented as a separate report in due course. The tribunal also proposes to issue a third report on a large number of ancillary claims. This first report concerns Ngai Tahu grievances arising from eight regional land sale transactions between the Crown and Ngai Tahu over the period 1844 to 1864 and a ninth claim in respect of the loss of Ngai Tahu mahinga kai, their food resources. These nine general headings of claim were presented to us by counsel as the "Nine Tall Trees of Ngai Tahu".

On 31 July 1844, the Crown entered into an agreement with Ngai Tahu to purchase over half a million acres of land in Otago for the sum of œ2400. Over the next 20 years the Crown completed further purchases from Ngai Tahu ending with the Rakiura (Stewart Island) purchase comprising 420,000 acres for œ6000 on 29 June 1864.

In total, 34.5 million acres of land passed from Ngai Tahu to the Crown for the sum of œ14,750. The total area of New Zealand is a little over 66 million acres so it can readily be seen that the land area involved in these transactions was most of the South Island and more than half of New Zealand. If we ignore the last sale in respect of Rakiura, which was quite disproportionate in price to the other seven regional sales, we see that some 34 million acres of land were purchased by the Crown for œ8750. In effect the Crown paid six one hundredths of one penny for each acre it purchased. In North Canterbury, two years prior to concluding the purchase of 1,140,000 acres from Ngai Tahu for œ500, the government actually sold a block of land containing 30,000 acres for œ15,000 which on a per acre equivalent was 1142 times more than Ngai Tahu was paid two years later. It was also more than the Crown paid for all Ngai Tahu's 34.5 million acres.

This claim is not primarily about the inadequacy of price that Ngai Tahu was paid, although as we will see in respect of the North Canterbury, Kaikoura and Arahura purchases, the claimants strongly criticised the arbitrary imposition and unfavourable terms of the purchase price. Ngai Tahu have certainly a sense of grievance about the paucity of payment they received for their land but then Ngai Tahu have always regarded the purchase price not as a properly assessed market value consideration in the European concept but rather as a deposit; a token, a gratuity. Ngai Tahu understanding and the substance of their expectations was that they agreed to share their resources with the settler. Each would learn from the other. There was an expectation that Ngai Tahu would participate in and enjoy the benefits that would flow from the settlement of their land. As part of that expectation they wished to retain sufficient land to protect their food resources. They expected to be provided with, or to have excluded from the sale, adequate endowments that would enable them to engage in the new developing pastoral and commercial economy.

This claim and this story is about that expectation. Ngai Tahu grievances therefore are directed at the Crown's failure to keep its promises, its failure to provide the reserves, the food resources and the health, educational and land endowments that were needed to give Ngai Tahu a stake in the new economy. This claim is also about Ngai Tahu's

comprehension of those areas of land they considered they did not sell to the Crown despite what the written agreements might have said. And of course, this claim is about Ngai Tahu expectations of their rights under the Treaty of Waitangi and how those rights were disregarded by the Crown in its dealings with the tribe.

In opening his claim, Rakiihia Tau spoke about his claim and the Treaty:

> I hereby claim upon the principles of justice, truth, peace and goodwill for and on behalf of my peoples within the principles of the Treaty of Waitangi. (A17:5)

He later said:

> It has been stated to me on many occasions by our Pu Korero that the European had offered the Maori a world free of conflict, free of barbaric practices, where all men would be equal. This was but one of the attractions advanced to encourage our ancestors to sign the Treaty and the Southern Deeds of sale. These noble thoughts were agreed to by our people in faith and trust, in expectation of the agreements made with our Treaty partner, that further lands would be allocated to our ancestors.
>
> ....On the other hand much discussion has taken place since the signing of the Treaty and the Southern deeds as to the material needs that people require for survival. This Marae, this wharenui has heard the echoes of these complaints, the non fulfilment of the contractual agreements between the Maori and the Crown, within the Treaty of Waitangi and the Southern Deeds. That is why we appear before you so that the liabilities can be assessed as to what was intended, and to address the remedies so that we can truly say Justice has been done. (J10:2-3)

As the narrative unfolds two important features will emerge. The first is that Ngai Tahu have, throughout their active attempts to seek redress, always abided by the rule of law and used constitutional avenues to pursue their claims. The tribe has displayed restraint and dignity before this tribunal. Secondly, Ngai Tahu have always demonstrated their loyalty to the Crown and their affection for the sovereign. The head stones of two Ngai Tahu rangatira, Hone Karetai and Matenga Taiaroa, spell out that loyalty. In 1860 Taiaroa represented Ngai Tahu at the Kohimarama conference called by the governor to sound the loyalty of the tribes to the Crown. He said:

> I will speak about my own Island. My Island is with the Queen. There is no person to say, Turn to one side. (F11:7)

We will see in chapter 18 several references to statements of loyalty made by Ngai Tahu leaders (18.2.3). The evidence of an historian, Bill Dacker (F11) enumerated many declarations of Ngai Tahu loyalty to the sovereign and of their acceptance of the Queen's laws. During the late part of the last century, as Ngai Tahu parliamentarians and leaders pressed for recognition of their land grievances they constantly acknowledged allegiance to the Crown. In 1903 Tame Parata said this:

> the Ngaitahu tribes, the residents of the South Island, have always been loyal, and continue to be loyal and faithful to their allegiance. (F11:12)

After referring to the continuing loyalty of Ngai Tahu, Dacker concluded:

> It is a sad commentary on the history of New Zealand that their loyalty was rewarded with no substantial recognition of their grievances despite nearly 150 years of effort on their part to obtain justice. (F11:12)

Ngai Tahu's attitude to the Treaty is also explained in this statement by Rakiihia Tau of his inherited understanding of the Treaty.

Article Three of the Treaty offered fellowship and brotherhood, a world where all men would be free, that we may be one people (kotahitanga) for these were the rights of all British citizens.

Article Two of the Treaty would give protection to the Maori and this was to include the protection of Maori property rights, i.e. Rangatiratanga over our mahinga kai that we desired to retain.

Articles Two and Three were our Treaty partner's commitment that would earn them the right to Kawanatanga, the right to Govern under Article One of the Treaty.

From a Ngai Tahu perspective this meant that our social order had to change from that of the rule by an Arikitanga under the old order to equality of all mankind under British justice under the new order.

By attaching their signatures to the Treaty and Southern purchase deeds, our Ancestors bound our people to the fulfilment of these undertakings. As in our view, so did the representatives of the Crown bind the Crown with their signatures. Maori custom was such that the word was our bond. The Southern Maori, as well as I think all Maoridom, were required to implement a social order recognising their commitment to the Treaty of Waitangi.

It is for this reason that Ngai Tahu Whanui had to improvise what we know as the Runanga structure. The Arikitanga of inherited rights was replaced by free elections of persons to represent their people who by the 1850s were confined to small and scattered reserves awaiting our Treaty partner to honour his word to Article Two and Three of the Treaty, to the contracts within the Southern purchase deeds, being the return of our lands, our mahinga kai.

The function of the Runanga Officers elected evolved according to Maori commitment to the principles of democracy, the equality and mutual respect of all mankind. The function of Runanga Officers was one of advising and assisting our people to those principles, being the voice of our people, to pursue and assist our Treaty partner to retain his commitment and his dignity, according to the Treaty.

Power over people was suspended voluntarily, which included abandoning the power of tohungaism. Such was the Maori understanding and commitment to the Treaty.

Our people expected that our Treaty partner would proceed in the spirit of the Treaty to protect and support our Rangatiratanga over our property rights, but instead, these rights were removed. (J10:37-38)

As we discuss the events surrounding the relationships between the Crown and Ngai Tahu at the time of signing the Treaty and as land purchases proceeded, we shall see how that history started honourably. In chapter 4 of this report we shall examine in detail events surrounding the Treaty and the directions of Colonial Secretary Lord Normanby to Governor Hobson. The instructions were explicit. Hobson was required to secure fair and equal contracts which were to be negotiated through an official protector appointed to watch over the interests of the aborigines. The duty of the protector was to prevent Maori from entering into any contracts which might be injurious to them, and no land was to be bought from them that was essential or highly conducive to their comfort, safety, or subsistence. These instructions clearly heralded the need to protect Maori from the highly adverse effects of settlement.

In chapter 5 of the report the tribunal will look in detail at the background to the purchases and the Crown's policy which directed the actions of the Crown's representatives and negotiators during the various sales. We shall see how Governor Grey and his agents ingeniously used the Crown's right of pre-emption to extinguish Maori rights to vast tracts of land in the South Island for nominal sums and pave the way for settlement. In the following 10 chapters the tribunal examines the principal grievances of Ngai Tahu arising from the respective purchase deeds. It is here that the tribunal looks very closely indeed at each of the purchases. It is here that the tribunal reaches its conclusion that the Crown failed time and time again to honour the principles of the Treaty of Waitangi. And it is here that the honour of the Crown is impeached by the actions of a few men. Instead of ensuring that Ngai Tahu were left with ample land for continued access to food resources and for developing agricultural and pastoral farming alongside the new settlers, they were confined to very small reserves barely capable of providing a subsistence living. Land which they sought to retain was denied them. Access to their mahinga kai was largely cut off.

In chapter 16 we overview the 20 years of land negotiations and how those events related to Treaty principles earlier enunciated by the tribunal in chapter 4.

In various chapters of the report as the tribunal looks at Ngai Tahu's social and economic situation both before and after the Treaty and the land purchases, we will examine the tribe's relationship with its resources. More particularly in chapter 17 we look at the impact of settlement after 1840 on mahinga kai, which as you will see, is defined by the tribunal as "those places where food was procured or produced" by the tribe.

Tipene O'Regan writes about the Ngai Tahu claim in Waitangi: Maori and Pakeha perspectives of the Treaty (1989). In his essay he states that the Ngai Tahu claim involving mahinga kai is one of the most emotionally charged elements of the tribe's grievances and further explains how commercial exploitation and use of natural resources both for tribal consumption and trade was basic to the Maori economy and to the whole social fabric of tribal and intertribal life. Although the tribunal has had to sever the sea-fisheries from this present report, nevertheless, it heard comprehensive evidence from tangata whenua and a host of professional witnesses with a wide

spectrum of skills. This section of the report is really all about the conflict that arose from the tribe's need to retain its resources and the settlers' need to develop the land. We will look at the compatibility of those respective needs and the consequences of the clash.

Following the purchases and the growing Ngai Tahu discontent with their lack of land and loss of resources including pounamu (greenstone), a series of parliamentary committees and Royal commissions investigated Ngai Tahu's complaints. From 1872 through to 1920 at least 17 separate inquiries took place. The tribunal examines the work of these various select committees and commissions of inquiry in chapter 21. It also plots the consequences of Ngai Tahu landlessness on the social and economic conditions of the tribe. The tribunal also looks at promises made in respect of schools and hospitals and at events both leading up to and emerging from the "landless natives" grants. At the end of this survey the tribunal overviews the Crown response to Ngai Tahu grievances and in a short, concluding passage, gives its finding that Ngai Tahu have established that they have major land and associated grievances. In that brief conclusion the tribunal encompasses all the findings that emerge from the detailed studies in chapters 6-21 inclusive and which are also encapsulated in chapter 2. It then remains for the tribunal to give some indication of how it sees the Crown and claimants should approach the question of redress which primarily involves the restoration of rangatiratanga. As the tribunal sees this question, the honour of the Crown can only be restored if first the honour of Ngai Tahu is restored. That is the issue which chapter 24 of this report addresses.

On 3 June 1987 the tribunal to hear the Ngai Tahu claim was constituted and it commenced its proceedings with a pre-hearing conference of counsel on 20 July 1987. The first hearing took place on 17 August 1987 and the final hearing on 9 October 1989. It can fairly be said that at the outset the seven-person tribunal, drawn from a range of professional, academic, commercial and people related backgrounds, had little knowledge of the claims and grievances they were charged to investigate. Most of the tribunal members also had scant knowledge of the constitutional history and background surrounding the land purchases of the South Island. Over the past three and a half years, as a result of the diligence of counsel and their researchers, the tribunal has received 900 submissions, has heard from 262 witnesses and 25 corporate bodies. It has been no easy task to sift and analyse the mountain of evidence. Although no tribunal conducting any historical investigation spreading back over 150 years can say with certainty that every material fact has been discovered, there is no doubt that the present inquiry has been a much more extensive and searching investigation than any earlier inquiry. But having said that, it is interesting to note the similarity of the principal findings of this tribunal and those of some earlier commissions, especially those conducted by Commissioner Alexander Mackay in 1887 and 1891.

The tribunal has been very much aware of the need to look at the situation as at the time and in light of the circumstances in which events occurred. We look at the explanations and excuses that may have justified or influenced the actions of those administrators who are now subject to serious criticism. In the end the tribunal has to apply the test provided by section 6 of the Treaty of Waitangi Act 1975. That is the function of this tribunal and by which it must be directed.

The facts related in this narrative must at least correct the widely held public view that this claim only arose because of the 1985 statutory amendment opening up claims back to 1840. That of course is not so. It has been in the hearts and minds of Ngai Tahu since 1848 and repeatedly advanced since that time by one generation after another. It is a claim that could have been avoided and should have been settled before the turn of the century. It still can be settled. The final chapter giving effect to that settlement is yet to be written.

This tribunal came to the claim with much to learn but we leave it in no doubt and in accord. We are relatively certain that, like us at the outset, the people of this nation do not understand the Ngai Tahu claim. In chapter 2 we have attempted to summarise the main grievances amd the tribunal's findings on these grievances in this large claim including the eight separate purchases and mahinga kai. Our summary includes our main findings as to breaches of the Treaty and Treaty principles and on other aspects of the claim. An in-depth discussion follows in the remainder of the report. We hope our fellow New Zealanders will find time to read on.

Waitangi Tribunal, Department of Justice, Wellington.

Introductory letter to the Minister

The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Te Rangatira Winston

Te Minita Maori

Tena koe, kua eke atu nei hei piki i nga taimahatanga o te iwi i pehi tonu nei.

Ka tahi ano mai rano i a Apirana Ngata ka noho he roia Maori hei Minita Maori. Nui rawa atu nga mihi kia koe. Me te mohio iho ko koe te Matua o te iwi.

Tenei ka tangi atu ki te hunga kua riro kua ngaro ki te po. Ratou katoa, te totara, hae mata, te tawatawa titi a Turirangi Te Kani ka riro. Nga mate mai te Rerenga Wairua, ki Murihiku whiti atu ki Wharekauri. Haere! Haere! Haere ra! Toia mai! Te Waka! Ki te urunga! Te Waka! Ki te moenga! Te Waka! Ki te takotoranga! I takoto ai Te Waka-o-Maui! "Te Tino Rangatiratanga o Ngaitahu."

We place before you the tribunal's report on the Ngai Tahu claim.

The report does not contain recommendations to give full effect to the findings of the tribunal on the major grievances. We have made recommendations pursuant to section 6(3) of the Treaty of Waitangi Act 1975 on only five matters. The claimants and the Crown requested the tribunal to issue its findings on the principal issues and then leave the parties to negotiate a settlement. We agreed to that course and will review the progress made in negotiations at the end of 12 months. We shall report to you on that question in due course.

The report is also incomplete in that it does not include the sea-fisheries claim nor does it address the further 108 ancillary claims which were raised during the hearing. Both those matters will be dealt with in two later reports. We propose to report on the sea fisheries claim next as the High Court has indicated that our report may be helpful to it in several fishery actions now adjourned sine die.

Further evidence is to be placed before the tribunal on sea fisheries. Overview reports on that evidence as well as submissions from the parties and the fishing industry will be presented at hearings set down to commence on 18 March 1991.

This report examines grievances arising from the Crown purchases of Ngai Tahu lands commencing in 1844. Most of those grievances are long-standing. Many are continuing grievances. Some are of recent origin.

This claim has traversed a time-span of 142 years since Ngai Tahu first voiced protest in 1848. It has been no easy task.

The tribunal hopes that this report will provide a sufficiently definitive base to enable settlement negotiations to proceed. We are conscious that most New Zealanders, like the tribunal itself at the outset of this inquiry, know very little about the nature and extent of Ngai Tahu's grievances.

The sheer volume of evidence and submission has unavoidably resulted in a lengthy report. Because of this, and in an endeavour to create a climate of informed understanding, we have encapsulated the major grievances and findings in the first part of the report. This also has been no easy task.

The tribunal believes that with goodwill it should be possible for the parties to settle their grievances sensibly and honourably.

We believe that in the conduct of this inquiry the tribunal, with the help of the parties, has done everything possible to establish a strong goodwill base for negotiations to succeed.

May we respectfully urge however that a successful settlement will only be achieved if a responsive and far-sighted approach is adopted by both parties as an acceptable compromise is sought. We also feel that the negotiations should take place at a high level once explanatory discussions and research are complete.

We trust, sir, that you will find this report of value and that the recommendations which are contained herein, particularly those relating to the funding and reimbursement of the Ngai Tahu Maori Trust Board, can be implemented speedily.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.1 Introduction

1.1. Introduction

We open this introductory portion of the report by asking six straightforward questions:
1 Who brought the claim?
2 What is the claim about?
3 Who was heard by the tribunal?
4 Who were the tribunal members hearing the claim?
5 How and where was the claim conducted?
6 What are the findings and recommendations of the tribunal?

We now proceed to answer those questions and as we do so, the answers lay bare the complexities of this huge claim. In opening, Mr Paul Temm, counsel for the claimants, referred to the scope of the claim by saying:
There is little doubt that the Ngai Tahu claim will be the biggest that this tribunal is ever likely to have to face. It involves almost the whole of the South Island and covers events that occurred during the course of over a hundred years. (A26:5)
The claim has indeed proved to be large. Apart from the eight very substantial claims affecting extensive areas of Ngai Tahu territory and the claim to mahinga kai, including sea fisheries, we received in total some two hundred claims concerning more specific and distinct matters. The late introduction of a substantial claim by other tribes challenging Ngai Tahu rangatiratanga over areas included in their claim and the representation of the fishing industry on fishery issues added to the variety of interlocutory issues which arose during the hearing of the claim.

That it was able to complete this inquiry is due in no small measure to the procedures the tribunal adopted. They will be explained shortly. The tribunal was also helped by the patience, tolerance and dignified attitude of the parties and their counsel. It was certainly helped by the commitment of the dedicated researchers.
The tribunal makes no apology for the length of this report. Nor does it regret that the size and number of claims have required it to adopt a markedly more clinical approach in exposition than in previous reports.

It is not only the size and number of issues that dictate the format. The tribunal has very much in mind that there should be finality of reporting on Ngai Tahu's long standing grievances. If, therefore, this account of our proceedings is somewhat detailed it is because of the need for posterity, as well as those presently concerned, to understand how this inquiry was conducted.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.2 Who Brought the Claim?

1.2. Who Brought the Claim?

The jurisdiction of the Waitangi Tribunal

1.2.1 The jurisdiction of the Waitangi Tribunal to consider grievance claims is contained in section 6 of the Treaty of Waitangi Act 1975 (herein referred to as "the Act") which reads as follows:

6 (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected -

(a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or

(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

As the law presently stands, a claim must be brought by a Maori and the claim is against the Crown.

Requirements of the tribunal

1.2.2 The general duty of the tribunal is spelt out in section 6 subsections (3) and (4) of the Act which read:

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

(4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the tribunal, the Crown should take.

The tribunal is required under the Act to present its findings and recommendations to the claimant, to the Minister of Maori Affairs and other ministers with an interest in the claim, and such other persons as the tribunal thinks fit. The tribunal is also given certain powers in respect of land transferred to a state-owned enterprise by section 8A of the Act.

The claimants

1.2.3 The present claim is brought by Henare Rakiihia Tau supported by the Ngai Tahu Maori Trust Board (herein referred to as "the claimants"). The former is Maori of Ngai Tahu and deputy chairperson of the claimant trust board. The latter is a body corporate constituted under the Maori Trust Boards Act 1955.

Claimants' counsel

1.2.4 The claimants applied for and were granted legal assistance under section 7A(2) of the Act. Mr P B Temm QC of Auckland was appointed as senior counsel and with him as assisting counsel, Mr D M Palmer of Christchurch. Mr M Knowles, a barrister of Christchurch, appeared with other counsel at the first hearing only.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.3 What Is The Claim All About?

1.3. What Is The Claim All About?

1.3.1 The original Ngai Tahu claim dated 26 August 1986 was filed on 28 August 1986. It was followed by seven amending claims over the next two years. It is not surprising there were a large number of amending claims. The actual hearing of the claim took over two years. During that time there was a need for revision. This was not due to any omission of the claimants but rather to the necessity to define the parameters of the claim, as Parliament, the High Court and the Court of Appeal during the hearing of the Ngai Tahu claim were dealing with matters such as state-owned enterprise legislation, Maori fishing rights and Treaty of Waitangi legislation, all of which had bearing on the Ngai Tahu claim.

During this period also, negotiations were proceeding between the Crown and Maori on land and fishing rights. Ngai Tahu were very much a part of this total scene. In particular the nature and extent of the Ngai Tahu sea fisheries claim required further definition.

List of Ngai Tahu claims

1.3.2 The following is a list of Ngai Tahu claims with brief particulars of each document. The details of the claims are in appendix 3. The content of the claims will be examined shortly.

(a) General claim of 26 August 1986
This is a short document challenging the Crown's move to transfer Crown pastoral leases and Crown land generally out of Crown ownership. The claimants alleged this action was contrary to the Treaty of Waitangi. The claim did not give specific details of any other grievances. It essentially attacked government's announced proposal to transfer land interests to state-owned enterprises.

(b) Amended claim of 24 November 1986 as altered by the insertion of paragraph 4 and schedule
This amendment reiterated Ngai Tahu opposition to the transfer of land interests under the State-Owned Enterprises Bill, but it also included general complaint about actions of Crown officials in the acquisition of Ngai Tahu lands from 1844. There were specific complaints about the Crown failing to honour allocation of tenths in respect of the Otakou (Otago) purchase as well as reference to improper alienation of reserves. The claimants further sought remedies specified in a petition to Parliament dated 7 December 1979.

(c) Amended claim of 16 December 1986
In this short document the claimants specified and identified the Crown freehold and leasehold interests to which it laid claim. A lengthy schedule of these lands was attached to the claim.

(d) Amended claim of 2 June 1987
On 24 April 1987, the tribunal by memorandum of directions, required the claimants to file a more particular statement of grievances, with specific details of the acts and omissions of the Crown of which the claimants complained. This amendment set out those particulars. It referred not only to grievances arising from land purchases by the Crown but also to Ngai Tahu's loss of their mahinga kai, including sea and inland fisheries.

(e) Amended claim of 5 September 1987
In this amendment the claimants set out their grievances in respect of Crown action granting perpetual leases of Maori lands reserved from the Arahura purchase and administered under the Maori Reserved Land Act 1955.

(f) Amended claim of 25 September 1987
This document detailed the Ngai Tahu claim to sea fisheries and the terms upon which Ngai Tahu would settle with the Crown.

(g) Amended claim in respect of inland waters, 13 April 1988
This claim asserted Ngai Tahu rights to inland waters comprising lakes, rivers and streams which are within the area of the Kemp purchase. Ngai Tahu deny these inland waters were sold to the Crown and say the Crown failed in its duty to protect te tino rangatiratanga of Ngai Tahu in these inland waters.

(h) Amended claim in respect of sea fisheries, 25 June 1988
In this final amendment Ngai Tahu reformulated their marine fishing claim. The claim details the nature and extent of Ngai Tahu fishing rights and deals also with management and conservation matters. It is a comprehensive statement of the Ngai Tahu sea fisheries claim.

The "Nine Tall Trees"

1.3.3 When Mr Temm opened for the claimants at the first hearing on 17 August 1987, he explained that the claim would be presented in nine parts which he called the "Nine Tall Trees of Ngai Tahu" (A26:5). Eight of these represented the different areas of land purchased from Ngai Tahu, whilst the ninth part would deal with mahinga kai or the food resources of Ngai Tahu. The "Nine Tall Trees" are grouped below in the chronological order in which the deeds of purchase were entered into between the Crown and Ngai Tahu:

1 Otakou (Otago), 31 July 1844

2 Canterbury, 12 June 1848

3 Banks Peninsula

(a) French purchases

(b) Port Cooper purchase, 10 August 1849

(c) Port Levy purchase, 25 September 1849

(d) Akaroa purchase, 10 December 1856

4 Murihiku (Southland), 17 August 1853

5 North Canterbury, 5 February 1857

6 Kaikoura, 29 March 1859

7 Arahura, 21 May 1860

8 Rakiura (Stewart Island), 29 June 1864

9 Mahinga kai

The "branches of the Nine Tall Trees"

1.3.4 At the first hearing counsel for the claimants stated he would be presenting a number of grievances attached to each of the "Nine Tall Trees". During the hearings the detailed grievances came to be known as "branches of the Nine Tall Trees". Mr Temm also indicated that a number of smaller claims which could be described as "undergrowth claims" would also come to notice.

As the hearing proceeded it became evident to the tribunal that it was facing a very large number of claims. Near the end of the hearings and at the tribunal's request the claimants were asked to file a list of grievances grouped under each of the "Nine Tall Trees". Counsel presented the tribunal with particulars of these grievances: in all, a total of 73 alleged wrongful acts or omissions of the Crown said to be inconsistent with the principles of the Treaty of Waitangi (see appendix 4). We shall now look at some of the major issues.

It is not an easy matter to select a sampling of the major issues as each of the 73 claims in its own way is important to the whanau, hapu or iwi of Ngai Tahu who are affected by that claim. There were however some issues which were argued more extensively than others. In the following summary therefore, the tribunal has selected some of those issues which will be examined, along with all the other issues, in the remainder of this report.

These are as follows:

1 Otakou
The claimants said that when 400,000 acres of land were sold to the Crown on 31 July 1844 for the sum of œ2400 the Crown failed to set aside one tenth of the 400,000 acre block as provided by the Crown's general waiver of pre-emption. The proclamation

provided that of all land sold, one tenth was to be kept for "public purposes especially for the future benefit of the aborigines".

2 Kemp
The claimants said that Ngai Tahu did not sell to the Crown as part of Kemp's purchase, any land west of the foothill ranges in an approximate line from Maungatere in the north, to Maungaatua in the south, nor did they sell Kaitorete Spit, or most of Waihora (Lake Ellesmere) and its northeastern shoreline with the adjoining wetlands. The claimants' argument on boundaries, if upheld, would mean that Ngai Tahu did not sell that land in the South Island from the Canterbury foothills up to the centre line of the alps. This large area of land, during the claim described as the "Hole in the Middle", now contains considerable hydroelectric and drainage works and includes major lakes, rivers and mountains.

The claimants also complained that the Crown failed to set aside ample reserves for their present and future needs and that their mahinga kai were not set aside and protected for their use as provided for under the purchase deed.

3 Banks Peninsula
The claimants said that they were not compensated for 30,000 acres of Ngai Tahu land awarded to the French, and further, that Ngai Tahu were denied a fair price for their land, adequate reserves and other resources for their continued sustenance and prosperity.

4 Murihiku (Southland)
The claimants said that the land west of the Waiau River (this land is now known as Southern Fiordland) was wrongfully included in the Murihiku purchase deed and was never sold. The claimants also said the Crown failed to reserve adequate land from the sale and failed to provide schools and hospitals as agreed upon.

5 North Canterbury
The claimants said that the Crown sold or leased lands to settlers before the Crown had purchased it from Ngai Tahu; the purchase was without adequate compensation and without any provision for reserves.

6 Kaikoura
The claimants said that the earlier Crown purchase of Kaikoura and Kaiapoi from Ngati Toa exerted unfair pressure on Ngai Tahu to sell on unfavourable terms. Further, that inadequate provision was made for reserves.

7 Arahura (West Coast)
The claimants said the Crown failed to permit Ngai Tahu to exclude such lands as they wished to exclude from the sale; failed to protect the right of Ngai Tahu to retain possession of pounamu (greenstone) and failed to protect Ngai Tahu by imposing perpetual leases containing unreasonable provisions over their reserve lands.

8 Rakiura (Stewart Island)
The claimants said they have been deprived of the full administration of the Titi Islands and that Whenua Hou (Codfish Island) was included in the purchase against the wishes of owners.

9 Mahinga kai
The claimants said that they have been denied access to and protection of mahinga kai and further, that the Crown has administered Ngai Tahu sea fisheries without reference to the tribe and without payment of any kind.

As stated, the foregoing grievances are a sampling only of the total of 73 grievances presented by the claimants, all of which will be dealt with in this report. The grievances we have mentioned are probably the major issues or branches of the "Nine Tall Trees" but the remainder of the 73 grievances are also important. Each grievance has been researched, presented and argued before the tribunal. Each grievance, large or small, requires the tribunal to determine whether the act or omission, policy or practice of the Crown was inconsistent with the principles of the Treaty of Waitangi. And so the "Nine Tall Trees" have 73 branches, but that is not all: as Mr Temm succinctly said at the first hearing, the "Nine Tall Trees" have also, beneath them, considerable undergrowth to which we shall now refer.

Ancillary or "undergrowth" claims

1.3.5 Counsel for the claimants explained at the outset that he would principally be concerned with the presentation of grievances in the nine groupings. But he added that at the commencement of each hearing kaumatua and other Ngai Tahu with grievances affecting their regions would present their claims under the general umbrella of the main claim. This procedure was followed and over a number of sittings throughout the various regions the tribunal heard a large number of grievances. Many of these claims concerned individuals and whanau and in some cases dealt with specific matters covered by the "Nine Tall Trees". These claims are scheduled in appendix 5. They will be dealt with in a later volume of this report.

A total of 108 claims made under this category have been received and will be reported on later. These claims cover not only a wide variety of land issues but also deal with legislation and Crown procedures. They also relate to matters such as loss of language, lack of recognition of Maori values such as place names, and various general issues such as the taking of too much land for roads and allocation of poor quality land in reserves. In addition to these 108 ancillary claims there are about 20 claims which will be dealt with in the sea fisheries report.

The number and content of the grievances as set out above will give some indication of the complex and wide ranging issues covered by the approximate total of the 200 grievances. As was said by several Ngai Tahu kaumatua at the poroporoaki following the final sitting on 10 October 1989, full opportunity was given to and taken by Ngai Tahu to tangi their grievances after a long wait of almost 150 years.

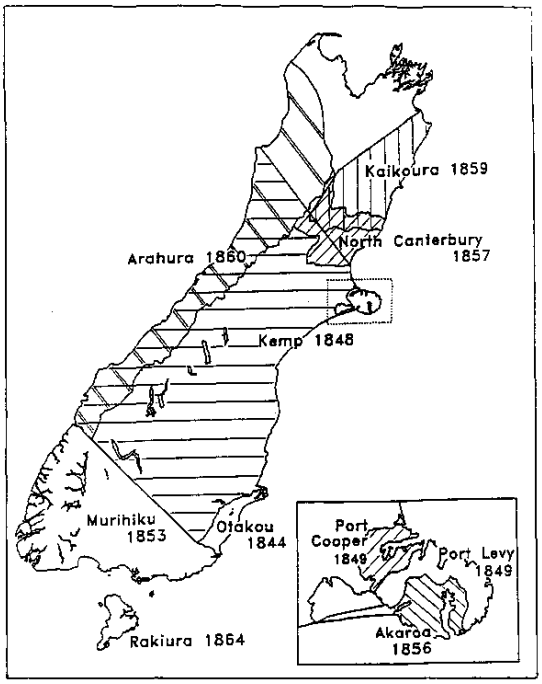

Figure 1.1: The Ngai Tahu purchases according to the deeds and deed maps. Many of these purchases overlapped each other. The Kemp purchase overlapped with the Kaikoura, North Canterbury and Arahura purchases, while the North Canterbury purchase also overlapped with Kaikoura.

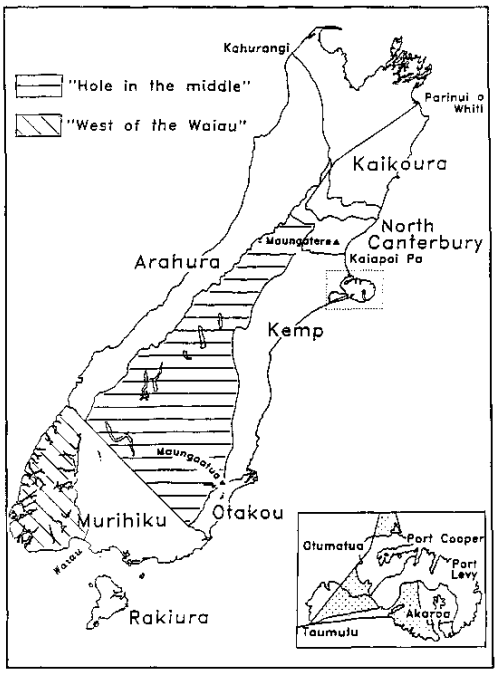

Figure 1.2: The Ngai Tahu purchases, showing the areas which the claimants maintained were not included by the tribe in the original agreements. The claimants maintained that substantial areas—the "hole in the middle", the land west of the Waiau River in Southland and parts of Waihora and Banks Peninsula—have never been purchased by the Crown.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.4 Who Was Heard By the Tribunal?

1.4. Who Was Heard By the Tribunal?

1.4.1 The primary duty of the Waitangi Tribunal is to inquire into the claims before it, and then report its findings and recommendations. The parties to a claim are the claimants and the Crown. The Waitangi Tribunal is deemed to be a commission of inquiry under the Commission of Inquiry Act 1908. Section 4A of that Act entitles any person, who is a party to the inquiry or satisfies the tribunal that he or she has an interest in the inquiry apart from any interest in common with the public, to appear and be heard at the inquiry.

At the commencement of this inquiry several government departments and state-owned enterprise corporations, as well as other corporate bodies, farming interests and Maori organisations, sought and were granted leave to appear and be heard. In most cases counsel represented these persons and by arrangement with the tribunal, appropriate fixtures were made to allow those interests to be present before the tribunal when any particular matters affecting them were to be dealt with. On 30 June 1988 the Treaty of Waitangi (State Enterprises) Act was passed and section 4 of that Act inserted into the Treaty of Waitangi Act a new section 8C.

This provision limits the right of appearance and hearing only in respect of claims affecting land or interest in land transferred to state-owned enterprises. Persons entitled to appear under section 8C are limited to:

(a) The claimant;

(b) The Minister of Maori Affairs;

(c) Any other Minister of the Crown;

(d) Any Maori who satisfies the tribunal that he or she, or any group of Maori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.

This particular amendment was enacted to give effect to an agreement reached between the New Zealand Maori Council and the Crown following the Court of Appeal decision of 29 June 1987. The preamble to the Treaty of Waitangi (State Enterprises) Act 1988 sets out the broad terms of that agreement. No doubt the reason for precluding state-owned enterprises and their successors in title from being heard on claims affecting land vested in them, was to limit representation and thereby avoid delays and additional legal costs.

The tribunal did not find that statutory restriction to be an impediment to ensuring that any evidence, statement, document, information or submission which any state-owned enterprise or any other person desired to place before the tribunal was in fact brought to notice. The tribunal considered that clause 6 of the second schedule to the Treaty of Waitangi Act 1975 gave sufficient power to receive all relevant material. The tribunal also had the fullest cooperation of counsel for the claimants and counsel for the Crown to allow the tribunal to receive all relevant submissions and evidence. As a result of the procedures adopted by the tribunal which will be later detailed, every possible piece of evidence affecting every type of claim which could be obtained from every source was presented. No government department, state-owned enterprise or any other corporate body or person was denied the opportunity to be heard.

Hearing of the parties

1.4.2 The claim hearings opened on 17 August 1987 and closed two and a quarter years later on 10 October 1989. The following were heard.

The claimants

1.4.3 The hearings commenced at Tuahiwi marae on 17 August 1987. Over the next ten-month period the claimants presented evidence to the tribunal at nine sittings spread over approximately ten weeks of hearings.

The tribunal generally sat in the district in which the various claims arose so that sittings took place in Kaikoura, Kaiapoi, Christchurch, Taumutu, Arowhenua, Otakou, Dunedin, Bluff, Hokitika and Greymouth.

During the presentation of the claimants' evidence, the tribunal inspected areas subject to grievance claims. An aerial inspection was made of some of the mahinga kai inland trail routes of Ngai Tahu to the west coast. Ground inspection took place of Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth), areas next to Taumutu, Arowhenua, the inland lake areas including the hydro lakes and dams, Aomarama and the Wainono area. The Arahura river valley was also visited. The tribunal also went up from Invercargill to Lakes Wanaka and Hawea. At many of these places the tribunal met local farmers and heard their views.

The tribunal also visited the Canterbury and Otago museums to inspect evidentiary material and to hear expert evidence. Hearings generally opened with submissions and evidence from the local people.

By the time the claimants had completed their case on 30 June 1988 the tribunal had been given a clear indication of the substantial nature of the claim and grievances. In addition to the investigative hearings, two further sittings were held on 14 August 1989 and 9-10 October 1989 to allow Mr Temm to make final submissions and close his case.

The Crown

1.4.4 The Crown were represented throughout the whole inquiry by Mrs S E Kenderdine, senior counsel from the Crown Law Office and Mr P Blanchard of

Auckland-a senior partner in a private legal firm. Mr A Hearn QC appeared at four sittings of the tribunal and made some legal submissions. Ms A Kerr of the Crown Law Office also appeared at a hearing in Wellington on 2 August 1989.

At the opening of the Crown's response on 30 June 1988 counsel Mr Hearn started with the following quotation from the Right Honourable Mr Justice Richardson in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 682:

Honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion. (K1:1)

Mr Hearn saw that comment as a guiding standard on the way the Crown should undertake its painstaking research and conduct the Crown's response. Crown counsel went on to say that the instruction given to the large number of researchers and experts engaged in the inquiry was "to find out the truth about the matters which are in issue here and neither to hinder nor blur that truth" (K1:7). Clearly then the Crown saw its role in this claim as presenting to the tribunal every relevant fact uncovered by its researchers.

At the conclusion of the final hearing of the claim in Christchurch on 10 October 1989 the presiding officer made these observations which we incorporate in this report as they apply not only to the Crown but to researchers engaged by the claimants and also by the tribunal:

In my respectful view, Crown counsel have acted in every way to protect the Crown's position yet more importantly to uphold the honour of the Crown. The Crown did not see itself in an adversarial role, though it did not hesitate to challenge disputed grounds; it rather saw itself almost in an amicus curiae role which required it to bring to the tribunal's notice all discovered material and opinion whether against or for the claim. The background researching by Crown officers and professional consultants has covered every facet, every nook and cranny of not only the nine tall trees and the related claims but also the large number of small claims. The result is that the record before this tribunal contains a most comprehensive and valuable taonga that will provide future generations with a priceless data base. This has resulted from the combined efforts of the claimants, the Crown and the tribunal's research teams. They are all to be thanked and congratulated for their diligence and scholarship. Before passing from the subject of the Crown's participation in this inquiry may I venture to suggest that if those Crown officials attending the South Island land sales 140 years ago had regarded the Crown's honour in the way these proceedings have been conducted by Crown officers this tribunal would not have been here today. (Y2:10)

The Crown made very extensive submissions and called a large number of witnesses during the nine weeks of sittings spread over the twelve months needed to complete the Crown research and response to the claim. In addition, counsel Mrs Kenderdine required a further week's hearing from 11-15 September 1989 to make her final address to the tribunal.

Fishing interests

1.4.5 At the seventh hearing of the tribunal on 11 April 1988 counsel for the New Zealand Fishing Industry Board (NZFIB), Mr J L Marshall and Ms C Wainwright, and counsel for the New Zealand Fishing Industry Association (NZFIA), Mr T J Castle and Mr R B Scott, requested the board and association be joined as parties to the Ngai Tahu claim. The tribunal ruled that neither body could be accorded the status of a party to the claim but the tribunal would allow them to appear and be heard on matters relating to sea and eel fisheries. Both the NZFIB and the NZFIA took a full part in the hearing of matters relative to fisheries and at the appropriate times made submissions and called evidence in support.

Other interested bodies

1.4.6 A large number of government departments, state-owned enterprises and other organisations made written and oral submissions to the tribunal either through counsel or directly. The record of documents appended to this report as appendix 6 gives details of these matters. Reference to appendix 7 will also provide details of the hearings of the tribunal, as well as representation thereat and the names of witnesses and persons attending each respective hearing.

At the first hearing several northern South Island tribes appeared and claimed rights that raised an issue of tribal boundaries. We shall refer more fully to these claims later.

1.4.7 In all, the tribunal received a total of over 900 submissions and exhibits, some containing as many as 700 pages each. The tribunal heard, in addition to submissions from counsel, submissions and evidence from 262 individual witnesses and 26 bodies such as government departments, state-owned enterprises, local bodies, farming groups, Maori authorities and community groups. Perusal of appendix 6 will give a fuller picture of the huge volume of material which came to the tribunal in 23 weeks of hearing spread over the two and a quarter years it took to complete the inquiry.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.5 Who Were the Tribunal Members Hearing the Claim?

1.5. Who Were the Tribunal Members Hearing the Claim?

As this is a public report we have taken the slightly unusual step of appending fuller particulars and background details of the seven members in appendix 9. These details are extracted from an official brochure published by the tribunal.

The following members of the Waitangi Tribunal sat on this inquiry:

Deputy Chief Judge Ashley McHugh
Bishop Manuhuia Bennett
Sir Monita Delamere
Mrs Georgina Te Heuheu
Professor Sir Hugh Kawharu
Professor Gordon Orr
Sir Desmond Sullivan

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.6 How and Where was the Claim Conducted?

1.6. How and Where was the Claim Conducted?

1.6.1 The powers and duties of the Waitangi Tribunal in relation to the conduct of proceedings before it, including admission of evidence, are set out in clauses 5-8 of the second schedule to the Treaty of Waitangi Act 1975. Although the tribunal generally may regulate its procedure in such manner as it thinks fit, it is bound to conduct its inquiry in a fair and just manner, and to ensure that parties and persons entitled to appear before it are properly notified and given full opportunity to be heard. This section deals with the actual procedures followed by the tribunal and of some modifications made to usual court procedures. Generally hearings followed the usual form in that the claimants first presented their claim and called evidence and the Crown responded and called its witnesses, followed by final addresses.

Two innovative measures were introduced by the tribunal however, in order to cope with the huge volume of evidence and number of claims and also to demarcate the principal issues. Both these steps were taken with the full assistance of counsel for both parties. There can be no doubt that not only did the procedure succeed in crystallising matters in issue, but more importantly it saved considerable time, effort and consequential cost. The first measure was the decision to formulate a list of the principal questions which appeared to need an answer at the end of the claimants' evidence. A schedule of issues was prepared by the tribunal, circulated to counsel and at a special hearing in Wellington those issues were debated and settled. The Crown then had a more formal basis on which to prepare its response and evidence.

The second measure was the appointment by the tribunal of two experts, in the persons of Professor Alan Ward and Dr George Habib, to prepare overview reports on the evidence presented on historical and fishing matters respectively. These reports were given by these two experts at the conclusion of all other evidence and were subject to examination and submission from the parties, including fishing interests. The reports provided not only valuable assessment criteria for analysis by those appearing before the tribunal, but also provided very useful appraisals for consideration by the tribunal. It is no easy matter for those engaged in a marathon hearing over 27 months, and involving a huge number of disparate claims to keep track of the principal issues. The technique employed was acceptable to all involved in this long hearing.

Pre-hearing conference

1.6.2 A pre-hearing conference was held in Wellington on 20 July 1987. Approximately 20 persons attended including 13 counsel representing the claimants, the Crown, government departments, state-owned enterprises and Federated Farmers.

A number of important matters were settled including representation, categorisation of claims, hearing dates, venue, procedure, appointment of overview researchers, notice to persons affected and public reporting of hearings.

Notice of claim

1.6.3 The tribunal, by public newspaper advertisements on 8 June and 13 June 1987, gave preliminary notification of the claim, inquiry and first sitting date, and invited all persons interested in or affected by the application to notify that interest or of any desire to be heard.

Following directions from the chairperson, written notice dated 30 June 1989 was served on the following persons advising the preliminary conference fixture, date and agenda:

1 Minister of Lands
2 Minister of Forests
3 Minister of Fisheries and Agriculture
4 Minister of Conservation
5 Minister of the Environment
6 Minister of Maori Affairs
7 Minister of Agriculture
8 Director-General, Land Corporation, Head Office, Wellington
9 District solicitor, Land Corporation-Mr C D Mouat, Christchurch
10 Weston Ward and Lascelles-Mr Palmer, Christchurch
11 Crown solicitor, Crown Law Office-Mrs S E Kenderdine, Wellington
12 Mr A Hearn OBE QC, Christchurch
13 Ngai Tahu Maori Trust Board, Christchurch
14 Federated Farmers of New Zealand-Mr E Chapman, Wellington
15 Mr P B Temm QC, Auckland
16 Mr Michael Knowles, Christchurch
17 Office solicitor, Royal Forest and Bird Protection Society, Wellington
18 Office solicitor, Ministry for the Environment, Wellington
19 Office solicitor, Residual Department of Lands, Wellington
20 Office solicitor, Ministry of Agriculture and Fisheries, Wellington
21 Office solicitor, Federated Mountain Clubs of New Zealand, Wellington
22 Office solicitor, Ministry of Conservation, Wellington
23 Maori Trustee, Maori Affairs Department, Wellington
24 Such other respondents as had notified representation
25 All members of the tribunal

On 7 August 1987 a press release giving details of the claim and hearing date was distributed to NZPA, The Evening Post, The Dominion, TVNZ-Christchurch, Radio Avon, Radio Ashburton, Radio 3ZB, The Press and other South Island papers. Copies of the claim were also sent to those on schedule A and B appended hereto (see appendix 7). Newspaper advertisements notifying hearings were also widely published prior to hearings.

Further notification

1.6.4 The tribunal circulated to all listed interests, a timetable of hearings so that all persons were aware of future hearing dates and matters set down thereat approximately three months in advance. Fixtures were arranged to suit the convenience of persons requiring a hearing. The general interest created by the inquiry also gave rise to considerable media coverage.

The tribunal took every step possible to notify the claim. No objections have been received from any person or organisation about inadequate or insufficient notice.

First and subsequent hearings

1.6.5 The first hearing of the claim took place at Tuahiwi marae on 17 August 1987. A full list of hearings, representation thereat and names of witnesses is set out in appendix 7.

There was a large attendance of people at the opening of the claim, so many in fact that it was necessary to move to the assembly hall at Rangiora High School after the formal opening of proceedings on Tuahiwi marae. The commencement of the hearing was delayed as the result of the unexpected arrival of a party claiming interest in the proceedings for the Interim Committee of the Kurahaupo Waka Trust (Kurahaupo-Rangitane). Matters concerning the claim of this group will be dealt with a little later in this chapter.

The chairperson of the tribunal, after the opening karakia, made the following short introductory comments:

He ra tino nui tenei ki a Ngai Tahu. Te Roopu Whakamana i Te Tiriti kua eke nei ki te whakarongo ki a koe Ngai Tahu mo nga mahi ki a koutou i mua noa atu. I ahatia i era wa, a, me pewheatia inaianei. Kua tae mai ki te whakarongo ki o auetanga. Inatata nei whakatatutia e te Kooti Piira, te tumuaki ko Ta Rapene Kuki, i ki ia ko nga taonga o Te Tiriti o Waitangi i mea; Te Maori me Te Pakeha i runga i te Tiriti kia kotahi, kia ngawari me te tino whakapono. Koia nei nga korero a Ta Rapene Kuki:

Tera whakahau ehara i te mahi iti, tino nui rawa atu te uaua. Ki te taka ki raro o nga whakahaere, ahakoa he aha te wa, te whakahau ma te Kooti kia whakahonoretia.

Na ena kupu i whakatakoto te nohotanga.

The English translation says:

This is a very important day for Ngai Tahu. This tribunal is about to hear from Ngai Tahu what has happened in the past, what was done about it and what must be done now. We are ready to listen to your grievances. Recently in the Court of Appeal decision, the president, Sir Robin Cooke, stated that the principles of the Treaty of Waitangi required the Maori and Pakeha Treaty partners to act towards each other reasonably and with the utmost good faith. Sir Robin Cooke said:

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured.

Those words set the scene.

1.6.6 The record shows that the tribunal conducted 23 hearings spread over approximately 24 weeks. During the course of hearing, 22 memoranda of directions on interlocutory matters were issued by the tribunal and responded to by counsel. The hearings were well attended, particularly by tangata whenua. There was a sprinkling of community and church leaders attending to listen, but a significant absence of those persons and bodies who have since 1985 tended to be critical of Treaty issues, and in some cases, of the tribunal.

The tribunal held its hearings on marae and in other public conference facilities. In all, the tribunal visited and sat on seven different South Island marae. When hearing the Crown case it held hearings at a university hall in Christchurch, in the conference rooms of the Canterbury Manufacturers Association, in a secondary school assembly hall, in an Otago University common room, in conference rooms attached to motor hotels, in meeting rooms of the Department of Justice and in a rugby club hall.

The tribunal received no complaints from the public nor from any participating party or witness about the choice of hearing venue or facilities. The tribunal consulted with counsel and bodies involved to make sure all matters were in order. Proper recording and interpreting facilities were in place at all times.

Seating for all was positioned on one level in such a way that people attending formed part of the proceedings and consequently had a sense of participation in the hearings. The courteous and dignified response of all who took part or attended may have been due to this sense of involvement and informality. Considerable credit is also due to the warm hospitality the tangata whenua at the various marae extended to all their visitors. It was no easy task to provide for the long sittings and varying numbers of visitors.

Staff of the Ngai Tahu Maori Trust Board and the tribunal also performed admirable feats in setting up the hearing facilities including recording and public address systems and audio visual facilities.

At every sitting of the tribunal opportunity was provided for any person who wished to speak or make a written submission to do so. No person was denied a chance to be heard.

Procedure at hearings

Kaumatua evidence

1.6.7 During the course of the claimants' case, and by agreement with counsel, the tribunal heard the evidence of tangata whenua, including kaumatua. This evidence was generally taken on marae. By agreement with counsel, the evidence from these people was not subject to cross-examination although questions necessary to clarify matters were allowed to be put through the chairperson. It was during the hearing of

this evidence that the tribunal received details of the ancillary claims set out in appendix 5. The evidence of kaumatua and other tangata whenua was sometimes oral and recorded, sometimes in written form.

Submissions and evidence in written form

1.6.8 At the preliminary conference on 20 July 1987 it was agreed that submissions and evidence would be presented in written form. This procedure ensured that the tribunal had before it comprehensive and carefully prepared and detailed statements. The tribunal planned its sittings, and the gaps in between, to allow the parties to prepare written material. This procedure meant a great deal of pressure on counsel but they responded admirably. As a result, not only did the tribunal have the necessary written evidence of researchers and experts to allow the tribunal to work methodically through it at each hearing, but it allowed instant copies of the material to be available for all those interested persons in attendance at the inquiry. The tribunal required the presenting witness to read through the evidence so that all in attendance were able to follow and quietly absorb it. In many cases the evidence was accompanied by video presentation or explained by maps, overlays and photographs. In one case an actual demonstration was mounted to illustrate how Maori fishermen used "mark-books" to plot location of fishing grounds. The tribunal also had on display a huge map of Te Wai Pounamu with boundaries of the regions sold in the various deeds. The procedures adopted required additional time for preparation of written material, but this resulted in better opportunity for the tribunal and counsel to examine the evidence. Counsel for the parties deserve the highest praise for the most efficient way in which they marshalled and presented the evidence and submissions to the tribunal.

As stated at the conclusion of the hearing there now exists as a result of the endeavours of counsel assisted by all those experts in many varied fields, a most valuable collection of taonga that will provide a priceless data base for future generations.

Examination of witnesses and evidence

1.6.9 The tribunal decided at the outset to limit adversarial examination of witnesses, and to apply marae kawa to proceedings where desirable and as provided in clause 5(6) of the second schedule to the Act to avoid lengthy cross-examination of witnesses.

Consistent with that, but in a desire to allow some measure of flexibility in testing evidence, the tribunal allowed counsel to ask questions directed to clarify a witness' evidence. Early in the hearing it was decided to introduce another rather innovative procedure. The length and expert content of much of the evidence from historians, marine biologists, archaeologists, geographers and other experts, not to mention lawyers, presented two difficulties in cross-examination. First, the process of questioning witnesses would have taken incalculable time. Secondly, the complex nature of much of the evidence did not readily lend itself to a process of immediate questions and answers.

Mr Temm however, proposed a logical and effective solution. He suggested a procedure whereby the opposing counsel be entitled to question a witness to clarify

the evidence, and in addition be also permitted to file a written memorandum commenting on the evidence and expressing any contrary view. By this method, which was agreed to by the tribunal and other counsel, the tribunal not only avoided unnecessary and often time-wasting oral cross-examination and the unpleasantries sometimes arising therefrom, but allowed both the Crown and the claimants the necessary time for their respective researchers to give considered and researched responses. If necessary, further opportunity was given to counsel leading the evidence to respond by a short memorandum. In essence, oral cross-examination and re-examination were replaced by a written commentary and memorandum of response. The procedures worked excellently and were ideal for the circumstances attending this extensive inquiry.

In the judgment of the Court of Appeal dated 22 February 1990 in Te Runanga o Muriwhenua Incorporated v The Attorney-General (CA 88/89), Cooke P, at page 31 made this comment when referring to some of the difficulties in using material from the Muriwhenua Report (1988) for evidentiary purposes in the High Court:

We also agree with the High Court that different portions of the work may warrant different weighting and THAT DUE ALLOWANCE WILL BE APPROPRIATE FOR ABSENCE OF CROSS-EXAMINATION AND FEATURES MAKING IT IMPOSSIBLE TO TEST ADEQUATELY SOME OF THE BASE MATERIAL. (emphasis added)

We have already explained the procedures taken in these Ngai Tahu proceedings to replace adversarial cross-examination with a system of evidence clarification coupled with examining written commentaries. While acknowledging that the well-tried system of cross-examination has strong merit, we respectfully consider that the procedures used in this claim, to provide opportunity for researched response, resulted in a closer and more effective examination of the lengthy and complex evidence.

We also make it clear the two overview experts, Professor Ward and Dr Habib, were cross-examined on their reports by counsel for the claimants and the Crown. In addition, the parties were able to file written commentaries on both reports.

Ward and Habib reports

1.6.10 As earlier reported, with the agreement of counsel for the claimants and Crown, the tribunal commissioned two researchers pursuant to powers given it by clause 5A of the second schedule to the Treaty of Waitangi Act 1975. Professor Alan Ward and Dr George Habib were asked to prepare overview reports on respectively, the historical and fishery evidence presented to the tribunal on the Ngai Tahu claim. They were asked:

to attend hearings, when possible, of the respective areas of study; to comment on the reliability and completeness of the evidence; to draw attention to deficiencies and omission, to draw attention to alternative interpretation, and to assist the tribunal to summarise and evaluate the data.

Alan Ward is a professor of history at the University of Newcastle, New South Wales, where he teaches Pacific history. He has carried out extensive research on the

interaction between Maori and settlers in New Zealand which is reflected in his book entitled A Show of Justice. He is a leading authority in the field of nineteenth century New Zealand history.

Dr George Habib holds a Doctor of Philosophy (zoology) degree from the University of Canterbury, New Zealand. Dr Habib's doctoral thesis was on the biology of red cod, one of the major marine species in the south. Dr Habib had previously been consulted by the tribunal, in particular on the Muriwhenua claim. He has worked as a scientist with the fisheries research division of MAF. He has managed an offshore fishing company and since 1984 has been running his own fisheries consultancy service.

The tribunal was indeed very well served by both these persons. Their reports were extremely helpful to the tribunal, to the claimants and Crown and to the fishing industry. The nature of their commentaries in the specialist fields meant they acted in the role of assessors, providing expertise in areas not covered by the tribunal's membership.

Counsel were given and took the opportunity to present written commentaries on matters where they disagreed, in some cases quite strongly, with the reports. The amalgam of all the material thus presented has given the tribunal a comprehensive assessment of complex factual data. We deal more specifically with the Ward and Habib reports as follows:

(a) Ward Report

This is a 427 page report in which the author looks firstly at Ngai Tahu prior to 1840 and then proceeds to examine all the Crown purchases and the aftermath of these purchases. It includes a short study of mahinga kai and a review of the Westland leases. (T1)

(b) Habib Report

The report is presented in four parts.

Part One: A report on Ngai Tahu fisheries evidence-362 pages of report and references

Part Two: A report on Ngai Tahu 1880 mahinga kai and settlements-an examination of the H K Taiaroa papers-16 pages

Part Three: An assessment of Crown evidence on mahinga kai fisheries aspects-116 pages

Part Four: A report on Crown and fishing industry evidence relative to sealing and whaling-45 pages (T4)

One indication of the value of the decision to engage independent over-viewers has been the numerous references to their respective works in the final submissions of the claimants and the Crown.

Privacy of certain evidence

1.6.11 The tribunal proceedings were conducted in public. All submissions and evidence were presented openly to the tribunal apart from a small number of mahinga kai sites, fishing mark books and privately owned charts of fishing grounds. This latter evidence was available for perusal by Crown counsel and by counsel acting for the New Zealand Fishing Industry Association and New Zealand Fisheries Board but by direction of the tribunal remains as confidential material in the record and not available for perusal by the public.

Claims by Kurahaupo-Rangitane

1.6.12 Just prior to the first hearing of the claim at Tuahiwi on 17 August 1987, the tribunal received notice that a claim was to be filed by Kurahaupo-Rangitane claiming interest in a portion of the same lands covered in the Ngai Tahu claim on the northeastern and northwestern areas of the claim. The following chronology sets out the details of that claim, the procedural steps taken by the tribunal and the outcome. Needless to say this intervening claim and others which also followed have caused considerable difficulty for the tribunal. As the following facts will show, the effect of the cross-claim was to raise dispute as to the tribal boundaries of the respective tribal groups. We now deal with the position.

(a) On 6 August 1987 Kurahaupo-Rangitane filed their claim and sought appointment of counsel. The claim referred to that part of the Kaikoura purchase deed of 29 March 1859, which lay to the north and east of the Clarence River and included the Awatere river valley from the coast to the headwaters, the inland Kaikoura range, and the coastline from White Bluffs to Cape Campbell to the Clarence rivermouth, and all forests and fisheries adjacent thereto. Kurahaupo-Rangitane stated that they occupied and enjoyed these lands, rights, and benefits on 6 February 1840, and that the Crown had wrongly deprived them of possession by purchasing from Ngai Tahu without the consent or agreement of the chiefs or people of Kurahaupo-Rangitane.

(b) By further claim dated 10 August 1987, Kurahaupo-Rangitane extended their interest to the Arahura deed of purchase dated 21 May 1860, again alleging wrongful sale of part of their land by Ngai Tahu to the Crown without their consent or agreement. The area of land claimed by Kurahaupo-Rangitane in the Arahura sale was all that portion north of the Arahura River and all forests and fisheries adjacent thereto.

(c) On 11 August 1987, the deputy chairperson issued directions referring to the two claims and seeking pre-hearing discussions between counsel for the claimants, Kurahaupo-Rangitane and Crown with a view to settling procedural differences.

(d) On 20 August 1987 Kurahaupo-Rangitane attended the first tribunal hearing. Despite opportunities given by the tribunal prior to the commencement and during the hearing at Rangiora, to see if a compromise could be reached, it was evident that the claimants and Kurahaupo-Rangitane were at issue. It was made very clear to the tribunal that the claimants strongly objected to the presence and any participation of Kurahaupo-Rangitane in the Ngai Tahu claim and its proceedings.

(e) On 25 August 1987 the deputy chairperson issued further directions setting out the issues between the claimants and Kurahaupo-Rangitane and requesting the latter to file an affidavit setting out the grounds upon which entitlement to claim was based. Mr Stevens was appointed by the tribunal as counsel for Kurahaupo-Rangitane, by way of limited appointment, to argue the jurisdictional matters arising out of their claim up to 21 September 1987, when the position was to be reviewed.

(f) On 21 September 1987 at Tuahiwi, Mr Stevens presented comprehensive written submissions which were strongly opposed by Mr Temm who said Ngai Tahu rejected the Kurahaupo-Rangitane claim.

(g) A special fixture was made for the claimants to respond at Tuahiwi on 5 November 1987. They did so. Crown counsel also made submission to the effect that it was important to have the boundary dispute resolved as it might place the Crown in double jeopardy.

(h) On 26 November 1987 the tribunal issued its decision which:

- found that Kurahaupo-Rangitane had filed a proper claim which must be heard;

- found there was a need for resolution of boundaries;

- determined for reasons set out in its decision that the Maori Land Court was a more qualified body than the Waitangi Tribunal to resolve tribal boundaries;

- recommended legislative changes to allow the tribunal to state a case to the Maori Appellate Court for a certificate from that court on the respective tribal boundaries similar to existing procedures for the High Court under section 50 of the Maori Affairs Act 1953;

- decided to continue with the Ngai Tahu claim pending outcome of any legislative change; and

- allowed Kurahaupo-Rangitane to attend and be heard until further decision of the tribunal but directed them to file an amended claim giving details of grievances alleged against the Crown.

(i) On 18 March 1988 Kurahaupo-Rangitane filed an amended claim. These amended proceedings extended their claim further south in the land subject to the claimants' application.

(j) On 23 June 1988 at Greymouth, the tribunal issued directions inviting the claimants and the Crown to make submissions on procedural questions raised in Kurahaupo-Rangitane's amended claim. They did so.

(k) On 19 September 1988 the tribunal issued its decision to proceed with the hearing.

(l) On 1 January 1989, by virtue of section 4 of the Treaty of Waitangi Act 1988, the tribunal was empowered to refer to the Maori Appellate Court by way of case stated,

any question of fact relating to rights of ownership of any land or fisheries and also any question requiring determination of Maori tribal boundaries.

(m) On 17 March 1989, a case stated was filed in the Maori Appellate Court and included in it were details of all the claims filed or anticipated.

(n) The questions put to the Maori Appellate Court required the court to determine in respect of the two areas of land purchased by the Crown from Ngai Tahu in the Arahura deed of purchase dated 21 May 1860 and the Kaikoura deed of purchase dated 29 March 1859:

1 Which Maori tribe or tribes according to customary law principles of "take" and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective deeds at the dates of these deeds;

2 If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?

(o) The Maori Appellate Court has now heard the iwi and persons affected and gave its decision on 15 November 1990 as follows:

The Ngai Tahu tribe according to customary law principles of "take" and occupation or use has had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.

Having decided that Ngai Tahu only is entitled question two above does not require an answer.

(p) The decision of the Maori Appellate Court is binding on the tribunal by virtue of section 6A(6) of the Treaty of Waitangi Act 1975.

(q) The tribunal observes however that the grievance claims already filed with the tribunal from Kurahaupo-Rangitane, Mr Mervyn N Sadd, Messers R P Stafford and H M Solomon together with any other grievances affecting lands in the northern South Island beyond the determined rohe of Ngai Tahu will in due course be dealt with by the tribunal.

Sea fisheries claim

1.6.13 This portion of Ngai Tahu's "mahinga kai" grievance is one of the major claims made by the tribe and as the record shows, several amending claims were filed at various times so as to define the parameters of that claim. As indicated earlier in this chapter (1.4.5), the New Zealand Fishing Industry Board (NZFIB) and the New Zealand Fishing Industry Association (NZFIA) were actively involved in the sea fishing claim and were represented by counsel at hearings commencing 11 April 1988, 27 June 1988, 7 February 1989, 10 April 1989, 29 May 1989, 2 August 1989, and 15 September 1989 when fisheries were under inquiry.

1.6.14 On 10 November 1988 the tribunal issued a memorandum referring to the various proceedings on Maori fishing rights before the High Court. The tribunal

expressed its concern not only with the question of propriety of continuing to hear evidence, but also the broader questions of costs and convenience in having two jurisdictions contemporaneously dealing with the same, or portion of the same, issues. In this connection the tribunal noted that the High Court was being asked to look at not only the meaning and extent of section 88(2) of the Fisheries Act 1983 but also Treaty rights which formed the essential ingredient of the tribunal's jurisdiction. The High Court also had to deal with customary fishing rights and common law rights under the doctrine of aboriginal title. The tribunal invited written submissions from the parties and fishing interests as to whether the tribunal should defer further hearings on the sea fisheries claim until the High Court actions were completed.

On 16 March 1989 the tribunal directed it would continue to hear evidence and timetabled future hearing dates. Subject to later adjustments to hearing dates, the tribunal continued to hear evidence and submissions.

The Court of Appeal have adjourned the Ngai Tahu High Court action in Ngai Tahu Maori Trust Board v Attorney General & Others to await the report of this tribunal.

The tribunal has also noted that other actions in the High Court have been adjourned to enable the effect of measures in the Maori Fisheries Act 1989 to be determined by Maori after a settling down period.

1.6.15 The tribunal completed its formal hearings on the Ngai Tahu claim on 10 October 1989 and was in the course of preparing its report on all matters raised before it, including the sea fisheries claim, when it received an application dated 22 May 1990 from the NZFIB and the NZFIA to adduce further evidence.

Following the issue of directions from the chairperson dated 29 May 1990 a hearing was held in Wellington on 28 June 1990. On 2 July 1990 an interlocutory determination was promulgated by the tribunal with the consent of the parties and also the NZFIB and NZFIA. The tribunal has decided to reopen the inquiry into the sea fisheries claim and has notified parties that the additional hearings required will take place in due course upon completion of the tribunal's report on the main land claims of Ngai Tahu. The tribunal decided it would also defer its report on the 108 ancillary claims until it had completed the sea fisheries report. It is not expected that the additional sea fisheries evidence will be heard before February 1991. Claimants and Crown as well as the NZFIB and NZFIA have been requested to file written material with the tribunal as soon as possible. Upon receipt of the additional evidence and supporting submissions the tribunal will commission an overview research report and will thereafter proceed to complete its inquiry and report to the minister.

The tribunal considers that the procedures followed have worked well and that, notwithstanding major interlocutory matters in the form of the conflicting claims and fisheries issues, the tribunal has been able to inquire into the major grievances in a logical and time-efficient way.

Ngai Tahu Land Report

01 The Claim and The Proceedings

1.7 Remedies and Recommendations

1.7. Remedies and Recommendations

The principal purpose of this report is to issue its findings on each of the grievances. At the beginning of the inquiry counsel for the claimants and Crown agreed that the question of remedies should be dealt with at a later stage. The role of the tribunal is to determine whether, and to what extent, the Crown has acted in breach of Treaty principles and the extent to which the claimants have been detrimentally affected by any such breaches. It is then left to the parties to negotiate a settlement of any proven grievance. This procedure was followed in the Muriwhenua fisheries claim. It leaves the way open for negotiation between the tribe and the Crown and for an overall settlement by agreement between the parties based on the findings of the tribunal. It also avoids the need for the tribunal and the parties to be involved in lengthy debate on quantum of remedies before any findings are made on the existence and extent of grievances.

We do not propose therefore to deal with remedies on the major grievances in this report. However, there will be some matters upon which the tribunal should propose recommendation. These relate principally to the grievances concerning pounamu (greenstone), the West Coast perpetual leases, Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth). Our findings will be made as each grievance is examined and in those cases just mentioned will be accompanied by appropriate recommendations.

Summaries of the principal grievances and the tribunal's findings are set out in the next chapter. These summaries deal with the 73 grievances or "branches" pleaded by the claimants under the "Nine Tall Trees". From chapter 6 we commence the more detailed examination of these grievances.

As stated before, the tribunal has divided its reporting process on the Ngai Tahu claim into three parts. This present report deals with the "Nine Tall Trees" or principal grievances arising out of eight South Island purchases and also includes mahinga kai. A second report will deal with the sea fisheries claim and a third report will cover the 108 ancillary claims. At the end of the hearings on 10 October 1989 a closing statement was made by the presiding officer. It forms part of this report as appendix 8. We now pass to the summaries of the main claims.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.1 Introduction

Chapter 2

SUMMARY OF THE GRIEVANCES, FINDINGS AND RECOMMENDATIONS

2.1. Introduction

This report is lengthy. The detail of the nineteenth century land purchases is complex, as is the history of the grievances which emerged from them. Ngai Tahu claims relating to the tribe's traditional food resources, their mahinga kai, has also necessitated a wide-ranging examination of Ngai Tahu's use of a territory over half the size of New Zealand. The gravity of these claims and their long history has demanded an extensive review of all the historical and other evidence which has been made available to the tribunal. We have also had to consider the interpretations placed on this evidence by the expert witnesses and the submissions of the parties and other persons who appeared before the tribunal. The tribunal is conscious that this inquiry is not the first to consider many of these claims. In the hope that long standing grievances can finally be put to rest, we have felt it necessary to deal with the issues in considerable detail. However to ensure that the story of each of these claims can be more readily understood, we have made summaries of each of the major claims and the tribunal's findings on the claimants' grievances associated with them.

It is essential that these summaries be read in the light of the full discussion of the evidence and the tribunal's reasoning and findings in the later substantive chapters of the report. Should there be any disparity between any aspect of a summary and the full discussion in a later chapter, the latter is to be taken as the tribunal's considered view.

The grievances in each section have been numbered as they were filed, and these numbers are used throughout the summaries. The index of grievances, at the end of this report, shows where each finding on these grievances is set out in the main report.

The report also contains several chapters discussing issues which are not summarised here. Chapter 3 examines Ngai Tahu before the Treaty. The tribe's history and its relationship with the land and the resources of Te Wai Pounamu is explored. Chapter 4 discusses Ngai Tahu's relationship with the Treaty. In June 1840, Major Bunbury brought the Treaty to Te Wai Pounamu, and it was signed at Akaroa, at Otakou and at Ruapuke. Six Ngai Tahu rangatira signed the Treaty: Tuhawaiki, Kaikoura, Tikao, Karetai, Iwikau and Taiaroa, although this last chief does not appear to have been the rangatira of the same name who played an important part in the much of this story. The tribunal also reviews in this chapter the Crown's responsibilities under the Treaty of Waitangi and the Treaty principles as they apply in this claim. Chapter 5 provides a

discussion of the Crown's policy in dealing with Maori at the time when the first purchases were made from Ngai Tahu in the 1840s and 1850s. We start the summary here at chapter 6 in the report, the Otakou purchase.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.2 The Otakou Purchase Summary

2.2. The Otakou Purchase Summary

Introduction

In early 1844 the New Zealand Company was looking for more land to settle Scottish immigrants as part of the New Edinburgh scheme, the brainchild of a George Rennie. The governor of the day, Captain Robert FitzRoy, waived pre-emption to allow the company to purchase a block directly, but appointed an officer to supervise the negotiations, and ensured that a protector of aborigines would also be present when the deed was signed. Soon after giving his approval for the purchase, FitzRoy by proclamation waived pre-emption more generally, allowing settlers to purchase land directly from Maori on certain conditions. The Otakou purchase followed several weeks of discussions and the agreement recorded in the deed, signed on 31 July 1844, transferred a clearly defined block to the New Zealand Company for the sum of œ2400. At the time the area of the block was estimated at 400,000 acres, although it was expected that the company would only be granted 150,000 acres of this. The tribunal has only recently discovered that the total area was as much as 534,000 acres. There were three pieces of land within the boundaries of the purchase which were specifically excluded from the sale, and these were later found to total 9600 acres.

Unbeknown to the Ngai Tahu and company negotiators, the New Edinburgh scheme had already been abandoned in England before the deed was signed. Uncertainty about land titles and the peace of the colony following the Wairau affair the previous year had made potential investors and colonists wary. It was not until 1847 that the Otago Association, the inheritor of Rennie's scheme, was able to send colonists to what had become known as the settlement of Otago. In the meantime, Governor Grey, FitzRoy's successor, had granted the whole 534,000 acres to the company and re-

imposed Crown pre-emption.

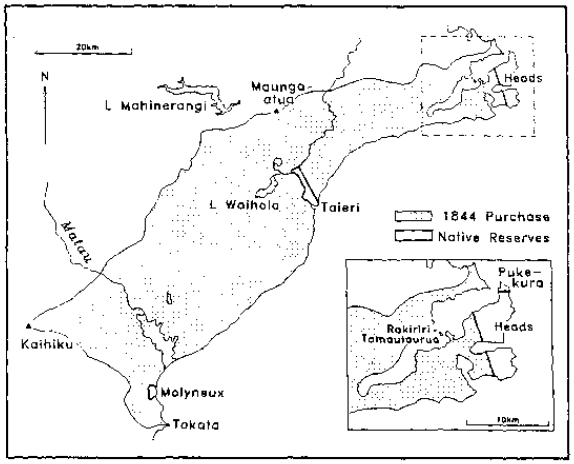

Figure 2.1: The Otakou purchase as defined by DOSLI and estimated at 533,700 acres, showing the reserves at the Otakou Heads, Taieri, and Molyneux (O45)

Claimants' grievances

The claimants' grievances concerned the question of whether Ngai Tahu should have been awarded tenths. On numerous occasions over more than 120 years, various Ngai Tahu have argued that their tupuna were promised that a tenth of the land purchased would be returned to them. The policy of reserving for Maori a tenth of the land purchased, was part of the company scheme and was applied, at least to some extent, in Wellington and in Nelson. The claimants alleged that Symonds, as protector, failed to discharge his responsibilities (no 1). They claimed that the Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu which would preserve their tribal estate (no 2). They also complained that under FitzRoy's general waiver of pre-emption the Crown had an obligation to set aside a tenth of the whole block which it failed to do (no 3). They claimed that the Crown failed to establish an administrative policy under the waiver proclamation, which would have protected Ngai Tahu (no 4). Finally, they alleged that Grey signed the Crown grant without setting aside tenths, as required by the waiver proclamation (no 5).

Background to the purchase: tenths policy

By the middle of 1844, Edward Gibbon Wakefield's tenths' policy had already undergone several transformations. Wakefield's original idea had been to acquire title to large areas of the country by purchase from Maori. The company would then sell the land at a very considerable profit to settlers and British speculators. When the land was surveyed it would be distributed to the company's investors by ballot. The company would select every tenth or eleventh section for Maori. However the title would still remain with the company who would manage this estate in trust. It was assumed that Maori would shift off their existing pa and cultivations and resettle on these tenths blocks, scattered randomly throughout the whole settlement. This would include a tenth of all land in the towns, in the suburbs and in the country areas. Although Maori would be paid very little for the land initially, they would benefit from the dramatic increase in the value of their tenths reserves as settlement developed.

The reality of the tenths scheme in New Zealand bore little relationship to Wakefield's theory. The company successfully obtained deeds of sale from Ngati Toa, Te Atiawa and other Cook Strait rangatira, and using these claimed title to some 20 million acres. Even before news of these negotiations had been relayed to Britain, the settlers were on their way. On the basis of these deeds, Lord John Russell, the colonial secretary, reached an agreement with the New Zealand Company in November 1840, with the Crown undertaking to grant four acres for every pound spent by the company on colonisation. However, when the company's purchase deeds were investigated by a land claims commissioner, William Spain, he concluded that very few of the company's claims were justified. The company was eventually forced to pay compensation to Maori to allow its settlers to occupy the land which it had sold to them. Maori were voicing their concern that they had not sold the land claimed by the company and they were also resisting attempts to move them off their kainga and cultivations. Although tenths had been allocated, Maori were receiving little benefit from them.

At the time of the Otakou negotiations, then, the tenths policy was in some difficulty. Maori in Port Nicholson were resisting the scheme. They were understandably reluctant to abandon their homes and to shift off their villages onto land which they did not own or control. Attempts by settlers to occupy land they claimed in defiance of Maori ownership had led to the killings at Wairau in 1843. The Crown was concerned to ensure that company action did not provoke other incidents of violence. It was in these uncertain and difficult times that the Otakou purchase took place.

The terms of the purchase and the way they were negotiated were largely influenced by earlier agreements between the Crown and the New Zealand Company over the other company purchases. In November 1840, the Crown agreed to take over responsibility for providing Maori reserves as stipulated in the purchase deeds. For any new purchases the Crown would decide what arrangements would seem "just and expedient for the benefit" of Maori (C2: 4:3). These arrangements may or may not have involved tenths, that was up to the Crown to decide. The Crown was only obliged to allocate tenths if these had been specified in the pre-Treaty deeds. The same agreement limited the company to land within the area of the original deeds, and this did not include Otakou. When this provision was modified in April 1841, the company was able to select land outside of the 1839 boundaries, provided that this land was not near Auckland, and provided that all other provisions of the 1840 agreement were met. The tribunal considered that this did not impose any legal obligation on the Crown to provide tenths in the Otakou purchase.

The Crown did have the responsibility to provide reserves for Maori from any further company settlement, and this was acknowledged by the New Zealand Company's prospectus, the June 1843 "Terms of Purchase for the New Edinburgh Settlement". When the directors of the New Zealand Company gave instructions to Wakefield to acquire land for this settlement, he was also told to heed Governor FitzRoy's directions in relation to Maori and public reserves.

Wakefield discussed the company's situation including the proposed South Island settlement with FitzRoy, at the end of January 1840, just over a month after the new governor's arrival in New Zealand. On 27 February FitzRoy issued instructions to John Jermyn Symonds, a Wellington police magistrate, to supervise the negotiations

and informed Wakefield of the pre-conditions to the Crown's waiver of pre-emption. Symonds was told that pre-emption would be waived once he reported that these conditions had been met. He was to report to Mathew Richmond, recently appointed superintendent of the Southern Division. Wakefield was told that the company would have to provide the money, that the 1840 agreement would have to be fulfilled and that the land would be regarded as an exchange for land it was already entitled to elsewhere. Neither of these letters mentions tenths, nor do they make any comments about Maori reserves.

In fact, there is no evidence in any of the written communications between the various company and Crown participants, Wakefield, FitzRoy, Symonds or Richmond, that any specific instructions were given on reserves for the purchase, either in written or oral form. While, as the Crown's historian, Dr Loveridge, suggested, there were good reasons why Wakefield, Symonds and Richmond should have sought clarification from FitzRoy on this issue, there is no evidence that this was done.

A despatch of 23 May 1844 from Richmond to FitzRoy suggests that Richmond was still awaiting advice from the governor on what Maori reserves would be required:

In relation to the New Settlement, when the choice of Sections are being made, it will be necessary to have an Officer on the spot to select Reserves for the Government and Natives; for this duty (should I not be previously instructed by Your Excellency) it is my intention to appoint Mr Symonds... I shall endeavour to furnish him with a list of what is required, in the event of my not learning in time what Reserves Your Excellency may consider necessary. (C2:9:4-5)

A week later Richmond sent a schedule of the required public reserves to Symonds, but remained silent on provisions for Maori. On 12 June Richmond again wrote to FitzRoy. He appeared concerned about the arrangements for Maori reserves, and informed FitzRoy of the actions he intended to take unless the governor informed him otherwise. Through misreading the Terms of Purchase for the New Edinburgh settlement, Richmond appears to have mistakenly believed that the Crown was obliged to set aside tenths, as in the earlier purchases. He informed FitzRoy of his intention to demand the allocation of tenths from the company, should the settlers arrive before he had received instructions from the governor.

I shall therefore demand on their [Ngai Tahu] behalf one-tenth of each description of Allotments i.e. Town, Suburban and Rural, and arrange with the Principal Agent of the Company, or the Agent for the New Settlement on the mode to be adopted for their selection, should I not receive Your Excellency's instructions on the subject previous to the arrival of the latter with the Emigrants. (C2:9:14)

Richmond appears to have made no attempt to notify Symonds or Wakefield of these intentions, and they were never carried out since the settlers did not arrive.

The tribunal concluded that in all the communications between FitzRoy and Richmond, Symonds, Wakefield and George Clarke Jr (the protector present at the signing of the deed), no instructions were given to provide tenths as part of the Otakou purchase. Richmond did signal his intent to have tenths selected should the settlers arrive, but this was based on a misunderstanding of the Terms of Purchase as

they applied to provisions for Maori. Richmond's intentions were also based on a lack of instructions from FitzRoy.

This does not mean that tenths were not a possibility. The November 1840 agreement gave the Crown the right to determine what arrangements for Maori should be made in any subsequent purchase. In giving his consent to waive pre-emption, FitzRoy made it clear that his decision was conditional on his being satisfied that Maori had been fairly dealt with and adequately provided for. He retained, on behalf of the Crown, the right to review any sale agreement, and to make further provisions for the sellers, should this be considered just. It would appear that most of the Europeans involved were aware that this could include the reservation of tenths. It was up to the governor.

The March 1844 Waiver proclamation

The claimants, in their grievances, did not argue that the obligation to make tenths arose from the particular circumstances of the Otakou purchase. On 26 March 1844, a month after FitzRoy agreed to a specific and conditional waiver of pre-emption for the New Edinburgh settlement, he issued a proclamation, which allowed Maori to sell land directly. Each purchase had to be approved by the governor. Pa and urupa could not be sold, and the governor could refuse any application if he considered it not in the Maori or public interest. The proclamation also provided that a tenth of the land "of fair average value as to position and quality" was to be conveyed to the Crown for "public purposes, especially the future benefit of the aborigines". The claimants saw this proclamation as applying in Otakou. They argued that the company policy of tenths applied to all purchases where pre-emption was waived. They did however acknowledge that such reserves would have been vested in the Crown, and Maori would not have owned or administered them directly.

FitzRoy's decision to waive pre-emption was a response to pressure from Maori and settlers alike, particularly from around Auckland. The Crown had no funds available for land purchase, and was unable to buy all the land being offered by Maori for sale, nor was it able to supply the settler demand for land. FitzRoy had sought Lord Stanley's guidance on the issue before he left England, and received a cautious reply. The colonial secretary preferred to defer any decision until he had been briefed from New Zealand. The governor did not wait for any such approval before issuing his March proclamation.

On 15 April, FitzRoy outlined to Stanley his reasons for approving the New Zealand Company's plans to directly purchase land from Ngai Tahu, and expressed his intention to repeat the waiver to allow the company to purchase further lands. He also, quite separately, gave his reasons for the more general waiver proclamation. Lord Stanley also treated the waiver provisions for the New Edinburgh purchase as being discrete actions unrelated to the general waiver proclamation. He wholeheartedly approved the measure for the company, but was only able to give a grudging and somewhat qualified approval to the general waiver.

Governor FitzRoy's instructions to Symonds were given a full month before the decision was made to issue the March proclamation. There is nothing in the proclamation which suggests it was to act retrospectively. No attempt was made by

FitzRoy to review the terms by which the company was to be allowed to purchase from Ngai Tahu. Under the proclamation, the company would have been required to make a specific application to have pre-emption waived. It did not do so nor was it required to do so. The tribunal considered that the only reasonable conclusion was that the March waiver proclamation did not, and was not intended to apply to the New Edinburgh purchase. Accordingly the tribunal considered that there was no obligation on the Crown to comply with the March proclamation in respect of the Otakou purchase. For these reasons, the three grievances which extend from this premise (nos 3,4 and 5) have not been made out.

The purchase

In early April, Frederick Tuckett, the company's agent for the negotiations and principal surveyor in Nelson, left Wellington to select the site and negotiate a purchase. With him went John Symonds to supervise the proceedings on behalf of the Crown. Relations between the two men were strained, and twice in the weeks that followed Symonds returned to Wellington to clarify his instructions and complain about Tuckett's conduct. Symonds had been told not to allow surveying, an action which could be seen as provocative in Maori eyes. Tuckett found this imposition extremely difficult to comply with. How was he to select 150,000 acres without surveying? The only solution appeared to be to purchase a much larger area from which the company block could later be selected and this was the option agreed to by Symonds. Concerned by Tuckett's activities, Symonds returned to Wellington at the end of April, where he obtained strong support from Richmond to keep the company agent within the confines of Richmond's restrictive regime.

The initial preference for the settlement was Port Cooper (Lyttelton) but this was rejected in favour of the site of present day Dunedin. A long narrow block, running down the coast from the Otakou harbour to the Molyneaux (Clutha) River was chosen, estimated to contain up to 400,000 acres. By 10 June word had circulated among Ngai Tahu that the company wished to negotiate a purchase and many Maori were arriving to begin the discussions. These did not begin until 18 June and the major meetings were held over the following two days. While there were wide differences over price and the areas to be reserved on 19 June, the following day Ngai Tahu rangatira and Tuckett came to an agreement. Professor Ward argued that Ngai Tahu agreed to commit themselves to a purchase largely because the company had agreed to raise the price to œ2400 and had abandoned its demand to control the whole of the western side of the harbour. Tuckett feared that Ngai Tahu and the Europeans who inhabited this area would be able to establish an independent town which could rival the company's own settlement. While Symonds had withdrawn from the proceedings when this agreement was reached, it still required the Crown's approval before it could be implemented by the signing of a deed.

Colonel Wakefield decided to be present at the signing of the deed and travelled down to Otakou, with Symonds, George Clarke Jr, sub-protector of aborigines, and the land commissioner, William Spain. On their arrival, a party including six Ngai Tahu set out to verify the boundaries, and following their return eight days later, all was ready for the formalities of signing the agreement and handing over the money. Three areas were to be specifically reserved from the sale; a large block on the western side of the Otakou Heads, a reserve at Taieri and another at Molyneaux. Together they were

eventually found to contain 9615 acres. When the agreement was finalised on 31 July 1844, George Clarke explained to Ngai Tahu that they had in disposing of their land:

surrendered their interest and title to such land; that their consent to sell it was binding on their children, as well as themselves, that they should remove from any portion then occupied by them, and confine themselves exclusively to their reserves. (C2:7:2)

The deed was read over in Maori and in English and the purchase money divided among the various families under Tuhawaiki's direction. Finally Tuhawaiki lifted a tapu on a burial site within the purchase and took the bones away for reburial.

There is nothing in the agreement or in the contemporary record of the negotiations to suggest that the company or Crown agents promised to ensure that tenths would be provided. As Professor Ward pointed out, the parties seem to have been at pains to carefully divide the lands which would remain in Maori hands and those which would go to the settlers. Ngai Tahu insisted, against the company's wishes, on having a considerable area of land under their own ownership and control. Symonds made this clear in his report to Richmond on 2 September, where he explained why he had made these reserves, rather than provide any specific provision for tenths.

I pursued this course as regards native reserves, from the conviction that the system heretofore adopted in other purchases of large tracts, was beyond the comprehension of the aborigines, and at the suggestion of Colonel Wakefield I left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:1-2)

Colonel Wakefield also reported on the sale, commenting that two further aspects were left to the governor. The first concerned the remaining area of the block not promised to the company, and the second involved:

the special native reserves, as in the other settlements; not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:55)

Like Symonds, Wakefield believed that there was no commitment made to provide tenths, the special native reserves in other company purchases, but the governor still had the discretion to impose these reserves when surveys had been made and the company's sections selected.

If tenths had been discussed, Professor Ward has concluded that given events in Wellington and Ngai Tahu's clear determination to retain ownership and control of the land reserved to them, there were good reasons for them rejecting such a proposal. Tenths would not, it must be remembered, have been owned or controlled by Ngai Tahu themselves. Symonds' report of the purchase explained his actions in supervising the transaction, and acknowledged that further provisions could be made by the governor for Ngai Tahu. In Symonds' view these could amount to tenths but FitzRoy had the power to make whatever further provision for Ngai Tahu he thought necessary.

Ngai Tahu raise their claim to the tenth

Ngai Tahu do not appear to have raised the issue of tenths with the Crown until much later in the century. In 1867 when Topi Patuki petitioned Parliament over the Princes Street reserve, his petition made no reference to any promise made in 1844, but to the "arrangement then existing" between the government and the New Zealand Company. Lands reserved for tenths in Wellington were at the time being placed directly in Maori control by the Native Land Court. In 1872 H K Taiaroa produced a statement to the Committee on Middle Island Native Affairs, said to have been made by his father in 1862, shortly before his death:

Secondly. After that land purchase commenced in this Island, the first land we sold was Otago; it was sold to Colonel Wakefield. We pointed out all the boundaries, and all stipulations were mentioned to Colonel Wakefield, as follows:-We said the first payment for this land would be œ100,000. Colonel Wakefield said, "That is too much, œ2,400 will be ample, and that is all the cash consideration; it had better be arranged in this manner, viz., that one acre in every ten shall be reserved for you." We agreed to this, and said, "You can have the land according to these terms." We do not know whether these words were written down or not, but all the people present heard these words.

These are the places about which we spoke, and stated that we desired to retain-Otakori, Taiari, Maranuku, Te Karoro, and other places. (C2:21:9)

Mantell told the same inquiry that he had discussed tenths with a number of Ngai Tahu rangatira, including Tuhawaiki who had drowned in 1844. The tribunal agreed with Professor Ward that this statement must be discounted. Despite active involvement in Ngai Tahu affairs between 1848 and 1872, Mantell never once raised the issue on their behalf, although he was twice minister of native affairs. Tare Wetere Te Kahu and Hoani Wetere Korako also gave evidence to the same inquiry, although only Te Kahu was a signatory to the deed. Neither mentioned anything resembling tenths. They both considered that Ngai Tahu were entitled to some small and specific pieces of land within the block.

The Smith-Nairn commission heard evidence from four Ngai Tahu present at various times during the negotiations. Hone Kahu simply said that Maori portions were to be chosen, "Ko nga whenua Maori hei nga Papatupu", from the land occupied by their ancestors, and he named four places. Wiremu Potiki maintained that Maori were refusing to accept Wakefield's offer of œ2400 until Wakefield promised that the land would be "divided". His recollection was that Wakefield "mentioned that the land was to be divided into sections and that was the reason why they agreed to take œ2,400" (P2:107). Horomona Pohio was confused about some of the details of the June and July meetings, but he too maintained that Wakefield had promised to have the land "divided into sections" for Ngai Tahu (P2:108). Rawiri Te Maire, like Pohio, had forgotten that agreement had been reached in the earlier June meeting, but he also maintained that Ngai Tahu had agreed to accept the money offered, after they had been promised that the land would be divided into sections for Maori and settlers. Te Maire said that George Clarke had explained that this would happen after the land had been surveyed. All the Maori witnesses used the term "wakawaka" to describe these

sections. Wakawaka were Ngai Tahu's traditional means of dividing resources among hapu and whanau.

This testimony is difficult to reconcile with the contemporary evidence of the negotiations and with the whole tenths policy as it applied in 1844. While Tuhawaiki, Karetai and Taiaroa all agreed to the terms of the sale on 20 June, the witnesses' recollections had these chiefs refusing to agree to the œ2400 until the end of July when the deed was finally signed. Wakefield's and Symonds' reports are also completely inconsistent with any promise of tenths having been made. The tribunal considered it likely that in the intervening years, Maori recollections of the discussions which led to the reservations of the Otakou heads had become confused with the issue of tenths.

Some of the European participants also made statements about the negotiations later in the century. In 1880 Symonds denied having discussed tenths at all, although he did not know if Ngai Tahu had discussed them with Colonel Wakefield. George Clarke sent an affidavit to the Smith-Nairn inquiry in April 1880. He was more forthright, saying that after his experience of the confusion in Wellington, he had been determined that the "whole terms of the purchase should be expressed in the Deed of Conveyance" (T1:106). He thought it possible that tenths may have been discussed by Colonel Wakefield, but concluded that Ngai Tahu had rejected any proposal where they could not choose the lands to be reserved to them. He emphasised that he was "almost certain, that NOTHING WHATEVER BEYOND THE CONTENTS OF THE DEED WAS PROMISED AS A CONDITION OF THE SALE" (T1:107). (emphasis in original)

Conclusions and findings

The claimants pointed out that tenths were very much in the air in 1844. Although the policy had run into difficulties, the March proclamation revitalised it, by ensuring that Maori retained their pa and cultivations, as well as vesting tenths in the Crown. Dr Ann Parsonson suggested that Ngai Tahu were well aware of these measures, and that Tuhawaiki had been informed of the governor's intentions when he met him in Wellington on 27 February 1844. This can only be speculation. We agreed with Professor Ward, that Ngai Tahu much preferred to have land they wished to retain set aside as excepted from the sale and that there is no good contemporary evidence that Ngai Tahu expected the company or the government to provide tenths on their behalf. Nor were we persuaded by any later evidence that such was the case.

The claimants were critical of Symonds' role in the negotiations, claiming that he failed to discharge his responsibilities as protector (grievance no 1). They concluded that his journeys to Wellington left the negotiations unsupervised. They also alleged, that along with Wakefield, Richmond and FitzRoy, he expected tenths would be provided, and yet made no attempt to implement this. Finally they suggested that he remained distant from the negotiations, and therefore made no attempt to protect Ngai Tahu's interests. The tribunal did not find this grievance to be made out. Symonds' responsibility was to look after Crown and Maori interests, and in supervising the negotiations he may have been over cautious, but this did not disadvantage Ngai Tahu. Although Tuckett's negotiations of 20 June 1844 were conducted in Symonds' absence, the resultant agreement still required his approval. In fact, it was Clarke, and

not Symonds who had the role of protector in this purchase. Clarke appears to have gone to considerable lengths to ensure that Ngai Tahu understood and accepted the terms of the agreement. Nor was Symonds' own role passive: he ensured that the boundaries were inspected and insisted that Ngai Tahu's demand to retain the large area at the heads be respected.

While we concluded that Symonds conscientiously followed his instructions, the tribunal was bound to say that these instructions were defective. FitzRoy failed to give any instructions to ensure that the Maori retained sufficient land for their present and future needs. The fault lay not with Symonds but with FitzRoy.

There had been no commitment by the company or by the Crown to provide any additional "special reserves". However, the governor still had to approve the purchase, and still had the option of making additional reserves for Ngai Tahu. The Europeans concerned expected that this would involve lands vested in the Crown and selected by ballot when the land was surveyed and selected. However there was nothing to stop FitzRoy from reserving lands directly to Ngai Tahu under the terms of the Crown's agreement with the company of November 1840.

At the end of the purchase, it was still expected that the settlers' arrival at Otakou was imminent. However, by the time Symonds' report reached FitzRoy in early September, news had reached Wellington that plans to send the settlers had been suspended. With urgency gone, FitzRoy delayed reporting to Lord Stanley until December 1844. He praised Symonds' role in the negotiations and forwarded a copy of the deed to London, but did not mention his obligation to consider the need for additional reserves. We have assumed from this that FitzRoy entirely approved of the transaction, including the provision of reserves in the deed, and that he did not propose to take any further action as to the provision of tenths. Lord Stanley appears to have accepted the reserve provisions contained in the deed as adequate for Ngai Tahu, and the company certainly believed that tenths were unnecessary in the block. Nonetheless, although not instructed to do so, Governor Grey, like FitzRoy before him, still had the discretion to provide additional reserves if he considered them necessary. He made no move to do so. On 13 April 1846 he issued a Crown grant for the New Zealand Company not just for the 150,000 acres originally intended for the company but for the whole of the Otakou block, then thought to be of 400,000 acres but now known to contain as many as 534,000 acres. Maori reserves were specifically excepted-those identified in the deed. When the settlers arrived in 1848 and had their surveyed lands balloted to them, Grey issued no instructions to have further reserves selected for Maori.

In considering whether FitzRoy or Grey should have vested a substantial endowment of land in the Crown for Maori purposes we noted Professor Ward's comments that to be consistent with his own undertakings, FitzRoy should have provided tenths at least for the residual 250,000 acres. The professor considered that the large reserve at the heads was intended to balance the 150,000 acres to be selected for the company settlement. The tribunal considered this argument consistent with the often stated policy of the Crown to provide resources from Crown purchases for Maori welfare. Dr Parsonson also demonstrated that FitzRoy believed that as a general rule tenths should be reserved for Maori vendors, in addition to lands for their occupation:

With respect to the interests of their descendants they [the Maori] are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition (R36(b):2:374)

The tribunal was at a loss to understand why having so clearly stated this policy to the colonial secretary, FitzRoy made no attempt to provide tenths in the Otakou situation.

The tribunal had to consider whether the failure on the part of FitzRoy and Grey to set aside additional reserves constitutes a breach of the Treaty of Waitangi. After the sale, Ngai Tahu were left with 9615 acres. Was this sufficient for their present and future needs and an adequate endowment? In considering this issue, the tribunal has rejected the suggestion of claimants' counsel that these 9615 acres should not be taken into account as they had been excluded from the sale. The exclusion from the sale of lands required for the comfort and subsistence of Ngai Tahu was consistent with the Treaty principle that they were to be left with a sufficient endowment for their own needs, both present and future. However, if these reserves were insufficient to provide an adequate provision for their present and future requirements, then the Crown was under an obligation to ensure this by way of further reserves.

How much then was adequate? The 9615 acres left Ngai Tahu can be contrasted with the 8650 acres FitzRoy awarded John Jones of Waikouaiti in December 1844. Following a prolonged dispute with officials, Jones was eventually awarded 8500 acres by special legislation in 1867, in addition to the 2560 granted him in 1849. This 11,060 acres comprises over 1000 acres per member of his family, including his wife and nine children. In contrast, Ngai Tahu were left with less than 30 acres per head, based on an estimate of 335 people who may have had rights in the block.

In a study of Ngai Tahu's social and economic position in the period after the purchase, Mr Bill Dacker, a claimant historian, argued that the tribe was seriously under endowed with land in their attempts to realise the benefits which European settlement promised. As a result, he argued that the tribe was marginalised in the European world and their tribal identity was eroded. The Crown responded with the evidence of Mr Tony Walzl, who while agreeing with Mr Dacker's general conclusions, did not see the reserves as being under pressure during the 1850s. Professor Pool, for the Crown, placed Ngai Tahu's needs in a demographic framework. He presented figures which suggested that by the estimates of the day for European needs, and considering the quality of the reserves, Otakou Maori had sufficient land for their 1844 needs. However he also demonstrated that European estimates of what was necessary increased dramatically as pastoralism took a hold on the New Zealand economy. As for Ngai Tahu's future needs, Professor Pool had no doubt that the provision made for them was inadequate, citing Alexander Mackay's 1891 figures which show only 12.8 per cent of Maori in Otago as having sufficient lands for their needs. To some extent the responsibility for this goes beyond the Otakou purchase and was a consequence of the Crown's subsequent dealings with Ngai Tahu over land.

Discussing present and future needs in terms of population per acreage was helpful, but presented the danger that the outcome was distorted. The Crown was under a duty to Otakou Maori to ensure that ample land was set aside to provide an economic base for the future. In fact it left Ngai Tahu only sufficient land for bare subsistence, with

no opportunity to turn, as European settlers soon did, to pastoral farming. The tribunal, therefore, had no hesitation in finding that the claimants' grievance that the Crown failed to provide an economic base was made out. In short, the Crown acted in breach of Treaty principles in failing to ensure that Ngai Tahu retained or were allowed sufficient land for their present and future needs.

In 1844 Governor FitzRoy was committed to a policy that tenths should be provided when Maori sold land, in addition to their retaining adequate reserves. The tribunal considered that the Crown was under a residual obligation to make further provision for the Otakou Ngai Tahu which might have been met by the provision of tenths vested in the Crown for Maori purposes. The tribunal had in mind that, as later occurred elsewhere, some tenths might have become vested in Ngai Tahu as owners. The failure on the part of the Crown either to make such provision for tenths or to make other adequate provision, constituted a breach of Treaty principle. It was clear that Ngai Tahu had been prejudicially affected by such failure on the part of the Crown.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.3 The Princes Street Reserve Summary

2.3. The Princes Street Reserve Summary

Introduction

Compared with the millions of acres involved in a number of Ngai Tahu's other grievances the 1 acre 2 roods 34 perches of the Princes Street reserve may appear relatively insignificant. Nonetheless the history of the reserve and the claim associated with it have been a major concern to Ngai Tahu of Otakou for many generations. The Princes Street claim has created a considerable file of archives and the tribunal was presented with detailed evidence supported by over 1000 pages of documents.

The reserve, intended to provide Ngai Tahu with a landing place at Dunedin, was made in 1853, by Governor George Grey on Walter Mantell's recommendation. A few years later the status of the reserve was challenged by the Otago provincial government, which claimed the land had previously been reserved for wharves and quays. Eventually a Crown grant was issued by Grey in favour of the province. Ngai Tahu challenged this, beginning a process of litigation which eventually led to an out of court settlement, whereby the tribe accepted œ5000 to abandon an appeal to the Privy Council. After a further petition to the House of Representatives an additional œ5000 in back rents was also paid. The œ10,000 was considerably less than the value of the reserve, by that time extensively developed through the city's rapid gold-fed growth during the 1860s. Ngai Tahu's legal case was not strong but they have continued to regard their claim for the reserve as unfinished business.

Claimants' grievances

Three of the claimants' Otakou grievances related to the Princes Street reserve. They alleged that the Crown failed to set aside the Otepoti (Dunedin) reserves promised at the time of the sale (no 6) and that it failed to create the Princes Street reserve in 1853, prejudicing Ngai Tahu's later litigation and negotiation (no 7). Finally it was claimed that the Crown failed to protect Ngai Tahu by not providing a permanent hostel for their personal use and occupation and as a base for their commercial activity (no 8).

The Otakou purchase

There is no mention of a reserve at Dunedin in the Otakou purchase deed of 1844 or in any other documentation of the time of the purchase. The suggestion that the reserve was promised in 1844 was first raised in 1867, when Ngai Tahu began their campaign to have their rights to the reserve recognised. Topi Patuki, in a petition to

the Queen, claimed that some small additional pieces of land had been excluded from the purchase. These included a place near the Toitoi stream which crossed Princes Street and another in the location of the 1853 reserve and the neighbouring manse. Patuki maintained that Ngai Tahu chiefs had withdrawn from the negotiations when these requests were refused by the New Zealand Company and Crown representatives, and that they had only returned and come to an agreement on the promise that these pieces would be reserved.

These claims were supported in 1867 by John Jones, also an eye-witness to some of the events of 1844. According to Jones, when these reserves were denied, the Maori returned to Waikouaiti on Tuhawaiki's boat for 10 days, until summoned back by Daniel Wakefield. Daniel Wakefield then agreed, so Jones claimed, to Ngai Tahu demands to reserve these pieces.

There is no contemporary record of any such discussion or agreement. Jones was advancing his own interests in 1844. He attempted to influence the negotiations to secure a water front section in the lower harbour. However there is no evidence of a request for a reserve at the site of Dunedin in the upper harbour. Symonds, a Crown agent supervising the conduct of the New Zealand Company in the purchase, remembered no such request when he gave evidence to the Smith-Nairn commission in 1880. Given the meticulous care he took in carrying out his duties, it was difficult to accept that so dramatic an event as a Maori withdrawal from the negotiations for 10 days over the issue would not have been recorded.

Having regard to these circumstances, the tribunal was not satisfied that Symonds and Wakefield or Tuckett promised Ngai Tahu the two reserves in the upper harbour.

Events after the purchase: Mantell makes a reserve

The Princes Street reserve had its origin, then, in Mantell's attempts to set aside a place for Ngai Tahu to land their canoes and trade their produce in the early 1850s. Towards the end of 1852 Mantell informed the colonial secretary of persistent requests by Maori from Moeraki to Otakou to have a piece of land in Dunedin set aside to build houses for them. In April 1853, Mantell sent Domett tracings for a reserve at Port Chalmers and another at Dunedin between Princes Street and the harbour. This was some distance south of the site at the Toitoi, at the time being used by Ngai Tahu. The land was steep and not entirely suitable, but justified by Mantell as the only piece available. We could only speculate why he did not propose land at the Toitoi, although there was a suggestion that Mantell, an Anglican, chose to locate the

Maori reserve next to the manse to spite his Presbyterian critics.

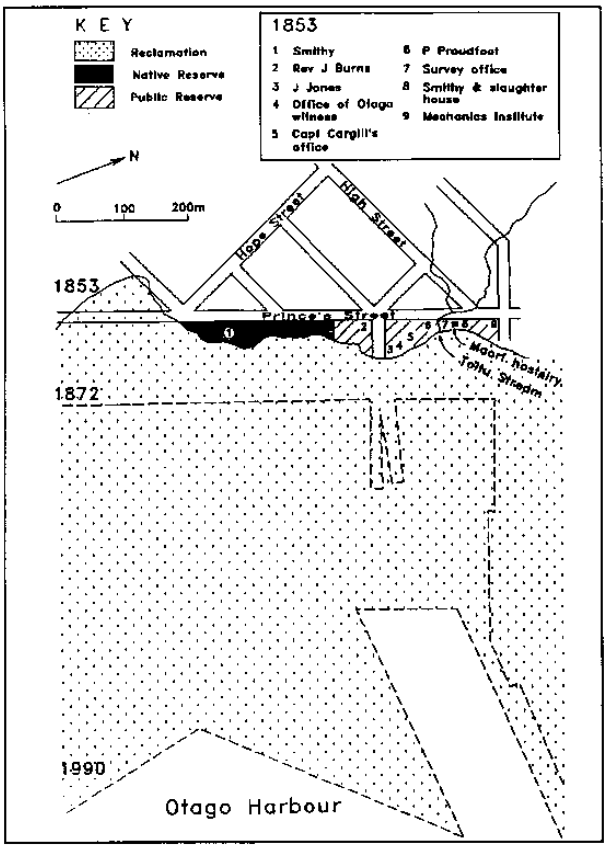

Figure 2.2: The Princes Street reserve from Mantell's 1853 sketch, showing the location of the hostel near the mouth of the Toitu Stream and the extent of reclamation since 1853.

Although Grey approved the reserve according to the plan sent by Mantell, this in itself was not sufficient to legally set aside the reserve for Ngai Tahu. For the reserve to have been properly set aside it would have been necessary to have taken the proposal before the Executive Council and gained its approval. This Grey did not do. Although the reserve had been agreed to by Grey, Mantell appears not to have informed Ngai Tahu of the fact, as over a year later they petitioned Captain Cargill to approve a shelter for them somewhere on the beach or in Dunedin.

A hostel for Ngai Tahu

If Ngai Tahu were unaware of the setting aside of a reserve for them until 1858 so was the Otago Provincial Council. In the meantime, the province had agreed to erect a lodging house. However this proposal languished until central government became involved in 1858. The 1853 reserve site was dismissed as unsuitable by the commissioner of Crown lands, and in choosing another site for the hostel, the matter became embroiled in a political wrangle between central and provincial government. Eventually a hostel was built by the central government on a site provided by the province in exchange for Crown land. This was near the Toitoi stream, already being used by Ngai Tahu, and not on the site selected by Mantell in 1853. Title was in the province, not in Ngai Tahu, and there was no security of tenure. By 1863 the building had greatly deteriorated and it was removed in 1865. There was a proposal to rebuild the hostel on another site, but this was never done. Ngai Tahu's use of the hostel appears to have declined considerably by this time.

Mantell's reserve is granted to the province

Provincial politicians complained in 1858, when they first heard of the reserve set aside by Mantell, that the land had already been allocated for wharves and quays by the New Zealand Company. The matter remained unresolved until 1862, when the town was experiencing rapid expansion. Parts of the reserve were leased to local businesses. However, because the status of the land was still unclear, the rents were banked in a separate account. By 1864 this account had a balance of about œ5000.

When Mantell again became native minister in 1865, he attempted to have title to the reserve vested in Ngai Tahu. Although the reserve was brought under the New Zealand Native Reserves Act 1856, this did not give Ngai Tahu title. At the same time provincial interests were advancing the province's claims to the land, arguing that the land had not been properly constituted as a native reserve. The Otago Association had originally set the block aside as a reserve for wharves and quays, and clearly had the right to do so. Whether the Crown had the power to override this reservation in 1853 is uncertain. The question is complicated by some debate over what powers the Crown had granted the governor in dealing with the association's lands, once they had reverted to the Crown after 23 November 1852.

The provincial officials took their case to the House of Representatives, which on 13 September 1865 passed a resolution that the reserve should be vested in trust in the superintendent of Otago. As Professor Alan Ward pointed out, Auckland politicians lent their support to the resolution, in return for their Otago colleagues' support in burying a proposal to establish semi-autonomous Maori provinces in the north.

On 11 January 1866 Grey signed a Crown grant for the reserve in favour of the superintendent of Otago for wharves, quays and other public purposes. It was later argued that the grant was signed in error along with a number of other grants, but Dr Parsonson has shown that this was the only grant signed by Grey on that day. It strains the tribunal's credulity that the signing of the grant was "inadvertent", and Professor Ward's conclusion that the grant was signed to ensure the government's continued support from Dunedin members is a more likely explanation. The decision to sign the grant was a political one, done without consultation with Ngai Tahu and with no apparent regard for their interests.

Ngai Tahu raise their claim to the reserve

Although the grant was signed, the central government still refused to hand over the accrued rents to the province. In August 1866, H K Taiaroa protested to the governor, claiming the reserve had been taken from Ngai Tahu. This was followed by Topi Patuki's 1867 petition, drawn up with Mantell's assistance.

In response to the petition, the government agreed that a writ of scire facias could be taken in the Crown's name against the superintendent to test the validity of the grant, providing, after some wrangling, the guarantee of legal costs. An attempt to have Parliament hand the accrued rents to the province was forestalled. The province sought a compromise by offering Ngai Tahu a site at Pelichet Bay and œ1000 or more for the building of a hostel, but no agreement was reached.

The Supreme Court decided that the governor did not have the power to make the reserve under section 17 of chapter 13 of the 1846 Royal instructions. The Court of Appeal rejected this, but found that in failing to show that the reservation had been approved by the Executive Council, as required by the instructions, the reserve was not properly made out. The court did not decide whether the 1846 instructions were in fact operative in 1853, when Grey approved the reserve.

With their case rejected by the Court of Appeal, Ngai Tahu decided to appeal to the Privy Council and in 1872 the Crown agreed to grant œ500 for legal costs. Soon after, Izard, Ngai Tahu's lawyer, recommended to Patuki, that given the chances of success, he should accept an offer from the premier, Julius Vogel, of œ5000 as a settlement. Mantell too counselled acceptance of the offer. Given the likelihood of success in the Privy Council, Izard's advice was sensible and the wisest course for Ngai Tahu.

There still remained the accrued rents, now increased to over œ6000. Eventually, in 1877, following a Native Affairs Committee recommendation, the government agreed to pay œ5000 of this to Ngai Tahu. The committee had recommended that all the money be paid. Taiaroa refused to accept the final œ4000 of this, holding out for the full sum, until 1880 when the native minister threatened to have the funds returned to the public account.

As far as the Crown was concerned the matter was then settled. Taiaroa made a further attempt to gain the interest which had accumulated on the œ4000 over the period he had refused to accept the amount. In 1939 Ngai Tahu took the matter unsuccessfully to the Native Land Court.

Conclusions and findings

Ngai Tahu were not consulted about the establishment of the reserve, nor were they even told it had been made until several years after its creation. They appear to have continued to use the more practical landing place at the Toitoi and it was there that a hostel was eventually built for them. The reserve set aside by Mantell was not suitable for the purpose, and appears to have been only used intermittently.

Ngai Tahu accepted a settlement, although reluctantly, and received œ10,000. Although this fell well short of the value of the land by that time, their claim to the reserve was legally doubtful, and they had little chance of success before the Privy Council. Despite this, the issuing of the Crown grant reflects no credit on the Crown. The grant was most likely the result of a deal between Auckland and Otago politicians, not an "inadvertent" action.

Although Ngai Tahu accepted a settlement in 1880, the tribunal did not consider that this precluded a claim under the Treaty of Waitangi Act 1975. The reasons for this are similar to those discussed in the tribunal's consideration of the Ngai Tahu Settlement Act 1944. There was no opportunity for Ngai Tahu to claim relief for a breach of the Treaty at the time. While the settlement must be taken into account, the tribunal considered that it was still able to determine whether any act or omission of the Crown in relation to the Princes Street reserve constituted a breach of one or more principles of the Treaty.

The tribunal was not satisfied that the company or Crown representatives, at the time of the sale, promised two reserves in the upper harbour, at the site of Dunedin. It followed that the claimants did not establish any breach of the Treaty in this respect (grievance no 6).

In making submissions on the next grievance, that the Crown failed to properly set the reserve aside in 1853, Mr Temm argued that Ngai Tahu had been prejudiced by some administrative bungling by the Crown. However, it is difficult, at this point in time, to determine if the governor actually did have the power to make the reserve. Justice Richmond's comments in Regina v Macandrew (1869) 1 CA 172 suggest that the governor may not have had this power, and we were left with very real doubts that such power did exist. Mrs Kenderdine submitted that the Crown would only have had a Treaty obligation to set aside the reserve if such a promise had been part of the purchase agreement in 1844.

The tribunal was unable to sustain the claimants' grievance no 6 that they were prejudiced by the failure of the Crown to formally reserve the Princes Street reserve in 1853. First the grievance assumed that it was competent, as a matter of law, for the governor to create the reserve, when it would appear that this is problematical. Secondly, the tribunal found it somewhat incongruous to be asked to hold that it was a breach of the Treaty by the Crown, to fail to effectively create a reserve which was not suitable for the purpose for which it was needed.

Mrs Kenderdine was also concerned with the implications which could be taken from Professor Ward's comments on this part of the claim. Professor Ward suggested that although the Princes Street claim was "not especially" strong, it demonstrated how Ngai Tahu's aspirations to participate in the new economy could be dashed by the failure of colonial officialdom (T1:25-6). While accepting that the Crown had a responsibility under article 2 to ensure that Maori were left sufficient land for their maintenance and livelihood, Mrs Kenderdine did not agree, as she saw Professor Ward implying, that the Crown's failure to ensure that a permanent hostel was provided was a breach of Treaty principles.

The claim that Ngai Tahu were entitled to a permanent hostel in Dunedin has wide implications. It suggests that when the Crown purchased land from Maori to facilitate Pakeha settlement, it was obliged under the Treaty to ensure that, in any town that resulted from that settlement, accommodation was provided for Maori visiting the town. The tribunal was unable to find that the Treaty imposed any obligation on the Crown to provide permanent accommodation for Ngai Tahu to meet a temporary need.

The tribunal accepted that the Princes Street claim could not be divorced from the purchase, and the obligations of the Crown. In considering that claim we concluded that if the Crown had provided tenths, in addition to the 9600 acres reserved from the sale, this would have provided Ngai Tahu with an adequate endowment. Obviously if the Crown secured a suitable reserve on Princes Street for use by Ngai Tahu, this would have served to meet part of its wider obligation. Having said this the tribunal had difficulty in concluding that the Crown had an obligation to provide in perpetuity a specific piece of land in the new town of Dunedin for the purposes of a Maori hostelry and trade. The failure to meet the Crown's Treaty obligations was found to

have rested more on the failure to ensure that Ngai Tahu retained sufficient land for their present and future needs and thereby denying Ngai Tahu the opportunity of participating in the commercial development of the town and the benefits that would have flowed from this. The tribunal considered that if Ngai Tahu are compensated for that breach of the Treaty, as they should be, such compensation should more than encompass any perceived loss by Ngai Tahu of "their" Princes Street reserve.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.4 The Kemp Purchase Summary

2.4. The Kemp Purchase Summary

Introduction

Kemp's purchase was the largest block of land ever bought by the Crown. Its 20 million acres made up almost a third of the country's land area, although some of this overlapped with later purchases. The purchase must also be one of the most controversial. Maori complaints began within months of the deed being signed. In the last 142 years the agreement has been the subject of numerous petitions, parliamentary inquiries, Royal commissions and court proceedings. In 1906, 1944 and 1973 Parliament enacted a number of measures to provide some form of relief or settlement. Despite the many inquiries, this is the first opportunity the tribe has had of having the Kemp purchase examined in terms of the Crown's Treaty obligations by a tribunal constituted for that purchase.

The purchase was negotiated by Henry Tacy Kemp on 12 June 1848, following earlier discussions between Ngai Tahu rangatira and Governor Grey in February. However the agreement was not implemented by Kemp, but by a second Crown commissioner, Walter Mantell. Kemp had been instructed to identify and survey all the land reserved from the sale, before the sellers signed a deed. He did not do this. Instead he made several promises about various kinds of lands which would be reserved to Ngai Tahu. These lands were described in the deed as:

Ko o matou kainga nohoanga ko a matou mahinga kai, me waiho marie mo matou, mo a matou e tamariki, mo muri iho i a matou; a ma ta Kawana whakarite mai hoki tetahi wahi mo matou a mua ake nei a te wahi e ata ruritia ai te whenua nga Kai Ruri (L9:17) (see appendix 2.2)

This was translated at the time by Kemp as:

our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us when the lands shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land ... (L9:416-418)

The Maori understanding of the agreement, as recorded in the original Maori deed, goes beyond Kemp's translation. From this and other evidence of the time, it is clear that Ngai Tahu agreed to sell much of their land to the Crown on their understanding that their villages and homes, their gardens and their natural food resources would be retained by them, as well as substantial additional lands.

Mantell was not present when Ngai Tahu consented to the purchase, but in implementing the agreement, he insisted on a narrow and parsimonious definition of its terms despite protracted Ngai Tahu protest. He substantially reduced the areas of land for Ngai Tahu from the large areas they considered they were entitled to have had reserved. He refused to recognise their reservation of lands for mahinga kai, the natural resources of their hunting and gathering economy. At the end of his mission, Mantell had allowed the setting aside of only 6359 acres out of 20 million. Kemp's failure to secure to Ngai Tahu the lands they reserved from the sale prior to finalising the agreement, compounded by Mantell's high handed conduct, reduced Ngai Tahu's remaining lands to a pitiful remnant of their previous vast territory.

Not only was the outcome approved by his superiors, Lieutenant-Governor Eyre and Governor Grey, but Mantell was rewarded with further commissions to purchase land from Ngai Tahu.

Claimants' grievances

The claimants filed 11 grievances on this purchase. The first concerned the impact of the Wairau purchase, negotiated by Grey with Ngati Toa the previous year. It was claimed that by including Kaiapoi in this purchase, Ngai Tahu were forced to part with Kemp's block on unfavourable terms (no 1). The next grievance alleged that the Crown failed to provide ample reserves for their present and future needs and that their mahinga kai were not reserved (no 2). They complained that a block between the Waimakariri and Kowhai Rivers was not reserved to them (no 3). The Crown, they alleged, imposed an interpretation of the boundaries of the block which went well beyond what Ngai Tahu are said to have agreed to (no 4). The claimants argued that Ngai Tahu agreed to sell only the plains to the foothills, and not over to the west coast. They also claimed that the eastern boundary of the block excluded Kaitorete and much of Waihora (Lake Ellesmere). Several ordinances or enactments were also the subject of complaint. These included the New Zealand Company Land Claims Ordinance (1851) (no 5), the Canterbury Association Amendment Act 1851 (no 6), the Native Land Act 1865 (no 7) and the Ngaitahu Reference Validation Act 1868 (no 8). They also complained that while Europeans were granted lands under the Lands for Settlements Acts, the Crown failed to do the same for Ngai Tahu (no 10) and finally, that when the Crown provided lands for Ngai Tahu under the South Island Landless Natives Act 1906, these were not in Kemp's block and were much inferior to those provided to Europeans (no 11). This last grievance is dealt with in a later section of the report (20.7.1-3).

Background to the purchase

Much had changed in the Crown's relationship with Maori between 1844 and 1848. At the time of the Otakou purchase, the Crown had been in a defensive position, facing financial crisis, and with the country on the brink of war. Four years later a new governor, with better resources at his disposal, was in a much stronger position in his relationship with Maori tribes. Grey had dismissed the protectors, and was able in their absence to appoint a single officer to negotiate a purchase from Maori and look after their interests. Although Grey had been instructed to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi", he was also instructed to register Maori land and to secure to the Crown what was believed in England to be an

extensive area of land unowned by Maori. This provided Grey with a dilemma. He was well aware that Maori claimed ownership to all the land of the colony, as had been every previous governor, but such concepts were difficult to explain to his superiors in London. Earl Grey, the colonial secretary at the time of the Kemp purchase, held a very narrow view of Maori property rights; acknowledging only Maori ownership of villages and land in actual cultivation. The governor was therefore under clear instructions to find an extensive estate for the Crown, and yet, contrary to the expectations of his superiors, this could only be achieved by fair purchases, if it was to be done in a manner consistent with the Treaty.

Grey also inherited some of the problems of the New Zealand Company's colonisation schemes in New Zealand. The company claimed title to 20 million acres of land on the basis of a number of deeds negotiated with Maori prior to the Treaty. The company sent out immigrants, sold large areas of land to colonists and investors and was promised four acres by the Crown for every pound it had spent on colonisation. When the company's deeds on which its claims were based were found to be largely worthless, the Crown was faced with a considerable problem. The settlers were here with titles given them by the company to land still owned and occupied by Maori. Maori understandably refused to abandon land they insisted had not been sold. A land claims commissioner, William Spain, determined that in the South Island, despite its claims to the Wairau valley and land as far south as the 43rd parallel (below the Hurunui River), the company had only gained title to a limited area around Nelson.

In 1847, during Te Rauparaha's forced exile in Auckland, Grey negotiated the Wairau purchase, conveying the disputed Wairau valley from Ngati Toa to the Crown. Almost as an afterthought, the southern boundary of this purchase was set at "Kaiapoi". There can be little doubt that Ngati Toa had Ngai Tahu's pa near the mouth of the Ashley River in mind. It was here that Te Pehi and other Ngati Toa rangatira had been killed. Although Grey and his officials may also have thought that the southern boundary was the pa, they had a different location in mind. This was at about the 43rd parallel, the southernmost point of the New Zealand Company's 1839 deeds, and a place identified by Grey as 100 miles south of the Wairau, a point that became associated with the mouth of the Hurunui. Although this was the place recorded as Kaiapoi on a number of contemporary maps, the pa site is about 40 miles further south. This

confusion would continue into the Kemp negotiations (see figure 2.3

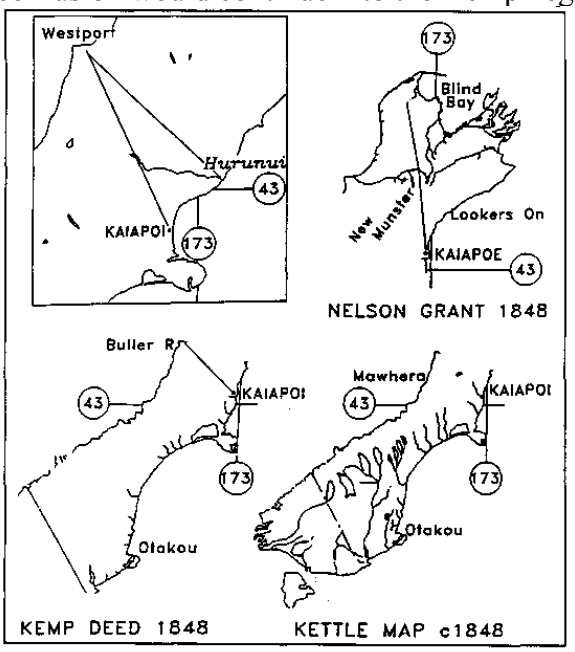

Figure 2.3: Comparing the location of Kaiapoi in relation to the 43rd parallel, as shown in three 1848 maps—the Nelson Crown grant map, the Kemp deed map and Charles Kettle's map. This shows the common but erroneous belief that Kaiapoi was located above the 43rd parallel, rather than further south at the mouth of the Rakahuri (Ashley) River.

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Grey argued that he had successfully purchased from Ngati Toa all the land down as far as the 43rd parallel, relying on Spain's determination of who owned the Wairau. He made no investigation of his own as to the rights of any other tribes who may have had rights to that land. He set about having a Crown grant prepared for the New Zealand Company to include all the area purchased from Ngati Toa in 1847 and the land already acknowledged as purchased by the company near Nelson. It was while he was arranging this grant that he visited Ngai Tahu, and the preliminary negotiations for the Kemp purchase took place.

Grey's negotiations in 1848

Grey and Colonel Wakefield met Ngai Tahu rangatira at Akaroa and Otakou, where they talked about a possible purchase. Details of their discussions are sketchy. Matiaha Tiramorehu provided the clearest explanation for what occurred at Akaroa.

... Ngaituahuriri spoke to the Governor concerning the payment for Kaikoura and Kaiapoi [the Wairau purchase]; he (the Governor) told the Ngaitahu Tribe that (the payment for) Kaiapoi should not be given to the Ngatitoas, but that for Kaikoura was already gone to them. Upon which Te Uki said to the Governor, Do not hide from us what you may have wrongly done with our place or country, but tell us that we may all know what you have done. After which conversation Governor Grey asked Ngaituahururi if he would part with some of his land; upon which the Ngaitahu Tribe hearing, gave their consent that Kaiapoi should be given up to the Governor. (L9:23)

Wakefield recorded that Grey had been offered the land between the Wairau and Otakou purchase and the "level country back to the central range of mountains" (L9:57). Grey's own account was written after the purchase had been completed. He emphasised Ngai Tahu's willingness to sell and to relinquish all their other claims to

land between the Wairau and Otakou blocks in return for "reserves for their present and reasonable future wants" set aside "for themselves and their descendants". No agreement was made as to price.

It was suggested by the Crown's historian, Dr Donald Loveridge, that Wakefield's account indicates that Ngai Tahu offered a coastal strip to the Crown, consisting largely of the Canterbury plains. While this is a possible interpretation of Wakefield's report of Grey's discussions with Ngai Tuahuriri, it is difficult to know whether this block consisted just of the plains or went back to the main divide. Ngai Tuahuriri's rights only went to the alps and Poutini Ngai Tahu would have had to have been consulted on any suggested sale to the west coast. While we were able to say that Grey acted as if he had consent to purchase all of Ngai Tahu's land between the two earlier purchases, we were unable to form a firm conclusion on Ngai Tahu's state of mind at the time.

Kemp's instructions

On returning to Auckland, Grey set about making arrangements for the purchase. He instructed Edward Eyre, the lieutenant-governor of New Munster, in Wellington, to organise the purchase. On Grey's suggestion, Eyre selected his native secretary, H T Kemp, for the commission. Kemp was the 30 year old son of a Kerikeri missionary. He was told that his responsibilities were:

the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitoa tribe and that purchased by the New Zealand Company at Otakou.(L9:68)

He was to "reserve to the natives ample portions of land for their present and prospective wants" and to mark off these reserves. After this had been done, he was to purchase all the sellers' rights to land within the remainder of the block.

Kemp's appointment; the requisitioning of the government's vessel, the Fly, discussions with Colonel Wakefield who was to provide the money for the purchase on behalf of the New Zealand Company and the preparation of a draft deed: these were all crammed into five days before the Fly was scheduled to sale on 29 April 1848. As a result of this haste, the draft deed, prepared by the Crown solicitor, Daniel Wakefield, was inadequate. Instead of specifying a cession to the Crown, the draft named the purchaser as William Wakefield, the principal agent of the New Zealand Company of London. Kemp took no maps, but arrangements had been made for these to be supplied by Charles Kettle, the surveyor of the Otakou block. Kettle was at the time the company's senior representative at Dunedin, and the Fly was to pick him up from there, to act as surveyor for the purchase.

The purchase

The Fly arrived at Akaroa on 2 May 1848, and was forced by bad weather to extend the expected four day stay to a fortnight. Arrangements were made for Ngai Tahu to meet with the commissioner when he returned. The Fly was unable to land Kemp at Otakou and he was forced to accompany the ship to the Auckland Islands. After

finally reaching Dunedin on 23 May, Kemp met with Otakou rangatira over three to four days, and on 4 June the commissioner and about twelve rangatira from Otakou and neighbouring settlements left for Akaroa, arriving there three days later.

By the time the deliberations began Kemp had had considerable opportunity to discuss his intentions with a number of the tribe's leading rangatira. About 500 Ngai Tahu were assembled at Akaroa when the discussions began on 10 June. Kettle's journal, and his report to the New Zealand Company, give some of the details of their deliberations:

the "correro" commenced by the chiefs coming forward and calling the names of the lands to be sold-Commencing from Kaikora one chief went down to the peninsula-Then Taiaroa called the lands from the Peninsula to Waitake-Then Solomon from Waitake to Moeraki-Portiki and others southward from thence to the Heads of Otakou"(L9:390)

According to Kettle, Tikao, from Ngai Tuahuriri, explained that all were not "fully agreed as to the sale of the land". He was also said to have confirmed that the whole of Banks Peninsula had been "sold" to the French.

Ngai Tahu had originally sought œ10,000 for the land but had recently lowered their request to around œ5000. They were therefore surprised and disappointed that the sum offered was so small, since Grey had led them to believe that they would be able to purchase cattle and sheep. Tikao was vociferous in his criticisms of the amount of money being offered and was later said to have asked œ5 million for the land. The day's discussions appear to have ended in deadlock over price and the scheduling of payments, but it would seem that the boundaries of the purchase, the rights of the various owners and other terms of the purchase had been discussed in detail.

There was no further public discussion the following day, however Taiaroa visited Kemp in the evening offering to give up his portion of the first payment and receive it in the next. Kemp informed him that they would be going aboard the Fly the next day and if Ngai Tahu wanted to receive the money they were to follow him on board.

Kettle described the meeting which took place on the Fly the following day:

we went on board the "Fly", and were followed by the principal chiefs. Mr. Kemp drew out the deed in the Maori language, in which it was stated [that] the northern boundary was to be from Kaiapoi, adjoining the Nelson Crown grant, across the island to the west coast; the southern boundary, a line from the Kaihiku range, south of the Molyneaux, to Milford Haven, on the west coast. I executed a map of the boundaries, which was attached to the deed. (L9:70)

Although Kemp claimed to have obtained about 40 signatures to the deed, including the proxies, Harry Evison, the claimants' historian, pointed out that many of the names were written in Kemp's hand and are not accompanied by any tohu or mark. According to Mr Evison the deed was signed by ten chiefs and had the marks of six others, leaving a vast majority of names written only in Kemp's hand. These figures differ a little from Mantell's, and it may be impossible to finally determine who signed, who put a mark on the deed and whose names were only recorded by Kemp.

While Mr Evison speculated to some extent on the circumstances which led to this, there has never been any previous suggestion in the 142 years since that the signatories' names were wrongfully attached to the deed. With the possible exception of Karetai, leading rangatira such as Taiaroa, Tikao, Horomona Pohio, Tiramorehu, Paora Tau and Wiremu Potiki either signed or placed their marks on the deed. Given that the deed was witnessed by reputable men and that the signatures and marks are interspersed on the sheet, it can only be concluded that those who were named but did not sign still gave their consent to the agreement.

It was also suggested by Mr Evison that the failure to identify the boundaries of the lands sold on the receipts could result in the signatories not having a clear understanding of what lands had been included in the transaction. This suggestion does not take into account all the discussions over who had rights in which areas, and what proportions of the payment should be given to the interests of any individual chief before payments were eventually made. The receipts, like the deeds, were merely the minutes of what had often been long and drawn out discussions. We know that Mantell, partly to overcome deficiencies he perceived in Kemp's handling of the purchase, went to considerable lengths to identify the major hapu and chiefs within the block. His census and his notebooks show the names of major chiefs with their given hapu, and the receipts demonstrate that those being paid were being paid for their rights in specific areas including in some cases land on the west coast.

Kemp's instructions had been clear that he was to select and mark off the reserves before the deed was signed. However he did not do this, blaming the winter weather. He instead promised that Ngai Tahu would have reserved to them substantial lands for their present and future needs. According to Kemp, these reserves were to consist of Ngai Tahu's villages and cultivations, and additional land which would be reserved at the governor's discretion when the block was surveyed.

The boundaries of the purchase

Establishing the exact nature of Ngai Tahu's understanding of their agreement with Kemp was not easy for the tribunal. From the time Mantell arrived to complete Kemp's task of marking off the reserves, we have evidence of a major divergence over the terms of the agreement between Crown agents and Ngai Tahu. In the months following the purchase, Ngai Tahu were to dispute the northern boundary of the block, the amount of land which would be reserved to the tribe, their rights to their mahinga kai (their natural food resources) and the Crown's right to determine which lands would be reserved. Some decades after the purchase many Ngai Tahu rangatira were also to complain that the block they sold to Kemp was much smaller than that identified on the deed map, and that the deed had only been signed under threats that otherwise soldiers would come and dispossess them.

The official record of the agreement, the deed and the deed map, has contributed to this legacy of uncertainty. Drawn up in haste, and not specifically identifying the actual lands which Ngai Tahu reserved from the sale, the wording of the deed and map allowed disputes over interpretation, which made it very difficult for Ngai Tahu to force the Crown to acknowledge and implement the tribe's understanding of the agreement.

In 1879 and 1880, Ngai Tahu rangatira explained to the Smith-Nairn Royal commission the boundaries of the block as they remembered them. They argued that the block was defined by Maungatere (Mount Grey) in the north and Maungaatua in the south. Eye witnesses to the sale gave evidence in 1879 that the lands sold extended back only as far as the first line of foothills on the western edge of the Canterbury plains.

The northern boundary

The deed, as translated by Kemp, referred to the lands situated on:

the line of Coast commencing at "Kaiapoi" recently sold by the "Ngatitoa" & the boundary of the Nelson Block continuing from thence until it reaches Otakou, joining & following up the boundary line of the land sold to Mr. Symonds; striking inland from this (The East Coast) until it reaches the range of mountains called "Kaihiku" & from thence in a straight line until it terminates in a point on the West Coast called "Wakatipu-Waitai" or Milford Haven ... (L9:416-418)

The plan gave the size and boundaries of the block more particularly. The northern boundary shown on the map runs in a north westerly direction across from the mouth of an unnamed river near a place labelled "Kaiapoe", just north of the 43rd parallel, to another river mouth on the west coast. Although this would seem to be the Kawatiri (Buller), the caption "Buller R" appears to have been added in pencil at a later date. The southern boundary runs along the edge of the Otakou purchase boundary and then runs in a straight line to a place marked Milford Haven or Wakatipu-Waitai. It can be noted that no other places are named on the west coast, although both coasts are boarded with a heavy blue band. Wakatipu-Waitai is not in fact Milford Sound, but Lake McKerrow, about 30 kilometres north of the sound. The Maori name for Milford Sound is Piopiotahi.

When Mantell came he identified the north-western corner of the block at Kaiapoi pa, near the mouth of the Ashley River, against repeated protests by Ngai Tahu. Ihaia Tainui's account of Mantell's fixing the boundary, although presented 30 years later, accords well with Mantell's own diary record:

we and Mantell went to the Kaiapoi pa. When we got there Mantell went right in the centre of the pa. Then Mantell said-"This is the boundary of Ngatitoa, from here to the north side of Mangatere." Then the Maoris said-"No; we shift the line further to Oteruawhare [near the Clarence River], further north from Kaiapoi pa" .... Paoro Tau said-"I don't want the boundary to be left at Oteruawhare; I want the Ngatitoa boundary to be put right back to Te Parinuiowhiti". (G2:773)

Kettle's deed map has Kaiapoi above the 43rd parallel. Dr Loveridge argued that Ngai Tahu agreed with Grey and then with Kemp that the location of the northern boundary of the purchase was at the mouth of the Hurunui and not at Kaiapoi pa. This, it was argued, was particularly important to Ngati Tahu since the northern boundary of the block was also the southern boundary of the Wairau purchase. If Kemp was purchasing only to Kaiapoi pa, then Ngai Toa were being acknowledged as having rights down as far as the pa, something Ngai Tahu would not countenance. For Kemp, locating Kaiapoi at the Hurunui was simply consistent with the assumptions made by

Grey in his Wairau negotiations and with the southern limits of the Nelson Crown grant.

The claimants argued that their tupuna's understanding of the northern boundary was that given to the Smith-Nairn commission, a line from Kaiapoi pa to Maungatere. However it was the tribunal's impression that the witnesses in 1879, who put forward this view, were remembering the boundary fixed by Mantell rather than that of their original agreement with Kemp. The numerous Maori complaints about the northern boundary, including appeals to Grey and Eyre in Wellington in 1848 make it clear that Ngai Tahu did not agree to a Kaiapoi-Maungatere boundary. Tiramorehu's 1849 accusation that Grey had reneged on his promise to pay Ngai Tahu for Kaiapoi also suggests that in 1848 Ngai Tahu's understanding of the northern boundary was that it went beyond Kaiapoi pa. We considered it inconceivable that Ngai Tahu would willingly agree with Grey or with Kemp that Ngati Toa had the rights to land as far south as Kaiapoi pa. We have concluded that Ngai Tuahuriri's offer to sell Kaiapoi included land to the north which was associated with the hapu's rights to Kaiapoi pa.

The looseness of the wording of the deed and the imprecision of the map allowed Mantell to impose an arbitrary and incorrect interpretation of the northern boundary of the block. Once imposed, Eyre and Grey allowed the boundary to stand, despite complaints by Ngai Tahu in Kemp's presence. It took years of persistent protest before Ngai Tahu's rights north of Kaiapoi were recognised in the North Canterbury purchase of 1857 and the Kaikoura purchase of 1859.

The inclusion of Kaiapoi in the Wairau purchase would have been a source of considerable anxiety to Ngai Tahu. The tribunal concluded however that this was substantially mitigated by Governor Grey's 1848 assurances and by the arrangements reached between Kemp and Ngai Tahu at the time of the purchase in locating the boundary between the Kemp and Wairau purchases at or around the Hurunui. For this reason the tribunal was not able to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with

Kemp's block on unfavourable terms.

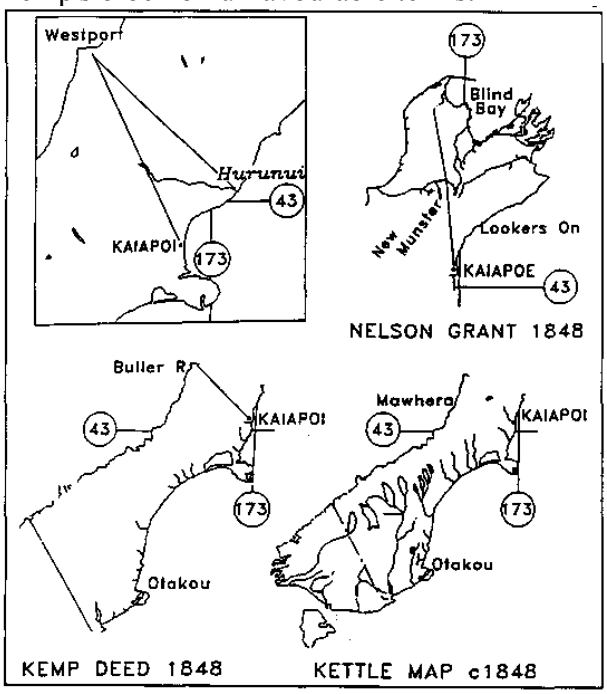

Figure 2.3: Comparing the location of Kaiapoi in relation to the 43rd parallel, as shown in three 1848 maps—the Nelson Crown grant map, the Kemp deed map and Charles Kettle's map. This shows the common but erroneous belief that Kaiapoi was located above the 43rd parallel, rather than further south at the mouth of the Rakahuri (Ashley) River.

The western boundary

To determine Ngai Tahu's understanding of the western boundary of the purchase, the tribunal had to consider a number of issues:

- Kemp and Kettle's understanding of the purchase boundary, and the extent, if at all, that this differed from Mantell's;

- because rights to the west coast were held by Poutini Ngai Tahu, were they present when the Kemp purchase was negotiated, and if so, did they consent to the sale?

- while Ngai Tahu's impression in 1879 was that the interior and west coast had not been sold, we had to examine this contention in the light of Ngai Tahu actions and written comments at the time of the purchase itself; and

- had Ngai Tahu's rights to the interior been adequately discussed by Kemp and did Ngai Tahu positively include the interior in the area sold.

There is no doubt that the European participants believed that the purchase went to the west coast. Both Kemp and Kettle clearly stated this at the time. The deed and the deed map mention Wakatipu-Waitai mistakenly as Milford Haven.

However no other west coast place on the map is named. Professor Ward's report suggested that the deed and map do not show sufficient evidence that the detailed disposition of the interior was discussed with Ngai Tahu. The report considered that Kemp and Kettle may have been careless about Ngai Tahu's rights to the interior,

since they may not have taken these rights seriously. If Kemp and Kettle did not discuss large areas of the interior with the tribe in June 1848, then were they adequately included in the sale?

The Crown refuted this argument, and Dr Loveridge argued that the absence of extensive detail on the deed map was not for want of knowledge on Kemp and Kettle's part nor was it evidence that the interior was not discussed. He discovered another Kettle map, created at the same time as the purchase, which contains considerably more detail about the west coast, about interior lakes and about Maori trails. In his view, the map shows that the European negotiators collected significant information about the lands they were purchasing, and that this was sufficient to show the breadth of the discussions about the boundaries and extent of the block. Given Kemp's later acknowledgement that he had accepted Ngai Tahu's claims to the whole of the block, and evidence that the lakes and mountains of the interior were discussed in 1848, we accepted the Crown's view that in the several days of discussions which preceded the actual signing of the deed, the interior was sufficiently discussed to have been included in the sale.

The first firm evidence we have that the interior and the west coast could have been excluded from the purchase comes from an 1867 petition handed to Grey while he was visiting Kaiapoi. This was followed by another in 1874 which outlined the argument presented to the Smith-Nairn commission five years later. However, earlier discussions by Ngai Tahu of the events of 1848 show quite different concerns. When Mantell arrived at Akaroa he was accompanied by Lieutenant-Governor Eyre. They were asked to reserve a block of land running from the Waimakariri River right across to the west coast. It was a request repeated on several occasions while Mantell was with Ngai Tuahuriri, and was the subject of much conflict as Mantell insisted the hapu make do with a reserve of only 2650 acres. We found it difficult to conclude that Ngai Tahu would have requested a coast to coast reservation, one that appears to be linked to their trails to Te Tai Poutini, where pounamu was obtained, if the purchase boundary only extended to the Canterbury foothills.

It was suggested in Ngai Tahu's 1874 petition and by the claimants that Ngai Tahu remained unaware that the Crown claimed title to lands west of the Canterbury foothills until some considerable time after the event. However, we have evidence that on two occasions soon after the purchase Ngai Tahu rangatira made direct references to the western boundaries of the purchase which were consistent with those on the deed map. In 1849 Topi Patuki offered to negotiate with the Crown over lands south of the Kemp purchase giving the boundaries of this purchase as joining the Otakou purchase boundaries as "hono tonu atu ki ta te Pa Kepa rohe ki tua ki Wakatipu" (joins Pa Kepa's [Kemp's] boundary over towards Wakatipu) (Q3:4,40).

Three years later, Werita Tainui, in a similar offer to sell lands north of the Kawatiri, mentioned the boundary of the land purchased by Mantell as:

ko te mutu tenei o ka utu a Matara, takoto haere ki Wangatipu.

[t]his is the end of Mantell's payments, lying along to Wangatipu. (Z10:8,9)

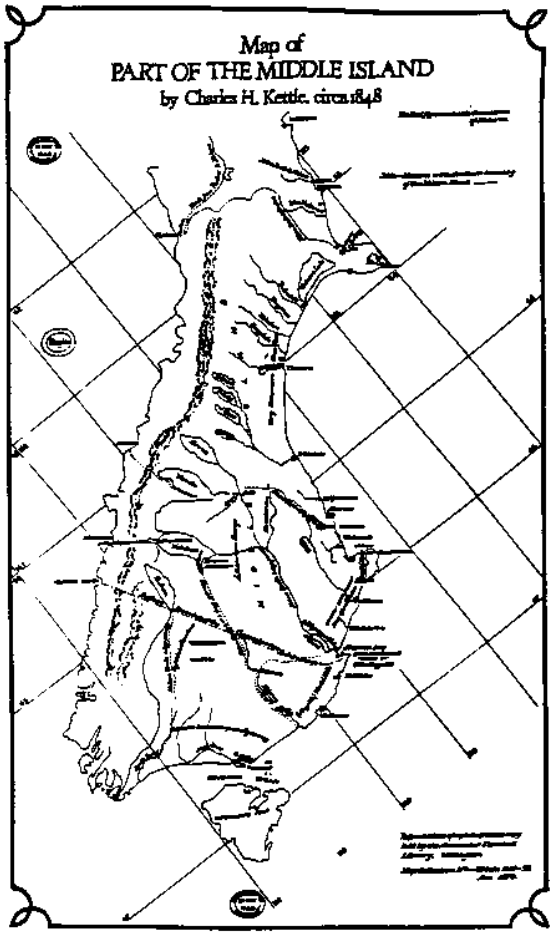

Figure 2.4: The Turnbull map as reproduced for Dr Loveridge and originally drawn by Charles Kettle, Kemp's surveyor, during the negotiations for the Kemp purchase in June 1848 (L21(b)). Alexander Turnbull Library, Wellington, New Zealand.

Werita Tainui was from Poutini Ngai Tahu, and a son of Tuhuru, the conquerer of the west coast. He lived at this time on the east coast not far from Kaiapoi.

Werita Tainui, and at least some others from the west coast, clearly considered that the lands from Kawatiri to Wakatipu had been sold. However we hesitated from concluding that Poutini Ngai Tahu were sufficiently represented at the sale for us to say that Kemp had their agreement to include their rights to the west coast in the purchase. Werita Tainui signed the Kemp deed and received some of the payment. Mantell tried to arrange for Poutini Ngai Tahu to be included in the second payment, but they arrived at Akaroa too late to receive the money.

Kemp and Kettle made no mention of a Poutini presence, but the Crown argued that Poutini Ngai Tahu were present at the Kemp negotiations. They based this conclusion largely on the Smith-Nairn evidence of Waruwarutu, who named a number of west coast chiefs and their wives as being present at Akaroa in June 1848. Dr Loveridge also suggested that the name Tuahuru on the deed was Tuhuru. Professor Ward was less certain of this, suggesting Huruhuru, a major Waitaki chief whose name is otherwise not on the deed as a possible alternative. We were unable to say for certain that Poutini Ngai Tahu were present at the Kemp purchase, however it is clear that

some Poutini Ngai Tahu did see their lands on the west coast as being included. In 1859, largely because of the failure to pay Poutini Ngai Tahu and define their reserves, the Crown entered into new negotiations with them for the purchase of the west coast, culminating in the Arahura purchase a year later.

However, although all Poutini Ngai Tahu may not have included the west coast in the Kemp purchase, the tribunal came to the conclusion that the Ngai Tahu rangatira who were parties to the Kemp deed included all their rights between the Wairau purchase, starting probably at the Hurunui, down to the Otakou purchase and over to the west coast. The tribunal therefore did not uphold the claimants' grievance no 4(a) that on the matter of boundaries, the Crown enforced an interpretation which had not been agreed to by Ngai Tahu in respect of the western boundary.

Ngai Tahu may have been mistaken in 1879 about the detail of the land they had in 1848 seen as reserved from the sale, but they correctly remembered that substantial areas of the block the Crown claimed had been sold should have been left to the tribe. This part of their testimony before the Smith-Nairn commission is amply supported by both Maori and European evidence from the time of the sale. To determine just what was excluded or expected to be reserved the tribunal had to re-examine Ngai Tahu's own perspective of what they agreed to with Kemp in June 1848. Kemp's failure to clearly identify the land reserved from the sale makes it almost impossible to now locate all the lands which Ngai Tahu wished to have reserved. When Mantell came down he brushed aside these wishes and set about providing very limited reserves.

Mahinga kai

One of the major areas of conflict between Ngai Tahu's interpretation of their reserved lands and Mantell's was mahinga kai. The deed promised Ngai Tahu their dwellings, "kainga nohoanga", and their "mahinga kai". Kemp translated mahinga kai as plantations: other translations used the term cultivations. The claimants argued that this was far too limited an interpretation of this term, which they saw as applying to all Ngai Tahu's numerous food gathering activities. They argued that for them the word meant "a place where food is gathered" (W1:280). For Ngai Tahu, so dependent on a wide variety of food gathering, the reservation of mahinga kai would have meant much more than just the very limited reservation of their gardens. It would have included their right to harvest aruhe and ti. It would also have included hunting for weka and all other birds and animals, and the claim for eel-weirs, estuarine fisheries and other places inland and at sea where kai moana could be gathered. Waruwarutu described mahinga kai in 1879, in terms very similar to those used by the claimants:

"Mahinga Kai" is not exclusively confined to the cultivation. That is called a "Ngakinga Kai". "Mahinga Kai" is not confined to land cultivated, but it refers to places from which we obtain the natural products of the soil without cultivating, you know, the plants that grow without being cultivated by man. (L9:169)

Other witnesses mentioned eeling, the taking of birds and other hunting activities. Alexander Mackay echoed these conclusions in an 1887 Royal commission, where he acknowledged that Ngai Tahu's understanding of mahinga kai went well beyond the

tightly prescribed definition until that time adopted by the Crown and by the Native Land Court.

Mackay also pointed out that Grey had very clear ideas in 1847 on the need to ensure that Maori had adequate lands provided for their hunting and gathering economy. In that year, Grey informed Earl Grey that:

To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is, in fact, to cut off from them some of the most important means of subsistence. (B3:7/1:4)

Despite all this, Mantell defined the term in its very limited sense as cultivations, and did not recognise Ngai Tahu rights to any other resources. Indeed he did not even include all their cultivations. In 1868 Chief Judge Fenton, when charged with interpreting the deed, determined that mahinga kai included only "local and fixed works and operations", although he did recognise fisheries as "the most highly prized and valuable of all their possessions". While he was then prepared to grant Ngai Tahu fisheries easements, he refused to acknowledge hunting grounds as mahinga kai. Fenton's decision would seem to reflect European ideas about aboriginal property, rather than any understanding of Ngai Tahu's traditional economy or definition of mahinga kai.

Mr Tony Walzl, a Crown historian, argued that Ngai Tahu's use of the term may have been narrower in 1848, than it became in 1879, originally applying only to cultivations. Mr Walzl demonstrated that there is very little written record of the use of the word in 1848, particularly by Ngai Tahu. In response, Dr Raymond Harlow of the University of Otago, argued for the claimants that Ngai Tahu's understanding was unlikely to have widened, particularly in a single generation. He also considered that it was doubtful, in the Ngai Tahu context, to have been used in a fashion which limited it to cultivations. A further Crown witness, Mr Patrick King, came to very similar conclusions as Dr Harlow. In the end, both witnesses added support to the claimants' view that mahinga kai was best defined as "those places where food is produced or procured".

If this was not sufficient, there was very clear evidence that Mantell was told by the tribe on repeated occasions that they were entitled to reserve lands for their natural food resources. He wrote in his sketchbook in 1848 that there was:

the absence among the natives of any perception in the inevitably appreciable change in their habits of life, foods etc.

Their wanting grounds reserved for Kauru & forests for cooking it-other forests for weka hunting-whole districts for pig runs. (X12(b))

The tribunal concluded that it is very likely that the expression meant two very different things to the respective parties to the deed.

Waihora and Kaitorete Spit

The Kemp agreement as it applied to Waihora shows a similar variation between what Ngai Tahu reserved and what Mantell and subsequent Crown agents determined they were entitled to. The claimants argued (grievance no 4 (b)) that the Crown enforced an interpretation of the eastern boundary of the Kemp purchase which did not accord with that agreed to by Ngai Tahu. The Crown has consistently assumed, on the basis of the Kemp map and the boundaries of the subsequent Banks Peninsula purchase, that Waihora and Kaitorete Spit were included in the Kemp agreement. The claimants argued that the actual boundary of the land they offered to Kemp ran from Taumutu to a spur on Mount Halswell, called Otumatua. In Mr Evison's evidence it was also argued that the line then went from Otumatua to Kaiapoi, which would have excluded from the sale a good deal of what is now Christchurch.

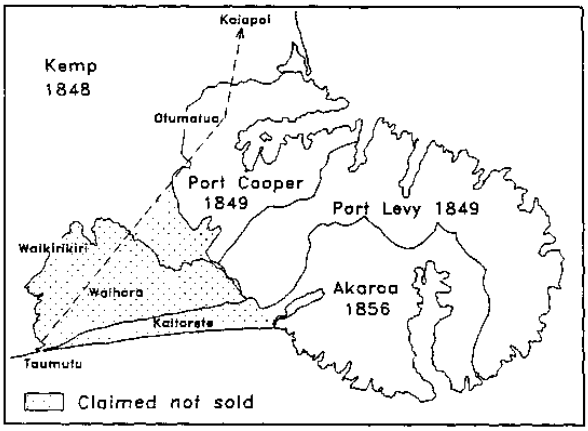

Figure 2.5: The boundary between Banks Peninsula and the Kemp purchase showing Waihora and the line between Taumutu and Otumatua, which the claimants maintained was not included in the Kemp purchase.

Such an understanding of the eastern boundary was derived largely from the evidence given the Smith-Nairn commission in 1879-as was the claimants' evidence on the western boundary. Waruwarutu, who had also given evidence that the western boundary of the Kemp purchase ran from Maungatere to Maungaatua, said that the:

boundary runs through Lake Ellesmere; not through the centre of it exactly, but cutting off a good piece of it, and thence to Taumutu. (B3:3/11:195)

Similar evidence was given by Pohau, who maintained that he had told Mantell that the boundary was a straight line from Otumatua to Taumutu, although he also suggests the line may have gone through Waikirikiri.

This evidence differs from that given some years earlier by Waruwarutu. In 1865 Waruwarutu requested payment for land he asserted was being reclaimed from Waihora by lowering the lake level. In this instance, it was the whole lake bed that he claimed had not been sold. Three years later Heremaia Mautai led a claim for Kaitorete Spit before Chief Judge Fenton's sitting of the Native Land Court in Christchurch. While the claimants suggested that the spit had not been sold, they did not present any evidence based on the external boundaries of Kemp's purchase.

An examination of a variety of contemporary maps associated with the Kemp and Banks Peninsula purchases appears to confirm that most, if not all, of the spit was included in the Kemp purchase. The Kemp deed map clearly includes the spit and the lake in the purchase. The head of the spit is given as the boundary between the Kemp

purchase and Banks Peninsula on a number of maps from 1848 and 1849. Only in a brief notebook annotation by Mantell is there any suggestion that Kaitorete was not part of Kemp's block, and this is contradicted by his own maps of the spit.

All this evidence would suggest that the lake and the spit were included in the boundaries of the purchase. Despite this there was convincing evidence presented to the tribunal that Ngai Tahu did not intend to sell their rights to the valuable food resources of Waihora and Kaitorete Spit. While Walter Mantell was attempting to complete the purchase in late 1848 he wrote in his sketchbook under the heading eel runs:

Why not specially reserved
Waihora etc.-eventually disused
the existence of legal right inconveniences. (X12(a)):25)

He was later to confirm that Ngai Tahu had continually asserted their right to reserve eel weirs and make new weirs.

At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no way would I give way upon this point. (A8:I:242)

He specifically refused to allow Ngati Ruahikihiki the right to open and close the spit and so control the fishery.

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it. (A8:I:242)

In 1866, when Mantell admitted to this refusal to acknowledge any Maori fishing rights, he said he had acted with a "high hand", as if he "possessed the unquestionable right to do so". Kemp told the Smith-Nairn commission that he remembered promising Ngai Tahu that they would be able to reserve eel weirs, although he thought that these were to be shared with Pakeha.

Waihora was one of Ngai Tahu's most valued fisheries, it was rich in tuna, patiki, piharau, aua, inanga and shellfish. The streams that fed the lake also provided kanakana, inanga, and fresh water koura. Putakitiaki were also caught on the lake in the moulting season.

The tribunal accepted that Ngai Tahu did not intend to part with this treasured fishery. It was satisfied that they intended to retain unimpeded access to both Waihora and the Kaitorete Spit. This they made abundantly clear to Mantell. He deliberately chose to disregard their rights. In doing so, the tribunal found that he failed to comply with the terms of the purchase which reserved to Ngai Tahu their mahinga kai: a serious breach of Treaty principles. Serious detriment has continued down to the present day.

It is clear from the way Ngai Tahu's rights to mahinga kai and to Waihora and Kaitorete were disregarded by Mantell, and then by subsequent Crown action, that although Kemp and Ngai Tahu had come to a broad agreement in June 1848, this agreement allowed for divergent interpretations. As we saw in the case of mahinga kai, Ngai Tahu and the Crown had very different understandings of what was involved. Because Kemp failed to implement the instructions he was given, the potential ambiguity of the deed allowed Ngai Tahu's rights to be very significantly reduced. However this need not have happened. If the Crown had sent a commissioner to consult with Ngai Tahu and to carefully and equitably mark out Ngai Tahu's reserves according to Treaty guarantees, then the agreement made with Kemp could have been properly implemented. But this did not occur.

Completing the purchase

On Kemp's return to Wellington he reported to Lieutenant-Governor Eyre, explaining the reasons for the various deviations from his original instructions, but seemingly well satisfied that he had negotiated an equitable and binding transaction. He was therefore surprised by Eyre's strident criticism of his performance. Eyre blamed Kemp for Daniel Wakefield's error in having the deed made out to the New Zealand Company. He was disturbed by recognition of Ngai Tahu's rights to the whole of the block, complaining that he had urged on Kemp:

the error of acknowledging a validity of title in the few resident Natives to vast tracts, the larger portion of which had probably never even been seen and certainly never been made use of by them. (L9:429)

Kemp responded by saying that Ngai Tahu claimed all of the land involved, and that "the mere fact of entering into a negotiation with the Natives for the purchase of the district in question, implies a recognition of their rights to the whole" (L9:439). In his view, Ngai Tahu had ceded "ALL THEIR LANDS, that is to say, THEIR RIGHTS OF OWNERSHIP in the lands" (L9:439) (emphasis in original). He implied that since Ngai Tahu had sold all their rights, it was unnecessary to argue with them over which particular rights the Crown recognised.

A much more serious complaint was Kemp's failure to identify and mark out the land reserved. Not only had Kemp failed to do this, he had not even set foot on the land he had purchased. Apart from the confusion over boundaries that this caused, on Kemp must rest the initial responsibility for the Crown's persistent failure to treat Ngai Tahu fairly and in good faith.

Eyre's rebuke of Kemp may well have been motivated by fears that the governor would hold his lieutenant responsible for a bungled and unsatisfactory mission. Grey, however, was not perturbed. He reported confidently to the colonial secretary that he entertained "no doubt that the transaction has been fairly and properly completed" (L9:16). He expressed confidence that another commissioner would tidy up any "informalities" in the proceedings, relying on his February agreement with the tribe.

Mantell's mission

Eyre's choice to complete Kemp's work was Walter Mantell, the son of a noted English geologist, and a resident of New Zealand since 1840. Mantell could speak Maori reasonably well, but was a less able writer of the language. He was instructed to travel from Akaroa to Otakou with a surveyor, marking off reserves as he went. The negotiations, "partially entered upon by Mr Kemp" were to be completed, and once the reserves had been marked, a new deed was to be signed, and a new map made showing the location of all the reserves. In establishing the land to be reserved Mantell was to be guided by the promises made by Kemp concerning villages and "plantations". However he was encouraged to use his influence to get Ngai Tahu to consolidate their holdings into as few locations as possible.

As Mr Evison rightly pointed out, Mantell, rather than Ngai Tahu, was given the initial decision over reserves. Eyre exhorted Mantell to exercise:

the most untiring patience and indefatigable perseverance in all inquiries or discussions with the Natives ... in winning them to acquiesce in such arrangements as YOU MAY CONSIDER JUST & BEST. (M3:101) (emphasis added)

Eyre accompanied Mantell and Alfred Wills, his surveyor, to Akaroa on 22 August 1848. Kemp's agreement was to be implemented by newcomers, none of whom were with Grey when he first discussed the purchase in February or with Kemp in June. At Akaroa Mantell received further instructions which confirmed Mantell's discretion in determining which reserves he "may consider necessary". He was also told not to make any reserves north of Kaiapoi, but to make a reserve as near to that point as possible. Ngai Tahu had made their intentions to settle at Tuahiwi clear to the lieutenant-governor.

These instructions further confirm Mantell's considerable discretion in determining Ngai Tahu's reserves. Wills had instructions from the New Zealand Company to impress on the commissioner the "evils" which could occur if Maori were allowed to reserve lands which would inconvenience the future settlers and the New Zealand Company.

The divergence between Mantell's impression of the size and nature of the reserves required by Ngai Tahu, and those which Ngai Tahu regarded as promised them by Kemp soon became very apparent. While Eyre and Mantell were in Akaroa they were told that Ngai Tuahuriri wished to reserve a large narrow strip of land running right across the island to the west coast from the Waimakariri River on the west coast. This request was repeated by the hapu on numerous occasions. The exact width of the strip was variously described in the years that followed. In 1887 Mantell told a parliamentary select committee that it could have included all the land between the Waikirikiri (Selwyn) and the Kowai. However, a careful perusal of the contemporary evidence suggests that the strip was to include land of a similar width from the Waimakariri to the Kawari, a stream not far from Kaiapoi pa. We would have expected, although there is no direct evidence, that this land would have followed the Waimakariri River over to the main divide and down the Taramakau or Grey Rivers and go down to include Arahura. Ngai Tahu can be seen as wishing to reserve lands which include their inland mahinga kai, and their route to the precious pounamu on the west coast.

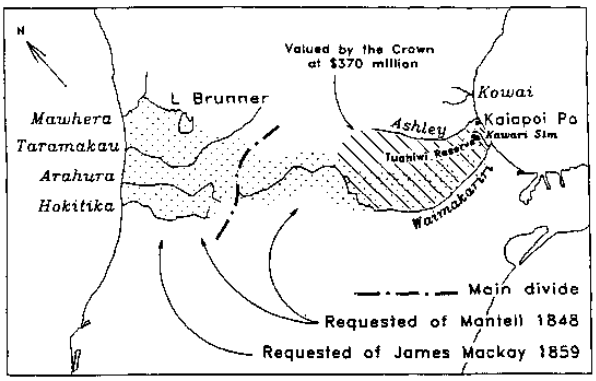

Figure 2.6: The possible area of the land Ngai Tuahuriri wished to exclude from the Kemp purchase. The boundaries are now impossible to determine, but the area appears to have crossed from coast to coast to preserve Ngai Tahu access to mahinga kai and pounamu. The reserve could have swung further south to include other important mahinga kai, such as Lake Coleridge.

Mantell treated this request with cavalier disregard. Having repeatedly denied this extensive reserve, he went with a number of rangatira to the sandhills at the coast, where he recorded the following discussions in his sketchbook:

About 1\2 past 10 set out for the sand hills. The natives demanded a block from K. North to the Domett S. to run right across the island and stated themselves [resolved] to take nothing less. [Arrived] on the sand hills they demanded from the Kawari to the Domett right across.

I took the party on until we reached a point S.E. from the point of the bush I then proposed to them to give from this point A by the sand hills to the Kaik [ ] thence by the N bank of the river to a point NW of the pa thence N.W. From A again down NW a distance of 2 or 3 or so miles to the point where I should direct the surveyor to turn to meet the other boundary. Of the 3 bushes on the S bank of the river the first koau for a [?]

the second to Wera for them the S. Pa-Kiaka contains Maras-these for the maoris the [rest] of the bush for [him]

Great disputes on this point.

The dispute continued while Mantell determined what land he was prepared to allow, until he commented:

At last when I had called several times for noncontents to state their objections, I requested Wills to set to work which he did.

K. to be also reserved.

The reserve allowed by Mantell was only 2640 acres.

The Crown submitted evidence of the present value of an area between the Ashley and Waimakariri Rivers, totalling about 220,000 acres but still comprising only a portion of the land denied Ngai Tahu, although possibly wider than that requested. This land was soon divided between only 13 European run holders. Mr Donn Armstrong, a registered valuer, estimated that the prairie value, that is the land value in its natural state without any improvements of any kind such as clearing, grassing,

fencing, subdivision and roading as well as other community provided assets, was œ205,000 in 1848 and $370 million today.

In the tribunal's view Ngai Tahu made it abundantly clear that they wished to maintain rangatiratanga over this land: they wished to retain it. Mantell, as the Crown's agent, was obliged to respect Ngai Tahu's wishes. But he failed to act in accordance with the Crown's obligations under the Treaty and his superiors Eyre and Grey, who endorsed his actions, failed likewise. The tribunal found that the claimants' grievance no 3 was well founded to the extent that it applied to a block bounded on the east coast by the Waimakariri River and the Kawari, north east of Tuahiwi. This reserve was not intended to extend to the Kowai as identified in the claimants' grievance. However the tribunal further found that it was intended that this reserve extend across to the west coast. Although the actual boundaries cannot now be identified, we thought it likely that the reserve was requested to preserve Ngai Tahu's access to mahinga kai and the pounamu on the west coast.

After confining Ngai Tuahuriri to a fraction of their lands, Mantell proceeded southwards to Otakou, setting aside reserves as he went. We know less of the arguments which resulted in his attempts to restrict other sections of the tribe to very limited plots, but we know that the same degree of blatant disregard of Ngai Tahu's wishes was applied. At Moeraki, Mantell even attempted to induce Ngai Tuahuriri there to vacate their kainga and take up land within the Tuahiwi reserve. The commissioner later admitted that in all his actions he had acted with a "high hand", determined to reduce Ngai Tahu's holdings as much as possible. In 1868 he stated that:

The reserves may be looked upon as the result of a struggle, in which I got the land reduced as much as possible. I used to tell the people that if they were dissatisfied they must appeal to the Governor. (A9:9:37)

He repeated this theme to the Smith-Nairn commission in 1879. Mantell made 15 different reserves, totalling 6356 acres, for 637 people by his own census. Averaging just under 10 acres per head, the reserves ranged from half an acre a head at Kaikainui to nearly 15 acres per head at Waikouaiti. This from a block of 20 million acres.

After Eyre's and Grey's discussions with Taiaroa in September 1848, Eyre wrote to Mantell, informing him that there would no longer be any need to have a new deed signed, and modifying his instructions about reserves. Mantell was told he could refrain from marking out all Ngai Tahu's reserves, and instead leave the third class of reserves, those promised when survey was completed, to a later time. Although the letter was dated 4 October 1848, it did not reach the commissioner until two days before Christmas. By this time he had completed his tour of the east coast of the island, and the reserves had all been laid out. He reported to Eyre that there was no need for any further land to be reserved to Ngai Tahu:

... I trust that it will be found that I have in every case given such consideration to the present and prospective necessities of the Natives that the Lieutenant Governor will see little cause to regret that the reserves should have been finally arranged prior to my receipt of His Excellency's letter. (M3:32-33)

Mantell was deceiving the lieutenant-governor. In the light of his later admissions, he had not considered Ngai Tahu's future needs. He had reduced their lands to the barest minimum, and he had done so by making promises that the governor would provide them with further benefits, with land and with schools and hospitals.

Despite glossing over Ngai Tahu's acceptance of his reserves, and overstating the finality of his arrangements, Mantell made no secret of how much land he had permitted to be reserved. His final report, of 30 January 1849, tabulated the amount of land allocated and the population at each reserve. Eyre, while commending Mantell on the success of his mission, made no comment on the amount of land reserved in his report to Grey. Even before Grey received Eyre's report, he informed the colonial secretary that:

I think it will be a source of great satisfaction to your Lordship to find that so large a tract of country of the most fertile description is thus unrestrictedly open to British enterprise, without any possibility of any of those embarrassing questions arising in relation to it between the European and Native population, in reference to titles to land, which have been a source of such loss and embarrassment to the settlers in the North Island. (A8:I:212)

When Eyre's report arrived, Grey gave his wholehearted approval to all Mantell's actions. Both Grey and Eyre were aware of how little land had been left Ngai Tahu, and both approved the reservation of 6359 acres to the original owners of the land, out of 20 million acres.

There were numerous early complaints about the size of the reserves. When Mantell returned to Wellington to report on his mission, he was accompanied by a deputation from Ngai Tahu seeking a ruling from Eyre on the distribution of the second payment. According to Tiramorehu, complaints were made at this time about the size of the reserves. In November 1849, Tiramorehu repeated his complaint that Mantell had ignored Maori concerns that the "part that should be reserved for the Maoris ought to be large" (L9:23). He asked for an extension of the Moeraki reserve for sheep and cattle to be run. On Mantell's advice, this request was turned down, Eyre replying that the 500 acres reserved at Moeraki were "considerable for the very few Natives resident there" (A8:I:229). How Eyre could come to this conclusion when there were only 5.7 acres per head reserved at Moeraki has been beyond our comprehension. Further land at Waikouaiti was granted, largely because the request was agreed to before Mantell had the opportunity to counsel against it. Mantell's refusal to reserve the coast to coast Kaiapoi reserve was also the subject of a number of complaints.

To some extent the social and economic consequences of Ngai Tahu's limited reserves were disguised by the immediate impact of the arrival of the new settlers in Otago and Canterbury. While European settlement was small, and confinement on the reserves more nominal than real, Ngai Tahu had new markets for their agricultural products and for their mahinga kai. However this prosperity was short lived. Once settlers became self-sufficient in agricultural produce and their numbers increased, Ngai Tahu lost the advantage. They were overwhelmed by European settlers and unable to compete due to their tiny land holdings. Pastoralism which allowed individual European farmers to gain control of tens of thousands of acres at a time further accentuated Ngai Tahu's disadvantage. The evidence of Mr Walzl and Professor Pool,

presented by the Crown, made it clear that Ngai Tahu in the Kemp block were confined to a marginal subsistence by the 1860s. By 1891 Alexander Mackay concluded that only 12.8 per cent of Canterbury Ngai Tahu had sufficient land. It is manifestly evident that the reserves set aside by the Crown under Kemp's deed were seriously inadequate for the present and future needs of Ngai Tahu.

Findings on reserves and mahinga kai

The tribunal upheld the claimants' grievance that the Crown failed to fulfil the terms of the agreement between Kemp and Ngai Tahu. This included the failure to provide ample reserves for their present and future needs and to reserve and protect Ngai Tahu's numerous mahinga kai for their use.

While Mantell did reserve most, if not all, of the Ngai Tahu places of residence, he refused to include all existing cultivations. In arbitrarily allowing an average of 10 acres per person to Ngai Tahu who were parties to the sale, Mantell made insufficient provision for their present needs, viewed on any basis other perhaps than that of bare subsistence. He failed to make any provision, as envisaged in the deed and as promised by Kemp, for additional reserves, so as to ensure that in total Ngai Tahu were left with generous areas of land fully sufficient to maintain access to mahinga kai and to develop alongside the European settlers, pastoral farming in addition to agriculture. He entirely failed to honour the obligation under Kemp's deed to reserve to Ngai Tahu their mahinga kai. It is not stating the position too strongly to say that the effect of the Crown's niggardly allocations was to "ghetto-ise" Ngai Tahu on small uneconomic units on which they could do little more than struggle to survive.

The tribunal did not believe that it would have been necessary for the Crown to reserve to Ngai Tahu unrestricted access on a permanent basis to all foraging and hunting, to all ti or fern-root, to all birds, to all inland fisheries, in the extensive areas which they sold. But had the Crown first ensured that in addition to their residences and existing cultivations adequate land was provided Ngai Tahu for future cultivations (as envisaged by Kemp); and secondly reserved all eel-weirs and other inland fisheries sought by Ngai Tahu; and thirdly in addition reserved extensive areas of good quality land in appropriate locations, which would remain as a plentiful source of mahinga kai and would enable Ngai Tahu to engage fully in both agricultural and pastoral farming pursuits, then the tribunal believed that the Crown's obligations under Kemp's deed would have been substantially met. More especially would this have been so had the Crown complied, as it should have, with Ngai Tahu's request for a very substantial reserve between the Waimakariri and Kawari.

The tribunal found that the Crown's failure to fulfil its contractual obligations under Kemp's deed in respect of reserves and mahinga kai was in breach of the Treaty principle which required the Crown to act with the utmost good faith towards Ngai Tahu. The Crown failed to so act.

The tribunal further found that the Crown failed to preserve and protect Ngai Tahu's rangatiratanga over their land and valued possessions in breach of article 2 of the Treaty. The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. In recognising the tino rangatiratanga over their lands the Crown was acknowledging the right of Maori, for

as long as they wished, to hold their lands in accordance with longstanding custom, on a tribal and communal basis. It is clear that Ngai Tahu had no intention of surrendering their pa, their cultivations, their valued mahinga kai and that, in addition, they wished to retain extensive areas of land for their future well-being-all this on a tribal or communal basis. The Crown, through its agents, rode roughshod over Ngai Tahu's rangatiratanga, over their right to retain land they wished to keep, over their authority to maintain access to their mahinga kai. Instead of respecting, indeed protecting, Ngai Tahu's rangatiratanga, the Crown chose largely to ignore it. In so doing it acted in breach of an important Treaty obligation, and has continued so to act down to the present time.

The tribunal further found that the Crown acted in breach of the Treaty principle which requires that in exercising its right of pre-emption the Crown was obliged to ensure that Ngai Tahu were left with a sufficient endowment for their own needs, both present and future. This the Crown patently failed to do at the time of the purchase. Such failure has continued down to the present time.

As will be shown, Ngai Tahu suffered grievously as a result, while the Crown, for a nominal payment of œ2000 obtained title to some 20 million acres of land. The outcome, while obviously highly satisfactory to the Crown and its senior officials, was nothing short of disastrous for Ngai Tahu who, when in good faith they negotiated with Kemp and listened to his assurances, could never have contemplated that they would in fact be rendered virtually landless. They would have expected, given the provisions in the deed, that they would be left with their homes, their mahinga kai and ample land on which to develop agricultural and pastoral activities alongside, and on an equal basis with, the new European settlers. The tribunal was convinced that had Ngai Tahu foreseen the actual outcome they would never have agreed to the sale.

We recall that Lord Normanby instructed Governor Hobson that the land should be bought extremely cheaply from the Maori-this would facilitate development and assist in bringing out more settlers. But the spin-off for Maori would be that the land they retained would, over time, increase greatly in value. But, as we have indicated, this would occur only if the Crown ensured that it left Maori with ample land. This the Crown failed to do. And so Ngai Tahu suffered severely in two ways. They were paid a mere œ2000 for 20 million acres, a substantial part of the South Island. In no way were they compensated for receiving such a nominal payment, as they were left with only a few totally inadequate reserves.

The claimants argued that the Crown failed to lodge a claim to protect Ngai Tahu's interest under the New Zealand Company Land Claimants Ordinance (1851). However in examining the ordinance it is clear that it applied not to Ngai Tahu as vendors of the land but to those people who had purchased land from the company and had not received titles. The tribunal accordingly could not sustain this grievance (no 5).

The sixth grievance involved the Canterbury Association Lands Settlement Amendment Act 1851. The claimants argued that this was passed without ensuring that Ngai Tahu's interests were protected. This was an amendment to an 1850 Act passed by the Imperial Parliament. The amendment allowed the company to engage in

development works, including drainage, within the Canterbury settlement. The British Parliament assumed that Maori title had been extinguished and did not act in bad faith. However local Crown officials had failed to ensure that the provisions of Kemp's agreement were fully and faithfully implemented. Had this been done, then Ngai Tahu's lands and mahinga kai would not have been vested in the company. The passing of this legislation aggravated pre-existing breaches of the Treaty. The tribunal accordingly found this grievance to be substantiated.

The grievances after the purchase

So complete had been Mantell's re-interpretation of Ngai Tahu's agreement with Kemp, that the tribe found it difficult to articulate the extent of their grievances to other Crown officials. With Eyre and Grey applauding Mantell's interpretation of the Kemp deed, Ngai Tahu found it almost impossible to impress upon the Crown their belief that they had not agreed with Kemp to accept an inheritance of impoverished subsistence. Mantell's promises that the governor would look after Ngai Tahu's future provided some hope, and many rangatira continued to appeal to various governors in writing and in person during the 1850s and the 1860s. Their appeals met with very limited success. Ngai Tahu's complaint about Mantell's revision of the northern boundary of the block, and their demands for the recognition of Ngai Tahu's rights to Kaikoura were eventually acknowledged by the Crown in the North Canterbury and Kaikoura purchases. However few, if any, Europeans understood the extent Ngai Tahu's wishes to retain very substantial areas of land had been ignored by Mantell.

In 1867 Grey visited Tuahiwi and promised to have Ngai Tahu's grievances examined. The following year sittings of the Native Land Court were held in the Christchurch town hall. Complaints that Kemp's deed was invalid or that the Crown's obligations had not been fulfilled led to Chief Judge Fenton's examination of the deed under an order of reference. Once Mantell had given evidence that he had failed to fulfil the terms of the deed the court set about determining how much land was due Ngai Tahu. Fenton reserved a further 5000 acres in Canterbury and Otago, raising the allocation to 14 acres per head. He also went a little way to recognising Ngai Tahu's rights to mahinga kai, although this was strictly limited to fisheries, by setting aside a number of small fisheries easements. He did not carry out his own suggestion to reserve Kaitorete as a fishery.

The claimants argued that Ngai Tahu were not adequately protected in their proceedings before the Native Land Court. They relied on Mr Evison's contentions that while Alexander Mackay was appointed to assist the Crown, Mr Cowlishaw, Ngai Tahu's counsel, withdrew in protest at the order of reference being considered by the court with insufficient notice. If this were true, Ngai Tahu would have been left unrepresented in a European court setting, on a major issue affecting their future. However both contentions were incorrect. Mackay was made an agent for the Crown at the Otago sitting, but was appointed to appear "on behalf of the Natives" when the court was at Christchurch. Far from withdrawing, Mr Cowlishaw was present throughout the proceedings. Any defects in the court proceedings were the responsibility not of the Crown, but the court. It follows that the claimants' grievance (no 7), that the Crown failed to provide adequate protection for Ngai Tahu in the conduct of the Native Land Court, has not been upheld.

In a further grievance the claimants suggested that the Crown passed the Ngaitahu Reference Validation Act 1868 to the detriment of Ngai Tahu. This Act was passed to legalise an irregularity in the order of reference which allowed the Native Land Court to examine whether the terms of Kemp's deed had been fulfilled. It specified that the Native Land Court orders were "deemed to be in final extinguishment of the Native title within the boundaries" shown on the plan. While the tribunal agreed with Mr Evison that the Crown acted reprehensibly in passing legislation which denied Ngai Tahu any access to the courts to test the validity of Kemp's deed, we did not consider that this was a fraudulent act. The legislation was aimed primarily at correcting a technical deficiency in the order of reference. Instead of being signed by the governor, as required by the Native Land Act, the order had been signed by a member of the Executive Council, Sir John Hall. The tribunal was unable to find it proved that Ngai Tahu have been prejudicially affected by the passing of the Validation Act. We also noted that the Act provided that the Land Court orders would not apply to any promises made by any officer of the government for schools and hospitals or any other inducement made to Ngai Tahu to consent to the sale of their lands.

With the finality of the Fenton awards pressed home to the tribe, Ngai Tahu's hopes that the court would deal with the wide scope of their claims were dashed. The Ward report commented on the increasing bitterness and discontent evident in the 1870s. The Tuahiwi missionary, James Stack, warned the government of the disillusionment and disaffection being experienced by Ngai Tuahuriri.

They now find themselves placed in a situation they never contemplated when disposing of their land for the purposes of colonisation and consider themselves the victims of deception and boldly charge the government with having purposely misled them. They are bequeathing to their children a legacy of wrongs for which they charge them to seek redress-this will serve to perpetuate the spirit of discontent which has for some time prevailed. (T1:357)

It was in this period from the late 1860s that Ngai Tahu began to perceive their claim to the large areas of land which had been denied them as a "hole in the middle". Piecing together their reminiscences of the details of the agreement, those participants in the sale who were still alive were forced to explain why they had agreed to a transaction which had been so narrowly defined by Mantell, and then recently confirmed by Fenton. Given that they had dealt with Grey, then Kemp and then Mantell, and that Mantell had failed to acknowledge the extent of the lands they had reserved from the sale, it is not surprising that they looked back on the events of 1848 with some confusion. In their various runanga discussions in the 1870s, the tribe came to see Maungaatua and Maungatere as marking the limits of the purchase.

We considered it inconceivable that Ngai Tahu, in agreeing to the purchase, would have agreed to forfeit their future access to important food resources. We were also convinced they entered into this deed in good faith and in reliance on Kemp's assurances that ample provision would be made for their needs. It was not in their minds that they would be confined to reservations so small as to be barely capable of sustaining them at subsistence level. They fully expected to retain extensive areas of land, which would provide them with continued access to mahinga kai and enable them to engage in the same farming practices as the Europeans. That their legitimate

expectations were not realised and still remain largely unrealised is due to the failure of the Crown then and since to honour its Treaty obligations.

The Ngaitahu Claim Settlement Act 1944

In 1920 a Native Land Claims Commission, consisting of the then chief judge of the Maori Land Court, R N Jones, and J Strauchon and J Ormsby, reported on the 1909 petition of Tiemi Hipi and 916 other Ngai Tahu concerning the Kemp purchase. The commission does not appear to have received evidence. It merely examined Mackay's compendium and some but not all of the various reports of previous inquiries. The commission considered Ngai Tahu's claim that only the eastern seaboard had been included in the sale, and concluded that, whatever may have been intended, the deed covered all land from the east to the west coast. The commission determined that the only fair way of dealing with the problem would have been to put "the aggrieved party in the same position as if the contract had been fulfilled, by allotting proper reserves, ascertain what the present value of them would be, and measure [the] loss accordingly" (M17:II: doc 42:37). But this, the commission decided, could not be done. Instead it subtracted the Arahura block, the Banks Peninsula block, the reserves actually provided and land it regarded as worthless in 1848 from the total area to be considered to come up with a total of 12.5 million acres. This they assessed to be worth œ76,125 in 1848. Adding 75 years interest at 5 per cent and an allowance for the tribe's costs, they arrived at a figure of œ354,000, which they recommended as compensation. The tribunal noted that in arriving at this figure the commission took no account of the loss of mahinga kai, and it ignored the failure of the Crown to set aside land Ngai Tahu wished to keep. Nor did it make any reference to the Treaty or the Crown's responsibilities under the Treaty.

It took 24 years for the commission's report to be acted upon. In 1928 the Native Land Amendment and Native Claim Adjustment Act stated that a decision on the implementation of the commission's report had not yet been made, but nevertheless it constituted the Ngaitahu Trust Board "for the purpose of discussing and arranging the terms of any settlement of the claims for relief that may be come to". In March 1930 Treasury advised the Prime Minister that liability should not be acknowledged by the Crown but that given the "false hopes" raised by the 1920 commission recommendation, an ex-gratia payment of œ15,000 should be made. In October 1935 Ngai Tahu rejected an offer of œ100,000 made by the coalition government. There were further discussions in 1938, but it was not until 4 December 1944 that the native minister, H G R Mason, gave instructions for a Bill to be drawn up providing for 30 annual payments of œ10,000. The Bill was quickly passed on 15 December 1944.

The long title of the Ngaitahu Claim Settlement Act 1944 is "An Act to effect a Final Settlement of the Ngaitahu Claim", and the preamble stated that the "persons now interested in the claims have agreed to accept the payment of the sum of three hundred thousand pounds in the manner hereinafter appearing in settlement" of their claims relating to the Kemp purchase. However there is very real doubt that Ngai Tahu were consulted on the measure at all before it was passed. In 1946 Mr Tirikatene told the House that the Bill was passed and the money handed over to the Native Trustee, and only then was he able to discuss the matter with Ngai Tahu. This sequence of events is confirmed by a 1971 affidavit of the secretary to the native minister at the time. Between 1944 and 1946 Mr Tirikatene did discuss the matter

with Ngai Tahu, and they gave their acceptance to what was by that time a fait accompli.

In 1973, when the last of the 30 annual payments was imminent, the government introduced legislation to extend the payments into perpetuity. Mr Matiu Rata, the Minister of Maori Affairs, in introducing the amendment stated that it had "become obvious to members of the present Government that the so-called settlement of 1944 was by no means to be regarded as a fair and final settlement".

Mr Tony Hearn QC, in making submissions to the Tribunal, argued that the events of the 1940s and 1970s acted as an estoppel, preventing Ngai Tahu from claiming from the Crown any further remedy for the Crown's obligations under the Kemp purchase. The 1944 and 1973 Acts were seen by Mr Hearn as a full and final settlement to claims arising from that purchase. The tribunal rejected that argument. Not only did the 1944 "settlement" merely partially implement the recommendations of the 1920 commission, it did so after more than two decades of delay. Nor did the 1920 commission on which the settlement was based deal with all matters relating to the Kemp purchase-it was silent for instance on mahinga kai. Far from being openly negotiated with the tribe, a unilateral settlement was reached in 1944 which was later accepted as a fait accompli. Whatever happened in 1944, subsequent events and submissions of the Ngai Tahu people show that settlement to be inadequate.

The 1944 settlement made no mention of the Treaty. The statutory right to make a claim based on the Treaty did not exist at the time and in the tribunal's view neither the 1944 legislation nor its 1973 amendment could be conclusive of claims made against the Crown under the Treaty of Waitangi Act 1975. The tribunal rejected the suggestion, seemingly implicit in counsel's argument, that Ngai Tahu was barred from making their claim by a settlement made before the statutory right was conferred. Such a proposition, in the tribunal's view, was not only untenable but difficult to reconcile with good faith on the part of the Crown.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.5 The Banks Peninsula Purchases Summary

2.5. The Banks Peninsula Purchases Summary

Introduction

When Kemp returned from Akaroa in June 1848, he had not purchased Banks Peninsula from Ngai Tahu. He said he had been told that the whole of the peninsula had already been sold to the French. Kemp was mistaken. The French were the Nanto-Bordelaise Company, which like the British New Zealand Company, attempted to acquire title to Maori land for commercial colonisation. The Nanto-Bordelaise Company's purchase deeds were no more valid than those of the New Zealand Company. Land Claims Commissioner Edward Godfrey found that no more than a few hundred acres on the peninsula had been properly bought from Ngai Tahu. An attempt to purchase more land in 1845 was incomplete and unlikely to have improved the company's title. The British government waived pre-emption to allow the company to purchase sufficient land to make up the 30,000 acres the Crown was prepared to award them. This was never done.

When the Crown came to purchase the peninsula in three separate blocks between 1849 and 1856, it was assumed that Ngai Tahu had already sold their rights to a good proportion of the land. Walter Mantell, fresh from reducing Ngai Tahu to the barest minimum of reserves in the Kemp block, managed to purchase the Port Cooper and Port Levy blocks in 1849. With instructions to act with a "high hand", Mantell treated Ngai Tahu as if they had already sold the land, he allowed a minimum of reserves, and forced Ngai Tahu to accept what were no more than token payments for the land. Despite placing even more pressure on Ngai Tahu to part with their land he was unable to get agreement for the purchase of the Akaroa block and it was not until 1856 that this was purchased by W J W Hamilton, on the assumption that 30,000 acres had already been sold to the French. Here too Ngai Tahu received only a token

payment and minimal reserves.

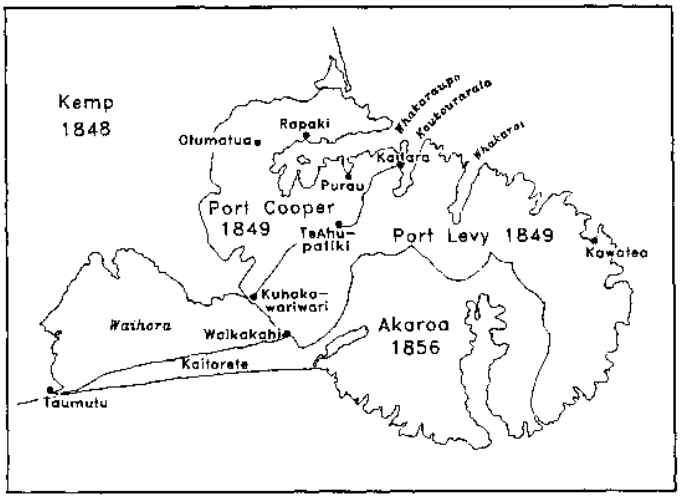

Figure 2.7: The Banks Peninsula purchases 1849-1856

The claimants' grievances

There were 18 grievances filed on the Banks Peninsula claim. These related to the French purchases, the three Crown purchases, Crown actions after the purchases and mahinga kai.

The French purchases

The first four grievances concerned the French purchases. The claimants alleged that Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu (no 1), and that Ngai Tahu received no compensation (no 2) or no reserves (no 3) from this award. They complained that the Crown failed to protect Ngai Tahu against the "land purchasing pretensions" of the French, and allowed Mantell and the Canterbury Association to use the 1845 French deeds to deny Ngai Tahu's traditional rights of occupation (no 4).

Port Cooper and Port Levy

Mantell's actions in the Port Cooper and Port Levy purchases were also the subject of complaint. The claimants alleged that Mantell was sent to "carry matters with a high hand", that he falsely asserted that the Crown already owned the peninsula, and that the Crown did nothing to rectify this (no 5). Mantell, they claimed, conducted his proceedings as an award. Price and reserves were non-negotiable, and as a consequence Ngai Tahu were denied a fair price and adequate reserves and resources for their continued sustenance and prosperity (no 6). This led them to abandon the Port Levy and Port Cooper blocks, apart from their inadequate Port Levy, Purau and Rapaki reserves (no 7). At Port Levy, so they said, Ngai Tahu's requests to reserve Okains Bay, the Kaituna valley and part of Pigeon Bay were denied (no 8). The Port Levy purchase was claimed to have been enforced, with Mantell not visiting all the settlements and gaining only minority agreement to the sale (no 9). The Canterbury Association Lands Settlement Act 1850 assigned the whole of the peninsula to the association although, the claimants alleged, it had not been properly purchased from Ngai Tahu (no 10) and that this led to European settlement over Ngai Tahu's lands before the tribe had been adequately paid (no 11).

The Akaroa purchase

For the Akaroa block, it was claimed that Ngai Tahu's attempt to reserve a substantial area of around 30,000 acres, including the Wairewa basin, was denied both by Mantell in 1849 and Hamilton in 1856 (no 12). Although the deed specified only those "places (or areas) in dispute at Akaroa", the claimants maintained this was used to enforce the sale of the whole block, excluding only 1200 acres (no 13). Both these reserves and the œ150 paid were claimed to be manifestly inadequate (no 14) and it was argued that the Crown unreasonably made the resident Ngai Tahu responsible for the interests of returning absentee owners, to the detriment of both (no 15). While under the Lands for Settlements Acts two substantial estates were resumed, it was claimed, for landless Europeans, peninsula Ngai Tahu were offered only inferior land elsewhere (no 16).

As a result of these acts, the claimants argued that Ngai Tahu of Banks Peninsula were driven off their land and lost their turangawaewae (no 17). The last grievance concerned mahinga kai and environmental despoliation of the peninsula. This was dealt with as part of the mahinga kai section of the report.

The French

French involvement in Banks Peninsula is a complicated story with an involved plot and extensive cast, set in New Zealand, France and Britain. The tribunal was grateful for the assistance of Dr Peter Tremewan, a senior lecturer in French at the University of Canterbury, for outlining much of this story. It all began in 1838, when Jean Francois Langlois, the captain of a French whaler, attempted to purchase the whole of Banks Peninsula from a number of Ngai Tahu chiefs. He paid a deposit of 150 francs (œ6) of a total of 1000 francs (œ40), to be paid on taking up possession. The sale was never acknowledged by Ngai Tahu in the terms of the deed written in French, and at most it could be said that some small areas of land at Port Cooper had been intended to be sold. Nonetheless, whatever the purchase signified, it had not been completed.

On his return to France Langlois sold his rights to Banks Peninsula to a group of French businessmen who formed the Nanto-Bordelaise Company, intent on settling French immigrants on the peninsula. The company identified weaknesses in Langlois' title and sought to have these removed by further deeds which it hoped would eventually give it ownership of the whole of the South Island. In March 1840 the Compte de Paris left Rochefort with 57 prospective colonists, unaware of course of the Treaty of Waitangi.

When they arrived in New Zealand they found the country a British territory, and private purchases from Maori banned. Hobson successfully pre-empted any attempt by the French to claim sovereignty over the South Island. Despite the proclamations of 14 and 30 January, which declared that only title to land derived from the Crown would be recognised, the French immediately entered into three additional agreements, designed at overcoming the deficiencies in the 1838 deed and further securing their claims to land on the peninsula and elsewhere. Maori and French views of the amount of land involved varied considerably. While the first deed signed on 11 August 1840 purported to convey the whole of Banks Peninsula and much of what is now North Canterbury to the company, the second deed specified a much greater area including all lands from the east to west coast of the island between Kaikoura and

Temuka. In contrast, Maori understanding of the agreements were limited to a few places in Port Cooper, Port Levy, Pigeon Bay and Akaroa.

It appears that the Maori signed blank pieces of paper and Langlois later filled in the detail. Not only this, but he pre-dated these deeds to a time when he was unaware of British sovereignty and the prohibition on private land purchases. When Captain Lavaud and his French naval vessel arrived, he was soon made aware of the deficiencies of the company's deeds. He advised yet another backdated deed. As Dr Tremewan pointed out "negotiations were now being conducted to satisfy the British authorities rather than the Maori landowners". This deed too involved from the Maori viewpoint (confirmed by some of the Europeans present) considerably less than the whole of the peninsula.

The advent of British sovereignty took the steam out of the company's scheme and no more colonists were sent out. The company began negotiations with the British government to secure its position at Akaroa and then later with the New Zealand Company to sell these rights and so recover some of its investment. The government in Britain agreed to award the company four acres for every pound spent, up to the 30,000 acres claimed. The French company was under the mistaken belief that this was the total area of the peninsula, when it actually comprised 250,000 acres. However the company's deeds still had to be placed before the Land Claims Commission.

When Commissioner Godfrey examined the company's claims in August 1843, he concluded from all the evidence that there was no indication of a sale in 1838. Ngai Tahu witnesses did admit sale to Langlois in August 1840 of small and discrete pieces of land; what Godfrey thought was about 400 acres at Akaroa. From the boundaries given, it would seem that this last piece may have been as much as 1700 acres. All this fell far short of the 30,000 acres claimed, let alone the whole of the peninsula. Godfrey was aware that the Crown had promised the company an award, but on the basis of his investigation he could not have recommended a grant under the Land Claims Ordinance.

In 1845 the French made one last attempt to secure their title with Ngai Tahu. Two further deeds were signed, goods distributed valued at almost œ1500 and further payments promised. While a map has survived the deeds have not. Some important Akaroa Maori refused to sign; a show of force by the French may have influenced the transaction; and it is not completely clear what the French intent was. Because the French warship the Rhin was about to depart, and threats had been made against the settlers, Dr Tremewan saw the events as a means to protect the French settlers once their military protection had gone.

After the British government had examined the accounts of the company, Lord Stanley accepted that it was entitled to the 30,000 acres claimed. He issued instructions that the amount of land sold to the French be confirmed and if this came to less than 30,000 acres, then the Crown would waive its right of pre-emption and allow the company to purchase the remainder directly from the Maori owners. Once this was completed a Crown grant would be prepared in favour of the company. None of this was ever done: the company was defunct and had no agent at Akaroa. In June

1849, the company's rights on the peninsula were conveyed to the New Zealand Company.

The tribunal concluded that all these French "agreements" of 1838 and 1840 were fatally flawed. The original 1838 deed was in French. There is no way of knowing the degree of Maori understanding of the deed, and the signatories do not appear to have included the major chiefs. The two August 1840 deeds, signed on blank paper and filled in later, cannot be relied on at all. The third 1840 deed, drawn up at Lavaud's recommendation, was a renegotiated version of the 1838 transaction, and backdated to deceive the British authorities. It was a forgery and cannot be invoked or relied on as in some way passing title away from Ngai Tahu.

Godfrey's investigation showed that Ngai Tahu admitted to the sale of what we have estimated to be no more than 3000 acres. He concluded when reviewing the documents in 1845, that only the last of these sales had any authenticity. Godfrey was unaware of the 1845 transactions. However these were incomplete: no deeds exist, major chiefs refused to sign and there was no waiver of pre-emption.

The Crown submitted that although the 1840 and 1845 sales occurred after pre-emption had been imposed, Ngai Tahu could still lose their rights to land if they conveyed them to a third party. Pre-emption simply meant that instead of the rights going to the private purchaser, they went to the Crown. However, despite the considerable sums paid by the French, nothing in the evidence of these transactions is sufficient to modify the conclusions made by Godfrey as land commissioner in 1843 that only very small pieces of land had been sold.

The claimants' first grievance was clearly made out. Lord Stanley did award 30,000 acres to the French, and there was no evidence that Ngai Tahu were consulted. However, he provided that before a grant was made to the company, Ngai Tahu should be paid for any land they had not already sold. The tribunal estimated that about 1700 acres at Akaroa had been acknowledged by the Godfrey commission as sold to the French, leaving over 28,000 acres to be purchased. The next two grievances (nos 2,3) were also sustained in that, as we demonstrated in our discussion of the later Akaroa purchase, no reserves or payment were ever made for the remainder of the 30,000 acres.

In dealing with grievance no 4, the tribunal concluded that the Crown was not in a position to protect Ngai Tahu from Captain Langlois' 1838 purchase, nor given the circumstances could it have prevented the 1840 purchases. In 1845 the Crown's representative, Police Magistrate Robinson, warned Belligny that his attempt to purchase further land from Ngai Tahu would have little validity.

In imposing pre-emption and in setting up the Land Claims Commission, the Crown did take steps to protect Ngai Tahu in respect of the early French transactions. However the grievance was sustained in that the Crown allowed these transactions to be used against Ngai Tahu by Mantell and by the Canterbury Association.

In 1848, then, when Kemp came to negotiate his purchase, Ngai Tahu had only agreed to the sale of about 3000 acres on Banks Peninsula, despite the pretensions of the various French deeds. Ngai Tahu, however, gave Kemp and later Mantell the

impression that the peninsula had been sold to the French. It is likely that Ngai Tahu, still expecting further payments from the French, were merely saying that the French had an option on the peninsula, pending payment in full from the French.

In April 1849, the New Zealand Company's agent, William Fox, informed Grey that there was some doubt as to whether Banks Peninsula had been purchased as Ngai Tahu were now maintaining that Ports Cooper and Levy were not owned by the Crown. Grey responded that it had been his intention to have the peninsula included in the Kemp purchase, but if this had not been the case then some further "compensation" should be paid. He however refused to admit that the land had not been sold by Ngai Tahu, describing it by some fiction as "native reserve". Eyre too was at pains to avoid any suggestion that the Crown was actually purchasing lands Ngai Tahu had not sold.

Mantell's purchases: Port Cooper and Port Levy

In being commissioned to finalise matters regarding the peninsula Mantell was well briefed, but the confusion about what he was actually doing, making an award or purchasing land, remained. It was certainly envisaged by Eyre that Mantell would be able to dictate the terms. When Mantell asked the lieutenant-governor what he was to do if Ngai Tahu rejected the price he offered, he noted in Greek script, "Let them leave it. I must carry matters with a high hand" (G2:322-323).

Port Cooper

It took five weeks of discussions with Ngai Tahu before he was able to induce them to agree to the Port Cooper purchase. In discussions over reserves Mantell was prepared to act unilaterally. At Purau he instructed the surveyor, Carrington, to mark out the reserve without Ngai Tahu consent, forcing them to abandon gardens not included in the reserve. Negotiations were difficult and intense: Ngai Tahu demanding that their title be recognised, and Mantell insisting that he had the right to determine the limited reserves and the payments he was prepared to offer. Ngai Tahu bargained vigorously and at length, but finally accepted Mantell's proposals. The Port Cooper deed was signed on 10 August 1849, involving 59,000 acres for which the Crown paid œ200.

Mantell moved on to Port Levy to negotiate the next purchase, but in the meantime received instructions from Eyre which allowed to him act even more arbitrarily and inflexibly in his dealings with Ngai Tahu. While Eyre increased the money at Mantell's disposal, he insisted that the matter be settled quickly and on the basis that the French had already paid Ngai Tahu for the land, that it should have been included in the Kemp purchase, and that the imperial government had envisaged no further payments for the 30,000 acres awarded to the French. All of these assertions were incorrect. The French had not completed the purchase, Ngai Tahu had excluded the peninsula from the Kemp block and Stanley had allowed for the purchase of additional land to accommodate the Nanto-Bordelaise Company. Eyre also told Mantell to ignore any representations by Ngai Tahu that the purchase be delayed until they had been able to discuss their concerns with Grey.

Koukourarata (Port Levy)

Mantell's attitude was reflected in the proceedings at Koukourarata (Port Levy) which the Ward report described as "at least as acrimonious and even more divisive than at Port Cooper" (T1:187). Mantell offered œ300, Ngai Tahu wanted œ1000. Mantell insisted on small reserves, Ngai Tahu wanted substantial areas reserved from the sale. In his discussions Mantell again emphasised the French purchases. He insisted quite wrongly that the land was already owned by the government and it is difficult to construe Mantell's comments as other than intimidatory. When Apera Pukenui told Mantell that he would keep his land unless he was paid the sum he asked, Mantell told him that the land had already been paid for. Of the money he was offering he said:

I shall not increase it because it is what I think just so I see no reason for exceeding the amount of œ300 on which I have decided. This money you can take or not the title to the land will none the less belong to the Governor. (G2:374)

Mantell's blustering and threatening conduct must have made it clear to Ngai Tahu that he was not willing to negotiate an agreement.

Rangatira from Ngai Tuahuriri, Ngati Irakehu and Ngati Moki left the negotiations, and although at least some of them had rights in the Port Levy block Mantell proceeded to finalise a deed with those who remained. Apera Pukenui expressed his disillusionment when he finally conceded to Mantell's terms.

I wanted the other 200 to distribute to those people to enable them to pay their debts but now I trouble myself no more about them. They say they will stop the survey. If they do theirs is the sin it can be surveyed at any time. We now care for no reserve at Pigeon Bay the grave can be combined with the churchyard or the bodies removed there when there is one there. I have no children to inherit from me nor have most of us. (G2:375)

The deed signed on 25 September 1849 involved 104,000 acres of which only 1361 acres were retained by Ngai Tahu in a single reserve at Port Levy. In 1880 only 300 acres of the reserve was described as good, arable land; the rest was rocky hillside.

Mantell's conduct of the 1849 negotiations

The claimants alleged in grievance no 5 that the Crown sent Mantell to Banks Peninsula to falsely assert that the peninsula was already the property of the Crown and to "carry matters with a high hand"; or alternatively that, Mantell having done these things, the Crown did nothing to rectify them. This grievance was sustained. There can be little doubt that not only was Mantell instructed to carry matters with a "high hand" he was also instructed to use the French purchases to argue that the Crown already owned the land. His actions showed that he took his instructions to heart.

Grievances 5 to 8 are interrelated and concern the adequacy of price and the reserves left Ngai Tahu.

It was complained that Ngai Tahu were denied a fair price or adequate reserves because Mantell treated the Port Cooper and Port Levy purchases as if they were awards. Despite Mantell increasing the price for Port Cooper from œ160 to œ200, the

tribunal was not satisfied that the price was freely negotiated, and as a consequence the purchase bore the character of an award, as the claimants suggested. The situation was similar in Port Levy. The tribunal was left in no doubt that Mantell succeeded in beating Ngai Tahu down in respect of payment by unfair means, to the extent that they were given no real choice as to the price.

In the allocation of reserves in Port Cooper, Mantell acted with similar arbitrary disregard of Ngai Tahu wishes or needs. The Purau reserve comprised only nine acres, and Mantell insisted that gardens beyond the reserve be abandoned. Although the tribunal had no figures for the population of the Port Cooper block in 1849, the population given in a census eight years later shows that only 11.8 acres per head was reserved, and very little of this was good land. This was grossly inadequate, especially given the poor quality of most of this land.

The Crown did not dispute that at Port Levy Mantell denied Ngai Tahu requests for reserves at Pigeon Bay and Okains Bay. Nor did it deny that a single reserve of 1361 acres was in no way adequate for Ngai Tahu's needs within the block. An 1880 survey found only three acres of arable land available per person in the Port Levy reserve.

The tribunal found that the claimants' grievances nos 6, 7 and 8 were substantially made out.

Port Levy: consent to the sale

Grievance no 9 was that Mantell's Port Levy deed was signed by only a minority of those chiefs present at the proceedings. Although seven of the nine rangatira identified by Mantell as representing the principal interests in the block signed the deed, others with lesser rights had previously withdrawn from the discussions. Clearly there was a divergence of opinion and in the end Apera Pukenui, the principal chief involved, felt under sufficient duress to agree to sign. The basic flaw in the Port Levy deed was that there was no true agreement between the Crown and Ngai Tahu. The tribunal found much force in the claimants' grievance that the Crown enforced the deed as a legal conveyance against the residents' wishes.

Mantell at Akaroa

At Akaroa, Mantell's demands were met with more strident and effective resistance. The deal he offered Ngai Tahu at Akaroa consisted of 1880 acres of reserves in four different locations, two at Akaroa and two at Wairewa, and œ150. This was rejected by Ngai Tahu, who still expected that they could eventually do better from the French, and Mantell returned to Wellington, this part of his mission incomplete.

In 1850, even though Mantell had failed to purchase a large proportion of Banks Peninsula, the Imperial Parliament passed the Canterbury Association Lands Settlement Act. This empowered the association to sell an area of about 2.5 million acres in Canterbury including all of Banks Peninsula. The Act therefore gave the association control over land in Port Cooper and Port Levy which should have been reserved to Ngai Tahu, as well as all of the remaining Akaroa block. The Canterbury Association only became aware that Ngai Tahu still claimed much of the peninsula in 1851, nonetheless it went ahead granting licenses over some of the unsold land for

stock runs. When Hamilton finally purchased the block in 1856 he commented that it had:

long been let by the Crown, and occupied by cattle and sheep runs, and part of it positively sold as freehold. (L3:III:64)

As a result the tribunal found the claimants' grievances no 10 and no 11 clearly made out in respect of the Akaroa block and partially made out in respect of the Ports Cooper and Levy blocks. Their complaint that Ngai Tahu had to suffer Europeans moving on such lands without any compensation to Ngai Tahu was also well founded.

The Akaroa purchase is completed

In 1854 Mantell still maintained that Ngai Tahu had no right to any land at Wairewa and Akaroa beyond that which he awarded to them in 1849, despite Ngai Tahu rejecting his terms. Nonetheless a year later he had done an about face, recognising that the Akaroa Maori were not bound by his award. In 1856 Governor Browne visited Akaroa and met with Ngai Tahu. He appears to have warned them that they would be dispossessed by force if necessary. J G Johnson, a Northland deputy native commissioner, was ordered by McLean to enforce the award, and was told that Ngai Tahu were entitled to only a hundred acre reserve at Onuku. Johnson soon discovered that the Crown had not acquired any title to the land being occupied by Ngai Tahu, and he in turn convinced McLean that the tribe had a just grievance. Nonetheless this recognition did not inspire any generosity on the part of the chief land purchase officer, for McLean recommended that 800 acres be reserved for Ngai Tahu, 1000 acres less then even that proposed by Mantell.

W J W Hamilton was commissioned to complete the purchase in August 1856. Johnson had prepared a map of the block identifying the French award, an area on both sides of the Akaroa heads labelled "the possession of which is disputed by the Natives" and the southern portion of the block, including Wairewa captioned, "Portion of the Peninsula over which the native claims were not extinguished by Mr. Commr. Mantell". Although we do not know if Hamilton had a copy of the map with him, the different areas described were important in the negotiations. Hamilton agreed to Ngai Tahu requests to make a further reserve at Wairewa, in addition to one on each side of Akaroa harbour. Together they totalled only 1200 acres. The deed appeared to have been signed without a great deal of discussion, and immediately afterwards Ngai Tahu applied to have an additional 400 acres for pasture at Wairewa. Hamilton regretted that this had not been raised before as he would have readily agreed to an additional reserve, but as the deed was signed there was nothing more he could do about it.

Akaroa: land not purchased?

At the Smith-Nairn commission the boundaries of the block became a matter of contention. According to a number of Ngai Tahu witnesses the land Hamilton purchased did not include the coastal part of the block, as illustrated on figure 2.8.

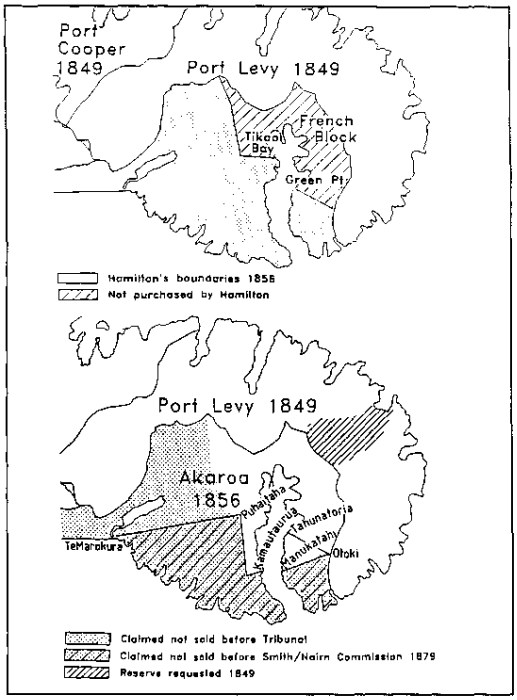

Figure 2.8: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

Hamilton, when examined by the commission, could not remember any discussion over boundaries. However on the day the deed was signed he wrote to the Canterbury Association recording the boundaries as he understood them and these are also shown on figure 2.8.

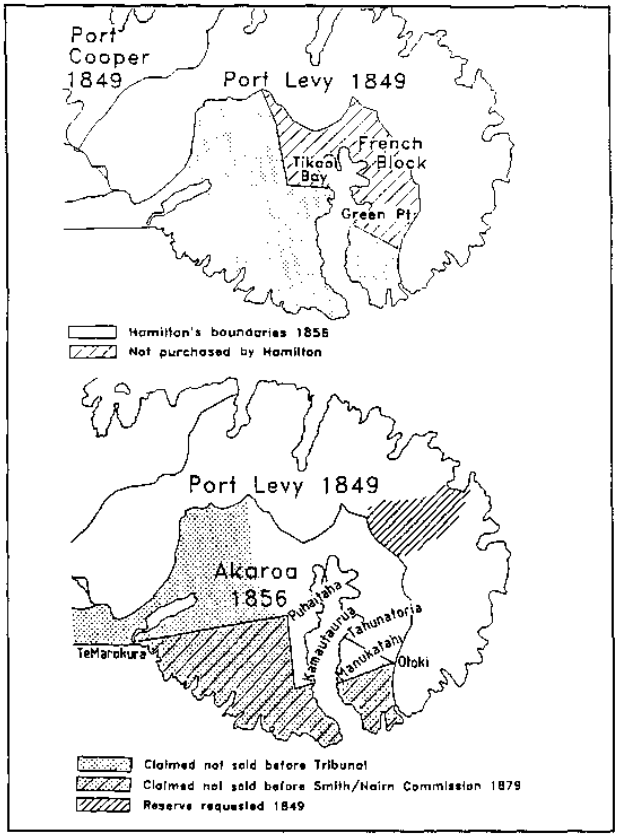

Figure 2.8: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

These boundaries could only have been given to him by Ngai Tahu.

Mr Evison went further to suggest that Wairewa and the Little River valley were also excluded from the sale, on the grounds that the area in dispute at Akaroa, as the block was defined in the deed, could not have included Wairewa. However, none of the Smith-Nairn witnesses suggested this. The setting aside of a reserve at Wairewa and the discussion about setting aside a further 400 acres confirmed that Wairewa had been included in the purchase boundaries.

There still remained the question of the 30,000 acres, identified on Johnson's map as "acknowledged by them as sold to the French". It was difficult to understand how Ngai Tahu could have made such an admission. After all the 30,000 acres was the Crown's award, partially surveyed by Carrington in 1849, and its boundaries were never the subject of any agreement between Ngai Tahu and the French. The boundary

of Hamilton's purchase, as he described it at the time, excluded this French block.

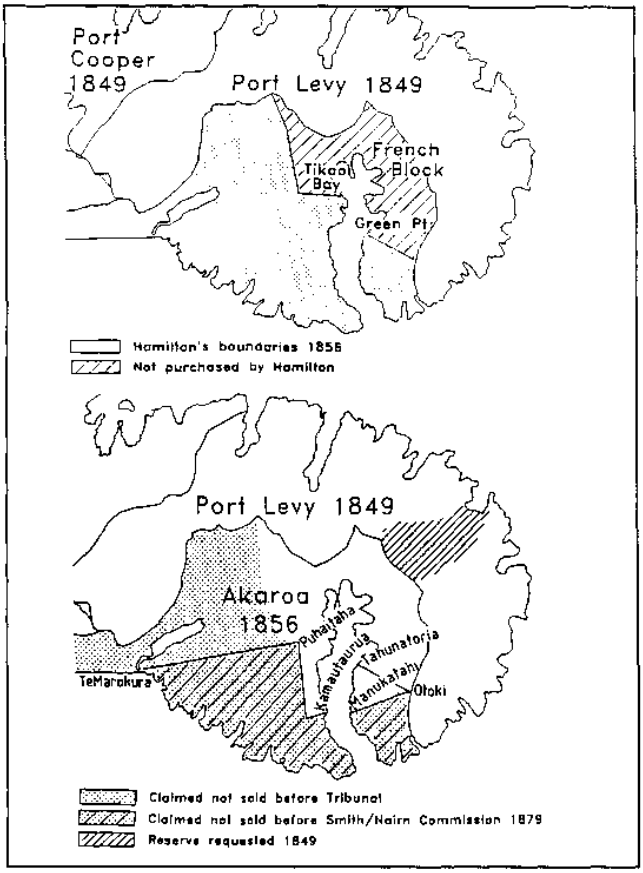

Figure 2.8: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

The claimants' grievance no 12 argued that Ngai Tahu wished to retain a block of some 30,000 acres, including the whole Wairewa (Little River) basin, and that this was wrongfully denied them. In 1849 Ngai Tahu were clearly intent on reserving such an area, and this appears to have been what was recalled by witnesses before the Smith-Nairn commission. However in 1856 the situation appears to have been different. Hamilton's understanding of the block he had just purchased, based on information he must have received from Ngai Tahu, indicates that all this land was included in the agreement. His provision for a reserve at Wairewa, at Ngai Tahu's request, also supports the view that the Wairewa basin was included in the sale. As a consequence, the tribunal found that the Hamilton 1856 purchase did include the southern part of the peninsula and the whole Wairewa (Little River) Basin. For the same reasons, the claimants' next grievance (no 13), was not upheld. Although the deed refers to "places in dispute at Akaroa", this was understood at the time to have included Wairewa.

Notwithstanding this, it is evident from Hamilton's definition of the block at the time of the sale, that he did not consider that he was purchasing the 30,000 acres awarded to the French. Apart from the 1700 acres, given up to the French, the tribunal found that at least 28,300 acres in the area shown in figure 2.8

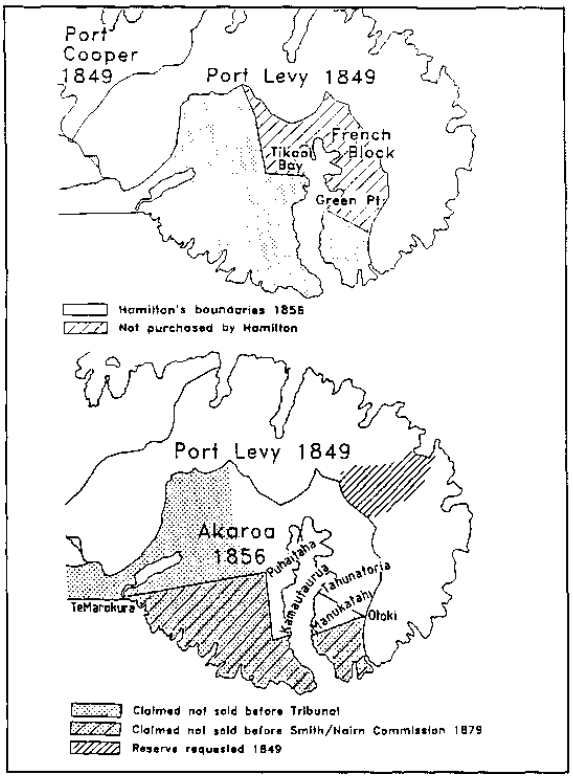

Figure 2.8: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

was not acquired by the Crown and to this day, Ngai Tahu have not been paid for it.

Akaroa: adequacy of reserves

The Crown did not dispute, nor could it have, that the reserves of 1200 acres and the œ150 purchase price were insufficient as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa block together with the absentees at the time of Hamilton's purchase. No sooner than the deed was signed Ngai Tahu were requesting a further 400 acres for grazing. Hamilton admitted the reserves were "barely sufficient". The tribunal found grievances nos 14 and 15 sustained.

"Landless natives" and lands for settlement

In the 1890s the Liberal government passed the Lands for Settlements Acts to allow for closer settlement by resuming title to large estates and subdividing them as smaller units. The claimants identified two of these on Banks Peninsula, the Morice and Kinloch estates. The cost of this policy was considerable. At roughly the same time the Liberal government was engaged in a dilatory and half-hearted attempt to deal with the problems of Maori landlessness in the South Island. This resulted in the South Island Landless Natives Act 1906. Alexander Mackay and the surveyor general, S Percy Smith, worked in their spare time to allocate 142,465 acres for landless Maori. The maximum allocation was 50 acres per person and the land was often poor and isolated. None was on Banks Peninsula. Nonetheless the Lands for Settlement Acts were not specifically for the landless, nor was there anything in the legislation to exclude Maori. Although this grievance was not sustained for this reason, the contrast

between the offers made by the government to provide land for general settlement on the one hand and for Maori on the other is glaringly obvious.

The tribunal agreed that the claimants did not exaggerate when they complained that as a result of Crown acts many Ngai Tahu were driven off their land and lost their turangawaewae. Had the Crown taken similar steps to re-establish Ngai Tahu on their own traditional homeland as they had to assist settlers the manifest injustice to Ngai Tahu would at least have been ameliorated.

Breaches of Treaty principles

In chapter 9 of the report the tribunal considers 17 of the grievances relating to the Crown's purchase of Banks Peninsula. Those 17 grievances are grouped under four main headings and considered in the light of relevant Treaty principles.

Stanley's award of 30,000 acres to the French

The tribunal found that Lord Stanley's award of 30,000 acres to the French was, in effect, a confiscation of Ngai Tahu land. The Crown's unilateral act in arbitrarily depriving Ngai Tahu of their rangatiratanga over the 30,000 acres, and in taking the land without consultation or ensuring that it was paid for, constituted a grave breach of the Treaty. Despite repeated efforts by Ngai Tahu no relief or remedy has ever been granted to them.

Mantell's conduct in the acquisition of the Port Cooper and Levy blocks

In the acquisition of the Port Cooper and Port Levy blocks the tribunal found that Mantell had acted in complete disregard of Ngai Tahu's rangatiratanga and was clearly in breach of article 2 of the Treaty. The breach was the graver because it resulted from a lack of good faith on the part of the governor and lieutenant-governor in the instructions given to and carried out by Mantell.

It was plain that Ngai Tahu did not wish to sell land at Okains Bay and at Pigeon Bay. But they were overborne by Mantell, in clear breach of article 2 which required the consent of Ngai Tahu to the sale of their land.

It was equally plain in relation to the Port Levy block that Ngai Tahu sought a substantially higher price-œ1000-for the block, but Mantell, using threats and an overbearing manner, refused to negotiate and awarded œ300 only. Again he acted in breach of article 2 by acting without their consent and in the knowledge that a significant number of Ngai Tahu having an interest in the land had withdrawn from the negotiations prior to the completion of the deed.

The effect of the Canterbury Association Lands Settlement Act 1850

It was clear that this Act vested legal ownership of virtually all the land on Banks Peninsula in the Canterbury Association, notwithstanding that much of it had not been purchased from Ngai Tahu and despite the methods employed to acquire the Port Cooper and Port Levy blocks. As a result of the Act land was leased or even sold by the association and the Crown before it had been lawfully acquired from Ngai Tahu.

The tribunal found that once again the Crown acted in breach of article 2 of the Treaty by failing to respect Ngai Tahu rangatiratanga over their land.

Failure of the Crown to set aside adequate reserves

It was abundantly clear that in setting aside 3540 acres out of 230,000 acquired from Ngai Tahu, the Crown failed to provide adequate reserves. There was insufficient land for Ngai Tahu's bare subsistence and nothing like enough for their long-term future needs. The tribunal found that Treaty principles requiring the Crown to ensure that an adequate endowment of land for present and future needs of Ngai Tahu on Banks Peninsula were plainly breached and that Ngai Tahu were very detrimentally affected. Equally significant was the failure of the Crown, in reducing Ngai Tahu to a near state of landlessness, to respect Ngai Tahu rangatiratanga in and over Banks Peninsula as article 2 required. This failure was a common thread to all major Crown dealings with Ngai Tahu on the peninsula and resulted in many having to abandon their turangawaewae. Instead of recognising this in subsequent years and taking action to make good the serious lack of land available to Ngai Tahu, the Crown chose to expend considerable sums on settling even more Europeans on the land. If those Ngai Tahu then made landless wished to have a portion of land it would be hundreds of miles away, often of poor quality, difficult of access and uneconomic.

The tribunal concluded its discussion of the Crown acquisition of Banks Peninsula by recording what had become obvious-that the Crown's actions brought no credit on those involved. The tribunal stated that a clear duty now rests on the Crown to repair, so far as may be possible, the grave harm done to Ngai Tahu by the serious and numerous breaches of the Treaty and its principles.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.6 The Murihiku Purchase Summary

2.6. The Murihiku Purchase Summary

Introduction

When Walter Mantell arrived in Dunedin to take up his appointment as commissioner of Crown lands on 16 November 1851, he also had a commission to acquire for the Crown Ngai Tahu's remaining lands in the south of the island. He wasted little time opening the negotiations, for two days after his arrival he met with Topi Patuki, Te Au, Karetai, Taiaroa and a number of other Ngai Tahu rangatira, to discuss the purchase. Less than a month later he set off with Topi Patuki for Foveaux Strait. On this 10 week journey Mantell visited all Ngai Tahu's Murihiku settlements and returned by way of Ruapuke Island. During this expedition, which included a major meeting with about 60 Ngai Tahu at Oue on 22 December, Mantell gained broad agreement to the purchase. He also marked out a number of reserves, but he refused to discuss the price the Crown was prepared to pay for the block.

On his return in February 1852 he sent Charles Kettle down to survey the reserves he had marked out, and he expected the agreement would be completed in Dunedin the following May. But the Crown was in no hurry to complete the purchase and no money was provided. There the matter lay for 18 months until August 1853, when Mantell feared he could wait no longer. Ngai Tahu were showing signs of wanting more for the block than the Crown was prepared to pay. He took the opportunity to get their agreement to a deed at Koputai (Port Chalmers) on 17 August 1853. By juggling the land fund and borrowing on the security of his own house, he was able to pay œ1000 as the first instalment the following month. A further œ1000 was paid to Foveaux Strait rangatira at Awarua (Bluff) on 15 February 1854. Mantell persuaded the governor to pay a further œ600, and this was eventually distributed at Dunedin.

For œ2600 and the reservation of only 4875 acres in seven reserves, the Crown acquired title to over seven million acres of land. According to the deed and the plan, the block began at Tokata Point, followed the south eastern boundary of the Otakou purchase, ran to Kaihiku and from there in a straight line to Milford Sound. The purchase included all the land south of this line and the islands adjacent to the shore. Ruapuke, Rakiura and the Titi Islands were excluded.

The grievances

The claimants filed 10 grievances in relation to this purchase. They claimed that Ngai Tahu should have had the benefit of a protector (no 1), and that the Crown limited the amount of land set aside for Ngai Tahu (nos 2, 3). They listed a number of specific

pieces of land which they argued Mantell should have reserved (no 4). They maintained that the Crown failed to provide promised schools and hospitals (no 5). A large block of land west of the Waiau River, including all of Fiordland, was claimed to have been wrongfully included in the sale (no 6), and it was alleged that not all of the Murihiku communities were adequately involved in the negotiations (no 7). The Crown was also charged with failing to ensure that Ngai Tahu were left with sufficent lands to preserve an economic base (no 8). A further grievance complained that the Crown provided insufficient remedies for the tribe's landlessness caused by the sale (no 9) and the final complaint was that the Crown failed to disclose the price at Awarua until after the deed had been signed at Port Chalmers (no 10).

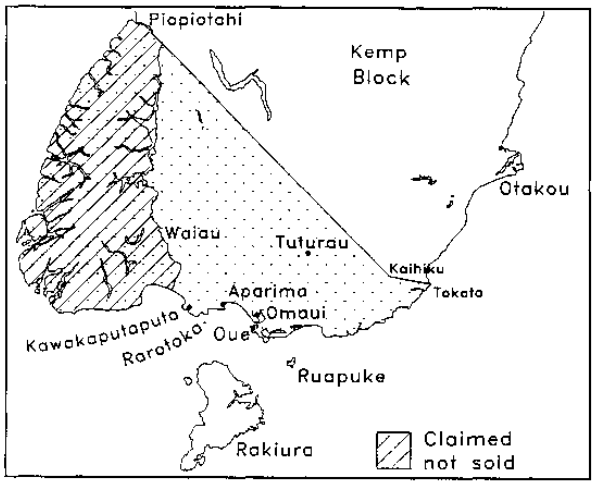

Figure 2.9: The Murihiku purchase, 1853, showing the land west of the Waiau River which the claimants alleged had not been included in the sale to Mantell.

The purchase

Prior to the purchase, Ngai Tahu rangatira had given a number of indications that they were prepared to negotiate with the Crown over the sale of land in Murihiku. In February 1849, immediately following the second payment for the Kemp purchase, Topi Patuki invited Grey to come to Ruapuke to discuss the purchase of Ngai Tahu land south of the Kemp and Otakou blocks. He made it clear that "Ko te nuinga ano o nga wahi hei a matou ano hei nga tangata Maori" ("the larger area however must remain with us, the Maori people") (Q3: 40,42). When the Acheron visited Murihiku in the summer of 1850-51, as part of its mission to chart the southern coastline, Ngai Tahu appeared anxious to enter into negotiations with the ship's master, Captain Stokes. As a result Stokes prepared a list of reserves in 19 locations and Ngai Tahu expressed their willingness to sell the remainder of their land from Otago to the western coast. Stokes suggested that œ2000 would be a sufficient price and that it should be divided equally between Ngai Tahu from Otago and Foveaux Strait. Topi and other Ngai Tahu also met with Grey following later purchase negotiations and confirmed their agreement to sell.

Mantell offered to undertake the purchase for the Crown in March 1851, making no secret of his intention to limit Ngai Tahu to small subsistence reserves. He told the colonial secretary, Alfred Domett, that in his Kemp purchase commission he had "carried out the spirit" of his instructions by allotting only 10 acres to each individual. He considered that this amount was adequate for their needs and would:

not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain. (E2:2)

Grey later claimed to the Smith-Nairn commission that he had never had any intention of limiting Ngai Tahu to the very small reserves they were left with after these purchases. However, at the time, the governor reappointed Mantell following his Kemp and Banks Peninsula commissions. Despite knowing how little had been reserved then, Mantell was still given final discretion over what lands were to be reserved. It would appear, as noted in the Ward report, that Grey's later testimony was "no more than self-serving rhetoric" (T1:216).

Mantell was instructed to find out who were the leading chiefs of the block and how much each should be paid. He attempted to do just this. After his first meeting at Otakou on 18 November 1851, he prepared a sketch map showing the whole of the block and identifying the places where many of the major Ngai Tahu rangatira were said to have rights. The map showed the whole width of the island, from Otakou to Piopiotahi (Milford Sound), and included the names of Ngai Tahu rangatira on the west coast. Although this meeting was held in Otakou, Topi Patuki from Ruapuke and Te Au from Oraka were also present. The information was further refined during Mantell's journey south, when he and Topi were caught in the rain at Tuturau on 10 December. There, a list of claimants was drawn up and another sketch map prepared, based on the original, but including some additional information. The list and the maps could only have been prepared with Topi's assistance, as there was considerable information about people and places Mantell was yet to visit. Amendments to the list of claimants showed that it was referred to later in the negotiations. It was clear from the list and the accompanying maps that Mantell was discussing the whole of the Murihiku block, including the west coast.

Reserves

On this trip Mantell marked off reserves for Ngai Tahu at Tuturau, Oue, Omaui, Aparima, Kawakaputaputa, Oraka and Ouetoto. The tribunal examined in detail the evidence relating to a number of pieces of land which the claimants said should have been reserved to them (grievance no 4). The tribunal found that this grievance was not made out in relation to an additional reserve at Omaui, the Oue reserve, a 300 acre reserve on the Waiau River, and a waterfall at Te Aunui on the Mataura River. However, in relation to a number of other pieces of land, the tribunal upheld the claimants' grievance. These consisted of the failure to reserve additional land at Aparima and Kawakaputaputa, although the tribunal was unable to quantify the deficiency in both cases. The tribunal also accepted that Mantell failed to provide for a 200 acre reserve at Waimatuku as requested by the people there. Rarotoka Island (Centre Island) should also have been reserved for the tribe, as should have land at Opuaki, about six miles from Aparima (Riverton). In not respecting those wishes the tribunal found that Mantell failed to act in accordance with the Crown's obligations under article 2 of the Treaty. Ngai Tahu were clearly detrimentally affected by the loss of the land they wished to retain.

The western boundary: Smith-Nairn

The western boundary of the purchase was of particular concern to the claimants (grievance no 6). They pointed to the evidence given by a number of their tupuna to the Smith-Nairn commission in 1880, and suggested that Ngai Tahu may have had a different understanding of the purchase boundaries than those described in the deed and on the deed map. From this testimony the claimants concluded that a large portion of the block, lying west of the Waiau River, which DOSLI has estimated at over 2.8 million acres, was included in the purchase against Ngai Tahu wishes.

Because there was little evidence of this grievance being raised at any other time in the last 136 years, the tribunal had to examine the Smith-Nairn evidence in detail. Mr McAloon, in presenting the claimants' evidence on this matter, based his conclusions on the 1880 testimony of Topi Patuki, Horomona Patu, Horomona Pohio, Matiaha Tiramorehu and Wiremu Potiki. Of these five, Wiremu Potiki admitted to being unclear about the boundaries and he did not name the Waiau as the western boundary. Matiaha Tiramorehu was likewise unable to define the actual purchase boundary, and he was not present on the day the deed was signed, although he did suggest that the traditional boundary of Murihiku was the Waiau. Topi's evidence contained a number of inconsistencies, no doubt caused by difficulties in remembering events of nearly 30 years previously. Horomona Patu was also confused about some elements of the purchase, and like Tiramorehu, he was not present when the deed was signed. Horomona Pohio, the last of these witnesses, also had some difficulty remembering the different meetings which occurred during the negotiations from November 1851 to October 1853. Six other Ngai Tahu witnesses who had participated in the purchase gave no evidence at all on the boundaries issue.

It is unfortunate that the Smith-Nairn commission was wound up before Mantell was able to be questioned on his role in the purchase. It is clear from evidence at the time of the sale that he considered he had purchased the land west of the Waiau.

The absence of corroborative evidence, and inconsistencies in the testimony of Patuki, Pohio and Patu made it impossible for the tribunal to conclude that the land west of the Waiau was wrongfully included in the sale. On the contrary, other evidence from the time of the negotiations supported the view that the purchase included the whole of the block.

There was evidence from Ngai Tahu witnesses to the Smith-Nairn commission that the west coast had been discussed during the negotiations. Hoani Paororo and Horomona Patu both stated that Te Au had requested a reserve at Piopiotahi. H K Taiaroa also gave evidence that his father had been promised a reserve at Piopiotahi and supported this by tabling an 1874 letter from Mantell confirming such a reserve. The Taiaroa claim was later examined under an order of reference, by two judges of the Native Land Court and the Te Au claim by the Native Land Court in 1917. In the light of such requests we found it difficult to believe that the sale did not go beyond the Waiau.

Boundaries in the deed

There was some indication during this inquiry that the translation of the deed boundaries included in Mackay's 1874 Compendium, misrepresented the Maori version of the original deed. The original deed stated the boundaries as:

Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotahi,) haere atu i reira ki Kaihiku a, i reira haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe ...(see appendix 2.5)

Which Mackay translated as:

The boundary commences at Milford Haven (the name given to that place in Mr. Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the land within these boundaries ..(see appendix 2.5)

The claimants suggested that the original Maori was confusing, and that Mackay's "and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore", does not reflect the meaning of the deed. However, having considered this, the tribunal concluded that the translation was actually very close to the original meaning expressed. While Patuki and Pohio both suggested that the reading of the deed did not alter their belief that the land west of the Waiau had not been included, it was clear that this could not have been the case. If the deed was read out, and it appeared that it was, then the fact that Piopiotahi and the west coast were included would have been obvious.

The tribunal also rejected the suggestion by a witness for the claimants that the deed map was created to deceive. Despite Kettle's omission of the Waiau on the map and some other inaccuracies, the deed map, with its clearly defined coastal boundary should also have made it clear to the signatories of the deed that the purchase extended across to the west coast.

After weighing all the evidence the tribunal found that the land west of the Waiau was not wrongfully included in the sale. Accordingly the claimants' grievance no 6 was not sustained.

Signatories

The claimants argued that there was confusion over the terms of the purchase because the people of the western settlements in Murihiku were inadequately involved in the purchase negotiations and did not sign the deed (grievance no 7). Mantell's failure to discuss the price of the block in Murihiku itself was also a matter of concern (grievance no 10). However, apart from Pohio and Tiramorehu, the claimants did not name any other major Murihiku chief who was not present when the deed was signed at Koputai on 17 August 1853. Of the 41 names identifiable from the 56 on the deed, 26 came from south or west of Otakou. By examining the names on the deed, and comparing these with those on Mantell's rights list and on his census, the tribunal found that all the leading Murihiku chiefs, as well as an appreciable number of lesser rank were signatories or, being present, assented to the deed. The tribunal therefore concluded that it is incorrect to say that only the people of Otakou sold the land,

although according to Mantell's rights charts and table, much of the west coast, from Piopiotahi to Dusky Sound, was theirs to sell.

Mr Evison pointed out that only a small minority of the names on the deed were in fact signatures. Most of the names had been written in by one or two people. However there has never been any suggestion that those named did not give their consent, only that there was confusion on the part of a few about the boundaries of the purchase. The deed was read out and the whole transaction accompanied throughout by discussion over the ownership of the whole block. Whether or not the deed was taken to Awarua, the actual boundaries must have been understood by those who were present when the deed was assented to and who received their portion of the payment.

Mantell's rights maps and claimant list provide strong evidence that the whole of the block was being discussed from the beginning of the negotiations in November 1851, and we have noted that at least 14 of the 20 chiefs identified as having rights on the west coast were signatories to the deed and to the first receipt. These included most of the principal chiefs as identified to the tribunal.

For these and other reasons explained in the report, the tribunal did not sustain the claimants' grievances nos 7 and 10.

The need for a protector

The tribunal upheld grievance no 1 and found that the failure of the Crown to appoint a protector to advise the tribe of their Treaty and other rights was a breach of the principle of the Treaty which requires the Crown to protect Maori Treaty rights. As a result of this failure Ngai Tahu were prejudiced in their negotiations with the Crown, they were denied the right to retain certain lands they wished to retain, and were left with insufficient land for their present and future needs. A protector would have ensured that such prized possessions as mahinga kai and pounamu would not have been lost to them.

Events after the purchase: "Half-caste" grants

Although there were many Ngai Tahu of mixed ancestry by 1853, they were not provided for at the time of the purchase. In 1864, when the Rakiura purchase was completed a provision was made for a reserve for "half-castes" on the island at the Neck. When this proved insufficient further land was made available under the Stewart Island Grants Act 1873, which allowed grants to landless "half-castes" of up to ten acres per male and eight acres per female. Following an 1869 report of the Public Petitions Committee of the Legislative Council, Alexander Mackay was asked to investigate the situation of those Maori of mixed descent in other purchases. His inquiry eventually led to the passing of the Middle Island Half-Caste Crown Grants Act 1877, which provided for grants of the same size as the 1873 Act to a named group of 53 persons living in Canterbury and 118 persons living in Otago. The Act made it clear that these grants were to be a final extinguishment of any claims in respect of promises made at the time the land was sold.

The tribunal upheld this grievance in that the provision of 18 acres per couple was insufficient to meet their need for land and was in breach of the Crown's Treaty

obligation to ensure that adequate provision was made for these people. The tribunal concluded once again it was our melancholy duty to report that the Crown failed to honor its obligation to many Ngai Tahu half-caste people, to their detriment and the detriment of successive generations.

Mantell's prerogative to determine the reserves

Grievances no 2 and no 3 alleged that the Crown wrongfully instructed or permitted Mantell, rather than Ngai Tahu, to decide what lands would be retained by the tribe following the sale. Both these grievances were sustained, since it was clear from Mantell's instructions that he alone was to be the arbiter of what constituted "ample provision" for Ngai Tahu's present and future needs.

The retention of an economic base

Apart from the western boundary question this grievance was the claimants' principal concern. As a result of the purchase the Crown aquired some seven million acres of land with high agricultural potential and heavily forested areas, of mountains, lakes and other features of great beauty. For the 273 Ngai Tahu recorded by Mantell as living in Murihiku and on Ruapuke, there were left only 4875 acres, or 17.8 acres per head. By any standard, this was a totally inadequate provision for the present, let alone future, needs of Ngai Tahu. The Crown conceded that although Mantell allowed Ngai Tahu to reserve most of the lands they asked for in the locations they sought, the total amount of land reserved did not "prove to be adequate in area or quality". An 1891 survey of Ngai Tahu land holdings show that only 7.7 per cent of Southland Maori were seen as having sufficent land, while 41.7 per cent had no land at all. It is not surprising that Murihiku Ngai Tahu named a rocky place "Te Upoko a Matara"- the head of Mantell-an insulting reference to his hard-hearted obstinacy.

Mahinga kai

The lack of any provision for Ngai Tahu's continuing access to mahinga kai in Murihiku was also an issue of concern to the tribunal. The deed makes it clear that Ngai Tahu were relinquishing all their:

anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. (appendix 2.5)

On the face of it therefore, Ngai Tahu had, at one stroke, alienated all their mahinga kai, save for a small quantity on the land reserved to them. The tribunal was unable to accept that Ngai Tahu could have contemplated that they were surrendering all future access to their traditional food resources or indeed their taonga, pounamu. The tribunal further considered it unlikely that had a protector been appointed to ensure that Ngai Tahu were independently advised of their rights, they would have agreed to surrender all their mahinga kai.

Schools and hospitals

The last of these Murihiku grievances to be dealt with, grievance no 5, concerning the provision of schools and hospitals, is considered later in the report in chapter 19.

Breaches of Treaty principles

Crown officials in New Zealand were aware that the various hapu maintained a system of shifting cultivations and engaged in seasonal foraging and hunting pursuits in different parts of the interior. It was incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over tribal territory as well as their more permanent kaika, so as to ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs. Mantell clearly failed to take such steps. On the contrary, he provided in the deed for the surrender of virtually all such rights without first ensuring that adequate lands had been excepted from the sale or reserved to Ngai Tahu which would preserve reasonable access to traditional food resources.

Murihiku Ngai Tahu appear to have welcomed the prospect of more Europeans settling among them and sharing the land. For many years they had experience of European sealers and whalers living and intermarrying with them. They were aware that the Crown was purchasing land to facilitate settlement but they probably had only a shadowy notion of the likely magnitude and rate of settlement.

The tribunal found that pre-emption was not to extend to land needed by Maori. Article 2, read as a whole, imposed on the Crown a duty, first to ensure that Maori people in fact wished to sell; secondly that each tribe maintained a sufficient endowment for its foreseeable needs.

If, as they clearly desired, Murihiku Ngai Tahu were to fully and effectively engage in the new economy which would result from European settlement and the steady development of agricultural and pastoral farming, or, as later occurred, dairy farming, they needed to retain extensive areas of suitable land. It was the duty of the Crown's purchasing agent, Mantell, to ensure that this happened. But Mantell had no sympathy for such notions. Although instructed by the governor that he was to be responsible "for taking care that ample reserves are kept both for their present and future wants", Mantell paid no regard to this injunction. As a result, they were left with a mere 18 or so acres per person, and without any significant access to traditional mahinga kai resources. Had the Crown, through Mantell and ultimately, Governor Grey fulfilled its Treaty obligations it would have ensured that in addition to their kaika and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers, in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might, as development occurred, be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for. Instead, the Crown's approach virtually denied the rangatiratanga of Ngai Tahu over their land, treated them as supplicants and left them virtually landless.

The tribunal also found that the Crown failed to ensure that Ngai Tahu were left with sufficient land to preserve reasonable access to mahinga kai. The Crown's failure to

ensure that Murihiku Ngai Tahu were left with sufficient land for an economic base, and to provide reasonable access to their mahinga kai, was found to be in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.7 The North Canterbury Purchase Summary

2.7. The North Canterbury Purchase Summary

Introduction

Mantell's decision to fix the northern boundary of the Kemp purchase at Kaiapoi pa effectively dispossessed Ngai Tahu of their territory in Kaikoura and North Canterbury. Not only did this have the consequence of acknowledging Ngati Toa's rights to land well within Ngai Tahu territory, it allowed European settlement to take place throughout the entire block before Ngai Tahu's rights were acknowledged by the Crown. Ngai Tahu had agreed with Grey and Kemp in 1848 that the northern boundary of the purchase would include all the territorial area of Ngai Tuahuriri, extending a good deal further to the north than Kaiapoi pa. It appears that Grey had not been prepared to acknowledge Ngai Tahu's rights to Kaikoura at that time. If the purchase had been adequately conducted by Kemp and Mantell then Ngai Tahu's exclusive rights would have been recognised as far north as the Hurunui, enabling the tribe to select sufficient reserves that far north. As it happened, by fixing the boundary at Kaiapoi pa, Ngai Tahu were forced to campaign for eight years to have their rights to North Canterbury acknowledged. In the meantime much of the area had been made over to the Canterbury Association and the whole block had become the exclusive preserve of European runholders.

Until the visit of Governor Browne to Canterbury in early 1856, the Crown either rejected or failed to act on repeated protests by Ngai Tahu over North Canterbury. Following Browne's visit, W J W Hamilton was appointed to negotiate a purchase, and this he did after he had finalised the Akaroa purchase at the end of 1856. He met with Ngai Tuahuriri on 4 February 1857, and a deed was signed the following day. In return for a block estimated to contain well over one million acres, Ngai Tahu were paid œ500, but were granted no reserves. While Hamilton justified this to them on the basis of the value of their existing reserves, the real reason was that the block was already completely occupied by Europeans.

Claimants' grievances

The claimants provided a single list of grievances for both North Canterbury and Kaikoura portions of the claim. First they complained that the Crown's inclusion of North Canterbury in the Wairau purchase exerted unfair pressure on Ngai Tahu to part with the block on unfavourable terms (no 1). They then alleged that the Crown allowed the block to be settled by Europeans before purchase from Ngai Tahu and that the tribe have never been compensated for this (no 2). They also complained that the reserves requested by Ngai Tahu at Hurunui and Motunau were not allowed (no 3)

and that the Crown failed to provide any reserves within the block (no 4). Finally they complained that while the Crown resumed a number of runs within the block for European settlement, it failed to do likewise for Ngai Tahu (no 6).

Background to the purchase

Only a few days after Mantell had set the boundary of the Kemp purchase at Kaiapoi pa, a delegation of Ngai Tahu went to Wellington to protest the limiting of the Kemp boundary to the pa. Their protests were ignored and Grey and Eyre decided to retain the boundary adopted by Mantell. Although Mantell was determined to keep Kaiapoi pa as the boundary of the Wairau and Kemp purchases, he did support Ngai Tahu's claims to rights to the east coast north of the pa against Ngati Toa. In 1849 Matiaha Tiramorehu complained that Grey had deceived the tribe, by going back on a promise to pay Ngai Tahu rather than Ngati Toa for Kaiapoi. After some inquiry it was decided that a further œ50 could be paid to Ngai Tahu for their rights between Kaiapoi and Kaikoura, however there is no record that the money was ever distributed. Ngai Tahu approaches to the New Zealand Company also caused some discussion, but no positive action.

Grey again visited Canterbury in March 1852 when Ngai Tahu repeated their complaints. It is possible that œ100 compensation was discussed, but again, there is no evidence that the Crown acted to make good the offer. Other direct approaches to government found similar responses, although one threat of violence was met with Grey's promise that "effectual means may be taken for at once crushing such acts of insubordination" (T2:85-86).

The Ward report summed up the situation:

Although the evidence is fragmented and somewhat confused, it does seem that during 1850-2 Ngai Tahu achieved limited government recognition of the fact that they had rights north of Kemp's purchase but this recognition did not improve their position with regard to the land. ... the government does not seem to have perceived a need for an inquiry into the extent of these rights. Nor was the validity of the Nelson Crown grant and the later transfer of land claimed by the tribe to the Canterbury Association questioned. (T1:265)

The Crown's historian, Graham Sanders, suggested to us that the problem was that the Crown was just not buying any land at this time. The claimants vigorously opposed this suggestion, pointing out that the Crown negotiated purchases with almost every other tribe in the South Island over this period. This succession of purchases began with the agreement in 1853 to pay Ngati Toa an additional œ5000 for their remaining rights in the South Island.

All through the period of government inactivity over the claim, Europeans were taking up large runs over the whole of the land. The first of these runs were established prior to 1848, and increased in number rapidly from the early 1850s until, as the accompanying map shows, by the middle of the decade the whole of the territory was covered with pastoralists. Although much of this land had been taken up under pasturage licenses, some had been freeholded. For example a single block, of 30,000 acres, was sold by the Crown for œ15,000.

In January 1856, Governor Browne paid his first visit to Canterbury, and Ngai Tahu pressed upon him the justice of their claims and their frustration at the delays in settling them. Browne promised to refer the matter to Donald McLean, the chief land purchase officer, for investigation. After consulting with John Grant Johnson, McLean convinced Browne that the claim was a valid one, but recommended that it be settled by a payment of just œ150. It was left to Hamilton to negotiate an agreement.

While Hamilton was allowed to reserve 800 acres for Ngai Tahu at Akaroa, no provision was made for any reserves in North Canterbury. As Professor Ward commented, this important aspect of the purchase was determined "by the Crown without reference to the wishes or interests of Ngai Tahu" (T1:272).

The purchase

In early 1847, Hamilton and his interpreter, the Reverend J Aldred, met with Ngai Tahu from Canterbury, Banks Peninsula and Kaikoura to discuss the Crown's proposal. Hamilton began by offering œ150 for the land north of Kaiapoi and telling Ngai Tahu he had no authority to make any reserves. Ngai Tahu rejected the offer outright, demanding either œ500 or œ150 with an "ample reserve". Hamilton increased the offer by œ50 on his own responsibility, but this too was rejected. The next day Hamilton reluctantly agreed to Ngai Tahu's suggestion that he pay them œ200 for the block and appeal to the governor for an additional œ300.

The deed was signed by 20 Ngai Tahu rangatira, and the boundaries of the purchase were given as the sources of the Waiau-ua (Waiau), Hurunui and Rakahuri (Ashley) Rivers. There was no plan, except for a very stylised sketch which is now attached to the deed. Although no new reserves were made, Mantell's 1848 promise to reserve the Kaiapoi pa site was finally implemented. Hamilton's report explained that he had refrained from making any other reserves, because the land had been so occupied by Europeans that any Maori reserve would have had to be referred to the Land Office, an action which could further complicate and delay the purchase. Without this difficulty he would have agreed at once to a reserve. So frustrated were Ngai Tahu with the delays in settling their grievance that they accepted œ200 and the hope of œ300 more for their rights to a very substantial and increasingly valuable block of land.

McLean accepted and justified Hamilton's decision not to allocate any reserves on the grounds that the land wanted by Ngai Tahu was of "great value". The additional œ300 was, however, paid.

Findings on grievances

While the tribunal found that Ngai Tahu had not been forced to part with the Kemp block on unfavourable terms because of the inclusion of Kaiapoi in the Wairau purchase in 1847, the situation was very different in North Canterbury. Mantell's exclusion of land north of Kaiapoi from the Kemp purchase meant that the Crown was in effect recognising Ngati Toa mana as extending to the pa. This caused enormous distress to Kaiapoi Ngai Tahu who did not rest until their mana was restored in February 1857. Such was their anxiety due to the pressure of European settlement that

their just rights would never be recognised, they parted with their lands initially for œ200, ultimately for œ500, but with no reserves at all.

The tribunal had no doubt, given all the circumstances leading up to the 1857 purchase, that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase and the Crown's acquiescence in recognising the boundary of Kemp's purchase at that point did exert unfair pressure on Ngai Tahu to part with the North Canterbury block on unfavourable terms. The first grievance was accordingly sustained.

It is clear that the Crown allowed the whole of the North Canterbury block to be occupied by European settlers before purchasing it from Ngai Tahu. As a result, by the time the Crown came to recognise the legitimacy of Ngai Tahu's claims to the land it had increased very considerably in value. Part of the block had been granted to the Canterbury Association, and this was being offered for sale at œ3 per acre. Land north of the Waipara River was being sold at 10 shillings per acre or 5 shillings per acre for low quality land. Between 1 July 1853 and 31 December 1854, 1178 acres were sold at œ3 per acre and 61,120 acres were sold at 10 shillings per acre. The stark difference in the price paid by the Crown, of œ500 for an estimated 1.14 million acres, is only too apparent.

Professor Ward compared the situation with that in the Wairarapa where in the same period 1.5 million acres were purchased for œ14,000 with large reserves and much of the best land withheld from sale. Ngai Tahu were denied the opportunity of developing land for pastoralism.

The tribunal found that the eight year delay in recognising and settling Ngai Tahu's claim to the North Canterbury block allowed their land to be completely occupied by European settlers. The Crown must accept responsibility for this. Ngai Tahu were placed in a greatly weakened bargaining position. For all they knew the Crown would continue to rely on the Wairau purchase as giving it title to the land.

The tribunal had no hesitation in finding that Ngai Tahu had never been adequately compensated for the sale of the North Canterbury block. Grievance no 2 was accordingly sustained.

The tribunal was unable to reconcile the Crown's action regarding the inclusion of Ngai Tahu land in the Wairau purchase from Ngati Toa with Ngai Tahu's rangatiratanga over such land. No investigations appear to have been made by the Crown as to Ngai Tahu rights in the North Canterbury block. While Grey in February 1848 recognised Ngai Tahu's rights at least up to the Hurunui River, this was revised by the Crown's subsequent acquiesence in Mantell fixing the boundary of Kemp's purchase at the Kaiapoi pa site. Despite persistent protests by Ngai Tahu from 1848 on, the Crown permitted all the land in the North Canterbury block to be occupied by European settlers and alienated substantial areas of the freehold to them. This was in blatant disregard of, or unconcern for, Ngai Tahu's rangatiratanga over this land. Far from consenting to this occupation of their land, Ngai Tahu vigorously objected. When very belatedly the Crown finally consented to recognise the rangatiratanga of Ngai Tahu over this land, they did so by agreeing to pay no more than a nominal price, far below the then value of the land. This was inconsistent with good faith and the obligation of the Crown to deal fairly and honourably with its Treaty partner. In so

doing it clearly acted in breach of article 2 of the Treaty, as equally clearly it did in denying for so long and with such serious consequences the rangatiratanga of Ngai Tahu over the North Canterbury block. Ngai Tahu have not been compensated to this day for the very substantial loss which flowed from the Crown's breach of Treaty principles.

The failure of the Crown to allow Ngai Tahu reserves in the block (grievances nos 3 and 4) was not disputed by the Crown. Hamilton noted the request for reserves at Motunau and Hurunui. His ostensible reason for refusal, that there were already adequate reserves in Canterbury, we have already found to be far from the case. The real reason was that the land was already occupied, or as McLean inferred, the land requested by Ngai Tahu was of great value. The tribunal upheld both grievances nos 3 and 4.

In no other purchase of Ngai Tahu land did the Crown fail completely to make any reserves for the tribe or wholly fail to meet their requests for reserves. Much of the North Canterbury block was very well suited to pastoral sheep farming. Ngai Tahu were anxious to participate in this activity alongside the new settlers. Instead they received a mere œ500, and then only after years of protest. The Crown's breach of article 2 of the Treaty is self-evident. It was conceded by the Crown. In failing to meet the request for reserves at Hurunui and Motunau the Crown flew in the face of Ngai Tahu's rangatiratanga over the land preserved to them by article 2. There could be no conceivable justification for such arbitrary action so at variance with the Crown's Treaty obligation.

In failing to set aside any reserves anywhere in the block the Crown ignored its clear obligation under article 2 to ensure that Ngai Tahu were left with ample reserves for their present and future needs. The tribunal found it impossible to reconcile the Crown's conduct in this purchase with its Treaty obligation of good faith.

The final grievance was that the Crown provided lands for settlement within the block for landless Europeans under the Lands for Settlement Acts, but failed to do likewise for Ngai Tahu. No submissions were made by counsel but in considering this grievance the tribunal noted that there was nothing in the legislation which required that the applicant for land be either European or landless. Any person, except a married woman, could apply to take up land and so far as the tribunal was aware there was no legal impediment to eligible Maori applying under the Acts.

On the assumption then, that Maori enjoyed the same rights under the legislation as Europeans, the tribunal was unable to sustain this grievance. However the tribunal noted that the Crown was able to provide considerable funds to make available lands for settlement of up to 5000 acres for a first class run and up to 20,000 acres for second class runs. This contrasts with the lands later provided for Ngai Tahu under the South Island Landless Natives Act 1906 restricted to 50 acres per adult and 20 acres for those under 14 years of age. It takes little imagination to appreciate the sense of deprivation of Ngai Tuahuriri for whom the Crown refused to set aside a single acre. And yet the Crown was prepared to resume, at considerable cost, either by repurchase or compulsorily, land bought from Ngai Tahu for a pittance, to facilitate closer settlement predominantly by European settlers.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.8 The Kaikoura Purchase Summary

2.8. The Kaikoura Purchase Summary

Introduction

Ngai Tuahuriri's lands north of Kaiapoi pa had been intended to be included in the Kemp purchase. Mantell's revision of the boundary, however, meant that it was not until 1857 that their rights to this land was acknowledged by the Crown, however inadequately. The land of Ngati Kuri, a Ngai Tahu hapu centred on Kaikoura, was never part of the Kemp arrangement. It would seem that in February 1848, Grey was not prepared to accept Ngati Kuri's rights to Kaikoura, and he continued with his plans to grant the land to the New Zealand Company. Kaikoura, like North Canterbury, had been largely overrun by pastoralists by the time Ngati Kuri's rights were acknowledged by the Crown. While Ngati Kuri were present at the negotiations over North Canterbury, their lands were not substantially involved. During the 1850s a number of tribes were paid for lands in the northern half of the island on the assumption that the Wairau purchase had not extinguished all their rights. Ngati Kuri were one of the last of these to be negotiated with by the Crown.

Following the Akaroa purchase in 1856, Hamilton reported to McLean that Kaikoura Whakatau, the principal chief of Ngati Kuri, was prepared to negotiate a settlement over their lands at Kaikoura, and that he vigorously denied Ngati Toa's right to have sold the block in 1847. However it was not until two years later that James Mackay Jr was appointed to negotiate the purchase. After several weeks of discussion in early 1859, a deed was signed which included a block of land from Parinui o Whiti, the northernmost point claimed by the tribe on the east coast, to the Hurunui, estimated by DOSLI to consist of 2.8 million acres. In return Ngati Kuri received œ300 and 5558 acres of reserves. A request for a reserve of about 100,000 acres was refused.

Claimants' grievances

The claimants filed six grievances on this purchase, in some cases identical to those filed for the North Canterbury claim. First they complained that the Crown's inclusion of Kaikoura in the Wairau purchase exerted unfair pressure on Ngai Tahu to part with the block on unfavourable terms (no 1). They alleged that the Crown allowed the block to be settled by Europeans before purchasing it from Ngai Tahu and that the tribe has never been compensated for this (no 2). They also complained that the lands requested by Ngai Tahu between the Kahutara and Tutaeputaputa (Conway) Rivers in the Kaikoura block were not allowed (no 3). They claimed that the reserves which were made were inadequate for agricultural purposes and as an economic base and were incumbered with roading and railway rights (no 5). Finally they complained that while the Crown resumed a number of runs within the block for European settlement,

it failed to do likewise for Ngai Tahu (no 6). Grievance no 4 related solely to the North Canterbury purchase.

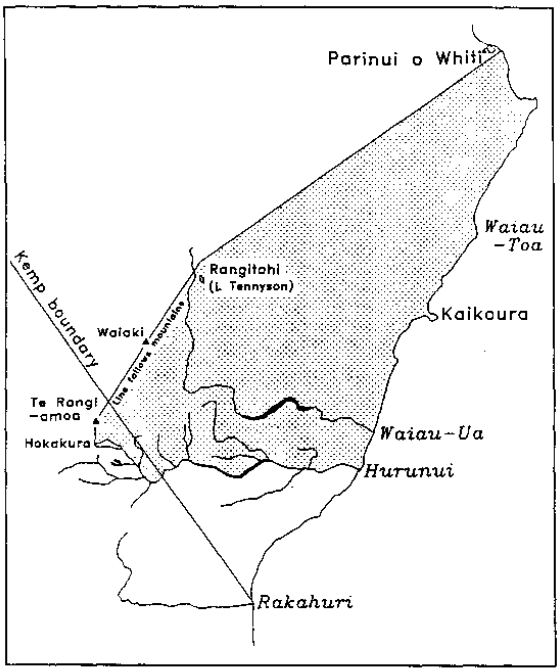

Figure 2.10: The Kaikoura purchase. The purchase overlapped with the North Canterbury purchase of 1857 which had its northern boundary at the Waiau-Ua.

Background to the purchase

When Ngai Tahu protested Mantell's decision to fix the Kemp and Wairau boundaries at Kaiapoi pa they suggested it be reset at Oteruawhare, near the Clarence River, or alternatively at Parinui o Whiti (White Bluffs). Mantell stood firm and in the 1850s Ngai Tahu complaints about North Canterbury often also applied to Kaikoura. Grey approved a proposal of the New Munster Executive Council to pay œ50 to Ngai Tahu for their rights between Kaikoura and Kaiapoi, but this appears not to have been distributed. Kaikoura Whakatau was, however, paid œ60 in October 1852 for his rights to "all claims in the vicinity of Kaikoura" (T2:66).

In the years immediately after the 1853 "Te Waipounamu" purchase, when McLean was actively purchasing the rights of other tribes in the northern South Island, Ngati Kuri's claims were given little if any attention. In the meantime the whole of the area was taken up in runs, with the exception of the land immediately around the Kaikoura peninsula.

Hamilton passed on Kaikoura Whakatau's complaints about the non-recognition of their rights as part of his 1856 report on the Akaroa purchase. According to this report, Whakatau was likely to accept terms similar to those being proposed for North Canterbury (œ150) but with two reserves totalling 1000 acres. This is more likely to have been Hamilton's estimate, rather than a specific offer from Whakatau. The Crown did not move with any speed. In August 1857 Hamilton again reminded McLean of the problem, but nothing was done until November 1858, when McLean appointed James Mackay Jr to make the purchase.

Mackay was instructed to provide reserves of between 10 and 100 acres per individual or family head and to ensure that the village site at Kaikoura required for European settlement was not reserved to Ngai Tahu. It was thought that œ150 would be sufficient payment, and Mackay was to follow the agreement with the purchase of Poutini Ngai Tahu's Arahura rights. For both purchases œ300 was provided. Mackay was given great discretion over the negotiations, and over the extent of the reserves necessary.

The purchase

When James Mackay and his cousin, Alexander, arrived at Kaikoura, they found Ngati Kuri asking œ5000-œ10,000 for the land. The commissioner reported that he would do his best to gain Ngai Tahu's assent and in a private letter to McLean complained of a lack of any assistance from the Nelson provincial government. He also commented that Ngai Tahu were too "wideawake" about the value of the land and the runs established on it for him to be confident of success.

The negotiations took over a month, between 24 February and 29 March when the deed was signed, and were broken off more than once. During this time all the eventual reserves were identified. Ngai Tahu finally agreed to accept œ300, but not without some protracted stonewalling and Mackay's subterfuge of appearing to be willing to depart:

I set the fellows down so that none of them had anything to say, except that it was no use for them to talk to me as I was as hard as a stone and was Satan and Haukiora-and after all could not get them to take the money [œ150 and then œ200]. (M11:26)

Ngati Kuri demanded to reserve about 100,000 acres of land between the Kahutara and Tutaeputaputa (Conway) Rivers. This land was on pasturage lease to three runholders, Fyffe, Tinline and Keene, and some of the land had been freeholded.

They were also extremely reluctant to accept œ300, knowing how inadequate such a price was, given the then well-established value of the land in the district. The price, although more than contemplated by Mackay, can only be regarded as nominal. It was grossly inadequate.

James Mackay allowed nine reserves ranging from three to 4800 acres. The reserves were situated on the coast both north and south of the Kaikoura peninsula, with some small reserves on the peninsula itself. Mackay even apologised to McLean for setting aside the largest, the 4800 acre reserve at Mangamaunu, justifying his action because the land was of the "most useless and worthless description" (A8:II:36).

Despite its lack of value for agriculture, the Mangamaunu reserve was greatly valued for its mahinga kai. Mackay noted the karaka trees, prized for their berries, and a later commentator explained that the land was chosen for the wide variety of kai moana and kai manu that could be obtained there.

Mackay openly admitted that it was:

questionable from the nature of the reserves whether they will be found more than barely sufficient for the wants of the Native population, and for the increase of their horses and cattle, of which they now possess considerable numbers, one of the best proofs of which is that they have applied to me to be allowed to purchase land from the Government, to the extent of about 400 acres within the block just ceded by them to the Crown. (A8:II:36)

While Ngai Tahu clearly wanted to reserve their mahinga kai resources, they were also intent on developing pastoral agriculture in the manner of their European neighbours. In the tribunal's view there was a reprehensible attitude on the part of the Crown's agent, who, to prove how hard a bargain he has driven, virtually gloats over the fact that to obtain land they want and need Ngai Tahu are driven to seek permission to buy back 400 acres of their own land. We cannot condemn too strongly such a cynical disregard by the Crown's agent of the rights of its Treaty partner.

Findings on grievances

For the same reasons as in the North Canterbury situation, the tribunal found that the Crown did, by the Wairau purchase, exert unfair pressure on Ngai Tahu to part with the block on unfavourable terms both as to price and reserves. Crown delay and the prior recognition of Ngati Toa's rights to Kaikoura seriously reduced Ngati Kuri's negotiating position. The first grievance was accordingly sustained.

As North Canterbury was parcelled out to runholders prior to purchase from Ngai Tahu, so was Kaikoura. Land was sold in the Kaikoura block at 10 shillings or 5 shillings an acre prior to Ngai Tahu being induced, after a month of hard bargaining, to accept œ300 for a block of 2.8 million acres. The tribunal concluded that Ngai Tahu have never been adequately compensated for the Kaikoura block purchase, and accordingly sustained the claimants' second grievance.

In almost the same manner as evident in North Canterbury, the Crown was in breach of article 2 of the Treaty in disregarding Ngai Tahu's rights, and in allowing the block to be occupied by settlers on the basis of the 1847 Ngati Toa purchase. The tribunal also found that to this day Kaikoura Ngai Tahu have not been compensated for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Mackay's refusal to grant Ngai Tahu the 100,000 acre reserve, on the ground that it had already been handed over to European runholders, was not defended by the Crown. Mackay was limited to the 10-100 acres per head formula, provided by his superior, the chief land purchase officer, McLean. In laying down such a formula McLean completely overlooked that article 2 of the Maori version of the Treaty guaranteed to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full, exclusive and undisturbed possession of their land so long as they wished to retain it. It is apparent that Ngai Tahu wished to retain a substantial area of land for pastoral purposes and no doubt for greater access to a variety of mahinga kai resources. Instead their wishes were ignored and they were induced to settle for a mere 5558 acres.

By imposing on its agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu, the Crown acted in clear breach of article 2 of the

Treaty. This breach was exacerbated by the action of the Crown in facilitating the leasing and, in part, the sale of land to which Ngai Tahu's title had not been extinguished. The Crown's agent Mackay, as his correspondence to his superior McLean only too clearly revealed, was fully aware of this. Mackay was obliged by the Crown to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they wished and were entitled to retain. It was the Crown's responsibility to respect Ngai Tahu's title to their land and to restore it to them if, as was the case, they wished to retain it.

It follows that Ngai Tahu's grievance no 3 was sustained.

In grievance no 5 the claimants complained that the reserves allowed were insufficient for agricultural purposes and to provide an economic base for the prosperity of Ngai Tahu and were unreasonably encumbered with Crown roading and railway rights.

That the land was insufficient for Ngati Kuri's present and future needs was readily accepted by Mackay himself. Had the Crown agent been able to agree, as he should have, to Ngai Tahu's request to retain 100,000 acres, it is unlikely that there would have been any later complaint. While the Mangamaunu reserve was of some size, it was completely inadequate for agricultural purposes. In a later report on ancillary claims the tribunal will discuss how the reserve's size was seriously eroded for roading, rail and scenic reserve purposes.

The Crown, as the tribunal has said on numerous occasions, was under an obligation to ensure that Ngai Tahu retained generous areas of land, amply sufficient to secure a reasonable access to mahinga kai and to engage in agriculture and pastoral pursuits. Once again the Crown failed to meet its Treaty obligation. In the result, Ngai Tahu suffered, and have continued to suffer, substantial loss. As a consequence the tribunal found grievance no 5 sustained.

The tribunal further found that the Crown's failure to ensure that Ngati Kuri were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

The last grievance concerning the provision of lands for landless Europeans while not providing similar measures for Ngai Tahu was identical in general form to that for the North Canterbury purchase, and was not sustained for the same reasons. The tribunal made the same observation that the considerable expense and effort applied to providing lands for settlement in blocks of up to 20,000 acres stood in stark contrast to the 50-100 acre limits in the Lands for Landless Natives legislation passed soon after. The tribunal again noted that while the Crown refused to set aside a single acre under this measure for Ngati Kuri in the Kaikoura block, it was prepared to resume, at considerable cost, land bought from Ngai Tahu for a pittance, to facilitate closer settlement, predominantly by Europeans.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.9 The Arahura Purchase Summary

2.9. The Arahura Purchase Summary

Introduction

Poutini Ngai Tahu had not suffered the indignity of having their lands occupied by Europeans prior to the Crown sending James Mackay Jr to Arahura to negotiate a purchase of the west coast in 1859. Few Europeans had ventured to this part of the South Island by the end of the 1850s. While settlers had not occupied the block as they had in North Canterbury or Kaikoura, the Crown already claimed to have extinguished the rights of several other tribes over the territory before it opened direct negotiations with Poutini Ngai Tahu. The tribunal found that the west coast was part of the Kemp negotiations in 1848, but there was not sufficient evidence to establish that Poutini Ngai Tahu had been present in sufficient numbers to convey their rights to the Crown. At any rate, they had not been paid their share of the purchase price, and no reserves had been allocated for them.

Mackay went to Arahura in 1859, with instructions to set aside no more than 500 acres and to pay no more than œ200 for all Poutini Ngai Tahu rights to the land on the west coast. The offer was rejected with contempt; Werita Tainui dismissed the amount as no more than the price of a horse. Ngai Tahu said they wished to reserve about 200,000 acres of land to protect their rights to pounamu, but they did concede that if the price and reserves were increased, they would be prepared to sell the whole block. Mackay returned to Wellington, persuaded the government to increase the allocation of reserves to 12,000 acres and had the limit on the purchase price raised to œ400.

When Mackay returned to the coast in 1860 he got Ngai Tahu agreement to a deed which transferred to the Crown Ngai Tahu's rights to seven million acres, at almost 100 acres per penny. Ngai Tahu remained anxious to protect their valuable pounamu resources and Mackay agreed to a number of measures which went some way to meeting their concerns, but which remained consistent with his instructions. He set aside 2000 acres along the banks of the Arahura River, guaranteed Ngai Tahu the ownership of the riverbed to its source, and gave the tribe the pre-emptive right to purchase additional land back to Mount Tuhua between the Arahura River and Lake Kaniere. Ngai Tahu had asked for land to be reserved along the banks of the river as far inland as Mount Tuhua, but to do so would have meant reserving about 8000 acres, taking the total reserved well above the limit set by his superiors. At 10 shillings an acre, Ngai Tahu were expected to pay (and in fact later did) 12,000 times the price they had received for the land.

In total 6724 acres were reserved for individual allotment and a further 3500 for educational and religious endowment. The reserves were spread right along the coast in 54 different blocks. Some, because of their location, would become very valuable, the most notable being the Mawhera reserve, on the site of what soon became the town of Greymouth.

Claimants' grievances

The claimants filed 11 grievances concerning this purchase. They complained that the Crown should have appointed a protector to independently advise Ngai Tahu of their Treaty and other rights (no 1). They suggested that the Crown used earlier sale agreements with other tribes to put pressure on Ngai Tahu (no 2). It was alleged that the Crown failed to exclude from the sale lands Ngai Tahu did not wish to sell (no 3), and failed to protect Ngai Tahu's possession and control of pounamu (no 5). They claimed that the Crown imposed a price on land the tribe wished to retain (no 4), and that all of this left Ngai Tahu without sufficient lands to provide an economic base and so to protect their tribal estate (no 6). The claimants also alleged that the Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land (no 8). The remaining grievances were all dealt with elsewhere in the report. Grievances no 7 and no 11 were concerned with reserves now in perpetual lease. The summary of the part of this report which deals with these issues follows this section on the actual purchase. Grievance no 9 concerned the reduction in the size of the reserves once they had been made, and will be dealt with in a subsequent report. The Landless Natives Acts are discussed as they relate to a number of purchases, and are also covered in chapter 20.

Background to the purchase

In 1853 the Crown entered into a new agreement with Ngati Toa rangatira to purchase all their remaining rights in the South Island. Known as the "Te Waipounamu" purchase, this opened the way for a number of other tribes to enter into negotiations for the purchase of their remaining rights in the island. Between 1853 and 1856 deeds were signed with Te Atiawa, Ngati Tama, Ngati Rarua and Rangitane. Many of these tribes purported to sell rights at least some way down the west coast. In April 1856 McLean reported on these purchases noting that there remained "a small remnant of the Ngaitaha [sic], about twenty-five in number, residing at Arahura", whose rights remained unextinguished by the Crown. McLean believed that 300-400 acres and a "small amount of compensation" would be sufficient to deal with their claims (A8:I:303).

In 1857, aware that Ngati Toa had been paid for rights to the coast, Poutini Ngai Tahu sent a letter to McLean offering to sell the whole of the west coast, from West Wanganui to Milford for œ2500. The letter was delivered by James Mackay Jr, a Collingwood settler who had travelled to Mawhera. Interest in the coast was increasing and in 1858 traces of gold were found.

Towards the end of 1858 Mackay was appointed by McLean to purchase Kaikoura and Arahura from Ngai Tahu. The instructions allowed only œ150-œ200 for the west coast purchase, less than a tenth of that requested by Ngai Tahu. It was not until July 1859 that Mackay met with assembled Poutini Ngai Tahu to discuss the purchase. It

soon became clear that Ngai Tahu wished to reserve from the sale an estimated area of 200,000 acres bounded by the Mawhera (Grey), Kotukuwhakaoka (Arnold) and Hokitika Rivers. They were concerned to preserve their control over their prized taonga, pounamu. Mackay offered them œ200 and reserves of 800 acres, 300 acres more than that recomended by McLean. The negotiations broke down: Mackay could go no further without exceeding his instructions and Ngai Tahu refused to accept the Crown's offer. Mackay returned to Nelson, having been told that the Crown would have to pay four or five hundred pounds if it wanted to purchase the whole block.

The purchase

After discussions in Auckland with Governor Browne and McLean's deputy, Mackay received new instructions increasing the maximum payment to œ400 and the reserves to 12,000 acres. Although Ngai Tahu must have been aware that gold had been discovered, the Crown was still anxious to acquire the land with a nominal payment. Mackay arrived at Mawhera in March 1860 and proceeded down the coast as far as Mahitahi, marking off reserves on his return north. Once back at Mawhera the negotiations began, with Ngai Tahu requesting œ300 for the whole of the block, and considerably larger reserves. After several days discussion, agreement was reached on 26 April, but the deed was not signed until 21 May 1860 after the Mawhera and other additional reserves had been finalised.

Mackay managed to get Ngai Tahu's agreement to the purchase for œ300, œ100 less than the maximum he had been allowed. However the most significant element of the agreement was the provision for the 54 reserves specified in the deed. A total of 6724 acres was allocated for individual allotment with an additional 3500 acres set aside as a religious and educational endowment and 2000 acres for later sale to cover surveying costs. Ngati Apa were also allocated 472 acres.

The reserves included 500 acres at Mawhera, at a site already identified by Mackay as the possible location for a town. His attempts to get Ngai Tahu to choose a different location were met with determined resistance. Tuhuru and other tupuna were buried on the hill above and Poutini Ngai Tahu refused to part with their homes.

At Arahura, Mackay had allowed a reserve of 2000 acres, running along both sides of the Arahura River. Although not specified in the deed, Mackay made two additional promises recorded on maps drawn up at the time. On one of these, he noted that the river was to be reserved to Ngai Tahu to its source. On the other that if the Arahura reserve did not extend as far as Mount Tuhua, Ngai Tahu had the pre-emptive right to repurchase the land between the reserve and the mountain at 10 shillings per acre. This was 12,000 times the price paid for the land by the Crown. The map suggests that the reserve was likely to have extended as far as the mountain, although Mackay was apparently aware that for this to be so, the reserve would have needed to have been four times the size.

Ngai Tahu were determined to protect their access to pounamu, and Mackay acknowledged that settling this reserve was a major stumbling block in the negotiations. It would seem that in order to ensure both that the reserves he allocated remained within the limit specified by his superiors in Auckland, and to gain Ngai

Tahu's agreement, Mackay led Ngai Tahu to believe that the Arahura reserve was likely to extend as far as Mount Tuhua.

Findings on grievances

The claimants argued that the Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale (grievance no 2). It is very clear that Ngai Tahu were treated as the last and least important of a number of Maori tribes with claims to the west coast. The œ300 paid Ngai Tahu contrasts with the œ5000 paid Ngati Toa, the œ1000 paid Te Atiawa and the œ600 paid Ngati Tama and Ngati Rarua for land which included parts of the west coast. Professor Ward's report commented that the relative size and power of each tribe appears to have been taken into account when determining the price to be paid. All these purchases took place before Poutini Ngai Tahu were even consulted over a possible sale of what was their land. The Crown made no attempt to determine who owned what before embarking on this series of purchases. During Mackay's 1859 negotiations he did attempt to use the Ngati Toa and other sales to gain Ngai Tahu acceptance of his terms. However, the fact remains that Ngai Tahu refused his offer and he was forced to return home empty-handed to gain new instructions, which included substantially increased reserves and an additional cash payment.

McLean's earlier dealings with other tribes do not appear to have been a strategy deliberately designed to pressure Ngai Tahu into selling, and selling cheaply. Rather he seems to have almost entirely disregarded them.

The tribunal concluded that it was unable to sustain this grievance. When in 1859 Mackay did use threats, these proved of no avail. Poutini Ngai Tahu agreed to sell in 1860, because, while no doubt disappointed that the price was not higher, the Crown had increased both the price and the area of land to be retained as reserves.

The claimants alleged in grievance no 8 that the Crown failed to reveal the value and importance of gold bearing land and that this was a breach of the duty of good faith. Although Poutini Ngai Tahu were aware that gold did exist on the coast by 1860, there is no evidence that they appreciated the potential significance of a major gold find. While the Crown was at this time also unaware whether gold would be found in commercial quantities, Mackay was unlikely to have gone out of his way to explain the implications this may have had on the value of Ngai Tahu's land, something an independent protector would have done, if one had been appointed.

However, the adequacy of the price can be judged by other factors besides its gold yielding possibilities. The price was nominal compared with that paid to other tribes and with the œ2600 earlier paid to Ngai Tahu for Murihiku, involving a similar area. The Crown's historian, Dr Loveridge, concluded that the Crown's final offer "cannot be described as a generous one" (N2:86). Crown officials were well aware of the potential value of the land, and Mackay even managed to avoid paying the full œ400 authorised. The crowning insult was Mackay's promise, having puchased the land at a penny per 100 acres, to sell back to Ngai Tahu land they had strongly urged to be reserved from the sale, at 10 shillings per acre.

The tribunal found this grievance sustained. In offering to pay no more than a nominal price for land which had the potential for a very early substantial rise in value, the tribunal concluded that the Crown failed to act with the degree of good faith required of one Treaty partner to the other.

Land reserved

The claimants filed two grievances concerning land Ngai Tahu wished to have reserved from sale (nos 3 and 4). These concerned the failure of the Crown to allow the full 8000 acres required to extend the Arahura reserve as far as Mount Tuhua, and the 200,000 acres Ngai Tahu wished to reserve from the sale in their first negotiations with Mackay in 1859.

Poutini Ngai Tahu wanted to preserve their rights to pounamu around the Arahura River, by reserving land on both sides of the river up as far as Mount Tuhua. This Mackay refused to do as it would mean an additional 4000 acres above the limits imposed by his instructions. He fobbed off Ngai Tahu with a promise that the riverbed would be reserved to them to its source and with giving them the pre-emptive right to repurchase any shortfall at 10 shillings per acre. The tribunal found that in imposing a maximum of 6000 acres for individual allotment for Ngai Tahu, Governor Browne and his officials were in clear breach of the Treaty. It is abundantly clear that Poutini Ngai Tahu wished to retain te tino rangatiratanga over the land on either side of the Arahura River, from the sea to Mount Tuhua and possibly to its source at Lake Browning. As it related to the failure to provide a reserve totalling at least 8000 acres, the claimants' grievance no 3 was sustained.

Ngai Tahu's request for 200,000 acres to be reserved from the sale is somewhat different. In 1859, when Mackay made his first official visit to Arahura, Ngai Tahu were adamant that given the inadequacy of Mackay's offer of œ200 and 800 acres of reserves, they were not willing to part with this block of land. Chief among their concerns was the protection of their rights to pounamu around the Arahura River. Mackay gave assurances that Ngai Tahu would continue to be able to take pounamu, but given the very narrow limits of his instructions he was unable to agree to the Ngai Tahu proposal. However, apart from their concerns about pounamu, Ngai Tahu were not opposed to the sale of the block, they simply rejected the price offered by the Crown. On leaving the coast after the negotiations had broken down, Mackay was adamant that it was all a question of price. This view is supported by the comments made on his return in 1860:

I found the Natives still desirous as on the former occasion to retain all the land intervening the Rivers Mawhera and Kotukuwhakaho, and the River Hokitika..., UNLESS they received œ300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven) ... (A8:II:40) (emphasis added)

As a consequence the tribunal was not satisfied that once offered œ300 and larger reserves, Ngai Tahu remained unwilling to sell the block. Nor was the tribunal satisfied that the Crown imposed a price on the 200,000 acre block which Ngai Tahu wanted to exclude from the sale. For these reasons grievances nos 3 and 4 were not sustained by the tribunal as they applied to this 200,000 acre block.

Despite the tribunal rejecting these aspects of the claimants' grievances, there remained the question of whether the Crown kept enough land to preserve to Ngai Tahu their economic base (grievance no 6). Compared with other Ngai Tahu purchases, it may seem that Poutini Ngai Tahu were left considerably better off than their east coast relatives. The approximately 66 acres per head was much more than the 10 acres per head Mantell provided in the Kemp block, although the land was of poorer agricultural potential. There were also many more reserves and they were within the locations chosen by Ngai Tahu. Some of the land was to prove very valuable, most notably the 500 acre Mawhera reserve on which the town of Greymouth was soon to arise. Despite all this, the contrast between the 7.5 million acres purchased and the 12,224 acres of reserves remains. Dr Loveridge, the Crown's historian, concluded that while the lands reserved may have been sufficient for Ngai Tahu's needs at the time, they were the "bare minimum which the owners could be induced to accept" and that "scant consideration" had been given to their future needs.

The tribunal was satisfied, particularly having regard to the nature of the land and climatic conditions, that the reserves were quite inadequate to provide a sustainable economic base for the future. The tribunal was also concerned at the scant consideration given to the tribe's needs to maintain access to their mahinga kai.

The tribunal found this grievance to be sustained in that the Crown failed to ensure that Poutini Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai and that this consituted a breach of article 2 of the Treaty. This required that the Crown ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

Pounamu

Ngai Tahu's grievance no 5, that the Crown failed to protect their right to retain possession and control of all pounamu, was considered in three parts; the first in relation to the Arahura River, the second in terms of Ngai Tahu's rights to pounamu elsewhere in the Arahura purchase block and thirdly, elsewhere in the South Island.

Pounamu in and adjacent to the Arahura River and its tributaries

Retaining access to the pounamu of the Arahura River was one of Ngai Tahu's prime concerns throughout the negotiations. It would seem that Mackay was prevented from reserving all the land Ngai Tahu wanted reserved by limits placed on him by Governor Browne. In order to go some way to meet Ngai Tahu's demands Mackay promised them title to the river itself and allowed them to purchase, at a considerable profit to the Crown, the area between the land reserved and Mount Tuhua. As it happened, 1050 acres were bought by Werita Tainui and others in 1873 under this provision. The remaining land was vested in the Hokitika Harbour Board in 1876 and most is now owned by Tasman Forestry Limited. The riverbed was vested in the Mawhera Incorporation in 1976. However it would appear that any pounamu involved may still remain in Crown ownership.

Crown counsel accepted that in reserving the riverbed for Ngai Tahu, it was intended to include not just the river, but its tributaries together with their banks. It was made

clear to the tribunal that accessible pounamu was found largely in the land adjacent to the river, rather than in the bed itself, where pounamu was more difficult to locate and to extract. Pounamu was and remains a precious taonga of Ngai Tahu. The Crown clearly acted in breach of its Treaty obligations in failing to meet the wishes of Ngai Tahu to retain ownership of the pounamu in the area adjacent to the Arahura and its tributaries. Although conscious of the fact that much of the adjacent land is no longer in Crown hands, the tribunal considered the Crown should accept responsibility and make every effort to redeem its long standing Treaty breach by negotiating for the repurchase of appropriate blocks of land adjacent to the Arahura and its tributaries, and if successful, settling such land on Ngai Tahu.

Pounamu elsewhere in the Arahura purchase block

While the Crown conceded that Ngai Tahu's rights to pounamu had not been extinguished in the Arahura River, its tributaries and their banks, it was argued that all other rights to pounamu elsewhere in the block had been given up by the terms of the 1860 Arahura purchase. The tribunal carefully examined the Maori text of the Arahura deed of purchase as signed by Poutini Ngai Tahu rangatira (appendix 2.9). Neither the Maori nor English version recognises the value attached by Poutini Ngai Tahu to pounamu. The Maori text refers to "kowhatu", or stones, translated in the English version as minerals. But there is no mention of pounamu as such in the deed. The tribunal was satisfied that there would have been a clear demarcation in Ngai Tahu thinking between ordinary stones and greenstone, so great were the spiritual and cultural values attached to its possession. Was not the island inhabited by Ngai Tahu known as Te Wai Pounamu? Since pounamu was not mentioned by name in the deed and since Ngai Tahu were so clearly concerned to retain it, there is every reason to believe that Ngai Tahu did not realise they might be thought to be assigning it to the Crown. The tribunal was satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey it to the Crown.

This was another instance where the presence of a protector to advise Ngai Tahu would have ensured that they were not put in the position where they might inadvertently part with their so greatly treasured possession. The tribunal found that Ngai Tahu did not sell or assign to the Crown their interest in pounamu within the Arahura purchase block. Had the Crown appointed a protector as it should have done, the tribunal considered this would have been discussed with the Crown's purchasing agent, Mackay, and specific provisions would have been made to make clear that Ngai Tahu retained ownership of all pounamu.

Pounamu elsewhere in the South Island

Mr Temm sought a recommendation that all pounamu in the South Island should be the property of Ngai Tahu. We have interpreted this as all those parts of the South Island formerly owned and occupied by Ngai Tahu. The tribunal has examined the Murihiku deed and all other deeds of sale between Ngai Tahu and the Crown. In none of these does pounamu appear in the Maori text signed by Ngai Tahu, nor in the respective English translations. Given the high intrinsic value of this taonga to all Ngai Tahu, the tribunal considered, for the reasons already discussed in the case of Poutini Ngai Tahu, that specific mention of pounamu in each deed would have been

required to signify Ngai Tahu's intention to part with their pounamu. The tribunal found that in none of the deeds of sale did Ngai Tahu agree to part with any pounamu.

Conclusions on pounamu

The tribunal considered that the unique nature of pounamu and its deep spiritual significance in Maori life and culture is such that every effort should now be made to secure as much as possible to Ngai Tahu ownership and control.

The tribunal's understanding was that the greater part of the resource is on Crown owned land. This should present no problem. We believe all such pounamu and any other owned by the Crown should be returned by the Crown to Ngai Tahu. Any such action would of course have to be on the basis that current mining licences relating to pounamu should run their normal course, to ensure that those licence holders are not adversely affected. The same protection should be afforded any licensees of pounamu in the state forests which have been excepted from the provisions of the Mining Act 1971. The aim should be for the Crown as expeditiously as possible to return to Ngai Tahu ownership and control over all such pounamu within its traditional boundaries.

Some pounamu, so the tribunal was informed, is the property of proprietors of privately owned land. The tribunal considered that it would be appropriate for an order in council to be made in respect of such pounamu pursuant to section 7 of the Mining Act 1971, and an appropriate amendment be made to ensure that mining privileges should be granted only to Ngai Tahu under that section.

The tribunal found that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu:

- in and adjacent to the Arahura River and its tributaries;

- in the remainder of the Arahura purchase block; and

- in the Murihiku and any other Ngai Tahu blocks purchased by the Crown where pounamu was to be found.

Finding regarding breach of Treaty principles

The tribunal found that although Ngai Tahu wished and intended to retain possession and control of all pounamu both throughout the remainder of the Arahura block and in all other blocks sold to the Crown, the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.

Recommendations in respect of pounamu

The tribunal made the following recommendations:

1 That to remove doubts as to the ownership of the pounamu in or on the land described in section 27(6) of the Maori Purposes Act 1976 (13.5.20) the Crown take

appropriate legislative action to vest all such pounamu in the Mawhera Incorporation or such other body or bodies as may be nominated by Ngai Tahu.

2 That section 27 of the Maori Purposes Act 1976 be amended so as to vest the beds of all tributaries of the Arahura River in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

3 (a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired and any such land already owned by the Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 That the Crown transfer ownership and control (including the right to mine) to Ngai Tahu or such other body as may be nominated by Ngai Tahu of:

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfer to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

5 (a) That the Crown pursuant to section 7 of the Mining Act 1971 by order in council declare in respect of all pounamu which is the property of proprietors of privately owned land on or under the land in the districts described in the preceding paragraphs 4(a) and (b), that pounamu on or under such land shall be prospected for or mined only pursuant to the said section 7.

(b) An appropriate amendment should be made to the Mining Act that no prospecting, exploration, mining or other licence relating to pounamu shall be granted under that or any other Act to any person or body other than Ngai Tahu or such other body or person as may be nominated by Ngai Tahu.

Grievance no 1: the need for a protector

The tribunal considered that the failure to appoint a protector was in breach of the Treaty principle which required the Crown actively to protect Maori Treaty rights. Ngai Tahu were seriously disadvantaged in their negotiations with the Crown's agent, James Mackay. In the tribunal's view a protector would surely have been able to

ensure that they retained the right of ownership and control of all pounamu. A protector would surely have encouraged them to demand substantially greater resources and emphasised that they were entitled to retain any land they wished to reserve. As a result of the failure of the Crown to ensure that Ngai Tahu were independently advised of their Treaty rights, they were denied the right to retain certain lands they wished to retain and were left with insufficient land for their present and future needs.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.10 The Perpetual Leases of Ngai Tahu Reserves Summary

2.10. The Perpetual Leases of Ngai Tahu Reserves Summary

Introduction

This grievance raised an issue that is well known to government. It concerns the action of the Crown in placing Maori reserved lands under perpetual lease, the terms of which provided for 21-yearly rent reviews, with rent later fixed at 4 per cent of the unimproved value of urban land, and 5 per cent in the case of rural land. In 1973 a commission of inquiry chaired by the late Judge Bartholomew Sheehan inquired into these leases and reported its findings in a comprehensive report published early in 1975. During the hearing of this grievance at Greymouth in September 1988 we were informed that an interdepartmental committee had been set up to complete proposals for legislation which would remedy the grievances, to be introduced in October of the same year. Legislation was apparently delayed to allow consultation with the lessees and Maori owners. On 18 January 1990 the Minister of Maori Affairs, by press statement, announced that legislation would be introduced in 1990. It is still awaited.

During the hearing several Maori incorporations and trusts from other parts of New Zealand such as Taranaki, Palmerston North, Wellington and Nelson, appeared to support the claimants. These Maori authorities administered Maori freehold land also subject to perpetual leases and have filed claims with the tribunal. They seek legislative changes similar to those asked for by Ngai Tahu. Because there are factual distinctions in the way the respective reserves were constituted, the tribunal determined it would have to hear each claim separately.

Two of the Arahura grievances applied to the issue of land in perpetual lease. In grievance no 7, the claimants alleged that the Crown imposed perpetual lease by legislation without the consent of the owners and failed to protect them from economic loss. Grievance no 11 claimed that the Crown had failed to implement the recommendations of the Commission of Inquiry into Maori Reserved Land, 1975.

Ngai Tahu also made a number of allegations concerning the failure of the Crown's appointed trustee to administer the reserved lands properly. These were directed to such matters as failing to consult with owners, failing to act as a prudent trustee, failing to take action to amalgamate land titles and develop lands, failing to prevent land being taken for public works, These complaints were almost all directed at the Maori Trustee.

The purchase

On 21 May 1860 Ngai Tahu sold seven million acres on the west coast to the Crown for œ300. Of the 10,224 acres reserved from the sale, 6724 acres were reserved for individual allotments (in the deed classified as schedule A lands) and 3500 acres were reserved for religious, social and moral purposes (in the deed classified as schedule B lands). The schedule A lands were intended for occupation by the respective owners.

There were 39 blocks listed in this category, the largest being the Arahura no 30 block situated on the north and south banks of the Arahura River. As chapter 13 on the Arahura purchase relates, this reserve was made as a strip of land up each side of the river to protect rights to pounamu. Another schedule A block comprising 500 acres and listed as reserve no 31 was reserved on the south bank of the Mawhera or Grey River. This is the present day site of Greymouth.

The schedule B lands comprised 11 blocks. Unlike the schedule A lands which were clearly intended to be occupied and used by the owners, the schedule B lands, like the North Island and South Island tenths, were seen as being leased to provide income towards the general social, religious and moral benefit of the tribe. The Native Reserves Act 1856 created a system for the efficient management of lands set aside for the benefit of Maori. It provided for governor-appointed commissioners with extensive powers to deal with the reserves. These included powers to set aside lands for schools, hospitals and charitable purposes for Maori, to lease up to 21 years and even to sell land or lease beyond 21 years with the governor's consent. The consent of the owners was needed to land being placed under the Act. All of the schedule B lands were brought under the Act as were the North and South Island tenths. It was never intended by the New Zealand Company that the Maori beneficial owners would take possession of the tenths but that trustees would be appointed to hold the land and apply the proceeds for the benefit of the owners. Regarding the Arahura lands however, seven of the schedule A blocks were brought under the 1856 Act-a total of 3498 acres out of the 6724 set aside for individual allotment. This was the first step towards the separation of the owners from their right of use. It was initially beneficial to them but resulted in their perpetual exclusion from use of their own land. How did it happen? We have used the Mawhera 31 block as a pilot study.

Events following the purchase

When James Mackay purchased the Arahura lands he was aware that the 500 acre reserve sought by Poutini Ngai Tahu would be needed as a town site, although interestingly he also knew of the flooding potential of that area. He was right about the prospects. In 1865 a new town, Greymouth, had sprung up due to the discovery of gold in the Mawhera River. Merchants were negotiating leases with Maori owners. The native minister saw problems arising from these arrangements affecting the orderly development of the town with roading and other services required. He sent Alexander Mackay, then resident magistrate at Nelson to investigate. Mackay's visit resulted in the Mawhera reserve being placed under the 1856 Act on 3 February 1866. He saw the need of both tenant and Maori owner for a better system. Mackay managed the lands conscientiously to the satisfaction of both the owners and tenants up until his departure in 1882.

During the 1870s and 1880s the government was subjected to intensive lobbying. Many leaseholders wished to buy Maori out, or for the government to do so and resell

to them at fair value. The leaseholders kept up pressure, claiming a need to replace wooden buildings with brick and stone. In 1872 Commissioner Charles Heaphy was sent to inquire and reported that the owners were strongly opposed to sale. Heaphy favoured freeholding in certain situations that did not expose the Maori owners to pecuniary disadvantage. Parliament rejected sale unless all the owners agreed. Alexander Mackay was strongly opposed to sale but was in favour of leases being extended to a maximum term of 60 years to allow tenants to erect permanent buildings. This was legislated for in 1873. Throughout the 1870s pressure was maintained by the leaseholders on the government to acquire the freehold, but Mackay and the owners opposed sale. In 1882 a significant change occurred in administration. Management of the reserves was vested in the Public Trustee, who was empowered to lease for 30 years for agricultural or mining purposes and 63 years, in 21-year terms, for building purposes.

Legislation affecting the Mawhera reserves

The South Island Native Reserves Act 1883 was a significant statute affecting the Mawhera reserves. In the first place, section 3 authorised the governor to grant the 500-acre Mawhera reserve to 26 Maori, whose names and the acreage each took were set out in a schedule to the Act. At that date, 8 September 1883, the relative interests and those to whom title was to pass were named persons. In the second place, the Maori owners agreed to a system of compensation for improvements being introduced into the leases. Although the owners were prepared to grant leases up to 60 years the Act restricted Mawhera leases to a 21-year term. This short term coupled with dissatisfaction over the form of the compensation provisions led once again to tenant pressures and resulted in the 1885 commission chaired by Henry Kenrick. The commission found that the tenants, relying upon assurances given by Commissioner Mackay, were entitled to renewal of their leases. The commission noted that the Maori owners were unanimously and strongly opposed to sale but were agreeable to lease up to 63 years. In a letter sent by seven prominent Maori to the native minister in October 1885, these owners, although expressing opposition to the sale of their lands, were prepared to give a renewed 63-year term, making a total leasing period of 126 years.

Following the Kenrick commission, a special commissioner was appointed to resolve disputes between lessees and sublessees. The commissioner, Henry Bunny, interviewed 80 lessees. He recommended that government acquire the freehold even though the Maori owners had expressed "the strongest objection".

There is no doubt that the Kenrick commission report and the subsequent Bunny report led to the legislation which gave the lessees not the right to freehold but perhaps the closest equivalent in the form of perpetual rights to lease.

The Westland and Nelson Native Reserves Act 1887 repealed the 1883 Act and in place of the old 30 and 63-year terms, substituted a standard 21-year term. Section 14 of this Act provided that the holder of the lease was to "have the right of renewal for a like term upon the same conditions and covenants (including the right of renewal)". Thus not only did this 1887 Act create the perpetual lease but it also introduced a provision which imposed the same conditions and covenants in all future renewals. This latter requirement has also penalised the lessors in preventing the insertion of

modern-day conditions of lease. It is this statutory provision that is the main subject of the claimants' grievances.

Following the report of a commission of inquiry in 1913, it was decided to transfer administration of Maori reserved lands from the Public Trust Office to a native reserves trustee. A Bill was introduced in 1914 but war intervened. In 1920 the Native Trustee Act was passed creating the office of Native Trustee as a corporation sole.

The next important statute was the Maori Reserved Land Act 1955. This Act effected a codification of 43 different statutes involving Maori reserved lands. It gave power to the Maori Trustee to convert all term leases into leases with a perpetual right of renewal. It imposed also a new statutory, prescribed rental for reserved lands. Section 34 fixed rentals at 4 per cent of unimproved value for urban land, and 5 per cent for rural land. These rates applied for the whole 21-year term.

A further legislative incursion into the reserved lands took place under sections 155 and 156 of this 1967 statute. The lessees had finally won out. Parliament, over the objections of Maori owners who had fought for 100 years to retain their freehold, allowed lessees the right to purchase the freehold from the Maori Trustee. This concession was not to last. It was strongly criticised in the report of the 1975 commission of inquiry which recommended repeal. The right to freehold was removed by section 9A and 9B of the Maori Purposes Act 1975 but between 1955 and 1975 a total of nearly 18,000 acres of reserved land in both islands had been sold by the Maori Trustee, including 35 sections at Greymouth.

Report of the Commission of Inquiry into Maori Reserved Land

The commission was constituted in 1973 and reported in 1975. Included in its seven terms of reference was the requirement to report whether the rights of renewal, frequency of rental review and methods of rent assessment were satisfactory. It recommended that the terms of the leases be changed to provide for five-yearly reviews of rent instead of 21; indexation of rental; and rents being fixed at a basic rent of 1 per cent above government stock instead of the respective 4 per cent (urban) and 5 per cent (rural) of unimproved value. None of these recommendations have been implemented. The commission considered it could not recommend breaking the perpetual term which it acknowledged "as having been arbitrarily imposed by legislation without the consent of the beneficial owners". Its reason against breaking the perpetual term was "such a change would be indefensible and would certainly involve the payment of very substantial compensation".

The commission however stated that a perpetual term was not satisfactory and any new leases should be for a limited term. In its report the commission commented that the United Kingdom had abolished perpetual leases in the Law of Property Act 1922.

One of the recommendations of the 1975 commission report advocated that administration of the Greymouth lessees be handed back from the Maori Trustee to the owners. This was done by the Mawhera Incorporation Order 1976. The incorporation in 1988 administered just over 900 leases of its reserved land.

Effect on Ngai Tahu

Several witnesses expressed strong feelings about the loss of use of their land and its effect on both capital and income resources of Poutini Ngai Tahu. Mr Tipene O'Regan, then chairperson of the Mawhera Incorporation, considered the unilateral imposition of perpetual leasehold, combined with Crown trusteeship, worse in some respects than direct confiscation, describing it as "confiscation on the cheap and by stealth".

Expert valuation evidence presented by the claimants identified 1960 as the start date from which the low rentals of 4 and 5 per cent resulted in monetary disadvantage to Ngai Tahu. A valuer calculated that the difference between the prescribed rents and rents fixed at a proper market rate would be a loss of $750,000 over a term of 21 years without any review and a loss of $2,250,000 if reviewed at 7 yearly intervals.

The Crown's response

Although the Crown acknowledged that for the past 15 years legislation had worked unfairly against the Maori owners, Crown counsel contended it would be wrong for the tribunal to conclude there had been any breach of Treaty principles. Crown counsel said the Crown was presently trying to improve the position. He argued that Ngai Tahu had favoured permanency of term for their leases in 1887 and did not object to the legislation. Further, that the objection to perpetual right of renewal was a modern development which arose from inflation. Comprehensive research evidence was presented in support of the Crown's case.

The lessees' response

Although several lessees appeared or made submissions, the principal submission was presented by the West Coast (South Island) Maori Leaseholders Association (Inc) represented by counsel, Dr Willie Young. The association raised two legal arguments challenging the claimants' right to seek protection under the Treaty. The other principal arguments were:

- that the Maori owners were consulted and consented to the leasing arrangements and in particular to the 1887 Act;

- that the Maori owners favoured commercial dealing;

- that the Maori owners were not prejudiced by the 1955 legislation; and

- that inflation was the cause of the problem.

The association called valuation evidence to show that up until 1955 Maori owners had not been financially disadvantaged and the rates fixed in 1955 were .25 per cent higher than actual rents then being received. Counsel concluded that it would be manifestly unjust to expect the tenants to fund any alteration in lease conditions and further urged the seriousness of interfering with land transfer titles. A valuer estimated that the lessees stood to lose 4.5 million dollars in the value of their land if the claimants succeeded.

Response of the Maori Trustee

The Maori Trustee, represented by counsel, denied the allegations of breach of trusteeship and mismanagement and said the claimants' allegations were not properly within the scope of a Treaty claim. Evidence was called to rebut the allegations. The deputy Trustee, Mr Richard Wickens, gave reasons why the criticism levelled at the Maori Trustee should have been directed to government.

Counsel informed the tribunal that the Maori owners were not alone in their concern, the Maori Trustee having expressed to government for some time the view that present legislation was iniquitous and should be changed.

The tribunal's examination of the evidence and findings

The tribunal examined three main questions arising from the evidence:

- Did the Maori owners consent to perpetual leases?

- Should government have implemented the recommendation of the 1975 commission which advocated change to the form of the leases?

- Were the Crown-appointed trustees negligent in the management of the reserved lands?

In the course of looking at the first matter the tribunal traversed the whole history of the Greymouth leases and in particular the Mawhera no 31 block. This inquiry included an examination of:

- all the statutes from 1856 to 1975;

- numerous reports by commissioners and government officials between 1866 and 1909;

- parliamentary debate and correspondence involving ministers and officers of the Crown; and

- Maori owners' attitudes and statements from 1866 to 1975.

It was evident to the tribunal that throughout the history of the reserved land Maori owners had strongly opposed its sale. They were prepared to lease their land and even to grant leases for two periods of 63 years each. Despite comprehensive argument addressed by counsel for the Crown and lessees respectively, the tribunal found that the Maori owners never gave their consent to perpetual leases in 1883 or 1887. The lessees kept constant pressure on government to freehold the land and sell it to the lessees. The tribunal considered that the 1885 Kenrick commission and the 1886 Bunny report had much to do with the insertion of perpetual lease provisions in the 1887 Act. The government was not prepared to accept Commissioner Bunny's recommendation that the freehold be purchased, but in order to appease tenants the alternative of perpetual leases was adopted.

The tribunal was satisfied that the Maori owners never consented to this provision either directly or indirectly through the Maori Members of Parliament or in any other

way. In a few strokes of a pen, the legislature took away from the owners a valuable property right and gave it to the tenants. It was an action that deprived the owners of use and occupation as well as their property right. The Mawhera lands were reserved for individual occupation. The owners were known. They were entitled to have informed advice on the meaning and effect of such an important change to their title. They did not get it. The tribunal considered it rather ironic that a little over 100 years later, when Maori are seeking to reverse the position, the present day tenants urged the tribunal to respect their rights and their guaranteed land transfer title. The lessees indeed do have a valuable right and are entitled to be heard and be compensated for any loss.

As to the second question, the tribunal found that the Crown has failed to move in respect of recommendations contained in the 1975 commission report and should have done so. The tribunal commented that if government had acted in respect of rent review and rental, following the commission's recommendations, there would possibly have been no grievance to address.

The tribunal considered that the action of the Crown in the 1955 Act, when prescribed rents of 4 per cent (urban) and 5 per cent (rural) were fixed, may not have been disadvantageous to the Maori owners at that time but certainly became so. The rental rates should have been kept under review.

The 1975 commission found the method of prescribing a fixed rate was unsatisfactory and the rents, particularly 4 per cent for urban land, to be inadequate and unrealistically low. Despite some assurances given by the Crown that changes were intended there had been no change at the time of this report. Nor has any change been made to the review period of 21 years despite the commission's recommendation of 5 yearly review.

As to the third question concerning allegations against the Maori Trustee, the tribunal found that primarily the action or omissions of the Crown have been responsible for the general complaints laid at the door of the statutory managers. From 1856 until 1975 the Crown persevered with a form of trust management in which the Crown made the rules and supervised the process.

The system adopted alienated Maori from any real consultation or knowledge about their interests in the reserved lands. Management has now been handed back to the owners. The tribunal made no specific findings against the statutory trustee:

(a) by reason of the generality of the complaints;

(b) because alternative remedies under trustee law are and were available to the owners; and

(c) the Crown, rather than the statutory trustee, was responsible for at least some of the failings set out in the general complaints.

It should also be mentioned that the tribunal rejected Dr Young's legal argument and held that the tribunal had jurisdiction under the Act to determine whether any act or omission of the Crown infringed any Treaty principle.

Maori Affairs Amendment Act 1967

The tribunal also reviewed the action of the Crown in allowing lessees to purchase the freehold under sections 155 and 156 of the 1967 amendment which inserted new clauses 9A and 9B into the Maori Reserved Land Act 1955. This matter was not the subject of any grievance by the claimants possibly due to the subsequent repeal of the provisions in 1975.

However, the move by the Crown to allow sale of the reserved land was a unilateral act of the Crown, and the final step in allowing the Maori owners to be dispossessed of their land. This was not Crown land or land owned by a public corporation. It was private land. The owners have been separated from administration of their land since 1866. In 1887 they had 21-year perpetually renewable leases imposed on them without their proper consultation or consent. They had fixed rentals of 4 per cent and 5 per cent imposed on them in 1955. In 1967 they stood to lose their freehold. That they did not lose all their reserved lands was possibly due only to the fact that the tenants had perpetual leases at low rentals and did not quickly move to freehold. Nevertheless land was sold. The tribunal viewed this legislation as a breach of the Treaty.

Findings as to breach of Treaty principles

The tribunal found the following actions and omissions to have breached article 2 of the Treaty.

1 The insertion of the perpetual right of renewal in the leases of Maori Reserved Lands by section 14 of the Westland and Nelson Native Reserved Land Act 1887.

2 The insertion of sections 9A and 9B into the Maori Reserved Land Act 1955 by sections 155 and 156 of the Maori Affairs Amendment Act 1967.

3 The failure of the Crown to implement those recommendations of the 1975 commission of inquiry report into Maori reserved land relating to renewal of term and review of rent.

The tribunal found that the claimants had made out both their grievances (nos 7 and 11).

Remedies recommended by the tribunal

Although the question of remedies generally will be a matter for negotiations between the claimants and Crown, the tribunal in this matter considered that immediate action is necessary in respect of the lease provisions. This is a long outstanding matter and the continuing injustice must be ended and righted. There has been too long a delay. The tribunal has accepted that the lessees are justly entitled also to be compensated by the Crown for such loss they might suffer. This would be a matter between the Crown and those lessees.

For reasons set out in the report the tribunal did not address the question of compensation to the claimants for the loss suffered and deferred that question. It did

however consider the claimants' request in respect of amendment to the leases and accepted their proposal as reasonable. Pursuant to section 6(3) of the Treaty of Waitangi Act 1975 the tribunal made the following recommendations.

1 That the Maori Reserved Land Act 1955 be amended so that the leases prescribed in that Act will:

(a) over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act;

(b) immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act; and

(c) immediately change from the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

2 That the lessees be reimbursed by the Crown for any provable loss suffered by them as a result of the legislative changes recommended above.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.11 The Rakiura Purchase Summary

2.11. The Rakiura Purchase Summary

Introduction

Rakiura (Stewart Island) was the last Ngai Tahu land mass to be purchased by the Crown. The purchase was completed by Henry Tacy Clarke in 1864 for a total of œ6000. A third of the purchase price was paid in cash, a third allocated for a number of specific individuals, and the remaining œ2000 was to be invested for educational and other purposes. Clarke was uncomfortable in combining his commission to purchase the land with his instructions to look after the interests of the Ngai Tahu vendors. Nonetheless, unlike earlier purchase officers, he appears to have taken particular care to protect the interests of Ngai Tahu, within the limits of his instructions. However, the purchase agreement was a complicated one, and the considerable delay in implementing the deed left Ngai Tahu seriously disadvantaged.

The Titi Islands are scattered along the coast of Rakiura. They were a valued food resource, not just for Rakiura Ngai Tahu but for the whole of the iwi. The agreement with Clarke ensured that Ngai Tahu retained access to the most favoured Titi Islands, however the remainder went to the Crown. Whenua Hou (Codfish Island) had been a place of significant Ngai Tahu settlement prior to the purchase, but was not specifically mentioned in the deed as being excluded from the purchase, and so also went to the Crown.

The claimants filed three grievances concerning Rakiura. First, they alleged that the Crown failed to appoint a protector to advise them on their Treaty and other rights at the time of the sale (no 1). Secondly they complained that Ngai Tahu have been deprived of the full administration of the Titi Islands (no 2). They claimed that according to their oral tradition, Whenua Hou had been excluded from the purchase (no 3). In addition the tribunal was asked to examine the situation regarding two reserves, Toitoi and Port Adventure, which had been allocated for "landless natives" soon after the turn of the century, but had never been formally vested in Ngai Tahu. The tribunal will be reporting on this aspect of the claim in its forthcoming report on ancillary claims.

Events prior to the purchase

There was no evidence to indicate Ngai Tahu were reluctant to sell Rakiura. Although many Europeans were squatting on the island, others had genuine claims to land on the basis of purchases from Ngai Tahu. In August 1860 Topi Patuki, the principal representative of Rakiura Ngai Tahu, offered to sell to the Crown a portion of the

island westward of the 168th degree of longitude. It was suggested that by 1860 the influx of Europeans had become too much for Ngai Tahu to cope with.

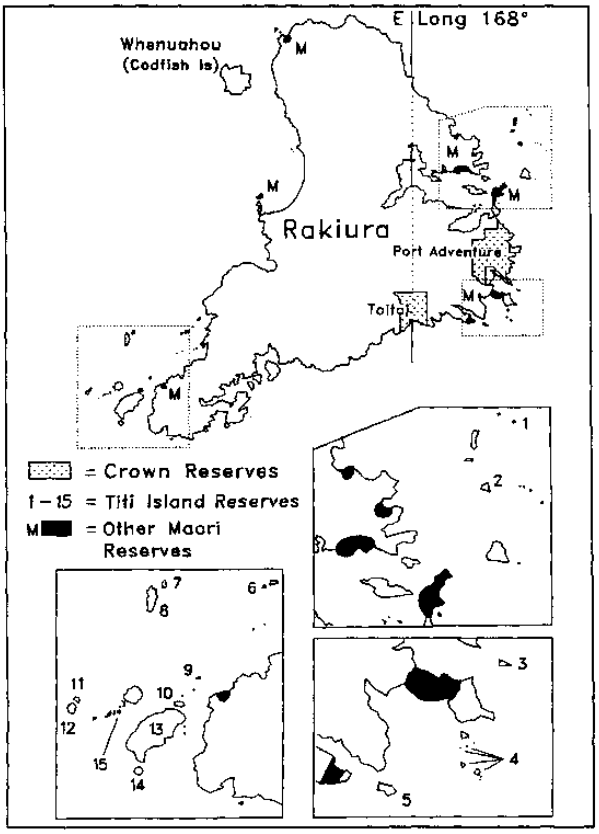

Figure 2.11: Rakiura showing Whenua Hou, the Titi Islands, Maori reserves and the Toitoi and Port Adventure blocks.

Nor was the Crown reluctant to buy Rakiura. The ownership of such a considerable land mass and valuable timber resource was an attractive prospect to colonial administrators. However, the increasing European encroachment on the island and all its attendant land title problems provided the biggest incentive to purchase the island and thus bring it under government control.

In November 1863, Patuki informed the government that he had entered into an agreement to sell a substantial portion of Rakiura privately. By this stage the government had already taken positive steps to arrange the sale. In September Theophilus Heale, chief surveyor of Southland, had been instructed to negotiate the purchase. He was to compile a list of those with interests in Rakiura and the extent of those interests. Heale's instructions show that the government had decided to attempt to purchase the whole of Stewart Island. They did not explicitly mention the Titi Islands. There was also a clear intention to provide an endowment for the vendors and not simply make a one-off payment. The following month, the Stewarts Island Annexation Act 1863 brought Rakiura under the wing of the Southland provincial government. This legislation did not affect Maori title to the area.

Heale was replaced in his commission by Henry Tacy Clarke in February 1864. Clarke was instructed to follow the guidelines given to Heale, as well as to adjudicate any land claims between Europeans and Ngai Tahu still outstanding. No specifics about the making of reserves were given, nor were the Titi Islands mentioned.

The purchase

Clarke arrived in Invercargill in March of 1864. He spent the next two months organising the purchase: informing Otakou Maori of the imminent agreement, arranging a payment schedule, ensuring funds were available and investigating direct sales of land which had taken place to Europeans.

In May, Rakiura Maori returned from their titi expeditions and all interested parties gathered at Aparima. The only account of the negotiations, which began on 23 May and extended over the next few days, is contained in Clarke's belated report to the colonial secretary on 24 October. Clarke satisfied himself that dissension arising over rights to the island between Ngati Mamoe and Ngai Tahu had indeed been resolved. He was resolute in his initial offer of œ6000 although Ngai Tahu negotiated for a much higher sum. Clarke proposed that œ2000 be paid to the tribe at the signing of the deed, œ2000 be held by the government and the interest paid to certain named people and their descendants, and the remaining œ2000 be invested in land in Murihiku as an education endowment for Rakiura Maori. Ngai Tahu eventually accepted the terms although they requested that the endowment monies be distributed at the signing of the deed. Ngai Tahu often repeated this request in the years following the purchase, to no avail.

The deed was signed at Awarua on 29 May 1864 and transferred to the Crown all of Rakiura and the adjacent islands. Nine reserves were specified, amounting to about 935 acres plus an unspecified amount on the Neck for those of mixed descent. Clarke appended to the deed a list of 28 "half-castes" living there but acknowledged that the list was probably incomplete. Twenty-one named Titi Islands were also reserved for Ngai Tahu/Ngati Mamoe but there was no indication of how this list was compiled. Most significant, however, was the exclusion of Whenua Hou (Codfish Island) and some of the smaller Titi Islands from the list of those reserved for the vendors.

Events after the purchase: the educational endowment

In 1870 suitable land was finally bought as an educational endowment and after some delay leased on a 21« year term. Ngai Tahu were already complaining that they were receiving little benefit from the fund. After further delays over surveying, two trustees were appointed to administer the rents received from the endowment. This income only partially met the educational needs in the area.

Today the endowment monies are still used for educational purposes and administered by seven local advisory trustees. The land is vested in the Maori Trustee and leased on perpetually renewable 21-year terms, subject to the Maori Reserved Land Act 1955 and the Maori Trustee Act 1953. The money is used to assist Rakiura Ngai Tahu in their tertiary education. No representations were made to the tribunal regarding either the question of ownership or the terms of lease of the endowment lands. The tribunal pointed out various provisions of the Maori Reserved Lands Act 1955 should Rakiura Maori wish to change the ownership of the endowment. The tribunal also gave its endorsement should the advisory trustees wish to support the revision of the perpetually renewable lease under the umbrella of the Mawhera Incorporation.

The œ2000 investment

The interest on this endowment was duly paid out to those specified in the deed, and on their deaths, to their heirs. In 1932 the interest rate was reduced and by 1954 six of the fifteen beneficiaries were receiving only nominal amounts. To avoid further fragmentation, œ3200 was distributed to the beneficiaries under section 7 of the Maori Purposes Act 1954.

Reserves

By 1868 the reserves stipulated in the deed had not been surveyed nor had many of the land claims been investigated. Mackay reported that the land reserved at the Neck was insufficient and recommended that more land be obtained. After an 1869 petition, Mackay was appointed to examine the situation and arrange the surveys. He compiled a list of 94 claimants recognised as landless "half-castes". Under the Stewarts Island Grants Act 1873, Crown grants were given to some half-castes born on the island and a number of the old land claims relating to pre-1840 purchases were resolved. A further 1676 acres from the Foveaux Strait area were set aside for others equally entitled to land. In 1874 the surveys of land mentioned in the deed were completed. However it was some years before provision was made for those half-castes who were not provided for at the Neck.

Finding on the need for a protector

There was no doubt that the Crown should have provided Ngai Tahu with a protector, an independent advisor to explain their Treaty and other rights to them (no 1). Clarke himself was aware of the ambiguity of his position: acting as a Crown agent on the one hand and keeping the interests of Ngai Tahu in mind on the other. The evidence however suggests that Clarke did his utmost to ensure that there would be no subsequent complaints about the way the island was acquired. In comparison with his predecessors, Land Commissioner Clarke executed his duties diligently. There was no evidence that Ngai Tahu were substantially prejudiced by the lack of a protector during the negotiations, or that the negotiations were carried out in a manner inconsistent with the principles of the Treaty of Waitangi.

However, the implementation of the deed was greatly delayed, to the detriment of Ngai Tahu. Had a protector been available to ensure that the terms of the deed were abided, reserves and the endowment would have been more promptly put in place. It was 10 years after the sale before the survey of the reserves was completed, and many more before those of mixed parentage were given land. Such delays are inconsistent with the Crown's duty actively to protect Maori interests. The tribunal was given no details as to any loss suffered by those living on the reserves and who eventually were given such land. For those half-castes who had to wait many years for an allocation of land there must have been loss, and this has been addressed in chapter 20.

The tribunal found that the claimants' grievance was sustained to the extent that it applied to the implementation of the agreement.

The Titi Islands

The Titi Islands lie off the south-west coast of Rakiura and are the seasonal home of the titi (mutton bird) on their annual migration from the northern hemisphere.

Twenty-one of the islands were reserved for Ngai Tahu under the deed, and Ngai Tahu are now the beneficial owners of these islands. However, all islands were vested in the Crown under the Rakiura deed of purchase.

The islands are of vital importance both to Ngai Tahu, as a prestigious mahinga kai, and to the Crown, as sanctuaries for endangered species. Administration of the islands is regulated by the Titi (Mutton Bird) Regulations 1978 which distinguish between beneficial islands (those reserved in the deed to Ngai Tahu) and Crown islands (those not named in the deed, and in which Ngai Tahu have no beneficial interest). The regulations make specific provision for the protection of the mahinga kai from despoliation by people and animals. Beneficial owners do not require a permit to enter beneficial islands, but access to Crown islands is by written permit only. The claimants stated that the tribe has been deprived of the full administration of the Titi Islands. At present the Department of Conservation administers the regulations. Rakiura Maori and their spouses have supervisory powers through representation on a committee which can make recommendations on issues concerning the islands. One witness maintained that it was time the Ngai Tahu Maori Trust Board administered the regulations. However most witnesses, although resentful of any regulations which restrict their rights to take titi, were primarily concerned with the continued protection of the titi resource, the gathering of which is a prerogative unique to Ngai Tahu.

In response to the claim, the Crown contended that the current system is of benefit to both Ngai Tahu, involving them in decisions over the protection of their mahinga kai, and to the Crown, protecting the endangered species on the islands. It stated that no permit has ever been refused to any Ngai Tahu wishing to take titi on a Crown island. Crown counsel maintained that only the Crown has the skilled workforce to protect both the titi and species at risk. Ronald Tindal, district conservator of Rakiura, further claimed that the history of Crown administration of the titi resource upheld at least three identified Treaty principles and that the Titi Islands are one of the best protected Maori food resources in New Zealand. Claimants' witnesses themselves submitted that under the current system Ngai Tahu have a lot of input into the way the islands are administered.

Finding on grievance no 2

The tribunal was satisfied that under the present regime the islands on which the titi burrow are sufficiently protected. We agreed that the regulations provide a good compromise between access to titi for Ngai Tahu and the conservation of endangered species. We acknowledged that Ngai Tahu have input into the administration of the islands through the supervisory committee. The tribunal found that there was no breach of Treaty principles in the action of the Crown in issuing regulations governing the administration of these islands.

The Crown islands

A further claim became apparent to the tribunal regarding the Crown islands. A number of submissions stated that Ngai Tahu did not wish to include any of the islands in the purchase: that such inclusion was inadvertent or that Clarke overrode Ngai Tahu objections in the matter.

No record of the 1864 negotiations exists today. The tribunal therefore found it difficult to investigate the allegation that Clarke disregarded Ngai Tahu's objections and did not reserve to them all of the islands. However it seems unlikely that the sale to the Crown of the less popular islands was inadvertent. Before the negotiations had begun Clarke intended to reserve only three or four islands for Ngai Tahu. In fact 21 were reserved and each of these specifically named in the deed. Discussion about the islands must have taken place.

Witnesses who for various reasons have taken titi annually over a long period of time on specific Crown islands, stated that the beneficial ownership of the Crown islands should be vested in themselves on behalf of their families, on the same basis as the beneficial islands.

The tribunal agreed that the vesting of beneficial ownership of the Crown islands in the appropriate Ngai Tahu would do much to recognise Ngai Tahu rangatiratanga and reflect the actual situation that at present exists.

Whenua Hou

Whenua Hou (Codfish Island) is the largest of the Crown islands, lying three kilometres off the west coast of Rakiura. In the Rakiura deed of purchase it was not mentioned as one of the islands to be reserved. The claimants stated that the island is ancestral ground and of vital historical significance to them. They claimed that according to oral tradition the island was included in the purchase against the wishes of the people.

There was no evidence to indicate whether or not Ngai Tahu objected to the inclusion of Whenua Hou in the sale. It was either an oversight or a conscious decision to exclude it from the rest of the beneficial islands. It was clear that the island was traditionally a stopping-off place for Aparima Maori on their way to the Titi Islands. However three boat landings and Mitini Island were reserved for Aparima Maori in the deed. It seems unusual that a place of such historical importance was not reserved from sale. The tribunal concluded that because of the lack of evidence the claim was a matter of speculation and therefore could not uphold the grievance.

A further claim was presented relating to the designation of the island as a nature reserve in 1986. Because of its size and distance from the mainland, Whenua Hou was said to be an ideal sanctuary for the introduction of species at risk. The claimants however maintained that the change in status from a scenic reserve to a nature reserve virtually precludes access to the island by the local people and detracts from its historical importance to Ngai Tahu. They also wanted Ngai Tahu involvement in management decisions regarding the island.

In response, the Crown maintained that permits for access were given to anyone with a legitimate reason for entering the island. It claimed access needed to be so restricted to protect the endangered species on the island.

With regard to the importance of Whenua Hou to Ngai Tahu and the need to protect the wildlife on the island, the tribunal recommended that, subject to prior notification, free access should be given to Rakiura Maori, consistent with the security of the

wildlife. The tribunal also supported the involvement of Ngai Tahu in the management of the island.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.12 Mahinga Kai Summary

2.12. Mahinga Kai Summary

Introduction

The claim involving mahinga kai is one of the most emotionally charged elements of the Ngai Tahu claim. The communal exploitation and use of natural resources both for tribal consumption and trade was basic to the Maori economy and hence to the whole social fabric of tribal and intertribal life. For generations, Ngai Tahu have petitioned Parliament over deprivation of their traditional mahinga kai. The tribe claims that the Crown guaranteed our people all our fisheries and other natural food resources under Article 2 of the Treaty and, in terms of the Kemp Purchase Deed, absolutely ...

Ngai Tahu claim compensation from the Crown for their lost mahinga kai and effective partnership with the Crown in the management and control of those few that remain-including the fisheries.

This brief description of the mahinga kai claim comes from Tipene O'Regan, chairperson of the Ngai Tahu Maori Trust Board, in his essay in Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi. The following is a summary of chapter 17 of the report dealing with mahinga kai but it should be said here that it is difficult to further abbreviate this subject when chapter 17 itself is but a fragmentary account of a vast and integral part of Ngai Tahu society.

What is mahinga kai?

What is meant by the term "mahinga kai"? The tribunal found that to Ngai Tahu in 1848 and subsequently, this expression meant "those places where food was produced or procured". Such a definition includes the tribal resources in and on the land, in the forests and in the rivers, lakes and sea and in the sky. It includes kai ika, kai moana, kai awa, kai manu, kai roto and kai rakau. Ngai Tahu see their mahinga kai in a holistic way, but for reasons given earlier, the tribunal had to sever sea fisheries and a number of ancillary claims from this study of the principal land claims. This summary is therefore not one of the total Ngai Tahu food resource but nevertheless it will give a general picture first of how dependent the tribe was on its mahinga kai, and secondly of how Ngai Tahu was adversely affected by land settlement and development. It concludes with the tribunal's findings on the tribe's grievances. It also offers some constructive ideas as to how changes can be made to ensure Maori have an effective future stake in environmental matters.

Claimants' grievances

The claimants alleged that Ngai Tahu had been dispossessed of their mahinga kai, in breach of article 2 of the Treaty and, in the case of the Kemp purchase, contrary to the terms of the Kemp deed. More particularly the claimants complained that the Crown failed to adequately protect Ngai Tahu's natural resources on Banks Peninsula including Wairewa and that as a result these resources have been destroyed or depleted (no 1); that in respect of the Kemp purchase the Crown failed to provide ample reserves and failed to reserve and protect Ngai Tahu mahinga kai (no 2). The claimants also claimed that the denial of access to mahinga kai had accentuated the effects of landlessness (no 3),that the agricultural use of land and introduction of acclimatised species had destroyed or reduced the value of mahinga kai (no 4) and that Ngai Tahu have been denied effective participation in resource management and conservation (no 5).

Ngai Tahu and their mahinga kai resources after 1840

Ngai Tahu was a highly mobile tribe. The people depended for their survival on hunting and gathering food over vast distances. A map produced to the tribunal located almost 4000 archaeological sites; the pin-pointed sites in fact traced out the shape of the South Island. Food gathering was also largely seasonal and evidence showed that Ngai Tahu would move to an area and there catch and preserve food to take back to their more permanent settlements. In autumn an annual migration took place to the Titi Islands to gather mutton bird. Even after the land purchases Ngai Tahu continued to gather their traditional food not only near their kainga but in long journeys across and down the island. These seasonal journeys also gave opportunity for hapu to barter with other hapu. The claimant, Rakiihia Tau, gave a graphic account of how he accompanied his father to catch and gather eels, salmon, koura, shellfish, duck and geese eggs, kereru and other birds. These foods were used for subsistence in those days and food from the shops was bought only to supplement mahinga kai. Mr Tau commented on the disappearance of mahinga kai, his family's principal food source, and the apparent inevitability of this loss.

The tribunal visits the regions

The tribunal visited marae in Kaikoura, Kaiapoi, mid and south Canterbury, Dunedin, Southland and the west coast where many witnesses spoke of their past reliance on mahinga kai and commented sadly on how those resources had diminished and all but disappeared. The tribunal visited river sites, estuaries, sea shores, the inland lakes and viewed some of the traditional hunting, birding and fishing grounds of Ngai Tahu. Not only did the tribunal hear a vast amount of evidence from the tangata whenua but the parties presented an impressive array of professionals in fields of archaeology, history, zoology, biology, geography and languages. Visits were made to four museums where explanations and demonstrations were given of hunting and fishing implements including all kinds of gathering utensils. An unbroken 10 day period was spent exclusively on mahinga kai inspection and evidence. The evidence given by kaumatua demonstrated how by oral means traditional skills of gathering, preparing, storing and conserving mahinga kai had been handed down through generations to the present. We were frequently reminded of the spiritual aspect attached to the food gathering and distribution processes. Sensitive, personal evidence relating to the sites of certain food and medicinal herbs was given and the tribunal was told of the special place names given to particular types of mahinga kai. It was interesting to note the

diverse resources of each region and in particular the special foods of some areas, such as the albatross of Otakou, which was once keenly sought for its meat and bone. Witnesses described the various fruits obtained from a number of native trees and how leaves from certain trees and plants were used to prepare medicines. Evidence given by Gordon McLaren, of Ngati Mamoe and Ngai Tahu, is typical of the evidence presented. It speaks both of the past and the present:

The whole of the land from Waitaha to Piopiotahi was clothed in Tane's forest, and few spots would have gone untrodden by our early hunting parties. Unlike other areas of Aotearoa, birds and fish were prolific everywhere. From the forests came the manu-kiwi, kaka, tui, kereru, kakapo, makomako and a host of others; and the hua rakau from the karaka, kotukutuku, miro, matai, rimu, kahikatea, koromiko, hinau, totara, ti, pikopiko, katoke, kurau, mamaku and others.

Other products gathered were kareao for hinaki, toetoe for tukutuku, pingao, harakeke, kie kie, raupo, kuta for weaving. With manu there was little waste-the flesh was eaten, feathers were used for decoration and the bones were fashioned into fish hooks and spear heads.

Some had dual uses, such as harakeke which also had a medicinal value and an edible nectar, and others were universal in their use, such as the ti-the dried leaves were ideal for paraerae, the fruit was eaten and the roots, when cooked in umu, were a principal source of sugar.

Then there was the puha and watercress-both still taken frequently-the aruhe.

The swamps, lakes and rivers writhed with fish life, especially tuna-once a staple diet-and yielded other food sources such as weka, pukeko and whio ... Tuna formed a big part of the diet of our tupuna, and hinaki were set all around the Makawhio-Maitahi area up until recent years. They are still taken, but no longer in great numbers.(H8:30-31)

Another witness Iris Climo explained her early life at Makawhio where there was no road access and supplies came by sea every three months. She said:

We learned how to gather our materials, practising Conservation (although we did not call it that at the time) in taking only as much as we required and returning our scrapes to the Source. The Moon was our calendar and we gathered food accordingly especially Kai Moana. We all knew how to kohikohi the birds and cook them in a variety of methods. We learnt how to cook in flax and hot ashes. Medicines using natural resources were also common. We lived as a Whanau looking after each other, taking only as much as we needed and bartering when necessary Drying and smoking fish for out of season especially Inanga, gathering seagull eggs was also a Whanau event. Hand trawling involved the whole population. In fact fishing was a major occupation.

Living was almost communal, in that so much of what we did and learned were as a group rather than individual.

Everyone participated at Hui, held in the hall and I can remember being put on the mattresses to sleep.

My mother made flax cups to drink from, when we were near streams. (H8:39)

This kind of evidence emerged as a pattern illustrating and explaining how the people continued to rely on their traditional skills and resources after 1840 and into this century.

Titi and the Titi Islands

Ngai Tahu's relationship with the Titi Islands is undoubtedly very important. The beneficial islands scattered off Rakiura (Stewart Island) and which provide the much prized titi (mutton bird), are beneficially owned by Maori and are collectively administered by those who have rights through whakapapa or genealogy. The individual rights of succession cannot be alienated by will or by gift or sale. The beneficial owners have unrestricted right of entry and they have regulatory protection from trespass or interference with their rights. Mutton birding has always been an integral part of Ngai Tahu society-an ancient tradition and mahinga kai right that is greatly valued and carefully guarded. The claimant told the tribunal that the relationship, management and administration of the islands, is perhaps the nearest living example of Ngai Tahu rangatiratanga over a natural resource. Decisions as to allocation of catching areas, protection and rules governing the environment are determined by those entitled through whakapapa to do so. The tribunal referred in some detail to the Titi Islands in the sections of the report dealing with Rakiura as well as mahinga kai. These sections set out details of the conservation measures and management procedures governing the islands. A committee of management is elected annually by the beneficial owners. The tribunal commented that the present arrangement whereby the Crown's role was to protect the resource in full consultation with the beneficial owners, reflected the principle of partnership under the Treaty. The tribunal further commented that the existence of this working relationship between Crown and Ngai Tahu on the Titi Islands illustrated how unfortunate it was that other mahinga kai such as tuna and kai moana could not have been safeguarded in a similar way.

The tribunal also looked at the ownership and the administration of the Crown islands. These islands are more widely distributed than the beneficial islands reserved for Rakiura Maori but they also contain titi and Rakiura Maori must first obtain permits before entering these islands.

The tribunal recommended that beneficial ownership of the Crown islands be vested in Ngai Tahu and that they be protected by regulation in similar way to the beneficial islands. The present joint management of the Titi Islands by Ngai Tahu and the Crown has resulted not only in the protection of the food resource but also in safeguarding a number of other endangered birds, plants, animals and insects which exist in these islands and which were described to the tribunal by Mr Ronald Tindal, district conservator for Rakiura as "the last arks of many endangered species".

Waihora (Lake Ellesmere)

Waihora was once known by its more ancient name of Te Kete Ika o Rakaihautu, or at the Wairewa end as Te Kete Ika o Tukekawa. It is now more commonly referred to by Pakeha as Lake Ellesmere. Ngai Tahu know it as Waihora.

The lake itself was one of Ngai Tahu's most precious mahinga kai, renowned for the quantity and variety of its fish, bird and other resources. The rights to these resources were shared by various hapu adjoining its shores but Ngai Tahu from more distant regions could also call on its resources through a complex network of tribal whakapapa. The lake was much larger in the mid-nineteenth century. Drainage, reclamation and opening the lake to the sea have lowered the water level and swampy wetlands have been turned into pasture.

Details were given of the lake's past treasury of food resources and of its gradual deterioration from a much deeper, clearer lake with a shingly bottom to its now highly eutrophic and deteriorated state. The principal species of fish were tuna, patiki, piharau, aua, and inaka. It was also used for birding during the moulting season. Raupo, wiwi and harakeke grew in abundance in the swamps. Although in recent years licences have been granted for commercial eel fishing we were told that fish were depleted by over-fishing. We shall be looking at the commercial fishing of this lake in the later report on fisheries.

Waihora was part of the area sold under the Kemp purchase. Despite the importance of the lake to Ngai Tahu as a food resource, despite the reservation of mahinga kai from the sale, despite acknowledgment by the Maori Land Court in 1868 that the tribe had always regarded this place as a valuable fishery and as the tribe's most highly prized and valuable of all their possessions, despite strong protests by Ngai Tahu over the years, no reserves of any kind were ever created over the lake to protect its use for Ngai Tahu.

The tribunal, in looking at the evidence, concluded that Ngai Tahu were the losers in a conflict between two economic systems with different priorities over natural resources. On the one hand Ngai Tahu relied on their traditional economy and expected that their rights to mahinga kai would be reserved to them. On the other hand the Crown saw that the Ngai Tahu economy must not prevent the needs and demands of land settlement. The agricultural and pastoral demands won the conflict. As a result Ngai Tahu interests in Waihora have been completely disregarded.

The tribunal found that the Crown acted in breach of the Treaty by failing to comply with the terms of the Kemp purchase which reserved to Ngai Tahu their mahinga kai (8.9.18-21). The Crown failed to protect Ngai Tahu in the retention of this treasured fishery. The tribunal has recommended the return of Waihora to Ngai Tahu ownership with full access to Kaitorete Spit. In considering the return of the lake the tribunal suggested there needs to be negotiation between the claimants and the Crown as to the exact area to be returned (17.2.23). Because of concerns about the present deteriorated condition of the lake,the tribunal also expressed the view that the Crown must take an active role in the provision of financial, technical, scientific and management resources to save Waihora (17.2.24). The lake may become a worthless mahinga kai resource without substantial financial and other input. The tribunal therefore suggested two options which Ngai Tahu may wish to consider. These involve first: that the Crown grant the full estate in fee simple to Ngai Tahu and at the same time

enter into a joint management scheme with Ngai Tahu binding the Crown to provide resources to improve the lake or second: that the Crown grant beneficial ownership to Ngai Tahu and remain on the title as trustee. The Crown then in consultation with the beneficial owners, would make regulations to protect the lake's quality and its use.

The tribunal expressed the view that either alternative would reflect the partnership principle of the Treaty in manner similar to the Titi Islands regime. The tribunal expressed the hope that Ngai Tahu would, in any joint management exercise with the Crown, have regard to the inclusion of public facilities.

Kaitorete Spit

This is an isthmus of approximately 12,000 acres which separates Waihora from the sea and provides seaward access to the lake. It has significant historical and archaeological importance. It is of national importance also because it contains the largest pingao plantation in the country. Pingao is used for weaving kete, whariki and tuku panels. Because of the obvious importance of this land the tribunal has asked that the question of creating special reserves on it be brought to the notice of the Minister of Conservation. In a later section of the report the tribunal offers some alternatives for discussion between the tribe and Crown which may lead to the setting aside of special reserves under existing legislation.

Wairewa (Lake Forsyth)

This lake is another important eel fishing resource of Ngati Irakehu. It is a coastal lake where access to the sea is blocked by a shingle bank. The lake is opened to the sea by digging a channel through this bank. During the autumn the eels congregate in the southern and outlet area. The tribunal visited the lake and inspected the eel trenches or wakawaka. Each of the wakawaka belongs to a particular hapu. Trevor Howse recounted his whakapapa which gave him rights to the wakawaka and produced a confidential map of the drains explaining the allocation. Dr Peter Todd, a fisheries scientist and a Crown witness, presented helpful evidence on the eel population and traditions still adhered to in the catching of the tuna. Both Dr Todd and Ronald Little spelt out the environmental problems facing Wairewa. The water is highly eutrophic and at certain times has toxic algae blooms that make it dangerous to swim in or for stock to drink. Mr Little outlined the similar deterioration that had occurred to Lake Tutira, just north of Napier, and the management plan successfully designed to arrest degradation in that lake. It required interception and diversion of nutrient-rich incoming waters, isolation of livestock, provision of vegetation buffers around the lake to soak up run-off and forest planting on all slopes leading directly to the lake. Similar action is needed for Wairewa.

Mr Little said that exclusive Maori eeling rights were granted over the lake following submissions by the late Joe Karetai in 1961. The tribunal was also informed that commercial fishing of the tributaries had stopped as a result of the decline in eel population.

The claimants' principal requests concerning Wairewa were:

- a fishing reserve adjacent to the eel drains;

- restriction of commercial eeling;

- consultation and representation on water management bodies;

- access to the lake bed where the eel trenches are located; and

- access to the shingle bank dividing the lake from the sea.

The tribunal deals with the need for consultation and representation on decision-making bodies such as regional water boards in chapter 17. The tribunal found that the failure of the Crown to set aside eeling reserves at the southern end of the lake where the eeling trenches were located was in breach of the Crown's duty to protect Ngai Tahu rangatiratanga under the Treaty. Although Maori have an exclusive eel fishing right on the lake, the tribunal considered this right should have been granted to Ngai Tahu. The tribunal therefore recommended that this error be rectified by amending the regulations so as to limit the use to Ngai Tahu. The tribunal also recommended that all commercial eel fishing be prohibited in the waters leading into the lake and the regulations reserving Ngai Tahu rights be amended so as to include those streams.

The tribunal concluded its report on Wairewa by urging that Ngai Tahu should be involved in the investigation and decision-making processes in respect of the water quality of this lake and considered that the Crown through it agencies should provide the resources to save this lake in the same way as recommended for Waihora.

Conservation

During the hearing of mahinga kai evidence the tribunal heard evidence about rules handed down orally over succeeding generations to conserve food resources. These measures were designed, not only to limit the taking and gathering of food, but also to create and develop the resource.

James Russell, one of a number of people who emphasised how the philosophy of conservation was ingrained from these handed-down rules said:

In a historically hand to mouth society, it is difficult to consider anything other than a conservation ethic. Wilful pollution or destruction of a waterway or a food resource would probably have an immediate and significantly detrimental effect on the community as a whole. Consequently, an elaborate set of rules, restrictions and guidelines were enforced, often by means of quasi-religious concepts such as "tapu", "rahui", "utu", and "muru" to ensure that such resources were indeed maintained as appropriate for community needs, resource management, or "rakatirataka" or "kaitiakitaka". (H8:51)

There is no doubt that Ngai Tahu adhered to strict rules of conduct in which tapu and rahui played an important role. The tribunal was impressed with the restraint shown by almost all of the witnesses as they spoke of their tupuna and of the trust reposed in them to cherish their taonga and to hand them on in good condition.

During the hearing evidence was given that measured the changes in our environment from as far back as 800 AD showing the gradual loss of our forests and the extinction of 40 bird species. The greatest loss had occurred over the past 150 years. The tribunal considered there were ominous signs we had not yet learned from history.

Impact of settlement

Under this heading the tribunal looked at the effect of land settlement of Te Wai Pounamu following the land purchases by the Crown. The tribunal looked in some detail at a number of areas such as deforestation, clearing and drainage of land, water use, the relationship between Maori and settler on acclimatisation matters, lack of access to food resources and pollution.

As the evidence unfolded it became clear that the grievances of Ngai Tahu over the loss of their food resources were closely interwoven with, and a consequence of, the development of New Zealand after the arrival of the settlers. Several witnesses described how the loss of traditional food resources and lack of land had contributed to loss of culture.

For some time after settlement began and before pastoral farming got underway, Ngai Tahu continued with their pattern of tribal foraging. Gradually however, land was cleared and livestock introduced. Maori began to understand better the European concepts of property and ownership, as fences and gates were erected and trespass signs appeared. As the forest was cleared for grazing, the consequent run-off of water caused land erosion. The need to cope with resultant flooding led to the introduction of river control techniques with further resultant loss of wetlands, lagoons and waterways which previously provided fish and bird habitats. As the forest disappeared, and the report shows how this took place, so too did mahinga kai. A Crown witness answered a question he had posed himself as to why these things were allowed to happen by saying:

Perhaps the easy answer is that in any developing country with a struggling economy and a rapidly increasing population, an environmental conscience is a bit of a luxury. (P15a:4)

As development proceeded many of the new settlers denied access to Ngai Tahu. A kaumatua giving evidence to the 1891 commission said:

All former sources of food-supply were cut off. If they went fishing they were threatened to be put in jail, and if they went catching birds they were turned off. (H6:32)

Another said:

Some of us were nearly put in gaol for catching wekas on some of the runs.... All our old mahinga kai are destroyed, and we are left without the means of obtaining the food we used formerly to depend on. (H6:32)

Several witnesses also referred to the restrictive laws and regulations passed by Parliament and spoke of being continually fined for catching salmon. There was direct

conflict between Maori and settlers over the use of the rivers as the settlers introduced trout, perch, and salmon, accompanied by new acclimatisation and wildlife regulations.

The development of hydro dams has also resulted in flow diminution in rivers, as has the draw-off of water for domestic, industrial and irrigation use. The tribunal visited the central lakes and inspected the hydro schemes.

Electricorp made submissions explaining how the corporation was committed to strict observance of environmental principles and the provision of clean pure water after use for power generation. The corporation gave evidence of its interest in creating fishery and recreational facilities for the public and also gave firm assurances of its desire to have a better consultation process with Ngai Tahu.

It was in the area of pollution that Ngai Tahu grievances were strongly and widely expressed. Witness after witness recounted the sad effect of pollution on mahinga kai. Sewerage disposal, wool scour effluent, dairy factory discharge, aerial spraying and topdressing, farm waste, wastage from forest mills, gold mining rubbish dumps and all kinds of other industrial wastes have all had their effect. Here is what one witness said:

... I look at these areas which I have mentioned here in the lakes, the mountains, the rivers, wetland areas, the forests, the estuaries and the sea, with saddened heart and misty eyes, at the rape, pillage and destruction of the national assets of this beautiful land of ours.

Our rivers, lakes and wetlands or what is left of them, most of our wetlands have been drained, nearly all of our rivers have been interfered with, or would meddled with be a better phrase to use at this time. I see raw sewerage, dead livestock, and other obnoxious materials, pouring down our waterways out to the open sea, little wonder that these areas of mahi kai are no longer fit for human consumption.

Our forests, practically nonexistent, and our native timbers, that is the chips, piled up in mountains along the quay sides of our ports awaiting export to foreign parts. I wonder at the mentality of all this carnage.

Is this the heritage that we of this generation are going to bequeath to our future descendants? Who is responsible?

I ask, where is the legislation that should be protecting these environments, and how good is it? (H13:29)

The Crown contended that pollution was of modern occurrence and was a problem facing the whole population. We were told that programmes were being put in place to cope with pollution.

The tribunal did not agree that pollution is of recent origin as there was evidence of pollution from goldmining and sawmilling back in the early settlements. The tribunal agreed there is currently much more active interest in anti-pollution measures and maintenance of water quality. However, there is irrefutable evidence of the damage

caused to mahinga kai resources by pollution. Furthermore, there was no doubt in the minds of tribunal members that pollution and all the other consequences of land settlement have impacted severely on Ngai Tahu's traditional food resources.

Ngai Tahu's grievances and the Crown's response

The claimants' grievances were wide ranging. Mr Temm, counsel for the claimants, argued that Governor Grey was fully aware that the tribe hunted and gathered over a vast area and depended on mahinga kai for their survival. Counsel said that Grey, Eyre and Mantell applied a deliberate policy of leaving as little land as they could so that Ngai Tahu would be encouraged to work for the settlers. He emphasised that mahinga kai were essential, especially fresh water and sea fisheries, and Waihora and Wairewa were also significant areas that had become polluted and over-exploited. He said Ngai Tahu had never been consulted by central or local government and that decisions of those bodies lacked a Maori dimension.

Crown counsel, Shonagh Kenderdine, noted that the only deed in which any reservation of mahinga kai was made was Kemp's. Mrs Kenderdine advanced the following submissions:

- the Crown had no duty to protect mahinga kai because Ngai Tahu had varying definitions of mahinga kai;

- Ngai Tahu were increasingly affected by settlement and their complaints led to the creation of fishery easements in 1868 which fulfilled the Crown's duty under the Treaty;

- that mahinga kai as referred to in the Kemp deed meant "cultivations" and therefore the Crown's duty to reserve and protect related only to "cultivations";

- the claimants had not given full weight to the words "so long as it is their wish and desire to retain the same in their possession" in article 2 of the Treaty;

- Ngai Tahu habits changed after settlement. They had adopted some European foodstuffs and had abandoned or were abandoning mahinga kai;

- the Crown's obligation to preserve and protect applied only to those resources which Ngai Tahu used in years preceding purchase and which they wished to continue using; and

- the claimants had wrongfully sought to protect resources now discarded. This approach denied the dynamics of history and human intervention. Ngai Tahu had moved into European resources and technologies.

The thrust of the Crown's argument, apart from its reliance on the limited meaning of mahinga kai, was that Ngai Tahu had abandoned their traditional resources and had moved voluntarily into a changing society and economy with its new food resources.

Crown counsel put to the tribunal that there was no ongoing responsibility or need on the Crown's part to protect old food resources and thus no Treaty breach. Counsel did

agree however that in Kemp and other purchases Ngai Tahu did not receive sufficient reserves to provide an adequate resource base.

The Crown submitted that those negotiating for the Crown would have restricted the size of the reserves for three reasons:

- the small population size of the tribe;

- the belief that Ngai Tahu would soon be extinct; and

- the belief that Ngai Tahu wished to be, and should be, assimilated.

Counsel said these factors did not excuse the granting of inadequate reserves but they helped to explain it.

The tribunal's conclusions

Omission of mahinga kai from deeds of purchase

The tribunal rejected the argument that in signing the various deeds of purchase Ngai Tahu were surrendering all future access to their traditional food resources. Lord Normanby issued a clear injunction that the Crown was not to purchase any lands that would be essential or highly conducive to Maori people's comfort, safety or subsistence. Crown officials were aware that Ngai Tahu needed access to these food resources and there was an obligation on them to make adequate provision for Ngai Tahu needs. The tribunal did not accept Ngai Tahu would have entered into the purchase agreements with the understanding they were thereby surrendering their food resources which they needed for subsistence and trade.

Abandonment of resources

The Crown argument was founded on the notion that Ngai Tahu, at the time of signing the deeds, could foresee the future and were prepared to relinquish all but their most important mahinga kai in anticipation of other benefits to come from European settlement. The tribunal found the evidence showed clearly that Ngai Tahu had no such perception or desire. They did not abandon their resources. They were shut out from them by land settlement.

Loss of rangatiratanga

In the report the tribunal found that the Crown had a duty under article 2 to ensure Ngai Tahu were left sufficient land for their present and future needs. It was incumbent on the Crown to set aside specific reserves to protect mahinga kai. It was not only necessary for the Crown to protect the principal food resource areas, it was also the duty of the Crown to provide the tribe with extensive land so that Ngai Tahu could adapt to the new pastoral and agricultural economy.

Governor Grey and his negotiators acted contrary to the policy laid down so clearly by Lord Normanby and expressed in article 2 of the Treaty. The lack of an adequate land base left Ngai Tahu a disintegrated tribe without power, without an effective

voice, and unable to participate in the political economy of the nation. Ngai Tahu were victims of settlement because it appears it was not intended by the Crown's agents that they should ever have a stake in it.

The tribunal therefore found that the Crown has failed primarily in its duty to set aside a sufficient endowment for Ngai Tahu in the form of land so as to allow not only reasonable access to mahinga kai but also an economic base to meet the new and changing economy. This was a breach of article 2 of the Treaty and Ngai Tahu were detrimentally affected by that breach.

Argument on definition of mahinga kai

The tribunal rejected the Crown's argument that the meaning of mahinga kai was limited to "cultivations". The tribunal concluded that the term had the broader meaning of "places where food was produced or procured" (8.9.12). The Crown argued that if the tribunal accepted the wider definition of mahinga kai, Ngai Tahu had voluntarily abandoned their traditional resources. As already stated, this argument was also rejected by the tribunal as the evidence showed that Ngai Tahu had not chosen to relinquish their food resources. They were effectively excluded from them.

Protection of resources and resource management

Grievance nos 1, 3, 4 and 5 relate mainly to the Crown's failure to protect mahinga kai during the development of the economy after settlement. The tribunal analysed what took place as land development proceeded and concluded that Ngai Tahu were disadvantaged and suffered loss to their mahinga kai as a result of this development.

However the allegations made by the claimants were general in nature. The tribunal found that the acts or omissions of which the claimants complained may have been contributed to by a variety of groups such as farmers, foresters, fishers, miners, contractors as well as citizens, local authorities, commercial and industrial firms. The tribunal was not able to conclude that the Crown has been sufficiently responsible for this loss so as to be held liable for a breach of a Treaty principle, and was not prepared to sustain the grievances as a breach of the Treaty. The tribunal did however conclude that the matters covered in grievances nos 1, 3, 4 and 5 when taken together with the clear breach of article 2 in relation to grievance no 2, added more weight to the tribunal's finding that Ngai Tahu mana and rangatiratanga were disregarded by the Crown.

List of findings

In respect of mahinga kai the tribunal found as follows:

(a) (i) that the Crown failed to make specific reserves to preserve and protect Ngai Tahu's mahinga kai; and

(ii) that the Crown failed to provide sufficient reserves to allow Ngai Tahu to participate in the developing economy.

As a result Ngai Tahu were deprived of their rangatiratanga guaranteed to them by article 2 of the Treaty.

(b) that the findings in respect of grievance no 2, as given in 8.9.18-21, in relation to the Kemp purchase were confirmed.

(c) that the Crown failed to preserve Ngai Tahu rights to the food resources of Waihora, as required by the terms of the Kemp purchase, and thereby acted in breach of article 2, and the Treaty principle of good faith.

(d) that the Crown failed, as required under article 2, to set aside specific reserves so as to protect Ngai Tahu's right of access to their eel resources at Wairewa.

(e) that the Crown failed to protect Ngai Tahu rangatiratanga under article 2 in that it granted eeling rights at Wairewa to Maori instead of to Ngai Tahu.

(f) that grievances nos 1, and 3-5 (inclusive) as set out in this summary are not sustainable as breaches of the Treaty for reasons given in the main report on mahinga kai in 17.5.5.

List of tribunal recommendations

The tribunal made the following recommendations pursuant to section 6(3) of the Act.

Waihora (Lake Ellesmere)

At the option of the claimants:

EITHER

That the Crown vest Waihora for an estate in fee simple in Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

(a) opening the lake to improve the fishery; and

(b) improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal. The joint management scheme binding the Crown to provide financial, technical, scientific and management resources.

OR

That the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee. The Crown then, in consultation with the beneficial owners, to make regulations for the future control and management of the lake in manner similar to the Titi Islands regulations.

Wairewa (Lake Forsyth)

(a) That the existing fisheries regulations giving Maori exclusive eel fishing rights over Lake Wairewa be amended to substitute "Ngai Tahu" for "Maori" so as to return the rights to the tribe.

(b) That the same regulations be amended to give Ngai Tahu exclusive rights to fish waters leading into the lake and to cancel any other existing licences.

(c) That an area of land be reserved around the eel trenches at the southern outlet which will secure Ngai Tahu rights of access.

(d) That Ngai Tahu in consultation with the Crown and its agencies enter into a joint management scheme to improve the quality of Wairewa with the Crown providing the resources to do this work.

Other recommendations

- That beneficial ownership of the Crown Titi Islands be vested in such persons or bodies as may be nominated by Ngai Tahu and be subject to similar management regime as the beneficial Titi Islands.

- That the question of reserving the pingao plantation for Ngai Tahu on Kaitorete Spit be brought to the notice of the Minister of Conservation for consideration and action.

A Maori perspective in environmental matters

In chapter 17 the tribunal has given its views on four areas of action to improve Maori involvement in environmental matters. They are:

(a) amendment to statutes to ensure that Maori values are made part of the criteria of assessment before the tribunal or authority involved;

(b) proper and effective consultation with Maori before action is taken by legislation or decision by any tribunal or authority;

(c) representation of Maori on territorial authorities and national bodies; and

(d) representation of Maori before tribunals and authorities making planning and environment changes.

The tribunal emphasised that the most significant area for change is in the field of consultation. In Maori terms consultation advances the well-being of the tribe and the tribunal commented that leaders in local and central government need to recognise that Maori expect to discuss proposals that affect them in their traditional way in a Maori context. The tribunal emphasised the importance of oral examination of issues in the presence of Maori on a marae.

The tribunal commented on several important matters and suggested that explanation, examination and discussion on tribal marae would be much more likely to lead to informed and acceptable decisions.

Future protection of Ngai Tahu mahinga kai: the doctrine of aboriginal title

In the concluding section of chapter 17, the tribunal looks at the need to protect what little of Ngai Tahu land-based mahinga kai as remains. In a later report the tribunal will address the other important area of sea fisheries. Ngai Tahu still continue to gather traditional foods such as puha and watercress, herbs and other flora such as pingao, kuta and harakeke. Trees from the forest such as totara are needed for carving.

The tribunal considers an article by Dr Paul McHugh on aboriginal servitudes in which it was suggested that amendment should be made to the Land Transfer Act 1952 so as to provide a means of protecting customary mahinga kai rights by registration of an interest following an investigation by the Maori Land Court The tribunal made no recommendation to this effect but expressed interest in a matter which may be subject to later inquiry in the ordinary courts. The tribunal suggested that several existing statutes provide mechanisms for reserving rights and may well be worth investigation by iwi as a means of protecting reserves such as pingao.

The tribunal concluded its report on mahinga kai by expressing the hope that Crown agencies would meet with Ngai Tahu and evolve procedures not only in joint management but also in creating reserves.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.13 Grievances on Matters After the Purchases

2.13. Grievances on Matters After the Purchases

With the Rakiura purchase, Ngai Tahu lost their remaining substantial land mass. Only Ruapuke, Tuhawaiki's island fortress where the Treaty was signed in June 1840, remained untouched by the Crown's purchasing officers. In presenting their claim Ngai Tahu argued that very substantial areas of land, amounting to as much as seven million acres, were never purchased by the Crown. This land consists of the "hole in the middle", the land between the Arahura purchase and the Canterbury plains which the claimants argued was not offered for sale to Kemp, and the area west of the Waiau River in Southland. A large portion of the much smaller Akaroa purchase was also seen as "kahore i hokona": not sold.

Only in the case of the Akaroa purchase has the tribunal sustained the claim that significant areas of land were not included in the original purchase agreements. At Akaroa the tribunal found that just under 30,000 acres of land, known as the French block, has never been purchased from Ngai Tahu. However in the Kemp and Murihiku purchases, the tribunal, after very careful consideration of the evidence, agreed with the Crown, that the boundaries of these blocks were those defined by the wording of the deeds and the maps which accompanied them. In the Otakou purchase, too, the tribunal has not sustained the claimants' grievance that tenths should have been provided for Ngai Tahu under the proclamation of March 1844, which generally waived pre-emption.

With the exception of the Kemp deed, where the tribunal has found that the terms of the deed remain substantially unfulfilled to the present day, the deeds generally reflect the agreements reached at the time they were signed. However, the tribunal's task is not only to examine the terms of these agreements, but to investigate the Crown's actions in relation to the principles of the Treaty of Waitangi. The reality was that Ngai Tahu's position in 1864, at the end of the Crown's purchasing campaign, was in no way compatible with the Treaty's promise to protect te tino rangatiratanga of Ngai Tahu. Over half of New Zealand's land area had been owned by Ngai Tahu in 1840, but by 1864, through the deliberate efforts of the Crown's agents, this once vast territory had been reduced to only 37,492 acres. In the decades that followed their condition deteriorated.

Remaining grievances

Several of the claimants' grievances referred to events which took place after the purchases and were not covered in the sections of the report which discuss the purchases themselves. These included a grievance relating to the provision of schools

and hospitals as part of the Murihiku purchase. The claimants maintained that as part of the purchase price the Crown was obliged to provide a school and hospital in every Ngai Tahu settlement and that it failed to do this (Murihiku grievance no 5). There were several grievances involving land for "landless natives". In the Kemp purchase the claimants argued that land was provided for Ngai Tahu which was inferior to that made available to Europeans under the Lands for Settlement Acts and that none of the land granted was in the Kemp block (Kemp grievance no 11). In the Murihiku and Arahura blocks it was argued that the land involved was insufficient to remedy the landlessness caused by both sales (Arahura grievance no 10 and Murihiku grievance no 9). The claimants also alleged that they were prejudiced by the Crown's premature halting of the work of the Smith-Nairn commission and by the suppression of its evidence (Kemp grievance no 9).

Schools and Hospitals

One of the major areas of concern for Ngai Tahu was the provision of schools and hospitals (Murihiku grievance no 5). This grievance was also applicable to the Kemp purchase. On numerous occasions Ngai Tahu rangatira argued that as they understood it, Crown purchase officers, and in particular Mantell, had promised them a school and a hospital in every kainga, at the time of the sale. They were also adamant that these promises had been crucially important in their finally consenting to these sales. There was no direct contemporary evidence of specific promises being made by Mantell or any other land purchase officer at the time of the Kemp and Murihiku sales. Despite this, the tribunal had little doubt that such promises were made. Mantell later claimed that he had oral instructions from Lieutenant-Governor Eyre to offer such inducement to Ngai Tahu in purchasing their lands. In 1855 Mantell explained that:

Now in making purchases from the natives I ever represented to them that though the money payment might be small, their chief recompense would lie in the kindness of the Govt. towards them, the erection & maintenance of schools & hospitals for their benefit & so on-you know it all. (G2:409)

In the mid-1850s Mantell directly appealed to the British government to have the promises fulfilled, over the heads of the colonial administration and much to the latter's embarrassment. Despite an attempt to play down Mantell's claims, on the part of Donald McLean, the chief land purchase officer, Governor Browne readily acknowledged the link between land sales and the provision of health and educational services:

I am satisfied that from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial government have been held out to the Natives to induce them to part with their land. Nor does it appear to me that the obligation could be less imperative if no promise had ever been made. The difficulty is how to fulfil either the promise or the obligation. (O21:58)

In assessing the nature of these promises the tribunal did not consider it necessary to determine whether they were part of the contractual arrangements of the purchases, as argued by the claimants, or "merely general inducements for land selling, which

became promises at a later date when the lack of government action in the South Island became apparent", as argued by the Crown. The tribunal was convinced that given the minimal price paid for the land and the minuscule reserves allowed, that the promises were influential in persuading Ngai Tahu to part with the land.

The claim for schools and hospitals became an essential part of Ngai Tahu's overall claim for recognition that the Crown had yet to fulfil the terms of the purchases. In 1881 Alexander Mackay was convinced that the Crown had failed to compensate Ngai Tahu for the non-fulfilment of these promises. From the 1840s on the government provided Maori people with some educational facilities, but little found its way to Ngai Tahu. As early as 1847 an education ordinance provided for the establishment of denominational schools for Maori, although these were also to be available for Europeans. However as Dr Barrington pointed out, Ngai Tahu received no benefit from this. From 1852 the provincial governments took control of education, but by 1868 they had provided nothing specifically for Ngai Tahu children. Only in the late 1860s were small portions of funding made available for schools.

In 1861 when Mantell joined the cabinet of William Fox, he did so only after obtaining the government's agreement to provide some of these services for Ngai Tahu. However ministries in the 1860s were often of short duration and Fox was soon out of office. Mantell's stint as native minister in 1864 was also short lived. But he was able to influence the terms of the Rakiura purchase in 1864, by ensuring that a third of the purchase price was allocated for schools and other similar purposes.

When in 1867 a Natives Schools Act was passed it allowed for a national system of Maori schools, but left the provision of the land and much of the funding to the Maori communities themselves. Alexander Mackay pointed out that small Ngai Tahu settlements were unable to pay the building, salary and other costs involved. Up until 1867, 20 years after the Kemp purchase, central government had, with the exception of Kaiapoi, failed completely to provide schooling for Ngai Tahu. All through this period and for many decades after, settlers resisted the admission of Maori students into their schools. By 1878 11 schools had been built throughout the South Island, the majority for Ngai Tahu. However the communities involved had been generally required to contribute substantial sums in building and maintenance costs. Ngai Tahu were still being required to pay for new buildings at a time when European schools were being provided completely by the government.

The tribunal considered that it was not possible to find the Crown's record in the provision of schools for Ngai Tahu in the three decades following the Kemp and Murihiku purchases as being consistent with good faith and honourable dealing with its Treaty partner.

In providing health services the government moved somewhat earlier with a hospital being built in Dunedin in the 1850s, apparently as a direct response to Ngai Tahu representations. Once taken over by the province in 1856, central government provided minimal financial assistance for Ngai Tahu patients, but Maori soon found themselves unwelcome there and sought their own hospital. From the 1860s a number of medical officers were appointed, largely at Mantell's prompting. Subsidies for doctors to attend Ngai Tahu patients came and went according to the economic circumstances and whims of the various ministries of the day. The Crown's historian,

Mr Walzl, concluded that the government's record in the provision of medical care was "woefully inadequate", as it was for education.

Despite coming under the scrutiny of Parliament time and time again, little was done to ensure that the lack of educational and health facilities available to Ngai Tahu was rectified. In 1868 the Ngaitahu Validation Act left open the question of whether any promises of schools and hospitals had been fulfilled by the Crown. So began a long and fruitless series of committee hearings and commissions of inquiry. There were select committee hearings in 1872, Native Affairs Committee hearings in 1875, the Smith Nairn Royal commission in 1879-1880, followed by the 1886-87 Mackay Royal commission, then a joint committee of both Houses of Parliament in 1888 and another in 1889. The inquiries of the 1880s had the same melancholy outcome as those of the 1870s-producing the same sorry history of the failure of successive governments to face up to their obligations and to act in accordance with the principles of the Treaty of Waitangi and the partnership it represents.

The tribunal found that the Crown, in acquiring land from Ngai Tahu, was obliged by the Treaty of Waitangi to conduct its dealings on the basis of sincerity, justice and good faith. Promises made by the Crown's representatives to Ngai Tahu to induce them to sell their lands should have been fulfilled by the Crown, and fulfilled promptly. Good faith, fair dealing and the honour of the Crown required no less, But, as the tribunal believes the evidence overwhelmingly shows, the Crown failed to meet these tests. Intermittent and long-delayed efforts were made partially to meet the Crown's obligations. To this day Ngai Tahu have not been compensated for the failure of the Crown adequately to meet its Treaty obligations in respect to the promises of schools and hospitals. In those early years, when the provision of these amenities would have made a significant contribution to the advancement of Ngai Tahu, they were left, over a considerable period, largely neglected and forgotten, or ignored. The tribunal considered that it is not too late for this omission to be repaired. We believe that the remedy proposed as long ago as 1887 by Royal Commissioner Judge Mackay, that a substantial endowment of land be secured to Ngai Tahu, would go far to right so many years of neglect.

Landless natives grants

In 1886 Alexander Mackay was appointed to investigate the extent of landlessness among Maori living in the South Island. Mackay was to identify Maori inadequately provided with land and to recommend what quantities of land should be made available to them and where. Mackay produced a detailed and thorough report which concluded that:

the fundamental principles laid down were not adhered to in acquiring the land in the Middle Island, neither in the reservations of sufficient land for Native purposes, nor in compensating the Native owners for the loss of a large share of their means of subsistence through depriving them of their hunting and fishing rights. (M17:I:doc 1:6)

Mackay recommended that blocks of land be set aside as an endowment for social purposes and land development, free from the "ever-varying influence" of Parliament. Additional blocks of land were recommended to be set aside for individual use. In the

Kemp and Murihiku blocks, including Banks Peninsula, Mackay recommended a total of 140,000 acres for endowment and 46,111 acres for individual use. A lack of time made it impossible for Mackay to select the land for specified Ngai Tahu.

The report was coolly received by Parliament. An 1889 joint committee brushed Mackay's recommendations aside, concluding that further land might be required and called for yet another inquiry into the tribe's condition. The 1890 joint committee which followed looked at the Otakou tenths claim. Although, unlike Mackay, they were not satisfied that tenths did apply to this purchase, they concluded that the existing reservation of land had been "by no means sufficient". And again they recommended further inquiry.

In 1891 Alexander Mackay was appointed to identify those Ngai Tahu without sufficient land within the Kemp, Otakou and Murihiku blocks. Ngai Tahu complained to Mackay on numerous occasions that the terms of his commission were too narrow. They wanted to raise again the major issues of the size of the reserves granted and those refused at the time of the sale. Mackay reported that 50 per cent of Ngai Tahu had no land and, using 50 acres per head as a measure of sufficient land holdings, only 10 per cent of Ngai Tahu were found to have had sufficient land. He gave a depressing account of the poverty, listlessness and despair amongst Ngai Tahu at the time. Again Mackay reiterated the finding of his 1887 commission that blocks of land of a significant size should be put aside as an endowment and for the use of Ngai Tahu.

In 1893 government finally appointed Mackay and S Percy Smith, the surveyor-general, to complete a list of landless Maori and to assign blocks of land to them. The task of identifying the land holdings of all South Island Maori and allocating interests in the land set aside by the Crown took over a decade, as Smith and Mackay were required to do the work in their spare time. Many of the blocks made available by the Crown, especially those of any size, were remote, inaccessible and unsuitable for occupation or settlement. A total of 142,118 acres were allocated to 4064 people, not all of them Ngai Tahu. The bulk of the land was in Southland, much of it in Southern Fiordland. The South Island Landless Natives Act 1906 formalised Mackay and Smith's recommendations. While there was some suggestion on the part of the native minister, Sir James Carroll that the measure would "clear our consciences and rid the records of any stigma attachable to the reputation of the colony and the Government", he fell short of arguing that the measure was a full and final settlement of the tribe's claims in respect to the Kemp purchase. In 1909 a petition of Tiemi Hipi and 916 others was presented to the House of Representatives. It sought a settlement of its grievances arising from Kemp's purchase and was referred to the government for favourable consideration.

In 1914 Michael Gilfedder and Henry Morpeth Haszard were appointed commissioners to examine complaints that the land awarded under the Landless Natives Act was unsuitable for any practical use by Ngai Tahu. It is apparent from Gilfedder and Haszard's 1914 report that little of the land allocated under the 1906 Act was capable of being farmed, certainly not in sections of up to 50 acres as originally envisaged. Land west of the Waiau River in Southland was wet, inhospitable and inaccessible. Any development required capital, and this Ngai Tahu lacked. Even where land was suitable for farming, the commission recommended that

blocks be at least 200 to 500 acres in size. It would have been impossible for anyone to make a living on many of the blocks.

In making findings on this aspect of the claim, the tribunal adopted the conclusions of the Crown's historian, Mr Armstrong. According to Mr Armstrong the Crown was extremely tardy in its attempts to "arrive at an almost totally unsatisfactory resolution" to the problem of Ngai Tahu landlessness, and it failed to provide Smith and Mackay with the resources needed for the task. He agreed with Mr Evison, the claimants' witness, that there was much more suitable land available, noting that between 1893 and 1909, 66 estates were resumed for general settlement at a cost of around œ2 million.

The contrast in Crown concern for Europeans with no land or insufficient land is startling. Whereas it was apparently thought impossible for the Crown to re-acquire substantial areas of good quality land adjacent to the places where Ngai Tahu lived on their meagre reserves, it was perfectly feasible for the Crown to purchase over 450,000 acres to facilitate European settlement.

The Crown was well aware by 1904, if not much earlier, that substantial parts of the land to be allocated in Otago and Southland were quite unsuitable for settlement by Ngai Tahu. The tribunal is unable to escape the conclusion that, to appease its conscience, the Crown wished to appear to be doing something when in fact it was perpetrating a cruel hoax. In the tribunal's view the facts speak for themselves. The tribunal was unable to reconcile the Crown's action with its duty to act in the utmost good faith towards its Treaty partner. The South Island Landless Natives Act 1906 and its implementation cannot be reconciled with the honour of the Crown. The tribunal found the Crown's policy in relation to landless Ngai Tahu to have been a serious breach of the Treaty principle requiring it to act in good faith. The breach is yet to be remedied.

Parliamentary select committees, Royal commissions and commissions of inquiry

Between the 1870s and the 1920s Ngai Tahu's various grievances were time and time again placed before numerous commissions of inquiry, Royal commissions or parliamentary inquiries. These consisted of:

The Middle Island Native Affairs Committee 1872
Chief Judge Fenton's 1876 inquiry
The Smith-Nairn Royal commission 1879-81
The Native Affairs Committee 1882
A parliamentary select committee 1884
The Mackay Royal commission 1887
The Joint Committee on the Middle Island Native Claims 1888
The Joint Committee on the Middle Island Native Claims 1889
The Joint Committee on the Middle Island Native Claims 1890
The Mackay Royal commission 1890-91
The Native Land Claims Commission 1920.

Some of these commissions dismissed Ngai Tahu's claims, often after only a cursory examination of the evidence. Others were detailed and comprehensive examinations

of aspects of the tribe's grievances. Alexander Mackay's 1887 Royal commission report provided a particularly extensive and thorough investigation of the tribe's concerns. Mackay's recommendation that an additional 186,112 acres be awarded Ngai Tahu, reiterated in his 1891 Royal commission report, led after years of delay to the ill-fated landless natives legislation in 1906. In general however one inquiry simply led to another, and successive governments largely failed to deal with the issues involved.

The demise of the Smith-Nairn commission

The Smith-Nairn commission has featured extensively in this report. Unlike many other inquiries, the commission examined Ngai Tahu eye-witnesses to the land purchases in considerable depth. Although it provided a greatly abbreviated report, this was done only after its funding had been cut off, and before it had heard evidence on some of the matters before it. The claimants argued that the premature halting of the commission's work was to the detriment of Ngai Tahu, and that the evidence of the commission was suppressed. It is clear that the native minister, Bryce, was not well disposed to the commission and that its report virtually sank without trace. But the tribunal was unable to find from the very limited information placed before it that the evidence was suppressed by the Crown and was therefore not able to sustain this grievance.

Ngai Tahu Land Report

02 Summary of the Grievances, Findings and Recommendations

2.14 Towards a Settlement

2.14. Towards a Settlement

In this chapter we have summarised the grievances of Ngai Tahu and the findings of the tribunal on those grievances. In some five areas the tribunal has made recommendations but has deferred the important question of recommending the principal remedial measures until the parties have had an opportunity to study the determinations of the tribunal. The parties will then hopefully negotiate and conclude a final settlement. Where the tribunal has seen a need to recommend an immediate redress then such action is referred to in the section dealing with the grievances both in this summary and in the later detailed examination.

The tribunal in chapter 25 has provided a more convenient summary of the small number of recommendations presently proposed. Reference to that chapter will disclose two further recommendations not raised in this summary. These relate to the making of ex gratia payments by the Crown to the Ngai Tahu Maori Trust Board. The tribunal has no power to award costs. In the first recommendation the tribunal asks the Crown to grant the sum of $1 million to the board to fund its negotiations for the claim settlement. In the second the tribunal considered that the Crown should reimburse Ngai Tahu for the $399,168 costs incurred in the preparation and presentation of the claim.

Although this summary may have given a synopsis of the principal grievances and findings it is important for the reader, as earlier cautioned, to read on and examine not only the detailed report surrounding the actual claims but also the historical background both prior and subsequent to the purchases. The tribunal examines not only the principles which guide its inquiry but also analyses in detail the Crown's response to the Ngai Tahu claims over the long period of time from the purchases to the present day. In chapters 16 and 22 the tribunal provides two overviews which frankly and clearly assess the Crown's overall responsibility first for the purchases as a whole and secondly in responding to the tribe's many calls for redress. These chapters need to be read, as does chapter 23 in which the tribunal reviews evidence placed before it by a number of government departments, state-owned corporations, farming interests and other bodies.

The predominant theme that constantly arises in the findings of the tribunal and indeed almost as constantly conceded by the Crown, is the failure of the Crown to ensure Ngai Tahu were left with ample land for their present and future needs. This finding has required the tribunal in penultimate chapter 25 to postulate how it sees the Crown and Ngai Tahu should approach the question of remedies in the negotiations which will follow the issue of this report. The tribunal, although standing back as

requested by the parties from recommendatory action, nevertheless suggests that a practical settlement is likely to be based on a mixed set of remedies and offers some suggestions.

What we are saying here is that although the length of this report may deter, it is necessary to go beyond the summaries in this chapter to gain a balanced view of all the relevant matters which guided the tribunal in makings its findings. It should also be noted that the views of a number of persons making submissions will be relevant when remedies are being considered.

Ngai Tahu Land Report

03 Ngai Tahu before the Treaty

3.1 Ngai Tahu Iwi

Chapter 3

NGAI TAHU BEFORE THE TREATY

3.1. Ngai Tahu Iwi

The descendants of Tahupotiki

3.1.1 Ngai Tahu take their name from Tahupotiki, a descendant of Paikea and a close relation of Porourangi, the ancestor from whom Ngati Porou has descended. Tahupotiki lived his life in the North Island on the east coast around the area now known as Poverty Bay-Hawkes Bay. Sometime in the seventeenth century his descendants gradually migrated south, travelling first to the Wellington coast and then crossing Raukawamoana (Cook Strait) in several waves to Te Wai Pounamu. Over a number of generations they spread over the large expanse of the island and on to Rakiura (Stewart Island). These heke occurred in comparatively recent times, but by intermarriage with those peoples who already inhabited the islands Ngai Tahu were able to forge links with the islands' more ancient history and resources. As Ngai Tahu moved south they sometimes fought and defeated, and sometimes intermingled with other tribes. In doing so they absorbed these peoples' older knowledge and experience of the land and its resources. This process of fusing Ngai Tahu with earlier communities was still continuing when Europeans first arrived on the islands in the eighteenth century.

Ngati Mamoe

3.1.2 While Ngai Tahu occupied Wairau and Kaikoura, interaction linked Ngai Tahu by whakapapa to many of the tribes which still inhabit the northern South Island, including Rangitane. However, Ngai Tahu's strongest rivals for control of the island's resources as a whole were Ngati Mamoe. Like Ngai Tahu, Ngati Mamoe were recent immigrants from the east coast of the North Island. A century before Ngai Tahu's arrival they had moved south, gradually shifting from their bases on the south coast of the North Island to Wairau and then further south. When Ngai Tahu arrived Ngati Mamoe were strong in the Kaikoura area. For a time there was peaceful coexistence. Then followed a series of clashes which resulted in Ngati Mamoe being driven further south and Ngai Tahu replacing them as the dominant tribe on the northern east coast of the South Island. Over the next century this process continued down the island. Ngai Tahu married Ngati Mamoe but the rivalries continued. By the time Europeans arrived Ngai Tahu had clearly established their dominance on the east coast while at the same time being heavily interlinked with Ngati Mamoe by whakapapa. In the far south of the island there were still those who regarded themselves as Ngati Mamoe

first and as the tribunal moved around the island it was clear that southern Maori still think of themselves as Ngai Tahu-Ngati Mamoe, a synthesis of the two tribal groups.

Waitaha

3.1.3 Older iwi still occupied the island before the southern migrations of Ngai Tahu and Ngati Mamoe. These people are collectively known to Ngai Tahu as Waitaha. Like Ngati Mamoe, their whakapapa and their traditions are linked with the history of Ngai Tahu. Waitaha were both a people and a collection of peoples. The name refers to all those who were there prior to the Ngati Mamoe and Ngai Tahu migrations. These peoples recorded their long and eventful occupation of the island in its most ancient names, names which were readily inherited by Ngai Tahu. Known by European scholars as Moa Hunters, the culture associated with the hunting of the moa had already gone with the passing of these flightless birds when Ngai Tahu first crossed Cook Strait. Although the collective name for a group of people, Waitaha also describes a people who traced their history back to Rakaihautu and his son Rokohuia who first landed the Uruao waka on the island many centuries ago. In Ngai Tau tradition it was Rakaihautu who travelled down the island beating the land with his ko and leaving the inland lakes. Ngai Tahu also have their own creation stories about the formation of the island looking to the Southern Alps as Te Waka a Aoraki, the canoe of Aoraki, with its paddlers making up the main peaks of the Southern Alps.

3.1.4 Mr Tipene O'Regan has outlined something of this history in Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi from which the following excerpt is taken:

It is hard to put a date on the Waitaha arrivals. The whakapapa (genealogy) takes root from the voyaging ancestor Rakaihautu, his son Rokohuia, and their canoe Uruao. Rakaihautu is present in traditions of Taitokerau (northern North Island of New Zealand), and in those of Rarotonga in Eastern Polynesia. The name of his canoe is also that of a star constellation and one of the ancient `star pathways' of Polynesian navigation. The names and the whakapapa are treasures of our antiquity to be lovingly recalled in debate and speculated on and intermeshed with archaeology and anthropology when it suits. What is important to our people is that Waitaha are the first people in our island and that, in his travels, Rakaihautu and his tribe named the land and the coast which borders it. These are the names we associate with the earliest archaeological evidence.

While these ancient Waitaha tribes were establishing their southern world, other tribes were building similar worlds in the north. There it was warmer and they were more numerous. Their kumara, yam, and taro were sustained with less difficulty and they could grow hue (gourds) for containers. While their numbers were increasing and they were beginning to contest the most favoured areas amongst themselves, the southerners were still expanding into more open and less contested land and resources. On the eastern North Island coasts, a tribal group grew up around the ancestor Whatua Mamoe and established substantial fortifiied pa in the region of the modern city of Napier. Just to the north, in what is now the Gisborne area, other groups formed which shared descent from the Cook Island ancestor Paikea and his brother Irakaiputahi. Roughly half-way between Gisborne and Napier lies the Mahia Peninsula; here a third group associated with the Kurahaupo canoe was forming. By

the early sixteenth century elements of these tribes were establishing themselves down the eastern North Island coast, to the edges of Raukawamoana (Cook Strait).

The descendants of Whatua Mamoe from the Heretaunga (Napier) region became known as Ngati Mamoe. In the mid-sixteenth century a small section of them settled on the Cook Strait coast near Wellington and shortly afterwards crossed the strait and imposed themselves on the Waitaha communities living in the Wairau district near modern Blenheim. According to our traditions, the Ngati Mamoe were drawn south by the abundant bird, eel, and fish resources of the Wairau estuaries and lagoons. Over time they came to dominate Waitaha, more by strategic marriages than by war, and the old southern tribal communities began to be known by their name, Ngati Mamoe, over the length of Te Waipounamu.

Meanwhile, back in the eastern North Island another more substantial tide of tribal movement was building. The mosaic of tribes was shifting southwards after a round of retributive fighting, sparked by the murder of a child. The movement had far more general causes than the historic incident which sparked it, and there began a steady migration of groups from within the eastern North Island tribes that was to continue into the seventeenth century.

Several of those groups migrated, over a span of about two generations across Cook Strait and into Te Waipounamu. Over time, they formed the principal southern tribe and became known as Ngai Tahu through their linking ancestry to Tahupotiki of the East Coast, North Island, whence their southwards migration had begun. However, they had a rich mixture of North Island tribal descent flowing in them, and the bonding into a reasonably unitary tribe did not take place until they had been in Te Waipounamu for nearly a century. The story of that century is one of conflict, of peacemaking, and intermarriage, both with the Ngati Mamoe and amongst themselves. It was during that time that 'classic' Maori culture was implanted in the South Island, to be modified by the rigours of the colder environment and a very different economy.{FNREF|0-86472-060-2|3.1.4|1}

Te Heke o Ngati Kuri

3.1.5 Ngai Tahu's moves south brought the tribe progressively into the various areas occupied by them at the time of the Treaty. The first heke, or migration, was that of Ngati Kuri. Kuri lived several generations after Tahupotiki, and it was his grandson and great-grandson, Puraho and Mako, who first took the tribe across Raukawamoana (Cook Strait), following a battle with Ngati Ira at Puharakeke (near Seaview, Lower Hutt). At Kura te Au (Tory Channel) where they settled, they soon came into conflict with Ngai Tara, whom they successfully defeated. In the Wairau they campaigned against Rangitane, and eventually a Ngati Kuri chief, Maru, moved south to Waipapa, on the Kaikoura coast. Mr Wiremu Solomon, a kaumatua from Kaikoura explained the events that then took place:

... Kati Kuri came and lived at Kaikoura and the tribes...living there gave over the Kaikoura lands to Maru... There were many hapu, or clans, living at Kaikoura even Kati Mamoe. These were the ones who wanted to live peacefully, who did not want fighting... Kai Tahu's battles were not murderous ones, they did not just fight for fighting's sake. They did not kill without end. It was not like that. They fought their

battles and when it was over that was the end of it. They did not chase their enemies all over the country nor did they kill treacherously. Kati Kuri was not like that. Now, at the time that Kaikoura was given over to Maru a poha (food storage container) named 'Tohu Raumati' was given also. This poha was fashioned with a bird in front and a human figure on top and the food in it was never eaten by man... although food was preserved in it each year. The first foods of the year were preserved in that poha. It was a sacred poha imbued with the sacred rituals and mana of the Maori. The giving of that poha was symbolic of the giving of the land. (H7:22)

Ngati Mamoe then settled at Pariwhakatau (Conway River) from which they were eventually expelled as far as Murihiku.

Mr O'Regan identified the Irakehu people as the next major heke south, bringing Ngai Tahu to Horomaka (Banks Peninsula) (A27:9).

Te Heke o Tuhaitara

3.1.6 Another great migration which led to Ngai Tahu occupation of most of what is now Canterbury is identified as Te Heke o Tuhaitara (J10:7). The heke is associated with Moki and Turakautahi. According to Mr O'Regan, Tuahuriri came into conflict with his brother-in-law Tutekawa who killed two of Tuahuriri's wives before fleeing to Wairewa (Lake Forsyth). Tuahuriri drowned and it was his two sons, Moki and Turakautahi, who travelled south to Wairewa, where Tutekawa was killed. Moki was himself killed by maketu at Wairewa soon after. From the members of this heke come the major hapu of Canterbury and Banks Peninsula. Mr O'Regan commented that:

The heke divided the new areas between them with Turakautahi coming here to Kaiapohia, Mako to Wairewa, Te Ruahikihiki to Taumutu and Te Rakiwhakaputa to Rapaki and so on. (A27:11)

3.1.7 Mr Rakihia Tau's account stressed not utu but the value of trade and the richness of the resources of the new territory.

Having mingled with their kinsmen Ngati Kuri, Waitai and some of his kinsmen left their kaianga nohonga near the Wairau River called o Te Kauae. This was on account of Maru their kinsman showing clemency to certain Ngati Mamoe people. These people were also closely related. Waitai and his forces travelled southwards as far as Murihiku or Southland. In time Moki's brothers-in-law who were with Waitai's forces desired to return to the Wairau, hence Kaiapu and Te Makino journeyed overland and returned to the Wairau. On their return they reported to Moki and the various chiefs their discoveries, the abundance of mahinga kai within this Island. This was the reason for the building of Kaiapohai [sic] Pa. The importance of the site came from the fact that it was the base for a NETWORK OF KAIANGA NOHONGA throughout the South Island. (J10:8) (emphasis in original)

Further disputes continued with Ngati Mamoe throughout the southern parts of Te Wai Pounamu until a final peace was agreed to at Poupoutunoa (near Clinton). The peace was arranged by Te Hautapuniotu of Ngai Tahu and Te Rakiihia of Ngati Mamoe. Although at times precarious, Mr O'Regan stated that the "union of the two tribes...has held from that time". (A27:12)

3.1.8 The last of these Waitaha peoples to be incorporated into Ngai Tahu were Ngati Wairangi. Ngati Wairangi held control of the west coast including the valuable pounamu of Arahura. They are presumed to have been a pre-Aotea people who originally came from the Taranaki area. Like the other tribes of the South Island they were already connected by marriage to Ngai Tahu prior to their eventual defeat in the late eighteenth century by Tuhuru at the battle of Lake Mahinapua, south of Hokitika.

Ngai Tahu's relationship with other tribes by 1840

3.1.9 We have explained that at the first hearing of the claim certain northern South Island tribes from the Nelson and Marlborough district appeared before the tribunal and claimed interest in the proceedings (1.6.12). The claim lodged by these tribes raised a dispute as to the tribal boundaries of the various iwi which led to a formal hearing before the Maori Appellate Court. The court gave its decision on 15 November 1990. The full text of that decision is appended to this report (appendix 4). Generally the dispute concerned the position of the north eastern and north western boundaries of Ngai Tahu.

Ngai Tahu claimed rights on the east coast up to the respective rohe shown in the Kaikoura and Arahura purchase deeds being respectively Parinui o Whiti on the east coast and Kahurangi on the west coast. These rights were challenged by three parties in the Maori Appellate Court representing ten northern tribes. On the eastern boundary Ngati Toa and Rangitane opposed Ngai Tahu's claim up to Parinui o Whiti and on the west coast Ngai Tahu rights were disputed by Ngati Toa, Ngati Rarua, Ngati Tama, Rangitane, Te Atiawa, and to a certain extent by Ngati Apa.

We do not propose to review the court's decision which examined the customary take such as ancestry (take tupuna), conquest (take raupatu), gift (take tuku) and the important question of actual occupation (ahi kaa) which must accompany a take.

On the eastern coast the court rejected claims by Rangitane that prior to the Ngati Toa incursion led by Te Rauparaha in 1828, Rangitane had occupied and held title to the land north of the Waiau Toa (Clarence River)

The court also found that although it was clear Ngati Toa had effectively conquered the east coast as far as Kaiapoi and possibly Akaroa, they did not follow up this military sucess by exercising ahi kaa over any territory south of Parinui o Whiti. The court decided that Ngai Tahu, in 1840 and in 1859 when the Kaikoura deed was signed, exercised rangatiratanga over the eastern coast up to Parinui o Whiti.

The court in looking at the various claims to the west coast came to the conclusion that Ngai Tahu held customary title to Tai Poutini lands for a considerable time before 1827 when Ngati Tama and Ngati Rarua arrived with their chiefs Niho and Takerei respectively. However the Maori Appellate Court also found that any rights these two tribes had were extinguished with the defeat of Te Puoho at Tutarau and the retirement of Niho and Takerei north of Kahurangi Point just prior to the Treaty. Claims made by Ngati Toa, Rangitane, Te Atiawa and Ngati Apa were also examined by the court and rejected. The Maori Appellate Court found that rights of ownership of the land comprised in the Arahura deed were vested in Ngai Tahu.

A little later in this chapter we again look at the invasion of Ngai Tahu territory by the northern tribes and its effect on the tribe.

The iwi

3.1.10 By the time of the Treaty then, Ngai Tahu were in control of a vast territory, but like all iwi they existed in hapu and whanau communities, with different genealogies, often reflecting the mixed origins of the tribe. Mr O'Regan described this in the case of Arowhenua.

Perhaps our Kati Huirapa people centred on Arowhenua best typify the three primary streams of whakapapa that go to make us-they are the centre of our Waitaha tradition, they have significant Mamoe descent and they carry the name of Huirapa, one of our most important founding tupuna from the southeastern North Island roots of Kai Tahu. Our tupuna tied us together in a kupeka, or net, of whakapapa... (A27:12)

Professor Atholl Anderson, himself of Ngai Tahu descent, presented the relationship between the different parts of the tribe to us in scholarly terms:

If I have understood this matter correctly then it can be inferred that the land and its resources was perceived in three ways: as a tribal territory, that is, the area for which the tribe would fight; as land in common ownership excepting those tenured pieces, or rights of access to resources, which were inherited through hapu and could be located at any point in the tribal territory; and as a series of annual ranges (weakly combined into districts), which were the areas customarily ranged over by the members of the residential communities in the course of their yearly economic activities.

This amounts, in turn, to an economic system in which common ownership was not congruent with management. The tribe owned the land in common but did not manage it economically. Hapu owned property or access rights but did not manage them at hapu level. Communities owned neither land nor resources but, were, nevertheless, the operationally-effective economic managers through their organisation of activity schedules and labour. (H1:73)

Professor Ward also commented on the way Ngai Tahu may have perceived their rights in line with his experience of other Polynesian cultures.

The question of just which sections of Ngai Tahu owned or controlled what rights is a matter of some complexity-a complexity that had grown up over many generations of travel and dispersal over and through Te Wai Pounamu. It is clear that some rights, like mutton-birding in the Titi Islands, were exercised far from the group's residential bases, and that mobility between residences (e.g. Taumutu, Otakou, Ruapuke) gave access to rights in various hinterlands and waters to people who resided from time to time in those settlements. (T1:9)

The Crown's witness, Mr Bathgate, further developed the same theme, and like Professor Ward, based much of his argument on the work of Professor Crocombe of the University of the South Pacific.

While the Ngai Tahu tribe was an entity in itself, it was comprised of many hapu which were the major units of social organisation above the whanau or family at the local level. The tribe as a corporate unit was more evident in relation to warfare, when the resources of the vairous [sic] hapu in the South Island under the control of chiefs of differing rank might be combined to take collective action against others, such as Te Rauparaha and his invaders in the 19th Century. (S2:236)

3.1.11 We have not lingered on the stories associated with the wars and migrations that peopled this island. Each of these stories has many versions and to try and isolate which events occurred where and in what order has the danger of turning the rich and varied traditions of the tribe into a fixed and sterile narrative. The tribunal's task is not to unravel these complicated traditions. To attempt to produce a standard or authorised edition would only undermine the very complexity on which traditional history was based. Our task is to examine Ngai Tahu's claim in connection with the Crown's obligations under the Treaty. It is clear to us that Ngai Tahu existed in 1840. It is just as clear that in 1990 Ngai Tahu continue to exist. As Mr O'Regan suggested:

Despite a little regional turbulence within us from time to time Kai Tahu Whanaui [sic] are one people and it is as one people that we stand before the Tribunal today. (A27:12)

That the tribe has survived through adversity will be made clear by the story of the events which follows. That they have survived at all is a tribute to their identity as an iwi.

We now turn to examine Ngai Tahu's relationship with its lands and other resources in the period prior to the Treaty being brought to Te Wai Pounamu by Major Bunbury in 1840.

Ngai Tahu Land Report

03 Ngai Tahu before the Treaty

3.2 The Tribe and its Resources

3.2. The Tribe and its Resources

How large was the tribe?

3.2.1 Professor Atholl Anderson, associate professor of anthropology at the University of Otago, provided extensive information on the size and location of the Ngai Tahu population in his evidence on mahinga kai (H1-3). The Crown too submitted considerable evidence about the Ngai Tahu population at the time of the land sales. In a comprehensive report produced by Mr Tony Walzl and audited by Professor Ian Pool of the University of Waikato, nineteenth-century censuses of population were tabulated and aggregated for the whole of the tribal area (O14-O16, O43). Although this evidence only covers from the mid-1840s onwards, the conclusions about the Maori population at the time of the Treaty were consistent with those of Professor Anderson. Both Claimant and Crown witnesses based their evidence on similar records. Although the study they provided was a valuable insight into Ngai Tahu demography from mid-century, estimates of how many Ngai Tahu there may have been at the time of initial contact with Europeans are much harder to evaluate because of the very limited source material.

Professor Anderson, Professor Pool and Mr Walzl make it clear that the accuracy of the various censuses that were taken of Ngai Tahu in the mid-nineteenth century is questionable. Reasons for this include the tendency of some enumerators to count only those who had no European ancestry while others include those of mixed parentage. As early as the 1840s there were Ngai Tahu who would have been regarded as quarter caste Maori or even possibly eighth caste Maori (H1:15). Ngai Tahu's continual movement about the island meant that the size of individual communities could rise and fall rapidly, depending on what time of year the population was recorded. Despite these reservations, the wide variety of observations and their relative consistency mean that it is still possible to come to a conclusion about the size of the Ngai Tahu population and its distribution at the time of the Treaty.

3.2.2 Professor Anderson suggested that the South Island had never supported a Ngai Tahu population much over 3000. He based his figures on a large number of different recorded observations of the populations of specific Maori communities. These figures were mostly taken during the middle decades of the nineteenth century, but some extend back as far as the 1810s. The evidence was divided into different regions. For the Foveaux Strait area he concluded that the Maori population was increasing during the period 1810-1828 to around 1000, with new settlements at Ruapuke and Centre Island. This increase was probably due to the new found ability to grow potatoes and to the economic potential created by European visitors.

The sealing industry collapsed in the 1820s, leading to declining European interest in the area until the establishment of shore whaling ventures in the late 1830s. Professor Anderson maintained that there was a uniform decline in the population from 1000 in 1828 to 400 in 1868, making the population at 1840 around 700. He attributed this decline largely to epidemic diseases. The situation in other areas was similar. The estimated population for East Otago was given as 700 in 1820, declining by about half two decades later (H3: fig 13). For North Otago the population was estimated at no more than 200 in 1840, and for mid-Canterbury about 500. The Kaikoura and Arahura populations were given as unlikely to have exceeded 100 each. In total, these figures would mean an 1840 population of between two and three thousand.

Seasonal migration, a confusion over whether or not to count Maori with European ancestry and migratory changes for defensive and economic reasons were acknowledged by some in the nineteenth century as throwing doubt on official figures. Alexander Mackay suggested that as many as 843 people may have been missed by Mantell in his 1848 census of the population within the area of the Kemp purchase (A9:11).{FNREF|0-86472-060-2|3.2.2|2} Although there is no other evidence to support so large an error in Mantell's figures, some Ngai Tahu were certainly missed because they were not present in the communities at the time the land commissioner visited them (O15:18).

3.2.3 The size of the population at the time of first European contact is open to even greater speculation. Mr Tipene O'Regan argued that at the end of the eighteenth century the tribe was considerably larger than the few thousand suggested by Professor Anderson. He attributed the rapid decline of the population on the wars with the northern tribes and on measles epidemics in the 1830s. Professor Anderson's evidence shows that Ngai Tahu numbers as recorded in the 1820s were only moderately higher than those of the 1840s, and were certainly not in the order of tens of thousands. If the population had declined from this high figure, then this must have occurred at least before 1820, and probably a good deal earlier. This would rule out the Kaihuanga feud, the northern invasions and recorded epidemics as the main reasons for population decline. All of these befell the tribe after the mid-1820s. So dramatic a decline in numbers could have occurred in the later decades of the eighteenth century, but there was no traditional, archaeological or historical evidence before the tribunal to support that contention. On this matter we would prefer to accept the conclusions of Professor Anderson. However, in doing so, we must acknowledge that we may not have heard the last word on the size of the Ngai Tahu population.

How did the tribe occupy its territory?

3.2.4 The question was often asked, how was it that so small a group of people were able to occupy so large a territory, with its mountainous ranges, turbulent rivers, dense forests and cold winter climate? Europeans in the nineteenth century often dismissed Ngai Tahu's claims to ownership of this vast region of apparent wilderness as being without any foundation. In fact, the tribunal was given substantial evidence that Ngai Tahu were familiar not only with the coast line of the island, where most of the permanent settlements were based, but also with the inland plains, mountains and lakes. The interior and mountain passes were crossed by a network of trails. Inland resources were an integral part of the tribe's subsistence and of their trade both

internally and with other tribes. This evidence was presented by members of the tribe themselves as well as by expert historical and archaeological witnesses for the claimants, the Crown and the tribunal.

Archaeological remains

3.2.5 One of Professor Anderson's most striking exhibits was a map of the South Island made up entirely of the locations of 3919 known archaeological sites (H1 fig 1). This map is reproduced below. Almost the complete coast line can be seen, with locations densely clustered around Kaikoura, Canterbury and Banks Peninsula, the Otago peninsula and Foveaux Strait. The inland regions of Canterbury, Otago and even Fiordland are included: regions where the lack of agricultural activity has made the discovery of such sites less likely. Many of these sites pre-date Ngai Tahu's arrival in the South Island. But, as Mr O'Regan explained (A27), in absorbing the Waitaha and Ngati Mamoe iwi who preceded them, Ngai Tahu inherited many of their traditions. These included, in some measure, earlier names for the features and resources of the island, as well as the economic activities, traditions and whakapapa associated with them.

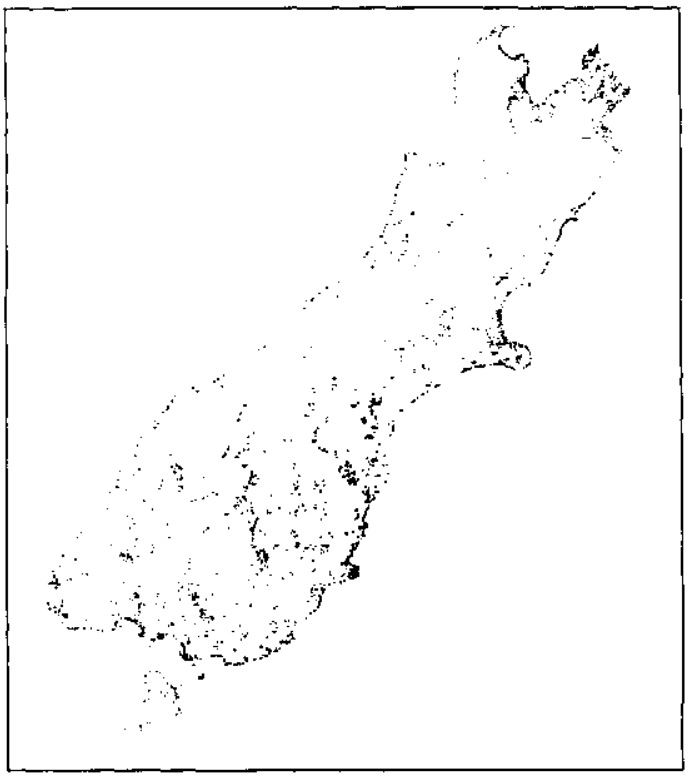

Figure 3.1: The distribution of 3919 known archaeological sites in the South Island, Department of Conservation.

Many of the interior sites recorded the hunting of the moa, a resource which had been exterminated prior to the Ngai Tahu migration. These sites are generally between 400 and 800 years old. But the archaeological record shows other uses of the interior continuing into European times. In addition to the quarrying of pounamu, South Island Maori had developed considerable expertise in fashioning a wide range of tools from other minerals. These included silcrete, a form of bonded quartz sandstone and porcellanite, a mudstone. During its visit to the Canterbury Museum the tribunal was shown the museum's extensive collection of South Island stone tools. Working these

materials into tools that could be of a considerable size required substantial skill and organisation.

Pounamu (nephrite or greenstone) was prized above all minerals for its durability, its strength and its beauty. Nephrite is found in a number of different forms from Nelson in the north, down the west coast to Wakatipu and Milford Sound. The pounamu from the Milford region, known as tangiwai, is bowenite rather than nephrite. The working of the stone could take place far away from its source. Kaiapoi pa became a renowned trading centre for the stone, where it was fashioned into articles ranging from intricate jewellery to robust mere pounamu.

Umu-ti, oven sites for the cooking of the roots of the ti, are also common in many parts of the South Island. Ti was also known as kauru. Remains of these ovens are liberally distributed throughout the South Canterbury and Otago area. On the downs between the Waitaki and Opihi valleys as many as 88 probable umu-ti sites have been recorded (H1:4). The cooking of kauru remained an essential part of the Ngai Tahu economy at least until the 1840s.

Rock drawings were also an indicator of Maori use of the interior. There are about 400 such sites in the South Island. About half of these are in Canterbury and the rest in North Canterbury and North Otago. Carbon dating of the debris found with these suggest their origin in the moa hunting period, 450-850 years ago. However the art did not die out with the passing of the moa. Maori continued to produce such art into the European era, with some paintings depicting sailing ships and other items of European material culture.

The land is named

3.2.6 Maori traditional knowledge, some of it from Waitaha and some of more recent origin, included names of all the most prominent features of the island, mountains, lakes, and rivers. All these features were known and their names often represented the deeds of the first explorers of this land. European names, which have in many cases displaced the Maori in official usage, celebrate the deeds of nineteenth-century explorers, Heaphy, Brunner, von Haast and others who traversed the island. These later adventurers were not the first, neither were the paths they took untrodden. Maori guides often accompanied such men, using trails with landmarks long familiar to them

and places named after their ancestors.

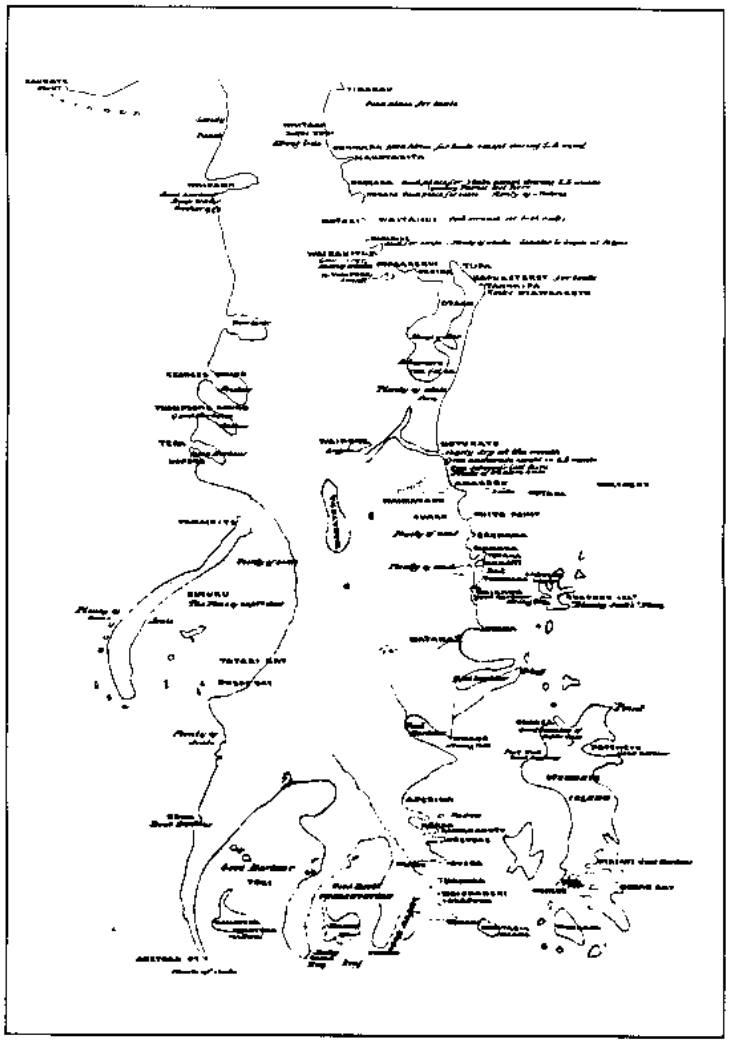

Figure 3.2: Southern portion of a Maori map of the South Island made for Edward Halswell in the early 1840s, courtesy of the Alexander Turnbull Library, Wellington, New Zealand.

Walter Mantell, whose role in purchasing land from Ngai Tahu will later be discussed in great detail, was given a long list of the important places up the Waitaki river from his guide Te Wharekorari. This memory map gives the names in sequence of the tributaries, camping places and ancient settlements from the sea to Lakes Tekapo, Pukaki and Ohau (H3:fig 26).{FNREF|0-86472-060-2|3.2.6|3} The detailed names including the places where different foods could be obtained were held in memory, like whakapapa, where the sequence and significance of every name had its own place.

A survey of the journals of many of these early European explorers clearly shows how their knowledge of the landscape was provided by Ngai Tahu informants. Maps made during these encounters gave Europeans sufficient information to recognise major features of the interior long before seeing them for themselves. A good deal of this evidence was presented to the tribunal by Professor Anderson and Mr Barry Brailsford for the claimants, but such accounts were scattered throughout much of the evidence. Edward Halswell, a protector of aborigines, produced a map in the early 1840s drawn up from information given him by Maori. It clearly depicts the coastline

from Timaru down past Otago on through Foveaux Strait and around to Dusky Sound and the west coast (J18:145). The map is a dramatic illustration of how Ngai Tahu saw their island landscape. Although the entire island is easily recognised, the size of areas most used by Ngai Tahu are shown as considerably larger than the remainder. During Edward Shortland's 1844 travels around the island, he was given several maps from the Ngai Tahu chiefs, Huruhuru and Tuhawaiki. The map he produced of the east coast and the interior clearly identifies Lakes Hawea, Wanaka, Wakatipu and Te Anau{FNREF|0-86472-060-2|3.2.6|4}

While many of these names have been lost in the century and a half since the Treaty, many are still known and remembered. The tribunal was given a map of the Kaikoura coast from Parinui o Whiti (White Bluffs) to just south of Kaikoura. On it were over 200 Maori names of places along the coast (H28).

South Island trails

3.2.7 Barry Brailsford gave evidence on the elaborate system of trails in the South Island. These linked the various Ngai Tahu settlements into the social and economic life of the tribe and tied them into networks of trade which extended well beyond the South Island. As a result of this, some knowledge of the geography of Te Wai Pounamu can be found in distant North Island locations. In 1793 Tuki, a resident of Oruru in Doubtless Bay in the far north, produced a map of both islands for Governor King in Norfolk Island. A river on the west coast of the South Island is clearly marked as a source of pounamu. A lake (probably Wakatipu) is also shown as the place where pounamu was taken for making axes. Tuki had never ventured there himself.{FNREF|0-86472-060-2|3.2.7|5}

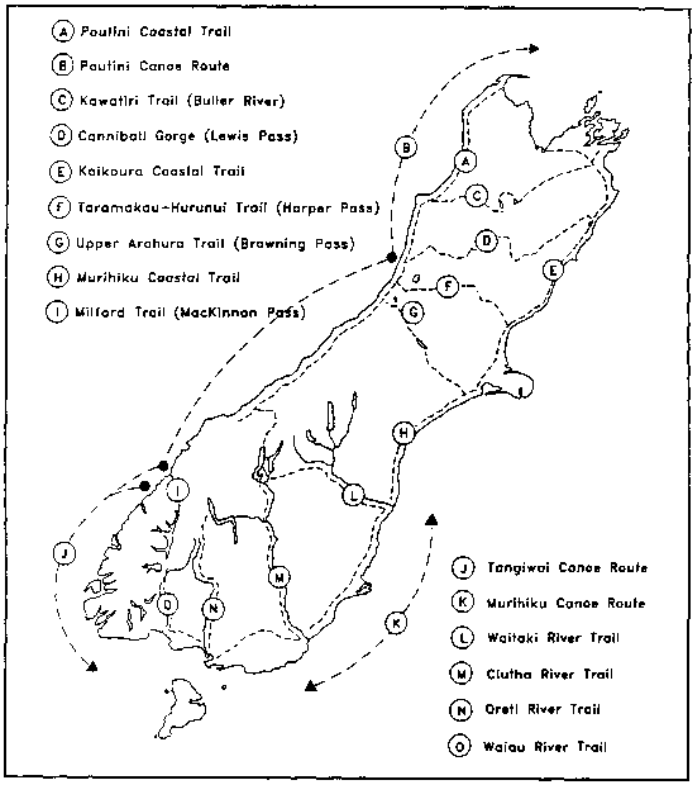

Figure 3.3: Major South Island trails as identified by Barry Brailsford *Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington, 1984) (J18)

We have reproduced one of Mr Brailsford's maps showing a complex network of trails across and up and down the island. The title of his book, Greenstone Trails, highlights the use of these trails in the trade in precious pounamu. But the trails had a wider significance. They were routes into the various resources of the interior. In another map of the Canterbury plains area (J17), we were shown the way Ngai Tahu travelled inland in search of weka and to lakes such as Coleridge, Pearson, Lyndon and Howden for eeling. Trails also connected the various Ngai Tahu communities, acting as a social and cultural link between hapu. Long distance travel allowed Ngai Tahu to trade amongst themselves and to keep their rights to distant resources alive. These trails were not just easy routes across a harsh terrain: they had to follow food resources. While a war party could cover these large distances in very short periods of time, the usual pace was more leisurely. Preserved food, such as dried fish, could sustain travellers in a hurry, but families travelled at a slower pace, stopping for different periods of time at places where eels were plentiful, weka easily caught, or some other food obtainable. Knowledge of the route included knowledge of where all these foods could be taken.

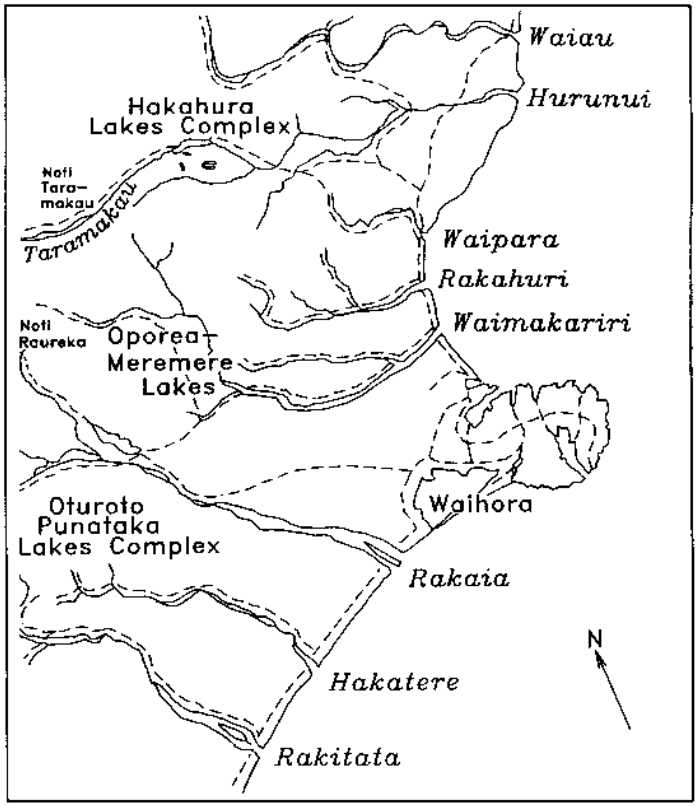

Figure 3.4: Canterbury trails between the coast and inland lakes as identified by Barry Brailsford *Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington, 1984) (J17)

Not all the trails were necessarily known by everyone, but neither were they used only occasionally. The historical record for the 1840s and 1850s shows just how far and how frequently Ngai Tahu travelled, sometimes across the land and at other times by sea. By the 1840s many Ngai Tahu rangatira had extended their experience of travel to the wider world, with many of them having been to New South Wales, and a number having travelled to the northern hemisphere on whale ships or with other traders.

3.2.8 Travel in and around the island was tied to the tribe's seasonal existence. Although Ngai Tahu were located largely along the sea coast in permanent settlements, Professor Anderson has shown that they ranged inland on a regular seasonal basis. Sometimes inland kainga could be occupied for several years at a stretch. Lakes such as Hawea and Wanaka show evidence of both longer term occupancy and of summer use. It was at Hawea that the Ngati Tama raider, Te Puoho, encountered Ngai Tahu whanau on his way south in 1836 (H1:32,58).{FNREF|0-86472-060-2|3.2.8|6}

The most persistent and obvious form of seasonal travel was the annual heke to the Titi Islands to take titi. This heke was highly structured. Ngai Tahu came south from as far north as Kaikoura and the birds were taken as nestlings from late summer to winter.

The location of settlements also varied with economic needs. According to Professor Anderson, prior to European contact, settlements were mainly located at the mouths of the large rivers. The rivers provided access to the foods of the interior as well as those of the sea. With the advent of sealers and whalers harbour locations became favoured. New sealing and whaling boats made sea travel more attractive and harbours offered the opportunities of extensive trade with Europeans. Settlements coalesced around new whaling stations at Moeraki, the Otakou Heads, the various harbours of Banks Peninsula and Foveaux Strait. Island locations such as Ruapuke and Raratoka, in Foveaux Strait, also became favoured, especially when the threat of invasion from the north became pronounced in the 1830s. The Kaihuanga feud of 1826 also led to some redistribution of population and the destruction of some settlements (H1:33). Matiaha Tiramorehu explained how the war had led Ngai Tahu to abandon temporarily some of their kaika around Moeraki (Z10:33).{FNREF|0-86472-060-2|3.2.8|7}

What resources did the tribe use and how?

3.2.9 Only Europeans who had extensive relations with Ngai Tahu were able to appreciate in any depth the extent to which Ngai Tahu interacted with the resources of the island as a whole. For new arrivals, familiar with a countryside transformed and tamed by centuries of intensive agriculture, the landscape was an empty, untouched wilderness. Ngai Tahu's place in this environment was judged entirely on the slight modifications which could be readily noticed by European eyes. These consisted of little more than villages and potato patches. To most Europeans this landscape was unused in terms of European notions. It was easy for them to conclude that the land was not owned in any sense that they would recognise.

In the period before the Treaty, those Europeans who came into Ngai Tahu's territory learnt very quickly that such assumptions were far from the truth. Early whalers and sealers soon found that the apparently unnamed landscape was known in detail, and that the tribe used different resources over the territory as a whole. They were also to discover and generally accept that Ngai Tahu's claims to rights over the island were extensive and were based not just on historic association or knowledge but on the use of the island's resources throughout the tribe's territory (5.3.5).

Evidence of the Ngai Tahu economy and resources

3.2.10 The tribunal received considerable evidence on the Ngai Tahu economy and its resources from tangata whenua and from the expert witnesses commissioned by the claimants, the Crown, the NZFIA and the NZFIB and by the tribunal itself. It was our impression that there was an overwhelming consistency in the evidence, and that despite the occasional clash between the experts, the vast bulk of the evidence presented to the tribunal showed a remarkable degree of consensus. Differences, when they did occur, sometimes appeared to us to be the result of professional rivalries between the experts.

An archaeologist may have found fault with the evidence of a historian or a fisheries scientist may have questioned an archaeologist's understanding of the ecology of a certain fish species. The tribes of modern experts defended their professional territories with a zeal Ngai Tahu would appreciate. Where these conflicts are relevant to the discussion of Ngai Tahu's mahinga kai rights under the Treaty we have discussed them.

We will not be concerned here with the evidence of sea fishing, the area where more substantial differences emerged between the parties. We are very conscious of the problems of dividing the sea fisheries from the land and fresh water based resources of the tribe. Ngai Tahu did not make such arbitrary distinctions between the land and the sea as those forced on us by the size of this inquiry.

We proceed to examine some of this evidence, although it was not contentious, because it portrays the Ngai Tahu economy in a way that should dispel the myth that Ngai Tahu were but a scattered group of hunters and gatherers who eked out a limited existence on a vast island scavenging foods as they found them. As the evidence suggests the truth was very different.

The archaeological record

3.2.11 We have already discussed the use of some resources, including the cooking of ti, and various stone for manufacturing tools. Professor Anderson, Dr Bathgate, Professor Leach and Mr Hooker presented considerable archaeological evidence based on a wide range of professional studies of midden remains. These studies are ongoing and have been carried out at various levels since the nineteenth century. However much of the midden evidence concerns Ngai Tahu's use of sea resources and so will be discussed in our later report on these matters.

Factors leading to deficiencies in aspects of the archaeological evidence were often pointed out. Professor Anderson, the claimants' archaeologist, and Dr Bathgate, the Crown's archaeological witness, both stressed the simple fact that some kinds of evidence survive better than others. This qualifies the accuracy of the information presented. For example, the absence of remains of fish structure made of cartilage rather than bone may not in fact indicate that such fish were not used. Because cartilage does not survive as long in the ground as bone, it will either be under represented or not represented at all in midden remains. Cultural practices, such as beheading the fish elsewhere than on site, or preserving fish and taking it away, may also influence what is found archaeologically. Dr Habib, too, was critical of a dependence on the archaeological record (T4). However, this does not imply that archaeological evidence has not been helpful or indicative of the lifestyle of those

who lived in the times before written records. It merely means that just as there are missing pieces in the early historical jigsaw, so too are pieces of the archaeological puzzle missing.

Differing opinions were expressed as to the relative reliability of either contemporary European recorders or the "archaeological record"-the bones, artifacts, structures, and any other remains associated with human activity that occurred more than one hundred years ago. One witness suggested that the archaeological record showed the true economic pattern of the tribe, unbiased by factors such as social significance of the resource or lack of accurate identification of resources by the recorder (S2:155-6). However while this is a debatable point, witnesses agreed that the various components of the archaeological record (the bones, artifacts, structures etc) should never be looked at in isolation from each other, nor should they be isolated from historically recorded events, or from traditional accounts. No one type of evidence should be taken as being solely definitive.

A regionally based economy

3.2.12 Archaeologists presenting evidence to the tribunal looked at the archaeological record of the South Island in total, from the time of the first recorded settlement to the nineteenth century. This enabled us to see the sequence of resource use as it unravelled over time. Temporal change was not the only variation which was evident. The main archaeological-early historical evidence presented for the claimants by Professor Anderson, and for the Crown by Dr Bathgate, showed that past Ngai Tahu use of resources was very much on a regional basis. It was apparent that each particular community had its own special areas for collecting different foods throughout their region in various seasons. The foods available in each region differed in abundance and ease of acquisition. Regions had their specialties.

For example, in communities around the Otago harbour, it is evident in both the archaeological and historical record that maka (barracouta) was an important resource. Ngai Tahu fished for maka by lure. The maka lure was comprised of a wooden shank with a bone point or seal tooth inserted in it (S2:48). These were trolled through the water, mimicking the small fish which darted to and fro trying to escape as maka drove them into schools to feed on them. Even when the lure was modified, the expertise in catching barracouta in this region was frequently noted by early observers (S2:52).{FNREF|0-86472-060-2|3.2.12|8} In the early 1800s Maori were supplying European ships with fish, potatoes, pigs and flax. By the mid-1830s Maori potato cultivation was clearly extensive. Taiaroa and Karetai, who owned whaleboats, would bring potatoes from Maori settlements as far afield as Taieri and Moeraki to be sold at Otakou (H1:21-22). Potatoes were exported from Otakou to Sydney in the 1830s by the Weller brothers, as was pork, mutton bird and dried and salted fish. Maori involvement in the whaling industry was particularly notable around Otakou in

the thirties.

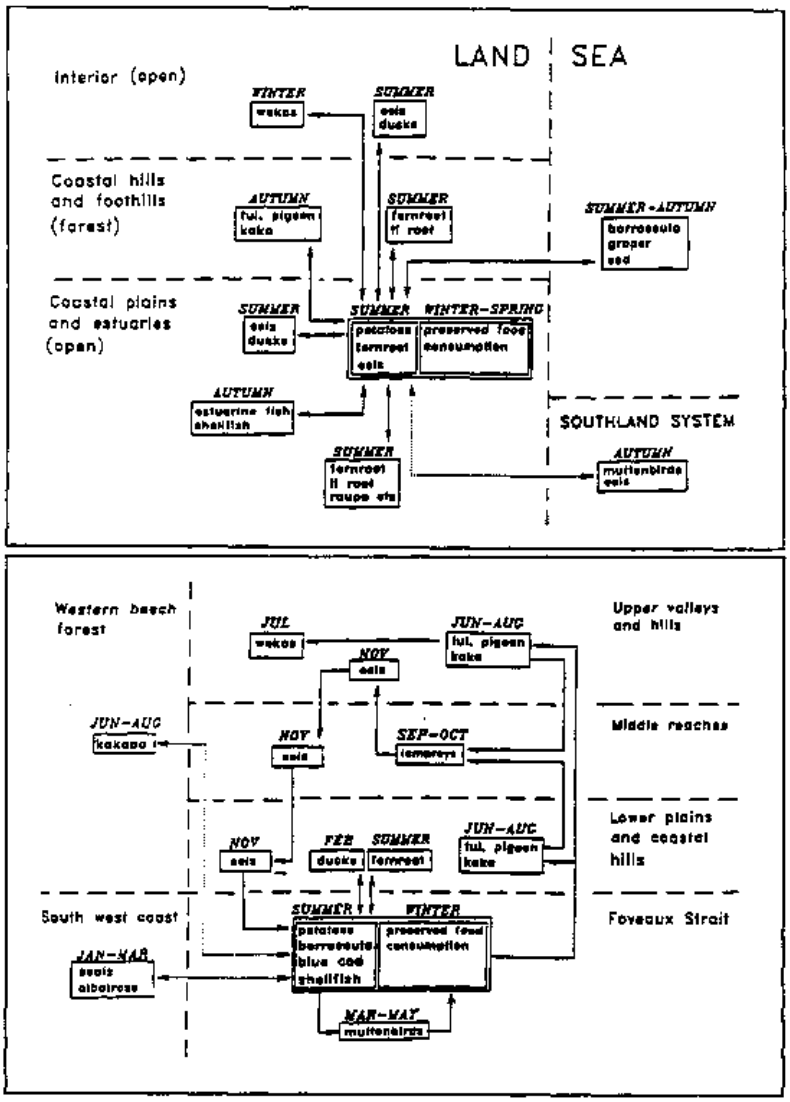

Figure 3.5: Professor Anderson provided these diagrams showing how the resource use of two Ngai Tahu communities, Waikouaiti (top) and Ruapuke (bottom), was governed by seasonal foraging across an extensive terrain (H3:figure 33)

Foveaux Strait, on the other hand, was renowned for the abundance of titi. These were caught from autumn to winter and many accounts were given of the importance of this resource to Ngai Tahu as a whole. Professor Anderson referred in one instance to an account of "stacks of preserved birds" lying beside the houses in Ruapuke in the winter of 1823, most of the people still absent muttonbirding on Stewart and the Titi Islands (H1:9). Ngai Tahu even came from as far as Kaikoura for titi. However, while this appears to have been the region's autumn and winter activity, those who lived around the Foveaux Strait in the early 1800s lived on a selection of foods, including potatoes, cabbage and other vegetables, fernroot, albatross and other wildfowl, seals, rats, eels, fish, shellfish and tutu juice year round (H1:9-11). Professor Anderson referred to an account that Maori of the Foveaux Strait "sometimes make excursions to the Snowy mountains and catch 300 woodhens per night" (H1:12).{FNREF|0-86472-060-2|3.2.12|9} In North Otago and South Canterbury there are records of eeling, digging fernroot, gathering raupo and eating tutu berries and tutu juice

(H1:29). The route from the coast up the Waitaki river to the central lakes brought Huruhuru and his people access to weka grounds and eels. There was even time for the preparation of luxuries. Scent made from taramea was highly prized and used for barter and as koha between rangatira. Cooking kauru or ti was also a regular occurrence in this area. At Wainono lagoon wild ducks and eels were obtained by locals and by travellers alike. Berries could be collected from inland forests.

At Taumutu on the shores of Waihora (Lake Ellesmere) kumara could be grown. From the lake came a whole variety of foods: eels, patiki, several varieties of ducks. Fernroot, here as elsewhere, was one of the staples of the Maori diet before the coming of European foods. Although it is recorded in accounts up to the 1840s, its use was clearly declining by that time. The quantities of eels and flounder which could be taken were enormous. Mantell recorded seeing the trenches which were dug to obtain the eels as they migrated across Kaitorete spit from lake to sea, commenting that one trench could provide "some hundreds of eels...in a day" (H1:37){FNREF|0-86472-060-2|3.2.12|10}. Flounder were available in the same bounty.

Even up to 1855, the Maoris of Taumutu, who only used flax nets, could manage a take of one cwt. of patiki at each haul. The flounders came in from the sea when the lake was opened, spread themselves over it, and ascended the several streams debouching into the lake. (S2:166){FNREF|0-86472-060-2|3.2.12|11}

Dried fish, particularly shark, was noted in the early historic accounts of mid Canterbury as a valued resource of the region. Kumara, potatoes, pigs, flax, ti, fernroot, maize and karaka berries were noted resources. Pounamu was traded with Ngai Tahu of the Poutini coast, who in the 1840s were recorded as living on eels, whitebait, grayling, dogfish, mussels, weka, kakapo, potatoes, fernroot, mamaku, tutu berries and ti (H1:41-47).

If the lake and the swamps which surrounded it provided prized fresh water fish and other resources, Ngai Tuahuriri looked to the hills beyond the plains for their kai manu and kiore, their birds and their rats.

The contrast between the resources of the mountains and those of the sea is aptly expressed in a waiata given to us by Mr Rawiri Te Maire Tau, who gave evidence of Ngai Tuahuriri's use of mahinga kai.

Ka huri mai to hau, ko te hau tena
Ki tua koroko e keo nei ana nga manu
ko te tau o te ora haere, kia kite nei
Te kaha o te uri o Tane
Te kaha o te uri o Tangaroa
Ka ki nga kete o te iwi e...
Ko te matahi o te tau e...
Te putanga o te hinu e tama

The wind changes direction towards me
It is the wind that blows from the back of Mount Koroko
I can hear the birds calling in the wind
It is the year of the journey

To see and harvest the multitude of the children of Tane
And the children of Tangaroa
That the kits of my people be filled-in the high summer
When everything is fat, filled with oil.(H6:12-13)

Mr Tau gave evidence of the use and importance of birding and the trapping of native rats to Ngai Tuahuriri. Both these activities were carried out in the mountains that overlooked Kaiapoi and in the ranges beyond them. Between April & July rats could be taken around Te Kuratawhiti (Mount Torlesse), Te Rakau (Birch Hill), Tatawahia, Ko Mamaha, Te Ara Tire, Takapu o Hinehou, Tawera (Mount Oxford) and O Kiore (Lower Loburn). A similar range of mountainous and inland locations was given for the taking of weka in the months between March and August. Kakapo were caught with weka on Mount Torlesse and Mount Otarama; Kereru at Tawera (Oxford) and Okuku (H6:38-39).

Seasons were extremely important: both birds and rats were harvested when they were fattest from gorging themselves on the berries on which they lived. Rats were plumpest and sweetest from April to July when they had overfed on the tawai berry. The native rat was the kiore, a short rat, coloured brown on the back and greyish white on the underside. It lived on berries and tree fruits and was particularly plentiful in the beech forests of the South Island, until the introduction of European rats led to its near extinction. Of all foods, the rat was the most prized. Rat runs were strictly divided into wakawaka among different whanau and hapu and their ownership was fiercely defended against poaching. The activity of rat catching was tapu and overseen by a tohunga. The demise of the kiore was possibly one of the first traditional and highly valued foods to become a casualty of introduced species of plants and animals.

Inhabiting a narrow strip of land between the mountains and the sea, Ngati Kuri of Kaikoura were clearly very dependent on the sea. They had on their doorstep koura, paua, hapuku and a wealth of other seafoods. Despite this, the evidence given on their behalf by Mr Wiremu Solomon showed just how important other resources were to the tribe (H7). These resources are still valued by Ngati Kuri and in giving evidence, they wished to keep the locations confidential. On a map depicting kai roto, or inland foods and resources, there are listed various plants used by the tribe. These included harakeke, raupo, taramea, kiekie, pingao, tikumu, as well as tree fruits such as karaka, manuka, ngaio, koromiko, raureka, ake ake, kowhai, karamu, hinau and mahoe (J11). Their fresh water fish included tuna, inanga, pakihi, kokopu and koura (H32). Kai manu included a very wide range of birds: kereru, titi, weka, kuku, kaka, kiwi, tui, koko, tarapunga, torea, takapu, kawau, pateke, korimako, karoro, toroa, parera, putakitaki and tata.

On the west coast, Poutini Ngai Tahu took fish, processed fernroot and caught eels and weka. Brunner recorded that on his visit to Okarito in 1847:

these places abound with eels I had full proof during my visit here the diet being nothing else, and was served out in liberal quantities, to dogs as well as Christians, three times a day (H1:43-44).{FNREF|0-86472-060-2|3.2.12|12}

Mahinga kai lists

3.2.13 Many of the above accounts can be attributed to European observers, but Ngai Tahu themselves collected and recorded information about their use of natural resources at a time when the informants could still remember back to the period before 1840.

In 1879 and 1880, Ngai Tahu kaumatua set about trying to record the names of the places where they had taken various natural resources. These are collectively known as the "mahinga kai lists", and were discussed by Professor Anderson and Dr Habib (H1, T4(b)). As part of the project, a large map of the South Island was marked with the names of hundreds of these places, generally within the boundaries of the Kemp deed map, and excluding the Arahura purchase (H2 fig 27). At the time, the Smith-Nairn commission was hearing evidence from Ngai Tahu about the early Crown purchases, and Ngai Tahu were preparing evidence for their claim that their mahinga kai, or as they defined it, the places where they obtained their natural food resources, had been reserved to them as part of the Kemp purchase agreement. We will be discussing this claim later in the report.

The lists were prepared to record both place names and the foods associated with them, although they were never completed and some lists gave less detail about resources than others. Professor Anderson commented that it is impossible to know if the information in these lists came from the direct knowledge of the informants or had been passed down from earlier generations (H1:63). The range of foods discussed goes beyond those usually observed by Europeans. Professor Anderson noted 62 resources, 57 of them foods:

Mahinga Kai for eels, fernroot and ti are most frequently listed but there is also a strong emphasis on a group of riverine or estuarine fish (waharoa, pipiki, patete, paraki, panako, grayling, smelt, whitebait and minnows) together with native trout (kokupu and koukoupara which Beattie calls "mountain trout"). Tutu, raupo root and flax honey were important plant foods, and weka, tui and rat are also quite prominent. (H1:63)

The foods included varieties introduced since European contact such as potato, showing how Ngai Tahu had adopted new crops but also adapted them to their traditional seasonal food gathering.

Dr Habib, who made a special study of the lists, was particularly impressed with the wide variety of Maori names and the ways these linked into the economic layout of the Ngai Tahu landscape. Although there were over a thousand names in the lists, many of these referred to places where a variety of different foods could be harvested.

For example, Kaitorohu was a food production site on the southern banks of the Waimakariri River in the Canterbury Province. It yielded tuna (eel), mata (a species of herring), inaka (whitebait), paraki (smelt), kokopu, patiki (flounder), parera (grey duck), putakitaki (paradise duck), raepo (species of duck), tataa (species of plant), potato, turnip, kumara and rushes (reeds) (R30:40). (T4(b):10)

In Dr Habib's opinion these lists represented only a sampling of the full lists of places with which Ngai Tahu identified, and to which they turned to provide themselves with food (T4(b) 12). Professor Anderson had a similar view. By comparing the density of

these wahi mahinga kai from areas where lists were supplied, to the rest of the South Island he argued that a full 1880 list could have contained as many as 3000 places.

3.2.14 There is further evidence to support this contention. From the later part of the nineteenth century a number of writers collected Ngai Tahu's traditions and place names. The most prominent of these was Herries Beattie, who published a number of books and pamphlets on Ngai Tahu in the mid 1800s. His collection of manuscript material survives in the Hocken Library in Dunedin and runs to over a thousand pages. Beattie's informants were made up of elderly Maori, largely from Otakou and South Canterbury, who were recording personal information from memories extending back into the period of the land sales themselves. A number of Beattie's books simply record the Maori place names of different parts of the island, running into thousands of different names. His notes record much information about resources and the techniques used for taking them.

Elsdon Best, too, used Ngai Tahu material in his surveys of different aspects of the Maori economy, such as in Fishing methods and devices of the Maori (1929) and Forest Lore of the Maori (1942). These included discussion of the harvesting and preparation of kauru, tutu hoki, of tuna caught in drains and traps, netting patiki in Waihora, catching inanga in channels, and hapuku. Birds like paradise duck, grey duck, brown duck, grey teal, blue duck and scaup were caught from canoes while they were moulting. Weka were taken in January. Pigeon, kaka, tui and bellbird were taken in snares. Rat runs were particularly prized possessions.

The range of resource

3.2.15 Overall, it is clear that Ngai Tahu's exploitation of the South Island was extensive, and that it included the use of a wide range of land and marine environments. The resources noted above are only some of those recorded in early written sources. Others noted to have been sought by Ngai Tahu at the time of European contact included:

aruhe (fernroot), ti (cabbage tree), mamaku, katote, kiekie, raupo root, korau (wild turnip) leaves, arore (fungus), sea anemone, seaweed, harakeke (flax) honey, and berries of the tutu, karaka, konini and makomako. Other plant resources included flax and ti leaves (for paraerae), birch and totara bark (roofing and patua), kelp (for poha) and taramea (a scent). Fish resources included kanakana, eels, crayfish, native trout and grayling, sprats, sole and other small estuarine and riverine species, whitebait, dogfish, red cod, blue cod, wrasses, barracouta, ling and hapuku. Mussels, paua, cockles, pipi, limpets, and seals were taken on the shore. And rats, titi, weka, albatross, ducks, penguins, kiwis, kakapo and kokako, pigeon, tui, bellbird and gull eggs from the land, were caught for consumption. Dogs were husbanded and eaten also. (T1:35){FNREF|0-86472-060-2|3.2.15|13}

We will probably never know from the archaeological, written or traditional sources all of the varied resources used by Maori during the long period of occupancy of Te Wai Pounamu.

Food preservation

3.2.16 Perhaps the most striking aspect of the preparation of the varied and rich Ngai Tahu foods were the methods of preservation of the season's surplus food supplies. This was an essential part of Ngai Tahu existence. Poha, which are bags made of kelp and sealed with fat, were frequently used to preserve foods at the times of the year they were most abundant. Titi, bush birds and fish were preserved in this manner during autumn, winter and summer respectively. Seals were smoked whole before the flesh was preserved in poha (S2:188). Fish were dried on mats, or else split and dried and either hung on strings of flax or placed on racks in the sun. Sometimes they were cooked in an umu prior to drying. These resources were used for exchange and gifts, in feasts catering for guests, to feed dogs, for eating on journeys and in times of less abundance.

Economic change

3.2.17 Ngai Tahu adapted their economy to the resources available to them. Maori life in Te Wai Pounamu was never static, and was always subject to the ebb and flow of the seasons, to changes in climate and the availability of resources. Like all living cultures the society adapted to meet new needs. It found new resources when old ones were depleted and shifted from one location to another through necessity or desire. Mr Richard Noel Holdaway presented evidence to the tribunal on behalf of the NZFIB and the NZFIA. He argued that Maori, like all Polynesian peoples, had "no more or no less claim to have lived in harmony with their environment or conservation awareness, than do the Europeans who followed them" (S17:2). Mr Holdaway pointed to recent archaeological investigations which indicated that Maori had overexploited resources such as seals, marine crayfish and birds of several varieties. Moa in particular were exploited to extinction in the South Island. Deforestation was also pointed to as an indication that environmental concern had its limits in pre-European Maori society. While accepting that species were depleted by overuse or by accident in the period before the arrival of the European, the scale of this was still minor compared with the extensive environmental damage which has occurred since 1840. We shall be discussing these issues further in chapter 17 on the mahinga kai claim.

As a result of species depletion, the declining ability to hunt large birds and sea mammals, the Maori diet was changing over time. From the fifteenth century there was a diversification of fish species caught and an increase in the use of shellfish. This was associated with the disappearance or decrease in use of former protein sources, the moa and the fur seal, and a general climatic deterioration.

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03 Ngai Tahu before the Treaty

3.3 The Consequences of European Contact

3.3. The Consequences of European Contact

A tradition of interaction

3.3.1 Whatever the extent of change in the Ngai Tahu world from the time of their arrival in Te Wai Pounamu to the middle of the eighteenth century, it was overshadowed by changes which ensued from the arrival of Europeans.

European impact on Ngai Tahu life occurred early compared with most other tribes and led to a relationship that was several generations old before Major Bunbury brought the Treaty south in the autumn of 1840. Unlike European contact with Maori in the far north, there was little or no missionary presence. As a consequence, there are no missionary records to draw on to explore this period in the tribe's history. Europeans came to Te Wai Pounamu not to save souls but to exploit the natural resources of the southern islands. They provided an exotic market for Ngai Tahu's traditional resources and gave a new value to resources which Ngai Tahu used more rarely or not at all. Ngai Tahu had always used whales and seals for a variety of purposes (S2:73). From the late eighteenth century, seals were taken in large numbers by European sealing gangs in Foveaux Strait, from off-shore islands and elsewhere in Ngai Tahu territory (H1:8-12; S6(a):3-8 and U2(a)). Mr McAloon described some of the difficulties which occurred when these gangs came into conflict with Ngai Tahu (J39), and these incidents were also discussed by Mr Molloy for the fishing industry (U2(a)).

It would appear that few of these sealers established permanent homes ashore, but through intermarriage many Ngai Tahu must be descended from these first visitors. Sealers brought the first trade goods, iron tools, blankets and new technology such as sealing boats with oars and European rigging. They also brought new crops which were rapidly taken up by Ngai Tahu who saw the opportunity of providing potatoes and onions and other vegetables to shore parties and to ships' crews wanting provisions (T1:45).{FNREF|0-86472-060-2|3.3.1|14} Ngai Tahu themselves acquired a taste for these new foods. Potatoes greatly extended the geographical limits of Ngai Tahu's agriculture, previously confined to the more temperate areas around and north of Taumutu.

3.3.2 The visitors' vessels carried an invisible and more sinister cargo, European diseases. Ngai Tahu, for so many centuries isolated from the rest of the world, were confronted with illnesses previously unheard of. Without the natural resistance which came from an inherited experience of quite common illnesses, the mildest infection could prove fatal to large numbers of Maori (T1:48-50). We cannot be sure how many Ngai Tahu died in the period from 1769 to 1840 but the numbers were clearly considerable. We have isolated accounts of actual epidemics and their effect on the

tribe. Around 1836, for instance, there was an epidemic of measles which killed many (T1:49).{FNREF|0-86472-060-2|3.3.2|15} But epidemics were only part of the story. Chronic diseases such as tuberculosis become major killers of Maori. By 1840 it was generally accepted that Maori numbers were declining, and that the prognosis for Ngai Tahu was far from good. European fears that Maori would die out had been at the heart of the humanitarian belief that colonisation should not take place. It would not be until the 1890s that there was a general recognition that Maori could survive at all. However, by this time Ngai Tahu had not only survived, they were beginning to significantly increase in numbers. The Crown's witnesses, Professor Pool and Mr Walzl, demonstrated that Ngai Tahu numbers were beginning to improve as early as the 1860s (O16-O18). If this was so, Ngai Tahu may have been one of the first tribes to turn the demographic corner.

3.3.3 The sealers began to decline in numbers shortly after the first decade of the nineteenth century. They had ravaged the resource, returns were declining and changes in European fashion had reduced the demand for seal skins. Shore whalers then came and set themselves up on Ngai Tahu's coastlines. Whale ships which pursued whales at sea and processed them on board ship did not need shore stations; they entered Ngai Tahu's ports only when they required provisions. Shore whaling was cheaper allowing whales to be caught from small boats and not requiring investment in large factory ships and their crews (U2(b)).

3.3.4 Contact with the European world also brought social change to the tribe. Professor Anderson has shown how Ngai Tahu migrated to new localities to indulge in new trading opportunities, to have access to the new agriculture and to participate in new industries, such as whaling (H1). Perhaps the most visible "tool" adopted from the beginning by Ngai Tahu was the whaleboat. In 1844 it was noted that:

whaling and sealing boats have superceded canoes, in the management of which they show great skill and boldness; they have become expert whalers, and obtain employment at the fisheries often on the same terms as Europeans (T1:45).{FNREF|0-86472-060-2|3.3.4|16}

In 1842 pigs were purchased from Ngai Tahu in exchange for a boat and in 1843 a sealboat cost 41 pigs and 700 baskets of potatoes (T1:46).{FNREF|0-86472-060-2|3.3.4|17} Some of the boats were used to freight goods and transport passengers for profit.

3.3.5 Initially Europeans and Ngai Tahu made oral agreements over the use of resources, formalised in the Maori way without any written deed or agreement. However, as the prospect of colonisation came closer and it became likely that New Zealand could come under the British Crown, more and more Europeans came with deeds supposedly to purchase land. Some of these Europeans were known to the tribe, involved in trade, settled in Maori communities and married to Maori women. Others were simply speculators who arrived on the beach with a blank form, printed in Sydney. They offered trade goods, blankets, guns, powder, alcohol, agricultural implements and even boats, in return for Maori signatures(T1:54-58).

The question of the status of these pre-1840 purchases was raised primarily in relation to the question of fishing rights. Evidence was presented by Mr McAloon on behalf of

the claimants which suggested that Ngai Tahu exercised control over the whale and seal fisheries by granting Europeans limited leases to fish for these mammals (J39). Mr Kevin Molloy, who presented evidence for the NZFIA and the NZFIB, maintained that Ngai Tahu had actually alienated rights to the fishery prior to the signing of the Treaty (U2(b)). These arguments will be dealt with in a subsequent report on sea fisheries aspects of the claims.

The newcomers came to understand that in order to use the resources of the island they needed to negotiate with those that had rights to the lands concerned. While new immigrants were forced to come to grips with these rights and to negotiate with Maori in order to use these resources, there was the opportunity for Ngai Tahu to assert control in a traditional Maori way. Europeans wanting to lease land or use resources had to accept Maori concepts of ownership and control. European perceptions about property rights were of necessity modified to accommodate Maori concerns. However, once the tide of settlers became a flood, overwhelming the tribe in the two decades of land purchasing that followed the Otakou purchase in 1844, Europeans no longer had to modify their views. Whether Ngai Tahu had rights to anything at all ceased to be a question settlers had to face. Yet it is clear from the evidence presented to this tribunal that Ngai Tahu's economy involved a use of the island that was extensive, rather than intensive, and that it involved sophisticated use of a wide range of resources in an integrated economy. This economy rested on an equally elaborate system of ownership, based on complexities of whakapapa, seasonal migrations and trade.

Civil war and invasion from the north

3.3.6 Between the late eighteenth century and the time of the Treaty, Ngai Tahu became embroiled in a series of conflicts. Accounts of these conflicts vary and we have distilled a narrative of these events from the claimants' evidence, in particular that of Mr O'Regan and Mr Tau, and from a number of other well known written accounts. These sources include, Professor Anderson's Te Puoho's Last Raid,{FNREF|0-86472-060-2|3.3.6|18} and James Stack's Kaiapohia, The Story of a Seige.{FNREF|0-86472-060-2|3.3.6|19} Various discussions of this part of the tribe's history appeared in the evidence of Dr Loveridge for the Crown (N2) and in the Ward report (T1).

To some extent these conflicts were part of the traditional competition between tribes over the mana whenua of Te Wai Pounamu. Ngai Tahu continued to extend their dominion over the island through battles with Ngati Wairangi at the end of the eighteenth century. Tuhuru led a party of Tuahuriri which defeated Ngati Wairangi at the battle of Mahinapua, and consequently extended Ngai Tahu control over much of the west coast during the early decades of the nineteenth century. The Kaihuanga feud split the tribe asunder in the late 1820s. Major battles were fought around the southern reaches of Banks Peninsula between southern and northern Ngai Tahu hapu. The feud led to many deaths and greatly weakened the tribe's ability to deal with later external threats. Mr Tau said of this low period in the tribe's history:

all those dark and negative forces [which] lay within Ngai Tahu and all mankind [were] released. The utter stupidity and the pure petty jealousy by the local feuding Hapu paved the way for Te Rauparaha to raze [Kaiapoi] Pa site to the ground. (A17:2)

Like the conquest of the west coast, the explanation for this conflict appears traditional. The warfare was the consequence of a breach of tapu, involving a cloak belonging to Te Maiharanui, the senior rangatira of the day.

3.3.7 However, a more serious threat to the future of Ngai Tahu followed very soon after. From the north came a calamity which came near to destroying Ngai Tahu's control over much of their territory. Te Rauparaha and his Taranaki and Ngati Raukawa allies had shifted south to the Cook Strait region in the early 1820s. Their migration was a direct consequence of the social and military dislocation which European technology brought to the Maori world. Muskets and potato and the trade in flax and other commodities made subtle changes in the balance of power between tribes. Te Rauparaha and his allies were able to exploit the new situation. Taking advantage of the new techniques in warfare, they achieved control of much of the southern North Island and a good deal of the northern South Island. By the end of the 1820s their attention was turning toward Ngai Tahu.

Te Rauparaha and Te Pehi took utu against Ngati Kuri of Kaikoura for an insult carelessly made. At Omihi, Ngati Kuri were expecting visitors and mistook Te Rauparaha's taua for their relations. The pa fell easily to the northerners' muskets. The taua moved on to Kaiapoi where Ngai Tuahuriri were unaware of the destruction of Omihi. The visitors were warily welcomed inside the pa, but their intentions were not too difficult to determine. Ngai Tahu chose to make the first move, and Te Pehi was killed inside the pa, along with a number of other northern chiefs. The raiders retreated to Kapiti, but their vengeance was not long in coming. The next year, Te Rauparaha engaged a European trader, Captain Stewart, to carry a troop of fighters to Akaroa, hidden beneath the decks. Once Te Maiharanui had been lured aboard, the trap was set and he was taken prisoner and returned to Kapiti. There he was killed by Te Pehi's grieving widow.

The unscrupulous behaviour of Captain Stewart brought considerable discredit to the English in New Zealand and contributed to a belief in Britain and the Australian colonies that British law should protect Maori from the worst elements of British society. For Ngai Tahu of Banks Peninsula, the event provided a reason to welcome Britain's traditional enemy, the French, into their world as prospective colonists. Stewart's conduct was so deeply associated with his English origins that some on the peninsula continued to believe that Stewart's brig, the Elizabeth, was in fact a British frigate. This was not the case.

Te Rauparaha then laid seige to Kaiapoi itself. The pa was solidly built and surrounded by swamp. Its defenders did not give way easily. The invaders built up brush around the palisades intending to fire the pa. With the wind blowing away from the walls, the defenders set fire to the brush themselves. All went well for a time, but then the wind changed and the palisades caught alight, allowing the pa to be taken. Taiaroa escaped as did a number of others, but many were killed, and the pa was destroyed. The invaders then attacked Onawe, a strong pa in Akaroa Harbour. This too fell. Many of the defenders were killed and eaten and many others taken prisoner to Kapiti.

3.3.8 Ngai Tahu's control over the Te Tai Poutini in the west of the island was also threatened. Te Niho of Ngati Tama swept down the coast as far as Okarito, capturing

Huruhuru and holding him prisoner. Te Niho married Huruhuru's daughter and settled at Hokitika. The pounamu coast had fallen.

The sacking of Onawe and the taking of Okarito marked the southern limits of the northerners' success. In 1836 Te Puoho led a Ngati Tama raiding party south down the west coast towards the remaining Ngai Tahu strongholds in Foveaux Strait. He boasted that he was going to skin the eel from head to tail. Travelling inland, he encountered some Ngai Tahu at Lake Hawea and elsewhere on his way through to the Mataura. Some escaped and were able to warn Ngai Tahu at Ruapuke. A defensive party swept north to Tuturau, Te Puoho was killed and his party taken prisoner. Fearing further vengeance from Ngai Tahu, Te Niho withdrew from Hokitika to Whanganui, and Poutini Ngai Tahu were able to reassert their rangatiratanga over their territory on the west coast.

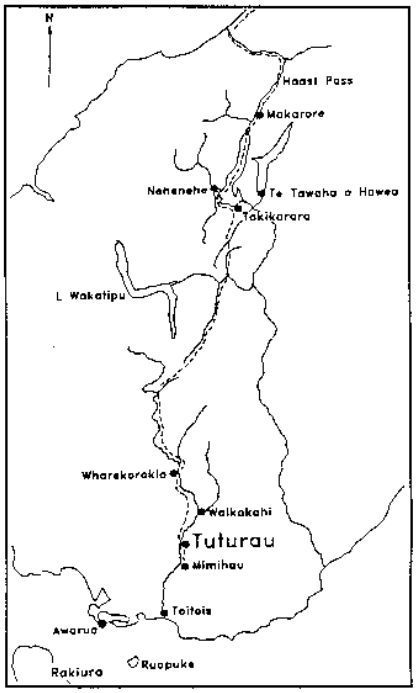

Figure 3.6: Te Puoho's route from the west coast to Tuturau, where he met his death at the hands of a Ngai Tahu taua from Ruapuke in 1836, Atholl Anderson, *Te Puoho's Last Raid: The march from Golden Bay to Southland in 1836 and defeat at Tuturau* (Otago Heritage Books, Dunedin, 1986) pp 21, 31.

3.3.9 Secure on their island fortress of Ruapuke, Ngai Tahu's leading chiefs were able to plan the reassertion of their mana over the areas abandoned after Te Rauparaha's triumphs at Omihi, Kaiapoi and Onawe. Well armed and travelling by canoe and sealing and whaleboats, the Ngai Tahu taua was able to make its way north and surprise Te Rauparaha, while he was taking ducks at Te Kapara Te Hau (Lake Grassmere). Te Rauparaha was lucky to escape, and the story goes that Tuhawaiki had him by the cloak before he struggled free. A further raiding party the following year failed to locate the Kapiti chief or his troops.

Eventually an uneasy peace was achieved and the Ngai Tahu prisoners returned to their homes. Despite the truce, the memory of the bloodshed wreaked upon the tribe would overshadow many of the events which occurred in the 1840s and 1850s. While the peace was maintained, Ngai Tahu would remain defensively grouped at Ruapuke and at Port Levy for most of the 1840s, never entirely sure that their northern boundaries were safe from further incursion.

Many of the tribe's leaders appeared to be well aware of the power of the British and the French and they were concerned to ally themselves with these powers. Hence they sought various treaties with the French and with the British. In early 1840, while northern chiefs were at the Bay of Islands considering the Treaty offered by Captain Hobson, Ngai Tahu rangatira were off to Port Jackson, New South Wales, where they considered the terms of another Treaty with Governor Gipps.

Ngai Tahu's ability to control and contain all that the European world would bring to their islands should not be over estimated. Although the tribe was more or less at peace with itself and with its northern neighbours by the end of the 1830s, the decade of war had greatly weakened them. Many rangatira had been killed and the threat of further violence had not been completely eliminated. Ngai Tahu were still a small iwi, lacking the numbers of many North Island tribes, and widely distributed over their vast territory. They had managed to contain the small numbers of Europeans who had ventured amongst them, but this was but a small test for what was to come. After the Treaty, planned colonisation would bring settlers by their thousands. For protection in this new environment, Ngai Tahu would have to rely more on the Crown than on their own resources.

Abandonment of resources

3.3.10 Mrs Kenderdine, in her final submissions for the Crown, made a number of points on mahinga kai that concern the period before the Treaty. While the Crown acknowledged that the Treaty guaranteed Ngai Tahu "the full exclusive and undisturbed possession" of their resources, she argued that the phrase following was also important: "so long as it is their wish and desire to retain the same in their possession".

The term 'resources' must be seen in relative terms. What was important for Ngai Tahu for their subsistence had already changed and would continue to do so. Some European foodstuffs had been adopted and some traditional foodstuffs had been or were being abandoned. It is this point which the claimants have neglected to consider. The only resources which the Crown had an obligation to preserve and protect for Ngai Tahu were those that they had used in the years immediately prior to the purchases AND WHICH THEY WISHED TO CONTINUE USING; ie those which they did not wish to abandon and which they would use in the future. (X3:43) (emphasis in original)

She argued that Ngai Tahu could not contend that if any resources were used at some time by the tribe, then the Crown had a duty to preserve and protect them. Such an approach would deny "the dynamics of history and the subtleties of human interaction" (X3:44). Each party to the later purchases would have made decisions based on the reality of their comparative situations at the time.

Using Professor Anderson's evidence, counsel for the Crown submitted that the observations made by Europeans of the Ngai Tahu economy in the 1840s were insufficient to argue that there was a "huge wide-ranging traditional economy" (X3:47). In her submission, these accounts demonstrated the extent to which the traditional economy had been eroded and abandoned through European contact. She maintained that Ngai Tahu were no longer making seasonal visits to the interior to

take foods: and instead were involved in whaling and new agricultural pursuits, raising pigs and growing newly introduced crops. Only on the west coast and in the North Otago-South Canterbury region did she see the pre-European economy remaining relatively intact.

Mrs Kenderdine was also critical of Professor Ward's report for not developing these issues and not dealing with the relative use of resources. To merely list the resources used, or claimed to have been used by the tribe, tended, she submitted, to give a picture that exaggerated Ngai Tahu's relationship with a number of food resources.

3.3.11 Had Ngai Tahu, then, abandoned a large part of their traditional economy by 1840? It is very clear, as Mrs Kenderdine pointed out, that Ngai Tahu's use of its pre-European range of foodstuffs must have declined towards the 1840s. Professor Anderson's evidence shows how extensively and successfully Ngai Tahu engaged in agricultural and whaling activities. In Foveaux Strait, for instance, there are numerous accounts of both activities. Gardening and the raising of pigs were both non-traditional pursuits in the area, it being impossible to grow kumara or other pre-contact crops there. Population decline must also have lessened the amount of traditional food gathering, while war and pestilence interrupted the seasonal foraging.

However does all this add up to an abandonment of the pre-contact economy? Europeans observed the adoption of introduced foods and industries based on new trading opportunities. But they also saw much evidence that Ngai Tahu continued to gather foods in the traditional manner.

To answer this question it is necessary to consider the extent of use of many of the resources identified by the claimants and by Professor Anderson as playing a part in the overall economy of the tribe. While it is possible to list a wide range of individual resources, the taking of some particular foods stand out as being of major significance to the tribe as well as being communal activities easily observed by Europeans.

- The annual harvest of titi involved large numbers of Ngai Tahu and a set annual routine, for both taking the birds and preserving them for trade.

- Eels were among the most cherished resources of almost all sections of the tribe. Their taking was often recorded, and the use of drains owned by hapu and whanau in lagoons and lakes such as Waihora and Wairewa made the fishery a large scale community activity. Almost all Europeans visiting Ngai Tahu's territory before the purchases noted the importance of eeling.

- The taking of barracouta was also a significant and easily observable activity in the Otakou area, which like eeling and the titi harvest, continued up to and beyond the time of the Otakou purchase.

- Kauru, for which there is evidence going back many hundreds of years, was also harvested and cooked well into the 1840s.

- Weka was hunted for food throughout the period of early contact and land purchase.

These were all specialised aspects of the Ngai Tahu economy, many of which involved large numbers of Ngai Tahu exploiting the resource as whanau or even as hapu. These were the activities which were most readily observed by even the least inquiring of European visitors. In all cases, though the scale may have diminished, the activity continued, despite the fact that a number of these resources were only harvested with great effort and even at some risk. These resources were also carefully preserved for later use and for trade. It would have been much easier to abandon them completely and take up a diet of pork and potato, without venturing beyond the immediate environs of the kaika. However, these activities were continued because they were an essential part of the social life of the tribe and participation in them allowed rights to be kept active and traditional tribal politics to continue.

3.3.12 Alongside these major endeavours was the utilization of a large number of other resources. These activities included birding, the extraction of tutu juice, berry picking, ratting, taking shellfish and other sea fisheries, as well as the use of various timbers and flaxes. All these were less likely to be noticed by Europeans, but noticed they were, and in the very period when Ngai Tahu were adjusting to the newly introduced foods and technologies.

Ngai Tahu's use of fernroot, aruhe, is particularly interesting. Fernroot was one of the staples of the pre-contact Maori diet. It was also one of the first foods to be substantially displaced by new agricultural crops. However accounts of Ngai Tahu's use of fernroot continue in the evidence, even up to the 1840s. Shortland recorded:

The natives consider that there is no better food than this for the traveller, as it both appeased the cravings of hunger for a longer period than other ordinary food, and renders the body less sensible to the fatigue of the long march. (H6:16){FNREF|0-86472-060-2|3.3.12|20}

Mr Te Maire Tau provided the following waiata, also recorded by Shortland, on the pleasures of eating aruhe.

He aha, he aha,
He Kai ma tau
He pipi-he aruhe -
Ko te aka o Tuwhenua
Ko te kai e ora ai, te tangata
Matoetoe ana te arero
I te mitikanga,
Me he arero kuri anu.

So what of it, Why?
It can be food for us
Pipi and fernroot
It is the vine of Tu Whenua
It is the food to sustain the people
The mouth waters from eating
like that of the salivating dog (H6:15)

Although fernroot could well have been abandoned completely by 1844 in preference to newer foods, it continued to be processed and eaten, if in reduced quantities. Von Haast described how even at end of the 1840s, Poutini Ngai Tahu killed their newly acquired pigs because they were threatening their fernroot (H1:43).

3.3.13 Ngai Tahu had to make choices in adopting new activities and using their resources in ways impossible prior to contact with the European world. That their pre-contact economy was greatly modified is clear. However it is altogether another thing to say that these long tested and much treasured foods and the time honoured methods of procuring them were abandoned. It would be more accurate to say that the new commodities were simply incorporated into the traditional economy, as the 1880 mahinga kai lists suggest. Mahinga kai came to include places where potato and onions were grown as well as where fernroot and ti could be harvested (T4(b):10).

To argue that a decline in the use of pre-contact foods continued uniformly from the 1830s until the time of the purchases may also be simplistic. Some portions of the tribe were still living in pre-European style, little affected by the technological change which had found its way to Foveaux Strait and Otakou. Those who did participate in the new trading economy were subject to the boom and bust cycles which were an inescapable part of dependency on overseas markets. Whaling activity slumped in the 1840s and with its decline the opportunities for trade fell accordingly. One of the Crown's historical witnesses, Professor Gordon Parsonson, examined the impact on Otakou Ngai Tahu of this economic downturn (P4:appendix A:1-5). He argued that the whalers left widespread poverty and hardship in their wake. Such a situation would have strengthened the hunting and gathering economy. The decline in private land purchase following pre-emption and the reduction in trade goods that accompanied this would have had a similar impact. The French colony at Akaroa was not wealthy enough to provide extensive opportunities for trade and it engaged in its own subsistence agriculture. Only with the arrival of the Otago settlers in 1848 were prospects for trade increased. For a brief period between the late 1840s and the mid-1850s, east coast Ngai Tahu did have the chance of returning to the trading and entrepreneurial activities which had emerged in the 1830s. However, these opportunities were shortlived, and they were only there to be exploited by a limited section of the tribe.

As we shall see in our examination of the Kemp purchase in particular, Ngai Tahu did wish to preserve very substantial areas for traditional foods, especially for eeling, for kauru and for weka.

If Ngai Tahu's determination to participate and thrive in the new world was to continue into the period of Crown purchase and substantial settlement, then compromises would have been necessary. Ngai Tahu may well have been prepared to give up the use of particular resources in return for new benefits and a continuing stake in the new economy. This would have been a matter of choice, to be negotiated between the Crown and the tribe as land was made available to the Crown through sale. Whether these compromises were made fairly will be discussed when we move on to consider the actual purchases themselves.

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04 The Treaty and Treaty Principles

4.1 Introduction

Chapter 4

THE TREATY AND TREATY PRINCIPLES

4.1. Introduction

Before discussing the Treaty and its application to the various claims of the Ngai Tahu people, we should first see how Ngai Tahu came to be a party to the Treaty. This is important because Ngai Tahu's adherence to the Treaty has been obscured by Lieutenant-Governor Hobson's action in issuing two proclamations on 21 May 1840. The first proclaimed the Queen's sovereignty over the North Island by right of cession under the Treaty. Hobson, however, was anxious over perceived disloyal activity by New Zealand Company settlers in Wellington and decided to take immediate action to claim the whole of New Zealand for the British Crown. Thus a second proclamation, of the same date, asserted the sovereign rights of the Queen over the South Island and Stewart Island by right of discovery and confirmed the cession of the North Island (A9:2/1).{FNREF|0-86472-060-2|4.1|1} These two proclamations were officially gazetted in London on 2 October 1840. Not surprisingly Ngai Tahu, whose Maori predecessors have occupied Te Wai Pounamu for upwards of one thousand years, take umbrage at the notion that the British discovered New Zealand, and in particular the South Island. Had Hobson not acted precipitately, his proper course would have been to proclaim sovereignty over the South Island also on the grounds of cession.

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4.2 Ngai Tahu Accession to the Treaty

4.2. Ngai Tahu Accession to the Treaty

4.2.1 Hobson had previously visited New Zealand in the 1830s. When he received his instructions of 14 August 1839 from Lord Normanby, the colonial secretary, requiring him to negotiate with Maori as a sovereign and independent state, he immediately sought further directions. In his letter to the Colonial Office he expressed the view that the development of the inhabitants of the North and South Islands was "essentially different" and that "with the wild savages in the Southern Islands, it appears scarcely possible to observe even the form of a Treaty". He suggested that he might be permitted to claim the south by right of discovery (A8:1).{FNREF|0-86472-060-2|4.2.1|2} Lord Normanby, in his reply of 15 August 1839, said that if, as Hobson supposed, South Island Maori were incapable "from their ignorance of entering intelligently into any Treaty with the Crown" then he might assert sovereignty on the grounds of discovery (A8:1).{FNREF|0-86472-060-2|4.2.1|3} This, as we have seen, he duly did on 21 May. But, as Major Bunbury was to find, Hobson's preconceptions were wide of the mark. Ngai Tahu leaders were quite capable of making a meaningful adherence to the Treaty.

4.2.2 Hobson, who became seriously incapacitated in March 1840, sent a number of emissaries throughout the North Island to obtain further signatures to the Treaty. Governor Gipps of New South Wales, hearing of Hobson's illness sent Major Thomas Bunbury to the Bay of Islands in April 1840. Gipps urged that prompt steps be taken to extend Crown authority over the South Island. Accordingly, Hobson on 28 April 1840, ordered Bunbury to sail in the Herald to negotiate with some North Island chiefs and to then proceed to the southern islands.{FNREF|0-86472-060-2|4.2.2|4} He was accompanied by Edward Williams, the son of Henry Williams, as his interpreter. At Akaroa on 30 May 1840, Bunbury secured the signatures of John Tikao and Iwikau, a brother of Tamaiharanui who was the paramount chief captured by Te Rauparaha. Later, finding no one at Stewart Island (although he failed to visit the Ngai Tahu settlement at Paterson Inlet) Bunbury and Nias, the captain of the Herald, made a declaration of sovereignty over the island basing the claim on James Cook's discovery. From there they proceeded to Ruapuke Island where on 10 June 1840 the leading chief Tuhawaiki signed the Treaty. Tuhawaiki was an enterprising Ngai Tahu leader, highly intelligent and with a reasonable knowledge of the English language. He had travelled several times to Sydney and was engaged in the whaling industry on his own account. Two other Ngai Tahu chiefs also signed at Ruapuke Island-Kaikoura (the principal chief from the northern area of that name) and Taiaroa, but there is doubt about the identity of the latter.{FNREF|0-86472-060-2|4.2.2|5} He was certainly not the leading Ngai Tahu chief Matenga Taiaroa. Bunbury had been anxious to obtain Matenga Taiaroa's signature but the chief was away at Moeraki. At the Otago harbour entrance Bunbury on 13 June further gained the adherence of the

Ngai Tahu chiefs Koroko and Karetai. Bunbury then sailed north and at Cloudy Bay on 17 June 1840 some nine chiefs signed, including one Kaikoura. It is thought this was a lesser chief than the Kaikoura who had signed at Ruapuke. There followed a formal ceremony at which Bunbury read a proclamation of sovereignty after which the Royal salute of 21 guns was fired. It is apparent from Major Bunbury's report of 28 June 1840 to Governor Hobson that he was very favourably impressed by the South Island Maori whom he had met, many of whom he found to have some facility with English. It is clear that Hobson had been seriously misinformed about the capacity and understanding of southern Maori.

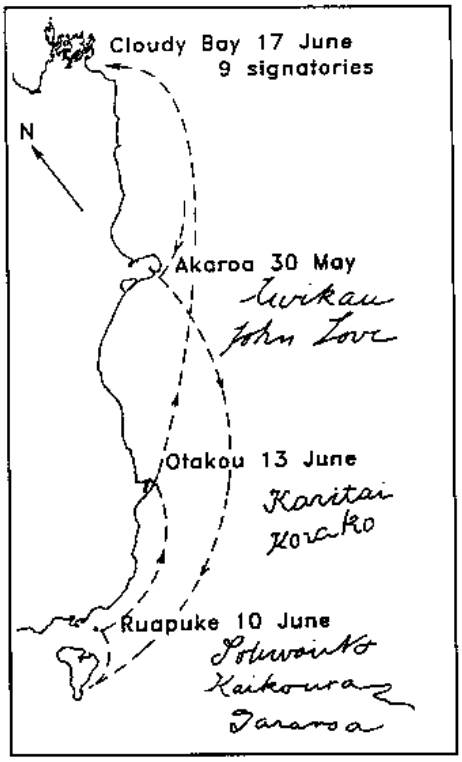

Figure 4.1: Major Bunbury's voyage to Te Wai Pounamu, Rakiura and Ruapuke in May and June 1840, collecting signatures for the Treaty of Waitangi.

Ngai Tahu understandably reject the notion that Te Wai Pounamu was "discovered" and that the Crown's claim to sovereignty over the island can legitimately rest upon such a ground. On the contrary, Ngai Tahu place great reliance on the fact that a number of their leading chiefs readily signed the Treaty of Waitangi. Not surprisingly, they reject suggestions, which even today are adduced, that the Treaty was of no significance in the South Island.

French interest in New Zealand

4.2.3 In the event, Major Bunbury's initiative in securing the adherence of influential Ngai Tahu and other South Island chiefs to the Treaty, and his subsequent public proclamation of sovereignty at Cloudy Bay, played a critical role in forestalling an attempt by the French to obtain sovereignty over Banks Peninsula and possibly much of the South Island. On 11 July 1840 the French corvette L'Aube of 22 guns and 160 men arrived at the Bay of Islands on its way to support a party of French immigrants shortly to arrive at Akaroa to establish a colony. Captain Lavaud, who called on Hobson soon after his arrival, refused to recognise Hobson's status as lieutenant-governor, or indeed British sovereignty over New Zealand. A stalemate ensued. On 23 July 1840, Hobson despatched Captain Stanley on the Herald to proceed without

delay to Akaroa. Accompanying Captain Stanley's instructions from the lieutenant-governor was a copy of Major Bunbury's South Island Cloudy Bay proclamation. Hobson instructed Stanley that independently of the assumption of sovereignty of the South Island by his proclamation of 21 May, the principal chiefs had ceded their rights to the Queen. Because of Bunbury's proclamation, Hobson said, no further proceedings by Stanley would be necessary. As an added measure, Hobson arranged for two magistrates to accompany Stanley and on their arrival they were to hold a court at each port as an act of civil authority.

The day following Captain Stanley's departure to Akaroa Captain Lavaud, in ignorance of Bunbury's proclamation, wrote to the French colonial and maritime minister urging negotiations with the British to repudiate Hobson's May proclamation claiming sovereignty of the South Island on the grounds of discovery. Further, he advised that if the British government had not yet obtained the signatures of the Banks Peninsula chiefs recognising British sovereignty, he would attempt to persuade them to retain their sovereignty under the patronage of the French nation and its government.

Captain Stanley arrived in Akaroa on the Herald shortly before Lavaud and formally took possession. The magistrates duly held formal court hearings. It is clear that Bunbury's action in obtaining the adherence of Ngai Tahu and other South Island chiefs and his proclamation of sovereignty effectively forestalled Lavaud's initiatives and provided Hobson with a persuasive answer to incipient French claims.

Waitangi Tribunal, Department of Justice, Wellington.

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04 The Treaty and Treaty Principles

4.3 The Status of the Treaty

4.3. The Status of the Treaty

4.3.1 In the Orakei Report (1987) 127, the tribunal left open the precise legal status of the Treaty of Waitangi under either international or New Zealand domestic law. We detect in current thinking and discussion, a significant shift from the firmly held earlier view that the Treaty lacked real status either internationally or domestically.

An international treaty of cession

4.3.2 Recent writing by well-qualified New Zealand lawyers has enriched our understanding of the status of the Treaty as an international treaty of cession.{FNREF|0-86472-060-2|4.3.2|6} Kingsbury asserts that the Treaty was a valid international treaty of cession and that the parties in 1840 were recognised as having the necessary legal capacity to enter into such a treaty. In support of this he relies on British policy towards indigenous peoples in the 1830s and 1840s, on British government instructions to Captain Hobson (appointed consul and lieutenant-governor designate), the response of France and the United States as the third-party states principally concerned and on later international arbitral decisions.{FNREF|0-86472-060-2|4.3.2|7}

Normanby's instructions to Hobson

4.3.3 Lord Normanby made it clear that Hobson was to negotiate with Maori as a sovereign and independent state. In his detailed instructions of 14 August 1839 he referred to the Maori as "a numerous and inoffensive people, whose title to the soil and to the Sovereignty of New Zealand is indisputable"(A8:I:13-17).{FNREF|0-86472-060-2|4.3.3|8} His instructions went on to say:

I have already stated that we acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor, disclaims for herself and for her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.(A8:I:14){FNREF|0-86472-060-2|4.3.3|9}

Russell's instructions to Hobson

4.3.4 Lord Normanby's successor at the Colonial Office, Lord John Russell, in a despatch to Governor Hobson of 9 December 1840 clearly recognised that the Maori chiefs, on behalf of Maori generally, had effected an act of cession:

[the Maori tribes] are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress; ...In addition to this, they have been formerly recognised 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.{FNREF|0-86472-060-2|4.3.4|10}

Kingsbury concludes that the mass of evidence, including the public documents which he cites, indicate a clear British intention to enter formally into an effectual treaty of cession. The British statement alone he argues "may now be seen as having constituted internationally binding unilateral undertakings..."{FNREF|0-86472-060-2|4.3.4|11}

The French response

4.3.5 What was the attitude of other interested nations at the time or shortly thereafter? France was anxious to establish a colony at Banks Peninsula and entertained hopes of enlarging its colonising venture to cover other parts, if not the whole, of the South Island. However by 1844, after some initial uncertainty, the French government accepted that Britain had obtained sovereignty over New Zealand by a treaty of cession. Kingsbury succinctly recounts the debate in the French Chamber of Deputies in 1844 in this way:

Guizot noted that over the period 1815-1838 the British Government consistently refused to assert sovereignty over New Zealand on the basis of 'discovery', and on the contrary that the British had 'by several public acts, by several acts of government, formally recognised the independence of New Zealand as forming a State under its native chiefs'. By Guizot's account, Hobson was sent to New Zealand charged with the duty of negotiating with the native chiefs for the cession of their sovereignty. He first obtained the cession of sovereignty by North Island chiefs through adherences to the Treaty of Waitangi. According to Guizot, Hobson subsequently obtained sovereignty over the South Island by securing the same from a number of chiefs there. When pressed by Messrs Billaut and Berryer, Guizot indicated that the French recognition of British rights in the South Island was necessitated by the Proclamations of 21 May and 17 June. He placed particular emphasis on the latter, which itself rested on South Island Maori signatures to the Treaty of Waitangi secured by Major Bunbury.{FNREF|0-86472-060-2|4.3.5|12}

International arbitral decisions

4.3.6 Kingsbury very properly points out that Guizot's views are not entirely consistent with the discussion of Mr Justice Richardson in New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 671 (CA) of Hobson's two proclamations of 21 May 1840. Mr Justice Richardson concluded that:

It now seems widely accepted as a matter of colonial law and international law that those proclamations 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.

There may, however, be force in Kingsbury's observation that following the approach of Chief Justice Marshall in Johnson v McIntosh (1823) 8 Wheat 54 it is possible to view the proclamation of 21 May 1840 (claiming the South Island on the grounds of discovery) as:

an assertion of rights based on 'discovery' as against other European powers, with the subsequent [Bunbury] Proclamation enunciating Maori consent to the extension of British sovereignty to the South Island in terms set out in the Treaty.{FNREF|0-86472-060-2|4.3.6|13}

Kingsbury cites from the US memorial in the well-known Webster claim and refers to the decisions of two international arbitral tribunals which indicate that the Treaty of Waitangi was a valid and effectual international treaty of cession.{FNREF|0-86472-060-2|4.3.6|14} He also relies on opinions of jurists, that promises in a treaty such as the Treaty of Waitangi point to their being cognizable in international law in mid-nineteenth century even if no forum actually existed in which they could be enforced. However, Kingsbury points to the absence of any precedent for a party to a purely bilateral treaty of cession, which has thereby lost its sovereign status, being competent to secure the international enforceability of treaty promises.{FNREF|0-86472-060-2|4.3.6|15}

The tribunal's view

4.3.7 Notwithstanding that there may be formidable obstacles, at least in the present state of international law, to a party to a treaty of cession which cedes its sovereignty to the other party, seeking to enforce that treaty in an international forum, we believe the foregoing discussion lends credible and persuasive support to the view that the Treaty of Waitangi was a valid treaty under international law. This reinforces the view the tribunal expressed in the Orakei Report (1987), that, given the intention of the British government to treat with the Maori people as a sovereign independent nation, it is surely reasonable to apply to the interpretation of the Treaty, general principles of treaty interpretation as applicable under municipal law. We reiterate the tribunal's view that "Whatever its strictly legal standing, good faith and the honour of the Crown call for such an approach".{FNREF|0-86472-060-2|4.3.7|16}

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04 The Treaty and Treaty Principles

4.4 Rules of Treaty Interpretation

4.4. Rules of Treaty Interpretation

4.4.1 The tribunal has considered this topic on various occasions. In the Orakei Report (1987) 128-129, we restated and developed views expressed in earlier reports (eg Te Atiawa Report (1983) and Manukau Report (1985) 64-65). Since then the Muriwhenua Report (1988) 188 has considered the approach to be made in that case with particular reference to sea fisheries. Given the magnitude and diversity of the present claims it is appropriate that we should at least briefly state our approach to the interpretation of the Treaty in this case.

At the outset we must stress that while we speak of "the Treaty" there were in fact two versions of the Treaty, one in the Maori language and the other in English. However, the Maori version of the Treaty was not written by Maori. Until the early missionaries, with the help of a Cambridge professor, reduced the Maori language to written form in the early 1820s, the language was a purely oral one. It was a missionary, the Reverend Henry Williams, who composed the Maori version of the Treaty with some help from his son Edward.{FNREF|0-86472-060-2|4.4.1|17} They had only the evening of 4 February 1840 to do this. There are significant differences in the two versions occasioned, in part at least, by the presence of some English concepts such as sovereignty, for which there was no Maori counterpart and, conversely, some Maori concepts such as rangatiratanga, for which there was no English counterpart. It may be more accurate to describe Henry Williams' "translation" of the English text of the Treaty (largely the work of Hobson and Busby) as an "interpretation" in Maori intended to express the spirit and tenor of the English version as nearly as possible.

Some of the rules of interpretation which we will discuss derive from the decisions of the United States and Canadian courts. These courts have been concerned with treaties with Indian nations or bands which are in one language only, English. Most international law rules of treaty interpretation, when concerned with treaties in more than one language, are directed at developed western languages, the respective versions of which have been drafted by persons long competent in their own written language. We, on the other hand, are required to give meaning to two versions of a treaty written by members of only one nation party to that Treaty. Few Maori, the other party, were in 1840 fluent in written Maori. They listened to the Treaty being read out in Maori and to explanations given in Maori by English missionaries and others competent in varying degrees in spoken Maori.

4.4.2 Section 5(2) of the Treaty of Waitangi Act 1975 requires the tribunal to have regard to the two texts of the Treaty (as set out in the first schedule of the Act, as amended, see appendix 1). For the purposes of the Act, the tribunal has exclusive authority both to determine the meaning and effect of the Treaty as embodied in the

two texts, and to decide issues raised by the differences between them. Two points in particular should be noted. First, while there are two texts there is only one Treaty. Secondly, the legislature recognises that differences do exist between the two texts. The tribunal's mandate is to reconcile or harmonize these differences.

In attempting this we should have regard to various considerations including the following.

Principles of the Treaty

4.4.3 Our principal function is to inquire into claims brought under section 6. These fall to be assessed against the "principles of the Treaty" not just the literal terms (s 6). We are not confined to the strict legalities. There are good reasons for this. The Treaty itself is a remarkably brief, almost spare, document. It was not intended merely to regulate relations at the time of its signing by the Crown and the Maori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop. As we have said elsewhere (Orakei Report (1987) 137), the broad and general nature of its language indicates that it was not intended as a finite contract but rather as a blueprint for the future. As Sir Robin Cooke has said, "What matters is the spirit".{FNREF|0-86472-060-2|4.4.3|18}

It follows that in ascertaining the principles of the Treaty relevant to the Ngai Tahu claims it is necessary to look not only at the language of both texts of the Treaty but also to the surrounding circumstances including the Maori perception at the time of what the Treaty meant.

International law of treaty interpretation

4.4.4 In the Orakei Report (1987) 128-129 the tribunal attempted to bring together certain rules of Treaty interpretation, as laid down by the leading international lawyer, Lord McNair, and certain United States, Canadian and British cases. In the later Muriwhenua Report (1988) 188 there is some amplification of the discussion in the Orakei Report. We do not propose to repeat the discussion in these two reports but will briefly recall the principal points which emerge.

(a) At international law when the meaning of a treaty is clear it is simply applied, not interpreted. Where, however, in the case of bilingual treaties, they are susceptible of different meanings, interpretation is necessary. It is acknowledged that the two texts of the Treaty of Waitangi differ in material respects.

(b) In relation to bilingual treaties, McNair says that neither text is superior and that it is permissible to interpret one by reference to the other. We believe this rule has primary reference to treaties between states of like power and common origin, for example, bilingual treaties between European nations. In the case of the Treaty of Waitangi, with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori. This is consistent with the contra proferentum rule that where an ambiguity exists, the provision should be construed against the party

which drafted or proposed the provision, in this case the Crown.{FNREF|0-86472-060-2|4.4.4|19}

(c) Regard should be had to the principle that treaties are to be interpreted in the spirit in which they were drawn, taking into account surrounding circumstances and any declared or apparent objects and purposes.{FNREF|0-86472-060-2|4.4.4|20} In extrapolating principles from intentions and expectations, equal regard should be had to the hopes and aspirations of both parties, as represented in their respective texts. This approach enables the tribunal to blend the texts, as appears to be contemplated by section 5. Such an approach accords with the spirit of the Treaty, that sought to harmonize the interests of two peoples of different cultures in a new enterprise.{FNREF|0-86472-060-2|4.4.4|21}

(d) We believe that the Treaty of Waitangi should be seen as a basic constitutional document. As such, it is appropriate that the legislature has directed us to assess claims against the Treaty's principles and not merely its terms. In the same way, Lord Wilberforce in delivering the opinion of the Privy Council in Minister of Home Affairs v Fisher [1980] AC 319, on a provision in the Bermuda constitution, found that it called for a generous interpretation which avoided "the austerity of tabulated legalism". In seeking to ascertain and give effect to the spirit of the Treaty as the nation's founding document, we must interpret each text in a generous, ample and ultimately compatible fashion. No less is owed to the Treaty partners. This approach is reinforced by the following statement of Mr Justice Richardson in the New Zealand Maori Council case:

Perhaps too much has at times been made of some of the differences and too little emphasis given to the positive and enduring role of the Treaty. Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaption to new and changing circumstances as they arise.{FNREF|0-86472-060-2|4.4.4|22}

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04 The Treaty and Treaty Principles

4.5 The Constitutional Status of the Treaty

4.5. The Constitutional Status of the Treaty

4.5.1 In the preceding paragraph we suggested the Treaty should be seen as a basic constitutional document. In the course of his closing address, Mr Temm, counsel for the claimants, submitted that there is a new development taking place in our constitutional law. This, he suggested, has been triggered in large measure by the passing of the Treaty of Waitangi Act 1975. Mr Temm went on to suggest that if this development leads to a conclusion that the power of Parliament is subject to the terms of the Treaty, and that, contrary to the orthodox views, Parliament cannot do whatever it likes, then a startling result comes into force. In such an event, Mr Temm submitted, the absolute power of Parliament will be curbed by its obligations to respect the terms of the Treaty. While it is evident that the passage of the Treaty of Waitangi Act 1975 and its subsequent amendments, along with other statutes discussed below, have greatly enhanced the status of the Treaty, there would appear to be formidable difficulties in reaching the conclusion postulated by Mr Temm in the absence of further legislative action.

The constitutional status of the Treaty is currently undergoing close scrutiny by the New Zealand courts and by scholars. This is not the place for a detailed consideration of the growing literature.{FNREF|0-86472-060-2|4.5.1|23} The present position is very briefly summarised by the tribunal, principally in reliance on Sir Kenneth Keith's recent article noted above.

4.5.2 A convenient starting point on the status of treaties in municipal law is a recent statement by the House of Lords in J H Rayner Ltd v Department of Trade [1989] 3 WLR 969, 980:

The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a Treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a Treaty or to award damages against a sovereign state for breach of a Treaty or to invent laws or misconstrue legislation in order to enforce a Treaty.

A Treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A Treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A Treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a Treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to

enforce Treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

In this passage the House of Lords has reaffirmed the proposition laid down in respect to the Treaty of Waitangi in Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590, 596-597, where the Privy Council said:

It is well settled that any rights purporting to be conferred by such a Treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.

4.5.3 But, as Sir Kenneth Keith has noted, that is not the end of the matter. The Treaty may be relevant in at least two broad ways. First, where legislation does incorporate the promises of the Treaty in some way. Secondly, in the interpretation of certain legislation.{FNREF|0-86472-060-2|4.5.3|24} Examples of incorporation are the Treaty of Waitangi Act 1975 and its amendments, and the State-Owned Enterprises Act 1986, section 9 of which provides that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. As Mr Justice Richardson noted in the New Zealand Maori Council case, the Treaty resides "in the domestic constitutional field" under the Treaty of Waitangi Act and the State-Owned Enterprises Act.{FNREF|0-86472-060-2|4.5.3|25}

Other recent legislation requires or permits decision-makers to have regard to the Treaty. As Sir Kenneth Keith observes, such legislation does not in general provide for the direct judicial recognition or enforcement of rights of Maori arising from the Treaty. Rather, it requires or allows those exercising the powers conferred by the particular statute to have regard to the Treaty or some particular aspect of it. Examples given by Sir Kenneith Keith are the long title of the Environment Act 1986, which requires that in the management of natural resources full and balanced account is taken of the principles of the Treaty of Waitangi along with four other matters, no one of which is given priority over the other. By contrast, section 4 of the Conservation Act 1987 expressly provides that the Act is to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.{FNREF|0-86472-060-2|4.5.3|26}

What if a statute makes no reference to the Treaty? In a valuable decision by Mr Justice Chilwell in Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188, 210, the judge ruled that:

There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

In that case Mr Justice Chilwell ruled that in considering an application for a water right under the Water and Soil Conservation Act 1967 the court could resort to extrinsic aids, including the Treaty. We conclude with Sir Kenneth Keith's comments following a discussion of the Huakina case:

The case is a striking example of the changing attitude of courts, counsel and the wider public to Treaty of Waitangi issues. It reflects as well changing methods of statutory interpretation, with an increased willingness to read legislation in its wider context. The case emphasises in addition the width of choice of technique available to courts interpreting legislation. So it is possible to argue that the Water Act is clear in its own terms; what is the reason to go outside it especially to require reference to Maori values? Parliament has included Treaty and other references in many other statutes and done that progressively, but not in this one; is not that silence significant? The case appears to reflect a general public perception of the Treaty; what if that changes markedly? What is the application of the proposition in this case that the law is always speaking? And in the end is not the Treaty being enforced-are not rights and duties being recognised-contrary to the general principles about treaties and to particular decisions on the Treaty over many years?{FNREF|0-86472-060-2|4.5.3|27}

How far this trend will go and how wide its scope will be are necessarily matters of conjecture. This tribunal senses that the central importance of the Treaty in our consitutional arrangements is likely to receive growing recognition by the courts, the legislature and the executive in the foreseeable future.

Waitangi Tribunal, Department of Justice, Wellington.

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04 The Treaty and Treaty Principles

4.6 The Treaty Provisions

4.6. The Treaty Provisions

4.6.1 There are various copies of the Treaty in both Maori and English, some of which have slightly different texts.{FNREF|0-86472-060-2|4.6.1|28} The tribunal is concerned only with the two texts printed in the Treaty of Waitangi Act 1975, which for our purposes constitute the "official" texts. It is our function to ascertain the meaning and effect of the Treaty as embodied in these texts and to settle issues raised by differences between them. That there are significant differences between the two versions of the Treaty is generally acknowledged. Two questions in particular have been the subject of much discussion by the tribunal and the wider interested public. These centre around first, the cession in article 1 of the Maori text of "Kawanatanga" to the Crown while the English version refers to "all rights and powers of Sovereignty". The second question is whether the grant or recognition to Maori in the Maori text of "tino Rangatiratanga" of their lands, homes (or those places where their fires burn) and all things prized (or all those things important to them) in article 2 of the Maori text, was wider in scope than the "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" guaranteed in article 2 of the English text. (The words "so long as they wished to retain the same" do not appear in the Maori version but this would appear to be a necessary implication).

These concepts have been discussed by the tribunal in considerable depth in relation to land claims, most recently in the Orakei Report (1987) and more recently in respect of sea fisheries in the Muriwhenua Report (1988). We do not propose here to rehearse all that was said in those reports. Rather we will draw on them in an attempt to crystallize the principal issues and state our conclusions on them.

Kawanatanga and sovereignty in article 1

4.6.2 We consider articles 1 and 2 in turn, but would emphasize from the outset that the two articles are necessarily related one to the other. Neither can be considered in isolation. Thus, if sovereignty was not ceded by the Maori in article 1, is this because rangatiratanga was preserved to the Maori in article 2? We set out here the English and Maori texts of article 1:

ARTICLE THE FIRST
The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over

their respective Territories as the sole Sovereigns thereof.{FNREF|0-86472-060-2|4.6.2|29}
KO TE TUATAHI
Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.{FNREF|0-86472-060-2|4.6.2|30}

The Maori text of article 1 has been rendered in English as follows:

The First
The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.{FNREF|0-86472-060-2|4.6.2|31}

The Crown perspective on articles 1 and 2

4.6.3 Sovereignty is a complex concept, the meaning of which has changed over time. In contemporary Westminster systems of constitutional government it is generally seen to reside in the notion of parliamentary sovereignty or parliamentary supremacy. Thus, in the New Zealand context, the Queen in Parliament is said to be competent to make or unmake any law. But this assumes there is no written constitution. In many Commonwealth countries, however, whose constitutional arrangements are based on the Westminster parliamentary system, the power of the legislature is in fact legally constrained by the provisions of a written constitution-just as it is thought ours would be were we to adopt an entrenched Bill of Rights, as recently proposed. In New Zealand, the concept of parliamentary sovereignty is still generally accepted as the basis of our largely unwritten constitution, although there have been some recent judicial hints that the New Zealand courts might, in extreme circumstances, seek to qualify this apparently unlimited power.{FNREF|0-86472-060-2|4.6.3|32}

4.6.4 In our consideration of this matter we are indebted to a recent discussion by Dr P G McHugh of sovereignty and rangatiratanga as legal sovereignty, in relation to Maori claims.{FNREF|0-86472-060-2|4.6.4|33} Dr McHugh considers whether or not rangatiratanga, as protected by article 2, can be a form of legal sovereignty alongside the legal sovereignty of the Crown.

After pointing out that "[l]egal sovereignty is the constitutional authority vested in the Crown in its executive, legislative, and through its erection of courts and appointment of judges, judicial capacities"{FNREF|0-86472-060-2|4.6.4|34} Dr McHugh proceeds to consider rangatiratanga as legal sovereignty. He makes the following points:

- that inherent in legal sovereignty under British (and New Zealand) constitutional law, is the power to make and enforce commands, that is, to make and enforce law which comes from a political superior subject to no other body;

- that English law has long recognised that the Crown's sovereignty over its territory is exclusive and exhaustive; and

- that the Crown's title to its territory is indivisible-it shares its sovereignty with no-one.

Dr McHugh concludes from these propositions that "rangatiratanga cannot be a form of legal sovereignty apart from that of the Crown".{FNREF|0-86472-060-2|4.6.4|35}

Interestingly, Dr McHugh distinguishes the position of the indigenous peoples of Australia, New Zealand and Canada-where the exclusiveness of the Crown's sovereignty excludes the possibility of any residual legal sovereignty being vested in those people-from the American position, where the tribes are described "as domestic dependent nations" retaining an inherent, residual legal sovereignty over and amongst their own people (where not ceded to the United States). He explains that this was because the Crown's charters for the New World did not claim sovereignty over the Indian tribes, having been issued before the English doctrine of territorial sovereignty, as exclusive and exhaustive, had developed. By 1840, however, the doctrine was in place.

4.6.5 We should also make it clear that the Crown's legal sovereignty over New Zealand does not, as a matter of strict law, derive directly from the Treaty, but from Captain Hobson's two proclamations of 21 May 1840 and their subsequent gazetting by the Crown in London. In the New Zealand Maori Council case Mr Justice Somers referred to the difference between the two texts of article 1 and to the assumption of sovereignty of New Zealand by the British Crown:

Where the word "Sovereignty" is used in the English text the word "Kawanatanga" is used in the Maori version. This has the connotation of government or governance. The concept of sovereignty as understood in English law was unknown to the Maori.

We were referred to a number of valuable commentaries on this part of the Treaty and to the several determinations of the Waitangi Tribunal. They provide grounds for thinking that there were important differences between the understanding of the signatories as to the true intent and meaning of article 1 of the Treaty. But notwithstanding that feature I am of opinion that the question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the "full sovereignty of the Queen over the whole of the North Island" by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. These proclamations were approved in London and published in the London Gazette of 2 October 1840. The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.{FNREF|0-86472-060-2|4.6.5|36}

By the English text of article 2 the Crown "confirms and guarantees" to the Maori:

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 and desire to retain the same in their possession...

It should be noted that the Crown "confirms and guarantees" the possession of the Maori people in their land and other property. The Crown, we believe, could give such a guarantee only if by article 1 it assumed full powers of governance, including the right to make and administer laws, to keep the peace (by force if necessary), to create courts for the resolution of disputes and to enforce the law. In short, if it

assumed sovereignty over New Zealand and all its inhabitants. This indeed appears to be contemplated in the preamble to the English text, which refers to the anxiety of the Queen to protect the just rights and property of the Maori, to secure them peace and good order and, given the presence of a considerable number of British subjects already in New Zealand and the rapid increase in numbers to take place, to establish a settled form of civil government.

The Maori perspective on articles 1 and 2

4.6.6 The Maori text of article 1 used the word kawanatanga in contrast to sovereignty in the English text. Kawanatanga has been interpreted to mean "complete government"{FNREF|0-86472-060-2|4.6.6|37} and "all the government".{FNREF|0-86472-060-2|4.6.6|38} Article 2 of the Maori text protects te tino rangatiratanga of Maori in their land and other property. Te tino rangatiratanga has been rendered as "the unqualified exercise of their chieftainship".{FNREF|0-86472-060-2|4.6.6|39} In the Orakei Report (1987) 134, after a lengthy and detailed discussion the tribunal concluded that the term was best rendered as "full authority", and to give it a Maori form the tribunal used "mana". Among the conclusions which the tribunal came to in that report are the following:

- The Maori text conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a phrase, that they would retain their mana Maori. That of course is wider than the English text which guaranteed the full, exclusive and undisturbed possession of lands, estates, forests, fisheries and other properties: so long as the Maori wished to retain them. The Maori text gave that and more.

- Kawanatanga was given to the Crown in the Maori text, not mana, for as the tribunal noted in the Manukau Report (1985) the missionaries knew well enough no Maori would cede that. Kawanatanga was another missionary coined word and, for reasons given in the above report, probably meant to Maori the right to make laws for peace and good order and to protect their mana. On the face of it, that 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. But nor does the Maori text invalidate the proclamation of sovereignty that followed the Treaty. Contemporary statements show well enough 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.

- It is the concept of partnership and the special relationship between the Maori and the Crown, as described by the Court of Appeal in the New Zealand Maori Council case that overreaches the two texts. For now, the tribunal need look only at the application of both texts to particular cases and concerns.

- The present case is concerned with land. It is plain that land, which is expressly referred to in both texts, is covered by the Treaty. The real question is the nature and extent of the interest in the land secured to the Maori. In the Te Atiawa Report (1983) the tribunal stressed that rangatiratanga and mana are inextricably related, and that rangatiratanga denotes the mana not only to possess what one owns but, and we

emphasise this, to manage and control it in accordance with the preferences of the owner. The tribunal thought the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the Te Atiawa claim), but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences. Clearly the same understanding would have been held in relation to land. We continue to believe that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing this view, and because the English text, referring to "full exclusive and undisturbed possession" also permits it.

- The acknowledgement in the Maori text, of their tino rangatiratanga over their lands 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.

- In recognising tino rangatiratanga over their lands the Queen was acknowledging the right of Maori for as long as they wished, to hold their lands in accordance with longstanding custom, on a tribal and communal basis.{FNREF|0-86472-060-2|4.6.6|40} In the Muriwhenua Report (1988) 174 the tribunal confirmed its preference for interpreting tino rangatiratanga as meaning "full authority" rather than the literal "full chieftainship". When discussing the Treaty, Maori often substitute mana, which includes authority but also has a more powerful meaning as discussed in the Orakei Report (1987).

4.6.7 We subscribe to the following propositions articulated in the Muriwhenua Report (1988) which, although primarily concerned with sea fisheries, are of equal application to land and associated claims:

- It does not follow that tino rangatiratanga in the Maori text is the tino rangatiratanga of pre-Treaty times, which was held in olden days only for as long as the tribe could maintain it against the ambitions of others. The Queen promised peace and the Treaty would guarantee the status of the tribes without the need for war. It was obvious that to do that, the Queen's authority had to be supreme.

- The concept of a national controlling authority with kawanatanga (literally governorship), or the power to govern or make laws, was new to Maori, divided as they were to their respective tribes. But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Maori interest (preamble, articles 2 and 3) had perforce an overriding power.

- Sovereignty, in law, is not dependent on the Treaty but on the proclamations that followed the signings at Waitangi. It is nonetheless important to consider whether sovereignty was founded in consensus.

- The tribunal considered above that Maori understood the cession of sovereignty in terms of some distal relationship. Subsequent conduct suggests that the authority Maori saw themselves as retaining was not in conflict with that. In the early years

there was much resentment among the chiefs when the governor and his magistrates sought to bring Maori within the scope of the new laws-an important consideration, for instance, in Heke's revolt in the north. Nevertheless, in the tribunal's view the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts, which is seen later in the King movement and other Maori organisations. This sort of demand for independent Maori control over Maori resources and people runs right through subsequent history. Article 2 has always loomed large in Maori consciousness as a result, even above article 3, but Maori did not regard their rights and privileges as British subjects-in matters of the franchise for instance-as unimportant. In more recent times the classic restatement of the Maori position was exemplified in the 28th Maori Battalion during Word War II. It reminds us that it is possible to have a separate Maori institution still bound in loyalty to the Crown.

- From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown.

- In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government.

- Upon reading both texts the tribunal concludes that they are not so much contradictory as complementary of one another. In the English text the Crown guaranteed Maori their just rights and properties. Just rights include the maintenance of their own customs and institutions. Their properties they could own and possess for so long as they wished to retain them. In the Maori text the Crown assumed [sic for assured] the full authority of the tribes over their important possessions. It is not a case of choosing between a British concept of ownership or a Maori form of control. Both were guaranteed for so long as Maori wished to keep them.{FNREF|0-86472-060-2|4.6.7|41}

These views are consistent with, but more fully developed than, the earlier propositions cited from the Orakei Report (1987). Together, they will underlie both our consideration of the Treaty principles relevant to the claim before us and the application of those principles to the claims.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

04 The Treaty and Treaty Principles

4.7 The Principles of the Treaty

4.7. The Principles of the Treaty

Surrounding circumstances

4.7.1 The genesis of the Treaty lies in the instructions Hobson received from the colonial secretary, Lord Normanby. The circumstances giving rise to the reluctant decision of the British government to send an emissary and governor-designate to treat with the Maori are related in the Orakei Report (1987) 137-140 and need not be repeated here. By 1839 the British government felt compelled to intervene and the colonial secretary in his instructions to Hobson explained why.{FNREF|0-86472-060-2|4.7.1|42} The Maori people, he said, were "a numerous and inoffensive people whose title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government". He expressed concern that "many persons of bad or doubtful character" were included among the 2000 or so British subjects already in New Zealand, and said extensive land purchases from the Maori had already taken place and several hundred colonists had recently left Britain for New Zealand. Normanby expressed the fear that unless Britain intervened to put in place "necessary Laws and Institutions" the Maori population was likely to be greatly harmed by war and other adverse consequences of European settlement and might even disappear as a race. To avert these disasters and indeed to protect the British immigrants themselves from a lawless state of society, he considered it desirable to take appropriate steps to establish a settled form of civil government. This, Hobson was told, was the principal object of his mission.

To achieve this objective, Hobson was required to negotiate with Maori for the recognition of British sovereignty over the whole or such parts of New Zealand as they were willing to cede. He was to "frankly and unreservedly explain to the Natives or their chiefs" the reasons why they should agree to the cession. Especially, he was to warn them of the dangers of having settlers among them not bound to any system of law, and the impossibility of Crown intervention regarding these settlers, without an acknowledgement of British sovereignty. Not only was Hobson to obtain the sovereignty of New Zealand for the Crown, he was to obtain Maori agreement not to sell the land to anyone except the Crown. To further this he was directed, immediately on his arrival in New Zealand, to issue a proclamation to all British subjects that the Crown would not acknowledge as valid any title to land not derived from or confirmed by a Crown grant. This he did.

In his dealing with Maori Hobson was obliged to obtain "by fair and equal contracts" such lands as might be progressively required to facilitate settlement by immigrants. "All such contracts should be made by yourself, through the intervention of an Officer expressly appointed to watch over the interests of the Aborigines as their Protector".

Finally, the Maori were not to be permitted to enter into any contracts for the sale of land to the Crown which might be injurious to them and no land was to be bought from them which it was essential or highly conducive to their own comfort, safety or subsistence they should retain.{FNREF|0-86472-060-2|4.7.1|43}

Running through these instructions to Hobson is the concern that Maori should be protected from the likely adverse effects of British settlement. This would be achieved by the Queen assuming sovereignty. Furthermore, no land should be bought from Maori which was needed for their comfort, safety or subsistence. To ensure this a protector was to be appointed to watch over their interests. The common thread is one of protection. It was reflected in the Treaty which Hobson prepared for the signature of Maori chiefs and is the opening theme of the Treaty preamble, which refers to the anxiety of the Queen to protect the just rights and property of Maori chiefs and tribes, and to secure to them the enjoyment of peace and good order. There was a further desire to establish a settled form of civil government in the interest of the Maori and British subjects alike.

4.7.2 So, in article 1 of the English text sovereignty was ceded to the Crown and in article 2 the Queen confirmed and guaranteed to the chiefs, tribes, families and individuals "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties..." while Maori yielded to the Queen the exclusive right of pre-emption over such lands as they wished to sell. By article 3 the Queen extended to Maori her "Royal Protection" and conferred on them all the rights and privileges of British subjects. In the Maori text of article 2 rangatiratanga is more extensive than in the English text. While it covers all the matters guaranteed to Maori in the English version, it also upholds tribal authority, which is wider than ownership and includes control over persons in the kinship group and their access to resources.

4.7.3 How well then did Hobson comply with his instructions from the Colonial Office? The preamble stresses the Queen's concern to afford protection of Maori just rights and property. Article 1, while constituting a major concession by the Maori, was obtained in part at least to enable the Queen, as sovereign authority to carry out her desire to afford protection to the Maori. Article 2, especially the Maori text, offers perhaps the highest possible degree of protection of Maori interests as is consistent with the cession of sovereignty. Article 3 confirms the Queen's Royal protection and confers the rights and privileges of British subjects to Maori. Protection of Maori and their interests can thus be seen as a recurrent theme of the Treaty provisions. In exchange for this, Britain obtained immensely valuable concessions by way of sovereignty over the whole country and the right of pre-emption of Maori land.

4.7.4 How well did the Maori chiefs who signed the Treaty understand its terms? This question necessarily turns on the understanding the chiefs gained from hearing the Maori text read aloud and on the explanations given by Hobson or his emissaries at the time of signing. The most recent authoritative account we have of the discussions and debates which surrounded the signing of the Treaty by the more than 500 chiefs is in Claudia Orange's Treaty of Waitangi.{FNREF|0-86472-060-2|4.7.4|44} Here we draw on the resum,, in the tribunal's Muriwhenua Report (1988) of Orange's detailed account.{FNREF|0-86472-060-2|4.7.4|45} The following salient points emerge:

- Hobson and his representatives placed considerable emphasis on the Crown protection afforded by the Treaty and the maintenance of peace and good order-protection both from foreigners (especially the French), and the unruly Pakeha element.

- There is evidence that Maori, on the other hand, may have placed greater reliance on the Queen affording protection or support to Maori against each other, whether over land disputes or intertribal fighting.

- The Crown representatives emphasised that Maori would be protected against land sales and that the Crown would ensure they kept such land as they needed or wished to retain.

- These assurances as to the protection and retention of their land weighed heavily with many Maori. It seems clear that the theme of protection in its various forms was uppermost in the minds of both Crown representatives and Maori during the months that signatures to the Treaty were obtained in various parts of New Zealand.

It is to be expected that there were markedly different levels of understanding on the part of individual chiefs. Different aspects interested or concerned different chiefs. Significant numbers were influenced by the favourable attitude of missionaries to signing. Some categorically refused to sign. Others, for various reasons, did not have an opportunity to sign had they so wished. We bear in mind all the foregoing factors in stating, as we now do, the Treaty principles which appear to us relevant to our consideration of the Ngai Tahu claims.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

4.7.5 This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity-the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.

Each party to the Treaty gained, but not without each making a major concession to the other. While, as we have seen, legal sovereignty is exclusive and exhaustive, this is not to say it is absolute. It is clear that cession of sovereignty to the Crown by the Maori was conditional. It was qualified by the retention of tino rangatiratanga. As Mr Justice Casey said in the New Zealand Maori Council case, "the whole thrust of article 2 was the protection of Maori land and the uses and privileges associated with it".{FNREF|0-86472-060-2|4.7.5|46} It should, of course, be noted that rangatiratanga embraced protection not only of Maori land but much more. We need to remember that rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising its sovereignty it must respect, indeed guarantee, Maori rangatiratanga-mana Maori-in terms of article 2. As Orange notes "...Maori fear that the mana of the land might pass from them if they signed the Treaty was eased by the Treaty's guarantee of rangatiratanga".{FNREF|0-86472-060-2|4.7.5|47}

4.7.6 The Crown in obtaining the cession of sovereignty, obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired under the Treaty was a qualified right. This was recognised by Sir Robin Cooke in the New Zealand Maori Council case:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation.{FNREF|0-86472-060-2|4.7.6|48}

In this passage the president of the Court of Appeal recognises that the principles of the Treaty do place some reasonable restrictions on the right of government to follow its chosen policy but it must not be unreasonably shackled.

4.7.7 The tribunal has recognised that in reconciling the concepts of sovereignty and rangatiratanga some compromises will need to be made by both Treaty partners. In the Muriwhenua Report (1988)195 the tribunal commented:

neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.

The Mangonui Report (1988) 60 developed this concept:

It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori lands or particular fisheries for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases however, it is a careful balancing of interests that is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for, and where necessary, reconciled.

The Crown right of pre-emption imposed reciprocal duties

4.7.8 Under article 2 of the Treaty the Crown obtained the valuable monopoly right to purchase land from Maori to the exclusion of all others. This raises the question of whether the granting of this right by Maori imposed any reciprocal obligation or duty on the Crown. To determine this, the Orakei tribunal considered in detail the circumstances surrounding the preparation of the Treaty by Captain Hobson and in particular the instructions he received from Lord Normanby, the British colonial secretary. Here we simply reiterate the Orakei tribunal's summary of the parameters and limitations imposed by Lord Normanby on the Crown when exercising its pre-emptive right to purchase Maori land:

- All dealings with Maori were to be conducted on the basis of sincerity, justice and good faith just as were negotiations for the recognition of the Queen's sovereignty over New Zealand.

- Maori were to be prevented from entering into contracts which would be injurious to their interests. By way of example, Lord Normanby stipulated that the agents of the Crown were not to purchase from the Maori any land "the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence".

- Lord Normanby further emphasised this point when he next stipulated that the acquisition of land by the Crown for the future settlement of British immigrants was to be confined to such districts as the Maori could alienate "without distress or serious inconvenience to themselves".

- Lastly, an official protector was to be appointed to ensure that this stipulation was complied with.{FNREF|0-86472-060-2|4.7.8|49}

The tribunal found it to be abundantly clear from these instructions, read in the light of the instructions as a whole, that no land was to be purchased by the Crown which was needed for the comfort and subsistence of the Maori people. In short, they were to be left with a sufficient endowment for their own needs-both present and future. An official protector was to ensure this. The right of pre-emption was to be a limited right. It was not to extend to land needed by the Maori.

4.7.9 The tribunal was reinforced in this view by Lord Normanby's instruction that the land was to be bought extremely cheaply from the Maori-this would facilitate development and assist in bringing out more settlers. The spin-off for Maori was that the land they retained would, over time, increase greatly in value, although, of course, this would occur only if the Crown ensured that they left Maori with sufficient land. For this and other reasons which are summarised in the Orakei Report (1987) 147 the tribunal has concluded that the two parts of article 2 of the Treaty must be read together and construed in the light of the surrounding circumstances, including the fact that, had the Maori chiefs not been assured that possession of their lands would be protected, they would not have signed the Treaty. In the light of these considerations the tribunal has found that article 2, read as a whole, imposed on the Crown a duty first to ensure that the Maori people in fact wished to sell; and secondly that each tribe maintained a sufficient endowment for its foreseeable needs.

What then might constitute a sufficient endowment for the tribes' foreseeable needs? There can be no single answer to this question for much might depend upon a wide range of demographic factors including the size of the tribal population; the land they were then occupying or over which various members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering. In short, their dependence upon the many forms of mahinga kai.

The importance of these various elements could vary depending upon the date at which the Crown sought to acquire tribal land. The major Ngai Tahu purchases, as we will see, took place well in advance of organised British settlement. While Ngai Tahu were aware that the Crown was purchasing land to facilitate settlement and for the

most part welcomed this prospect, they probably had only a shadowy notion of the likely magnitude and rate of settlement. In fairness to the Crown, it should be observed that the governors of the day would also have lacked precise knowledge of the timing, scale and momentum of future settlement. Much of this was for a time under the control of the New Zealand Company.

4.7.10 In negotiating with the Ngai Tahu chiefs, the Crown was obliged to have regard as best it reasonably could to the range of demographic factors we have mentioned. Its duty was to ensure that Ngai Tahu were left with sufficient land for their present and future needs. Present needs would almost certainly differ from future needs, when settlers arrived in their midst and the land was subdivided. While it might be contemplated that over time Ngai Tahu would become increasingly involved in the new economy, it should have been apparent that this would occur only gradually and over a relatively lengthy time-span. In the meantime, generous provision of land and guaranteed possession of eel-weirs and other sources of mahinga kai would be needed. Since it was the Crown's intention to acquire Ngai Tahu land as cheaply as possible, there was a correlative duty to ensure that adequate land of good quality was left in their possession so that they would, as Lord Normanby contemplated, later enjoy the added-value accruing from British settlement. Sufficient land would need to be left with Ngai Tahu to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.

Although by the 1840s Ngai Tahu were relatively thinly dispersed over a vast area of land, Crown officials in New Zealand (in contrast to their Colonial Office masters) for the most part accepted that the territory belonged to Ngai Tahu. They were also aware that the various hapu maintained a system of shifting cultivation and engaged in seasonal foraging and hunting pursuits in different parts of the interior where they settled intermittently and for a relatively brief period. It was incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over the tribal territory, as well as their more permanent kainga. This would ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs, including various forms of farming.

The Crown obligation actively to protect Maori Treaty rights

4.7.11 Article 2 of the Treaty "confirms and guarantees" to Maori their property and other rights. Likewise, the preamble expresses 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 tribunal in various reports has stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The tribunal's views have been endorsed by the Court of Appeal and in particular by the president, Sir Robin Cooke, in the following passage:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports that support that proposition and are undoubtedly well founded.{FNREF|0-86472-060-2|4.7.11|50}

The duty of protection imposed on the Crown extends not only to the use of their lands and waters, as noted by Sir Robin Cooke, but to the exercise by the Crown of its Treaty right of pre-emption. In his instructions of 14 August 1839, Lord Normanby directed Hobson that all contracts for the purchase of land from the Maori were to be made by the governor through an officer "expressly appointed to watch over the interests of the Aborigines as their Protector". Evident in the colonial secretary's instructions is the concern that Maori be dealt with fairly and honestly and in a way that ensured their Treaty rights were recognised and protected. To facilitate this, the appointment of an official protector was contemplated.

4.7.12 In exercising its right of pre-emption, the Crown was obliged to protect Ngai Tahu interests in various ways. First, it should acquire only such land as Ngai Tahu were willing to sell. To be satisfied that the land was being sold with the owners consent it was necessary to ascertain who the owners were. Professor Ward, in his report to us on the historical evidence on these claims, has pointed out that the question of which Ngai Tahu units owned or controlled what rights was a matter of some complexity (T1:8-12). He referred to various individuals, whanau and hapu of Ngai Tahu exercising rights over a great variety of food resources and other resources from land and sea. These included garden lands close to their villages and weka grounds or ti tree stands far afield. Some rights, such as mutton birding in the Titi Islands were exercised far from the groups' main residential bases. Many of these rights were specific to particular groups, families and even individuals.

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

4.7.13 Although in the early years of land purchase by the Crown it would have been unrealistic to expect the boundaries of a proposed purchase to be fixed by survey, it is implicit in the notion of consent that the Maori owners knew with reasonable certainty the area of land they were being asked to sell. The onus unquestionably lay on the Crown to ensure this. The duty of active protection required no less.

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

Lord Normanby contemplated that an official protector would be appointed to safeguard Maori interests on Crown purchases of their land. But he appears to have envisaged that the same official would act for the Crown in conducting the negotiations for the purchase. It soon became evident that this would involve the official in a conflict of interest. Ultimately it was for the governor to decide how the Crown's Treaty obligation of protecting Maori Treaty rights should be effected; the

important point for our purposes is that the Crown was obliged to ensure this happened.

The tribal right of self-regulation

4.7.14 This concept was developed in the Muriwhenua Report (1988). It is an important element of tino rangatiratanga. The Muriwhenua tribunal put it this way:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.{FNREF|0-86472-060-2|4.7.14|51}

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources; and

- the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control, resource protection being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not disregard or diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2. It follows that Treaty fishing interests should not be qualified except to the extent necessary to conserve the resource.{FNREF|0-86472-060-2|4.7.14|52}

In its Mangonui Report (1988) the tribunal emphasised a duty on the Crown to recognise tribal rangatiratanga. The Treaty was made with tribes and it was understood at the time that traditional mechanisms for tribal controls would continue to be respected and maintained.{FNREF|0-86472-060-2|4.7.14|53} But, as the Orakei Report (1987) demonstrated, policies were introduced over a century ago to put an end to these tribal powers. In the Mangonui Report (1988) the tribunal also adverted to the failure of the Crown to recognise the tribal position and, in particular, to provide a legal foundation and appropriate resources for tribes to contribute more fully to local affairs and to enable them to take necessary steps for the protection of tribal interests.{FNREF|0-86472-060-2|4.7.14|54} This defect has now been remedied by the passage of the Runanga Iwi Act 1990.

The principle of partnership

4.7.15 The Treaty signifies a partnership and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith. This proposition was independently agreed on by all five members of the Court of Appeal in the New Zealand Maori Council case. Several of the judges emphasised the importance of the "honour of the Crown". Mr Justice Casey saw the concept as underlying all the Crown's Treaty relationships.{FNREF|0-86472-060-2|4.7.15|55} Sir Ivor Richardson, who referred to the Treaty as a "compact", commented in this way:

Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.{FNREF|0-86472-060-2|4.7.15|56}

Sir Robin Cooke also emphasised the reciprocal nature of the obligation to act reasonably and in the utmost good faith. "For their part", he said, "the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation".{FNREF|0-86472-060-2|4.7.16|57}

4.7.16 This tribunal adopts the following statement by the Muriwhenua tribunal as to the basis for the concept of a partnership:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.{FNREF|0-86472-060-2|4.7.16|58}

The right of redress for past breaches

4.7.17 In the New Zealand Maori Council case, Mr Justice Somers recognised this right as a Treaty principle:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s 9. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other-a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.{FNREF|0-86472-060-2|4.7.17|59}

Sir Robin Cooke also accepted that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at least some form of redress,

unless grounds existed justifying a reasonable partner in withholding it-which he thought "would be only in very special circumstances, if ever".{FNREF|0-86472-060-2|4.7.17|60} It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown.

The duty to consult

4.7.18 While rangatiratanga is revealed in the words and actions of individuals, it is nevertheless the very antithesis of individualism. As trustees the credibility of rangatira and hence their mandate have depended on accountability to their beneficiaries and always on a willingness to confer with them. An individual without his or her people is powerless and rangatiratanga meaningless. Accordingly, if this were so for the Maori, a Maori perspective of article 2 of the Treaty would presume a similar willingness on the part of the Crown to confer with the Maori, insofar as the Crown guaranteed, trustee-like, to protect rangatiratanga.

By the same token the question of whether there was a duty on the Crown to consult with its Treaty partner was considered by the Court of Appeal in the New Zealand Maori Council case. Counsel for the New Zealand Maori Council submitted that an obligation to consult the other Treaty partner and the correlative right to be consulted was itself an implied principle of the Treaty stemming from the obligation of good faith and, on the Crown's part, from the protective guarantees of Maori interests which come under the Treaty.

Sir Ivor Richardson, along with other members of the Court of Appeal, rejected this submission in its absolute form. He explained why:

There are difficulties with that submission when expressed in that way as an absolute duty of universal application superimposed on the consultation which takes place as part of the ordinary political and governmental processes. What matters affecting Maoris are within the scope of the duty and how is the line to be drawn in the conduct of government? With whom is the consultation to occur? The undertakings in article 2 relate to "the chiefs and subtribes" in the Maori text and to "the chiefs, tribes, families and individuals" in the English text. And inasmuch as any Maori may apply to the Waitangi Tribunal, it is not obvious that a tribal affiliation or other Maori organisation could necessarily speak for all Maoris interested. There is, too, the further question as to the form and content of the consultation. In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it

to act consistently with the principles of the Treaty without any specific consultation.{FNREF|0-86472-060-2|4.7.18|61}

It follows from Sir Ivor Richardson's discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources-mahinga kai-also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.

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Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.1 Introduction

Chapter 5

THE BACKGROUND TO THE PURCHASES: CROWN POLICY AND SETTLEMENT
5.1. Introduction

Just four years after the signing of the Treaty of Waitangi the Crown embarked on a policy of land purchase from Ngai Tahu which over twenty years made available tens of millions of acres for European settlement. The Crown's actions in acquiring title to what is the vast majority of land in the South Island is at the heart of this claim. The areas of the individual purchases were huge, ranging from tens of thousands of acres up to around twenty million acres. Few land purchases from Maori in the North Island exceeded the smallest Ngai Tahu blocks. The grievances associated with these purchases make up eight of the "Nine Tall Trees" which comprise the major claim. This section of the report deals with each of these heads of claim separately in order of purchase.

It is necessary to examine the circumstances of each purchase in some detail. The tribunal has been taken through each of these on more than one occasion, first by the claimants, then by the Crown and finally by Professor Ward and Dr Tremewan. The actions of the Crown in allowing the New Zealand Company to purchase land from Ngai Tahu or in purchasing land directly from the tribe can only be adequately examined if there is a clear understanding of what occurred in the negotiation of each individual deed. On much of this material the witnesses for the Crown and the claimants were agreed. But there were still many major areas where there was a clear difference of view as to how the details should be interpreted. For this reason the tribunal has found it necessary to explore in depth the circumstances of each sale.

Before embarking on a discussion of these complex transactions we will review the general development of Crown policy as it related to Ngai Tahu during this period. The Crown's policies towards Maori fluctuated over the two decades during which the purchases took place. Dramatic changes in the settlement and government of the country occurred; governors were replaced, colonial secretaries succeeded colonial secretaries and a succession of Crown agents were dispatched to the South Island to purchase land. In 1844 when the Otakou purchase took place, Europeans were heavily outnumbered and almost all the country was still in Maori ownership and control. Settler government did not exist and the Colonial Office dealt with Maori issues directly through its man on the spot, the governor. Battles between British troops and Maori tribes were taking place in the far north and in Wellington. Understaffed, without adequate financial support and at a serious military disadvantage, the governor was unable to assert his authority over Maori. In 1864, when Rakiura

(Stewart Island) was purchased, the scenario had changed almost beyond recognition. All of the South Island and a good deal of the North had been acquired by the Crown. The demographic and military balance had changed in the Europeans' favour. Another series of wars were being fought across the centre of the North Island and the frontier of Crown influence had extended into the Waikato, Bay of Plenty and Taranaki. Settler politicians were planning the confiscation of huge areas of Maori lands. The British government had passed most of its powers to control the internal affairs of the colony to a locally elected, settler government in which there was no Maori voice whatsoever.

Waitangi Tribunal, Department of Justice, Wellington.

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05 The Background to the Purchases: Crown Policy and Settlement

5.2 The Governors : the Crown in New Zealand.

5.2. The Governors : the Crown in New Zealand.

5.2.1 New Zealand did not have its own constitutional government until 1853, when the Imperial Parliament's New Zealand Constitution Act 1852 was implemented. Until that time, New Zealand was a Crown colony. The power vested in the Crown by the various Acts of Parliament relating to New Zealand was in turn vested in the governor. The colonial secretary issued him with instructions as to how this authority was to be exercised. In a colony with only one governor, none of the executive powers were delegated. He could take advice from subordinates but nothing could be done without his authority. In theory once lieutenant-governors were appointed, as in New Zealand after 1846, they would conduct the administration of their provinces, and certain executive powers would be delegated to them under the supervision of the governor-in-chief.

New Zealand was initially under the adminstration of the New South Wales governor, Sir George Gipps. On 3 May 1841 the country became a Crown colony in its own right and Hobson was elevated from lieutenant-governor to governor. Hobson died on 10 September 1842 after a series of illnesses which left many of his duties to his few officials. His replacement was Captain Robert FitzRoy, governor from 26 December 1843 until 17 November 1845. It was during his term of office that the Otakou purchase was negotiated. The Hobson and FitzRoy administrations were periods of considerable economic and political difficulty. Government was severely under-resourced and under-funded. Tensions between Maori and settlers, and between both races and the Crown remained unresolved. With the appointment of Captain George Grey, backed by Imperial troops and much stronger financial support, the Crown was able to take the initiative.

5.2.2 For the purpose of this claim, Sir George Grey is the most important figure among those who acted vice-regally in New Zealand. His term of eight years, from 18 November 1845 to 31 December 1853, far exceeded those of his predecessors. Autocratic by nature, Grey kept tight control over the parliamentary grant and made sure that his lieutenant-governors' powers were more formal than real. Grey was a most effective politician, undermining the authority of any group, Maori or Pakeha, which could threaten his control over government. One of the first casualties of his administration was the Protectorate Department, set up to look after Maori interest and under the independent control of the chief protector, George Clarke Sr.

Apart from the obvious duty of governing, the most important obligation of the governor was to keep the Colonial Office informed about events in New Zealand and the measures taken to deal with them. While general guidelines were laid down

12,000 miles away, much had to be left to the judgement of the governor about the precise manner in which government would be carried out. Here again, Grey's personal qualities were important. His acumen as a despatch writer gave him even greater freedom of action.

On Grey's departure, the dominating influence in land purchasing became that of Donald McLean. Already established as the leading official dealing with land buying from Maori, McLean gave continuity to the management of this area of government for the remainder of the 1850s.

Although the Crown was directly represented in New Zealand, the lines of communication were long and difficult. It took many months for British officials to get responses from their governors in New Zealand. Distance gave the initiative to the governors, but in their actions they were always responsible to the Imperial government. We turn to examine how this relationship between the British government and the governors in New Zealand influenced the ongoing recognition of Maori rights as promised in the Treaty of Waitangi over the period when the Ngai Tahu purchases took place.

Waitangi Tribunal, Department of Justice, Wellington.

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05 The Background to the Purchases: Crown Policy and Settlement

5.3 The Challenge to Treaty Guarantees in the 1840s

5.3. The Challenge to Treaty Guarantees in the 1840s

5.3.1 We have discussed in some detail Lord Normanby's instructions to Hobson which dictated the terms of the Treaty offered to Maori (4.7.1). As we have seen, they contained an unequivocal recognition of Maori tribal ownership and control of their land and other resources in New Zealand. We have found that this would clearly have been the way Maori signing the Treaty would have interpreted the promise of "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa". In New Zealand few intelligent Europeans with any experience of the country and familiar with Maori views on the rights of land ownership would have seen this promise in any other terms. However in Great Britain, Normanby's instructions were not the final word in the Crown's recognition of Maori property rights to the whole of the country. They were little more than the opening round in a debate which extended throughout much of the 1840s over whether Maori did own lands beyond their villages and cultivations, and whether the guarantees of article 2 of the Treaty extended beyond these very limited classes of property. The ebb and flow of this debate coloured the instructions which the Colonial Office sent to the Crown's agents in New Zealand throughout the decade.

The whole weight of European cultural assumptions was against acknowledging the ownership of land beyond what was cultivated or held under a recognisable legal title. Most British politicians held on to the narrow interpretation of the land guarantee. It is hard to exaggerate the importance placed on the meaning of this guarantee coupled with a second argument, that of the transfer of sovereignty. If you believed, as the New Zealand Company and its supporters believed, that Maori owned only the relatively small amount of land which they cultivated and the Crown owned all the rest by virtue of sovereignty, then buying land from Maori was a matter of little significance. If, on the other hand, Maori land ownership was co-extensive with the whole of New Zealand, and to be respected in the way in which private, rather than public, land ownership was respected in the European tradition, the implications changed dramatically. The process of acquiring an estate for the Crown to dispose of for settlement would be difficult, time-consuming and a drain on those funds which, according to the supporters of systematic colonization, ought to go into emigration and the development of the new settlement.

5.3.2 Normanby's views had been greatly influenced by the permanent under-secretary of state, James Stephen, an advocate of the aboriginal rights of indigenous peoples. The instructions to Hobson were largely drafted by Stephen himself.{FNREF|0-86472-060-2|5.3.2|1} Stephen too had close ties with Dandeson Coates, the lay secretary of the Church Missionary Society. The society was opposed

to the intentions of the New Zealand Company and represented a missionary view of the affairs of New Zealand to the Colonial Office. Also influential was the 1837 Commons Committee on Aborigines in British Settlements and the lobbying of the Aborigines Protection Society.{FNREF|0-86472-060-2|5.3.2|2} The committee had a particularly gloomy view of the impact of British settlement on indigenous communities. The Aborigines Protection Society was founded by members of the 1837 Commons committee. Unlike Coates and the Church Missionary Society however, the society believed that colonisation could take place if adequate protection was provided for indigenous peoples. Such protection included an unconditional property guarantee.

As permanent under-secretary, Stephen was however only the civil servant, and it was his political masters, the colonial secretaries, who made final decisions and established policy. Lord Glenelg (1835-1839) Lord Normanby (1839) and Lord John Russell (1839-1841) all relied heavily on Colonial Office advice, but the most important of their successors, Viscount Stanley (1841-1845) and Earl Grey (1846-1852) were more independently minded. The views of a number of these colonial secretaries differed substantially with Stephen's on this very question of Maori ownership of the soil. Peter Adams, in his study of the British government's reluctant moves to intervene in New Zealand, points out that in 1840 during a debate in the House of Lords, Russell argued that the Crown's policies in New Zealand had been in accord with the ideas of Emerich Vattel.{FNREF|0-86472-060-2|5.3.2|3} Vattel's arguments, as expressed in his The Law of Nations, first published in an English edition in 1760, were commonly referred to in debates over indigenous rights during the nineteenth century and had been taken up by Dr Thomas Arnold, the famous headmaster of Rugby School. According to Vattel and Arnold, indigenous societies could only claim ownership to land they had cultivated. Rights to the ownership of land could only be maintained by "civilised" societies who were able to cultivate them. The argument was a clear denial of Maori ownership of land not occupied by dwellings or gardens. Governor Gipps, who was Hobson's immediate superior from 1840 until 3 May 1841, certainly did not espouse an all-embracing view of Maori property rights. In introducing legislation to examine pre-1840 purchases in New Zealand, he expressed views of Maori ownership that were far more limited. After stating that the Bill was founded on three general principles, which he regarded as "political axioms", Gipps defined the first of these as:

that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it.{FNREF|0-86472-060-2|5.3.2|4}

The other principles were that the right of pre-emption was held exclusively by civilised power and thirdly, that a colony could not be established by private individuals without Crown assent.

5.3.3 In the minds of officials and ministers the question of Maori ownership rights under article 2 of the Treaty remained confused and abstract until the whole issue of the New Zealand Company's ownership of land was examined by William Spain in

1842. The New Zealand Company initially had every reason to acknowledge extensive Maori rights to land because its titles had been based on deeds of transfer from Maori tribes. However, an agreement between the Crown and the company in late 1840 obliged the Crown to provide four acres for every pound spent by the company, not just that spent on land purchase (C2:4:1-4).{FNREF|0-86472-060-2|5.3.3|5} When Spain's investigation showed the Cook Strait deeds to be virtually worthless, the company tried vainly to argue that the Crown had promised it a grant of around one million acres and that any further responsibility to extinguish Maori title lay with the Crown. The Crown maintained its position that any grant had been promised on the assumption that Maori title had been extinguished. Eventually on 12 May 1843 Stanley accepted an offer proposed by the company to provide additional funds to extinguish whatever remaining title was found to exist within the lands to be granted to it (P3:180).{FNREF|0-86472-060-2|5.3.3|6} This turn of events reinforced the view of the company and its supporters in Britain that Maori did not in fact have title to "waste lands", although this was in clear contradiction to the recognition of Maori ownership implied in the deeds of purchase negotiated with Maori only three years earlier (C1:13-14). The company's views were bluntly put:

If an interest in the land, never yet recognised by any Christian nation, as possessed by savages, is to be attributed to the natives of New Zealand;-if the aborigines are to be regarded as being ... proprietors of the whole surface of New Zealand, ninety-nine hundredths of which are probably covered with the primeval forest;-then, doubtless, the claims of the natives would be co-extensive with those of the Company;... But the only interest in land which our law has ever recognised as possessed by savages, is that of "actual occupation or enjoyment";... If the claims of the natives be limited to such lands, ... the question can, at the utmost, be one only of a few patches of potato-ground, and rude dwelling-places, and can involve no matter of greater moment than some few hundred of acres.{FNREF|0-86472-060-2|5.3.3|7}

5.3.4 Under pressure from the company, a parliamentary select committee was established in 1844 to look into the whole question of the colonisation of New Zealand. A draft report was prepared for Lord Stanley which stated his view that Maori rights to land ownership could not be determined in England but would have to be established in New Zealand according to local Maori custom. Although Stanley, like others in England, doubted that these rights would add up to the whole of the country's lands, the draft argued that Maori had their own complex system of property rights and that this would probably apply in New Zealand. The committee was told by several witnesses that Maori did in fact claim ownership to every acre of New Zealand.

The Colonial Office draft was rejected by the committee in favour of Lord Howick's alternative, which condemned the Treaty of Waitangi as "injudicious", rejected the concept that "wild lands" were owned by Maori and recommended that the Crown take steps to assert ownership of all land in New Zealand not in the actual occupation of Maori. There can be little doubt that actual occupation was limited to European notions of cultivations and dwellings. Although the committee's report was a victory for the New Zealand Company, Lord Stanley chose largely to ignore its findings and recommendations. To implement such a course of action, Stanley argued, was contrary to "justice, good faith, humanity, or policy".{FNREF|0-86472-060-2|5.3.4|8} Stanley was well aware from the reports he was receiving from New Zealand that

implementing such a narrow interpretation of the Treaty would cause insurmountable difficulties for his agents there. But he also believed that the rights of indigenous peoples could not in justice be denied.

5.3.5 The Normanby instructions to Hobson in 1839 had assumed that the Crown's estate in New Zealand would be comprised of lands purchased from Maori. It is also likely that the Colonial Office believed that once an examination of land titles derived from purchases of land prior to the Treaty had been completed, there would be a large surplus of land between that granted to European purchasers and that where aboriginal title had been extinguished. This land, it was assumed, would belong to the Crown. Even those, like Stanley, who believed that Maori could assert title to what was seen in European eyes as wilderness lands, still felt that there must be substantial lands somewhere in New Zealand unowned by Maori or claimed by Europeans, which could only be the property of the Crown. In the corridors of Downing Street it was still inconceivable that a 100,000 "uncivilized" Maori could own all the lands of New Zealand.

Once in New Zealand, these ideas did not match the reality of Maori title. All the country was claimed and owned under Maori concepts of ownership, which were in many ways quite different from those of British custom. Perceptive Europeans who dealt directly with Ngai Tahu and who learned the Maori language often came to accept that the tribe did hold title to the large areas of land which to European eyes consisted of untouched wilderness. Edward Shortland, who had considerable contact with Ngai Tahu while acting as interpreter for the land claims commission in the South Island, provides an example. After fulfilling his responsibilities with the commission, he travelled as far south as Aparima (Jacob's River), visiting whaling stations and taking a census of Maori population, and then walked the 200 miles of coast from Waikouaiti back to Akaroa. Material from his journal, kept during the six months spent in the South Island, was later published.{FNREF|0-86472-060-2|5.3.5|9} Humane and educated, Shortland stands out as the most perceptive and enlightened European recorder of Ngai Tahu of the period.

In Shortland's eyes, Ngai Tahu dominated their territory, though whether they filled the whole vast area was less certain to him. When he wrote the introduction to The Southern Districts of New Zealand back in England several years later, he was ready to think that because of the small Maori population, the southern region might accommodate the system of colonization as carried out by companies:

For it is indispensable to the success of this system, to have at command a continuous and extensive block of land, unembarrassed by the claims of native proprietors; which requisite is not to be obtained in the North Island.{FNREF|0-86472-060-2|5.3.5|10}

His text and notes however, show that he was more aware of the Maori viewpoint. As protector he dealt with complaints against Europeans who had begun to arrive with cattle and sheep which they spread over the country while refusing to make any payment to the inhabitants, on the ground that all the land belonged to the Queen of England. Shortland encountered one such new arrival who declared that he understood it was illegal to pay anything to the Maori for land:

The doctrine which Mr. G[reenwood] advocated was, I had before remarked, a very favourite one among new comers, who landed full of the idea that there were large spaces of what they termed waste and unreclaimed land, on which their cattle and flocks might roam at pleasure, and to which they had a better right than those whose ancestors had lived there, fished there, and hunted there; and had, moreover, long ago given names to every stream, hill, and valley of the neighbourhood.{FNREF|0-86472-060-2|5.3.5|11}

Although Europeans in New Zealand did not necessarily equate Maori ownership of land with that of a British land title, they did realise that Maori could assert title to land very widely on the basis of traditional use and occupation.

It was in the midst of the 1844 Common's inquiry that the first Crown purchase from Ngai Tahu took place. The Crown waived pre-emption in allowing the New Zealand Company to enter into a purchase for the New Edinburgh settlement at Otakou. However these negotiations were little influenced by the deliberations of the Commons committee; local conditions prevailed. In the wake of the Wairau affair, Governor FitzRoy was determined that the purchase should be carried out as smoothly as possible, fearful that if the negotiations went awry, further violence could result. There appears to have been no open suggestion that the block of over 500,000 acres purchased from Ngai Tahu on 31 July 1844 was not in every sense owned by Ngai Tahu.

5.3.6 On 13 June 1845 Stanley issued instructions to Captain George Grey calling for strict attention to the provisions of the Treaty of Waitangi:

I repudiate, with the utmost possible earnestness, the doctrine maintained by some, 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. In the name of the Queen I utterly deny that any Treaty entered into and ratified by Her Majesty's command, was or could have been made in a spirit thus disingenuous, or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.{FNREF|0-86472-060-2|5.3.6|12}

Later in the despatch Stanley lamented that in his view the failure to identify and register Maori land had been one of the chief reasons for the colony's numerous problems under FitzRoy:

If Lord John Russell's instructions of the 28th January 1841, to define on the maps of the colony the lands of the aborigines, and my own for a registration of such lands, had been carried into effect, much of this difficulty would have been surmounted.{FNREF|0-86472-060-2|5.3.6|13}

A fortnight later Stanley returned to the issue of the registration of Maori lands and the Crown's right to "waste land":

It would appear to follow as a natural consequence of the Treaty of Waitangi, which recognises the title of the native tribes to their lands, that the limits of those lands should be distinctly recognised and set forth under the sanction of the sovereign authority.{FNREF|0-86472-060-2|5.3.6|14}

Stanley suggested to Grey that a two or three year period be given to allow tribes to register their lands, however Grey was given considerable discretion in carrying out these instructions. After the registration had been completed, Stanley went on to suggest that it would then be possible to judge:

what portion of the unoccupied surface of New Zealand can justly, and, without violation of previous engagements, be considered as at the disposal of the Crown...{FNREF|0-86472-060-2|5.3.6|15}

It is clear from the reference to the Treaty, that Stanley saw no contradiction in the instructions to register land and to uphold the Treaty, particularly as we have seen that he was prepared to acknowledge Maori customary ownership.

Stanley was moving towards a view that the Treaty could be interpreted in terms of the system of rights and ownership of Maori themselves. Stanley argued as much before the House of Lords in 1845. Peter Adams saw his reasoning as a significant recognition that the issue of ownership could not be imposed on Maori, it only had meaning in terms of Maori customary rights:

It had taken five years after the signing of the Treaty of Waitangi for the Colonial Office to recognise clearly and firmly that the correct interpretation of the land guarantee could only be decided by reference to Maori custom. Lord Stanley had at last created the possibility that the Treaty of Waitangi would be interpreted according to the sense in which the signatories understood it.{FNREF|0-86472-060-2|5.3.6|16}

5.3.7 The possibility was shortlived. In December of that year, Stanley was replaced by W E Gladstone, who after a six month period was followed by the man whose report had been adopted by the 1844 committee on New Zealand, and who had since been elevated to the title of Earl Grey. As colonial secretary, Earl Grey immediately set about to implement the tenor of the committee's report. He sent further instructions to Grey, which reiterated Stanley's intentions of 1845. His despatch of 23 December 1846 leaves little doubt as to his views on Maori land ownership:

The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts or of the habits of civilized life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. (K2:12:67-68){FNREF|0-86472-060-2|5.3.7|17}

It was a principle he firmly rejected and after citing Arnold at length he continued:

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. (K2:12:68){FNREF|0-86472-060-2|5.3.7|18}

Unlike Stanley he went on further to deny any tribal right whatsoever. Tribal property was public property and on cession, public property was transferred to the Crown. In laying down these general principles Earl Grey made only passing reference to the Treaty, and then only to find added support for the policy of pre-emption.

5.3.8 Debates in England as to whether to recognise the Maori ownership of the soil of New Zealand were little more than academic. Even strongly worded instructions were of little value if they could not be implemented. The reality was that government in New Zealand could not be carried out without an overall recognition of Maori property rights. Governors were then posed with a very real dilemma. They were instructed to locate a vast Crown domain, which they either believed did not exist or, even if they shared the views of Earl Grey and the New Zealand Company, knew could not be enforced. The prospect of registering Maori land ownership, proposed by Stanley and Earl Grey as the solution to the problem, was also unrealistic. When the Native Land Court was eventually established to do the same thing in the 1860s it proved a difficult, drawn-out and expensive process. This was not the quick and easy solution to identifying Maori rights to lands which colonial secretaries envisaged in the 1840s.

Governor Grey's response was to ignore the instruction and provide Earl Grey with a carefully worded justification. After a long introduction during which the governor skirted around the issue by suggesting that strict compliance with the instructions would possibly have put the Crown in a position where it would be acting in a "manner opposed to the principles of equity and justice", Grey suggested that a middle way could be found on the issue:

Indeed there was an evident necessity for considering the principles enunciated by your Lordship, in reference to the peculiar state of New Zealand; for even if those principles were admitted to be abstractly true, they related to the rights of two parties, one of which parties it would have been impossible to have induced to assent to them; and as this party was a very powerful one, and composed for the most part of very loyal subjects, who were disposed to make very great concessions to meet the views of the Government, the question which would always arise would really be, Would it [be] better to endeavour at all hazards to enforce a strict principle of law, or to endeavour to find out some nearly allied principle which should be cheerfully assented to by both parties, and which would fully secure the interests and advantages of both. (A9:3:2){FNREF|0-86472-060-2|5.3.8|19}

Grey's "allied principle" lay in pre-emption, and after blaming a good deal of the ills of the colony at the time of his arrival on the abolition of pre-emption, he explained how the objectives of Lord Stanley's instructions-the identification of a sufficient estate of Crown land to allow settlement-could be achieved by strict adherence to the principle of pre-emption:

As far, therefore, as I can understand the position of this country in reference to the lands of the natives it is this-that the native population would, to the best of their ability, resist the enforcement of the broad principles which were maintained by Dr. Arnold; but that they will cheerfully recognize the Crown's right of pre-emption, and that they will in nearly all-if not in all-instances dispose, for a merely nominal consideration, of those lands which they do not actually require for their own

subsistence. Even further than this: in many cases if Her Majesty requires land, not for the purposes of an absentee proprietary but for the BONA 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. (A9:3:2){FNREF|0-86472-060-2|5.3.8|20}

Grey was not willing to assert that all New Zealand was owned by Maori and set his position clearly against what he described as the "opinions which have been so generally expressed to your Lordship by such high authorities in the northern part of this island" that there was no such thing as waste land within the colony unowned by Maori. He informed Lord Grey that such land existed even in the densely populated areas of the North Island:

there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right; and that when these tracts of country come to be occupied by Europeans, the natives will 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. An instance of this kind has recently occurred, in which an extensive and valuable tract of country has been in this manner ceded to the Government. (A9:3:3){FNREF|0-86472-060-2|5.3.8|21}

Grey went on to inform the colonial secretary that he would deal with the whole problem by strictly maintaining pre-emption and by modifying the thirteenth chapter of the royal instructions headed "On the Settlement of the Waste Lands of the Crown". Grey proposed that the registration of Maori land be a gradual process, and that it be achieved through purchase:

I have therefore deemed it inexpedient to disturb the present tranquillity of the country by calling upon the natives generally to register their claims to land; but I have taken care, in as far as possible, to keep the land purchases of the Government so far in advance of the wants of the European settlers as to be able to purchase the lands required by the Government for a trifling consideration. What has then been done was, to extinguish absolutely the native title to the tract purchased, but to reserve an adequate portion for the future wants of the natives, which reserves were registered as the only admitted claims of the natives in that district, and they have been furnished with plans of these reserves, and with 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, are much esteemed by the natives, and accustom them to hold land under the Crown, which is an extremely desirable object to attain. This mode of proceeding also renders the labour of registration very trifling-secures the perfectly accurate registration of all such claims as are entered, and gives to the act of registration the appearance of a boon conferred by the Government, instead of clothing it with a compulsory character. I have also no doubt that, in process of time, when the Europeans require the more distant districts of the country, the natives will have wholly forgotten, and have abandoned many invalid claims to tracts of country which would now be urged. (A9:3:4){FNREF|0-86472-060-2|5.3.8|22}

As long as the Crown was able to purchase land in advance of settlement, then the prices paid would only need to be nominal:

the real payment which they receive for their waste lands is not the sum given to them by the Government, but the security which is afforded, that themselves and their children shall for ever occupy the reserves assured to them, to which a great value is given by the vicinity of a dense European population. They are also gradually becoming aware that the Government spend all the money realized by the sale of lands in introducing Europeans into the country, or in the execution of public works, which give employment to the natives, and a value to their property, whilst the payment they receive for their land enables them to purchase stock and agricultural implements. (A9:3:4){FNREF|0-86472-060-2|5.3.8|23}

Grey's plan was ingenious. Nominal title would be recognised so that Maori, and the missionary and aboriginal protection lobbies would be kept happy. Nominal sums would be paid for this land so the exchequer would be satisfied. But the areas of land acquired to meet the needs of the Crown and settlers would be far from nominal. The whole test of the policy would be, could the Crown purchase lands from Maori in sufficient quantity? The timing of Grey's proposition is highly significant to the claim before us. In May 1848, H T Kemp had just been sent to the South Island to purchase from Ngai Tahu all their rights to land between the Wairau and Otakou purchases, on the basis of an agreement Grey had negotiated with a number of the tribe's rangatira the previous February. In 1847 Grey had negotiated with Ngati Toa a deed of purchase for very substantial areas of the northern South Island. On the basis of this purchase he was about to issue a Crown grant for a block which would eventually comprise much of Marlborough and a good deal of Nelson provinces. Although Grey had a tendency to overstate his control of the situation and to prophesy the assured success of his policies, in this case he can be seen to have had some cause for optimism.

5.3.9 The South Island was the ground on which these policies of extinguishing Maori title and defining reserves was tested. The Wairau and Kemp purchases were tendered by Grey to the Colonial Office as clear evidence that the messy business of extinguishing Maori title was once and for all under control. Following the Wairau purchase he reported confidently:

Every land claim but one, in the southward of the Colony, which is likely to occasion any future discussion or disturbance, has now been disposed of. (A8:I:202){FNREF|0-86472-060-2|5.3.9|24}

After the Kemp purchase had been negotiated but even before the reserves had been finalised he wrote to Earl Grey:

I think, therefore, that Her Majesty's Government may, for all practical purposes, regard all Native claims to land in the Middle Island as now conclusively set at rest, with the exception of the portion of the Island in the immediate neighbourhood of Foveaux Straits, and I do not apprehend that any difficulties will arise in respect to that portion of the country. (A8:I:208){FNREF|0-86472-060-2|5.3.9|25}

Following the completion of the Murihiku purchase in August 1853, the Crown claimed title to almost all of the South Island, with the exception of the southern portion of Banks Peninsula including Akaroa Harbour, the Marlborough Sounds and parts of the area between Golden Bay and the mouth of the Buller River.

5.3.10 However Grey's confidence glossed over the serious deficiencies in these blanket tribal purchases. There were numerous protests by many of the tribes concerned that these early purchases had been incomplete, that legitimate rights had not been recognised, that the wrong people had received payment and that significant areas of land had not in fact been bought. We will be examining these complaints in detail as they apply to Ngai Tahu when we discuss the individual purchases. Until 1853 the Crown generally rejected these complaints, or offered some additional payments, as in the case of Ngai Tahu's rights to lands north of the northern boundary of Kemp's purchase. However, in 1853 the Crown's efforts to purchase land it acknowledged as remaining in Maori title in the South Island were being stalled by the major tribes involved. Ngai Tahu and Ngati Toa refused to enter into any further land sales with the Crown unless their rights were recognised to areas supposedly already purchased. Other tribes such as Rangitane, Ngati Tama, Te Atiawa and Ngati Apa had not had their rights recognised at all. Ngai Tahu had complained on numerous occasions since 1848 that their rights north of Kaiapoi pa had been ignored, and that Ngati Toa had been wrongly paid for this land. After having these grievances rejected for several years, Ngai Tahu made recognition of these rights in North Canterbury conditional on entering into negotiations for the sale of Akaroa (T1:271). For their part Ngati Toa refused to enter into any further sale agreement until rights to Arahura were recognised.

5.3.11 Between August 1853 and 1860, the whole question of Crown purchases was re-opened in the South Island. The Crown entered into several new purchase agreements. Many of these were particularly vague about boundaries. The terms of the "Te Waipounamu" deed is typical. Grey, who with Donald McLean negotiated the deed which was signed on 10 August 1853, aimed at extinguishing the rights of Maori on the island once and for all. Henceforth Maori would be confined to reserves:

Na, ko te paunga rawatanga tenei o a matou whenua katoa ki tera moutere, ka oti nei i a matou te tuku, te tino whakaae, me ona Rakau, me nga Roto, me nga Wai, me nga Kohatu, me nga mea katoa, o runga ranei o te whenua, o raro raro o te whenua, me nga aha noa iho o aua whenua ki a Wikitoria te Kuini o Ingarangi, a ake tonu atu. (A8:I:307){FNREF|0-86472-060-2|5.3.11|26}

Which was translated by Alexander Mackay as:

Now this assuredly is the final transfer or sale of all our lands on the said Island, which we have hereby certainly and faithfully conveyed, with its trees, lakes, waters, stones, and all and everything either under or above the said land and all and everything connected with the said land, to Victoria the Queen of England, for ever and ever. (A8:I:307-308){FNREF|0-86472-060-2|5.3.11|27}

Despite this deed claiming to represent the interests of all the tribes in the island, including Ngati Toa, Ngati Awa (Te Atiawa), Ngati Koata, Ngati Rarua, Rangitane

and Ngai Tahu, this was not the last but the first of a series of purchase agreements with these tribes. Ngai Tahu were not in fact even a party to the deed.

In 1854 a further deed was entered into with Te Atiawa (2 March). On 10 November 1855 Ngati Rarua and Ngati Tama signed a deed ceding all but specified lands in the South Island to the Crown. On 1 February 1856 Rangitane signed a similar deed. During 1856 several deeds were signed with Te Atiawa, Ngati Rahiri, Ngati Kuia and Ngati Koata. In this year also the last Ngai Tahu sale on Banks Peninsula was completed. In 1857 the Crown negotiated the North Canterbury purchase with Ngai Tahu and in addition, Matiaha Tiramorehu received œ200 for his rights north of Kaiapoi. In 1859 the Kaikoura deed was signed by Ngati Kuri of Ngai Tahu and finally, in 1860, the Crown purchased Arahura from Ngai Tahu (A8:I:2-5).{FNREF|0-86472-060-2|5.3.11|28}

There was a sketch plan with the North Canterbury deed, and clear maps accompanied the deeds negotiated with James Mackay Jr for Kaikoura and Arahura. For the most part however, there was little attempt to determine precise boundaries to the non-Ngai Tahu deeds. It would appear that the Crown wanted to claim that all rights were extinguished wherever they may be, and the sellers may have in turn seen these deeds as some form of recognition of rights in areas where their ownership could have been highly contentious. We are reminded of Grey's advice to Earl Grey in 1848 that waste lands distant from the usual residence of their Maori claimants and subject to competing claims could be acquired cheaply by simply recognising Maori ownership. Eventually, when the lands were occupied by settlers, so the argument ran, Maori would forget all about them.

5.3.12 The last of the Ngai Tahu purchases, that of Rakiura (Stewart Island), took place in 1864 and stands out on its own. This was the final purchase of a large block of Ngai Tahu land. After this the tribe would be confined on the various reserves which had been imposed or agreed to during the process of the sale negotiations. Despite this purchase taking place with a good deal more attention to the needs of the Ngai Tahu sellers than had many of the previous purchases, only four years after the deed was signed the Crown was obliged to send a further commissioner to allocate additional reserves. From 1864 on, Ngai Tahu would be involved in a series of campaigns to have their claims to further lands and their interpretation of the terms of these purchase agreements acknowledged.

Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.4 The New Zealand Company and the Crown

5.4. The New Zealand Company and the Crown

5.4.1 Several of the Ngai Tahu purchases were a direct consequence of Edward Gibbon Wakefield's New Zealand Company scheme to colonise New Zealand and turn the country into a prosperous version of rural English society. The Otakou purchase in 1844 led to the settlement of over half a million acres by the Scottish settlers of the Otago Association. The Kemp purchase became the location for the proposed Canterbury Association settlement, following the failure of the Crown to purchase land in the Wairarapa, the association's first choice for Canterbury. The Port Cooper and Port Levy purchases were also to provide land for company settlers and investors. Although the North Canterbury, Arahura, Port Cooper, Port Levy, Akaroa and Kaikoura purchases took place after the company's demise, they all in some way resulted from earlier acquisitions for one or other of the Wakefield settlements.

Ngai Tahu land provided the laboratory for Wakefield's experiments in colonisation. Not only was Ngai Tahu land acquired so that these settlements could take place, but Wakefield's ideas were influential in the policy adopted by the Crown in dealing with the Ngai Tahu sellers.

The idea of colonising New Zealand for profit was not a new one. In 1825 an expedition was sent to New Zealand under Captain James Herd to explore the potential for colonisation as a commercial venture. Rapid industrialisation and population growth were seen by many in Britain as dangerous to social order. Colonisation was promoted as a solution to the problems of overcrowding, population explosion and the boom and bust cycles which marked the British economy from the 1820s to the 1840s. Social and economic uncertainty were accompanied by intellectual and political ferment, with any number of radical philosophers offering their panacea for society's ills. It was during this period that the Chartist movement demanded universal male suffrage and that the ideas of Marx and Engels on economics and history were developed. Edward Gibbon Wakefield entered this debate about what was called the "condition of England". Wakefield was a entrepreneur who wove around the idea of systematic colonisation a vision of an idealised rural England, recreated in a new country and better than the original.

5.4.2 Wakefield's views were first expressed in what were described as Letters from Sydney. Although supposedly written by a colonist with first hand experience of the situation in New South Wales, they were actually written while Wakefield was in Newgate prison serving a three year sentence for abducting a fifteen year old heiress. The problem with colonies, according to Wakefield, was that land could be obtained too cheaply. This destroyed the social order of things because labourers, not capitalists, gained access to land. Low land prices were a disincentive to investment

and without investment the colony was starved of capital, immigration stagnated and the colony languished. Wakefield's solution was simple. Control colonisation through a single association or company. Keep the price of land high to European investors. Use the proceeds from these sales to encourage the migration of labourers and for public works so that the colony would develop. The price of land would increase as development occurred. The original purchasers would make a tidy profit, and profits would promise even further investment.

The other side of the equation was that land would have to be acquired cheaply from the indigenous proprietors. The cost of the scheme in New Zealand was to be borne by the original Maori owners. But Wakefield saw no injustice in this. Sharing the commonly held European view that only European labour and European capital could give value to land, he saw Maori title as without commercial worth. He argued that Maori interests could be protected by ensuring that 10 per cent of all lands purchased were reserved for Maori. This land would enable Maori chiefs and their immediate families to become part of the gentry classes as they became Europeanised and shared in the increasing value of their estates. It was assumed that the rest of the tribe would become landless labourers like everyone else.

Wakefield and his supporters' self confidence and zeal were as high as their knowledge of Maori and New Zealand was low. One historian described the hyperbole with which the venture was floated:

Like the modern advertising agent, Wakefield and John Ward, the first Secretary of the New Zealand Company, were masters of the gentle art of the puff direct and the puff oblique. Fine phrases flowed smoothly and abundantly from their pens, and although neither of them had ever visited New Zealand, this acted only as a further stimulus to their imagination. 'There is probably no place in the world,' declared Ward, 'which presents a more eligible field for the exertion of British enterprise.... New Zealand is fitted by nature for the production in abundance of those three articles, which have always been the especial signs of plenty, wealth and luxury of a country-corn, wine and oil. The vine has already been found to thrive luxuriantly in the islands, and the possibility of its successful cultivation, both for home consumption and commerce, admits of no doubt...and there is good reason to believe that the wines, not only of Italy, but of Spain, Portugal and the south of France, might be brought to as great perfection as in those countries. Finally, the latitude and climate are suitable to the olive, the plant, par excellence, of the sweet south, and the ancient emblem not less of plenty, than of peace.' Thus argument passed into poetry; reason into faith.{FNREF|0-86472-060-2|5.4.2|29}

Maori were presented in these arguments as a noble race, industrious, peaceful and above all, ready to throw off their own culture and adopt that of the European almost as soon as the first immigrants arrived on their shores.

Wakefield's ideas were taken up by many influential parliamentarians, and by a number of associations promoting emigration and colonisation. In 1832 some of these theorists turned their attention to the possibility of a colony in South Australia and after various negotiations with government, an Act was passed in 1834, which incorporated Wakefield's ideas about emigration based on a land fund. Wakefield was

not involved in the implementation of the scheme and was critical of the compromises being made with his theoretical principles. His attention turned to New Zealand.

5.4.3 Between 1837 and 1839 three organisations were established to promote colonisation in New Zealand; the New Zealand Association, the New Zealand Colonisation Company and the New Zealand Land Company. By this stage intervention by the British government was becoming inevitable. The high enthusiasm of prospective colonists and investors became channelled into a race to establish a stake in New Zealand before the country became a British colony. On 12 May 1839, the Tory left England to purchase land in New Zealand. In September 1839, before any word could have reached England about the success of the mission, four boat loads of colonists were farewelled from England, many of the emigrants firm in the belief that they possessed a secure title to lands in New Zealand.

In attempting to turn the New Zealand Company vision into reality William Wakefield, Edward's brother, entered into a number of deeds with Maori from Taranaki to Cook Strait in late 1839. These deeds made provision either for a tenths reservation or for the reservation of sufficient lands for Maori endowment. When Colonel Wakefield was sent by the company to purchase land in New Zealand before the Crown arrived he took the following instructions:

you will take care to mention in every booka-booka, or contract for land, that a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe .... you will readily explain that, after English emigration and settlement, a tenth of the land will be far more valuable than the whole was before. And you must endeavour to point out, as is the fact, that the intention of the Company is not to make reserves for the native owners in large blocks, as has been the common practice as to Indian reserves in North America, whereby settlement is impeded, and the savages are encouraged to continue savage, living apart from the civilized community-but in the same way, in the same allotments, and to the same effect, as if the reserved lands had been purchased from the Company on behalf of the natives. (C2:4:20-21){FNREF|0-86472-060-2|5.4.3|30}

The Tory arrived at Te Whanganui a Tara (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased twenty million acres of land on both sides of Cook Strait and at Taranaki. Although tenths were not specifically identified in all these deeds, there can be little doubt from Wakefield's instructions that this was what was intended.

There was no intention that these reserved lands would be held directly by Maori, at least not in the foreseeable future. The sections were to be selected by ballot in the same way as all the other sections in the new settlements. An agent of the company would collect every tenth (or every eleventh) section balloted and this was to be held by the company in trust for the Maori sellers. Just who would manage this trust became a matter of debate. Under an agreement made between the Crown and the company in late 1840, the Crown took over responsibility for providing reserves for Maori. We now consider this agreement in the light of the relationship between the Crown and the New Zealand Company.

5.4.4 The Colonial Office was not impressed with the company's frantic rush to establish a foothold in New Zealand before the Crown arrived and it remained hostile to the plans of the New Zealand Company to colonise New Zealand as a private capitalist venture. Hobson was told that the governor of New South Wales would be instructed to have the claims of private purchasers of Maori land investigated by a commission to determine:

what are the lands in New Zealand held by British subjects under grants from the Natives, how far such grants were lawfully acquired and ought to be respected, and what may have been the price or other valuable considerations given for them. The commissioners will make their report to the Governor, and it will then be decided by him how far the claimants, or any of them, may be entitled to confirmatory grants from the Crown, and on what considerations such confirmations ought to be made. (A8:I:14-15){FNREF|0-86472-060-2|5.4.4|31}

On 30 January 1840 Hobson issued a proclamation declaring that Her Majesty did not:

deem it expedient to recognise as valid any titles to land in New Zealand which are not derived from or confirmed by Her Majesty.(A8:I:23){FNREF|0-86472-060-2|5.4.4|32}

This was followed up by the appointment of land claims commissioners with wide powers to investigate the nature of pre-Treaty purchases. If these purchases were found to be valid, the commissioners were able to recommend that Crown grants be issued up to a maximum of 2560 acres.

5.4.5 The New Zealand Company's claims were similar to hundreds of other European claims. But because the company's claims involved hundreds of settlers already in the country, it was essential that the Crown and the company come to some special arrangement. The British government was forced to acknowledge the company and in late 1840 it negotiated an agreement which gave Crown sanction to the company's colonisation scheme (C2:4:1-4).{FNREF|0-86472-060-2|5.4.5|33} This led the way for the company to receive a Royal charter. The agreement included provisions for:

- a government-appointed accountant (James Pennington) to examine the company's total expenditure on colonisation;

- the granting to the company four acres for every pound spent; and

- the lands to be granted in the parts of the colony already settled with 160,000 acres available for the company around Port Nicholson and New Plymouth.

A lead was taken from the Aborigines Protection Society, which maintained that Maori rights could be protected by the kinds of safeguards promised by Wakefield under clause 13 of the agreement. The Crown assumed responsibility for implementing the Maori reservations intended in the original company deeds of purchase. It also provided for:

the Government reserving to themselves, IN RESPECT OF ALL OTHER LANDS, to make such arrangements AS TO THEM SHALL SEEM JUST AND EXPEDIENT FOR THE BENEFIT of the natives.(C2:4:3){FNREF|0-86472-060-2|5.4.5|34} (emphasis added)

On 22 April 1841, after representations from the company, Russell allowed the company to exchange their grants for land outside the original deed boundaries, but subject to existing provisions for Maori reserves and not for lands in the vicinity of Auckland.

5.4.6 In entering this agreement with the company, Russell assumed that their deeds of purchase had in fact extinguished title to substantial areas of the colony. This was soon found not to be the case. William Spain, sent to investigate the purchases, found all the company purchases around Cook Strait to be seriously flawed. The tribes involved informed Spain that they had not agreed to sell all their rights to the lands involved and they refused to shift from their traditional places of occupation onto the company tenths set aside for them. The issue become serious, since the lands most desired by the settlers at Pipitea and Te Aro were occupied by Te Atiawa, who refused to abandon them. Professor Alan Ward described the situation in Wellington as it applied to these tenths reserves:

Notwithstanding the deeds, which purported to convey some 20 million acres of land to the Company, the resident Maori clearly had no intention of handing over both ownership and control of this vast territory and putting themselves at the disposition of the Company's officers. Whatever they had intended (those who in fact marked deeds) they did not mean that. However well-intended the 'tenths' scheme, the Wellington Maori in particular, declined to vacate their pa and their cultivations within the new town boundaries in favour of the subdivisions that were selected on their behalf upon some of which they were supposed to reside. (T1:75)

By 1842, then, it was clear that the company had not extinguished Maori title to the lands it had sold to settlers and that Maori were refusing to abandon their pa and cultivations for tenths which they did not directly own or control.

5.4.7 The uncertainty continued while the Crown and the company argued over who would be responsible for purchasing the lands to be granted to the company under the Pennington award. Finally on 12 May 1843, the company's offer to provide funds to buy further land from Maori was accepted (P3:180).{FNREF|0-86472-060-2|5.4.7|35} Meanwhile the impatience of the Wellington and Nelson settlers increased. With the question of the company's rights to land at Wairau still being considered by Spain, the settlers attempted to occupy the valley. In an armed and violent confrontation on 17 June 1843, four Maori and twenty-two Europeans were killed. The dead included Te Rongo, the wife of Te Rangihaeata, and Captain Arthur Wakefield, a brother of Edward Gibbon Wakefield.{FNREF|0-86472-060-2|5.4.7|36} Governor FitzRoy arrived in New Zealand at the end of 1843 and was forced to consider the situation on his first visit to Wellington in February 1844. He acknowledged the injustice of the settlers' attempt to occupy the lands still being considered by Spain, and earned the ire of many Europeans by taking a conciliatory line with the tribes involved. However he had little alternative: his powers were limited, his lines of communication difficult

and he had few troops at his disposal to enforce his will against Ngati Toa and Te Atiawa, had he decided such a course was justified.

The Wairau affray further heightened uncertainty about the state of affairs in New Zealand. A fortnight after the confrontation, George Rennie's scheme to establish a Scottish colony was accepted by the New Zealand Company in Britain. The scheme was eventually abandoned when 11 months later news of the Wairau reached Scotland and startled investors and prospective colonists. It was not known in New Zealand until mid-September that the settlers were not coming. By this time the company had completed its purchase of lands at Otakou.

Armed with greatly increased resources in money and troops, Grey was able to restore some optimism to the company's British investors and prospective immigrants. In 1847, the Otago Association was able to send immigrants to take up the land purchased in 1844. In the same year plans were advanced to establish a high church, Anglican settlement to be called Canterbury. Grey's apparent success in dealing with Ngati Toa and Ngai Tahu in 1847 and 1848 was a major factor in his ability to sustain this confidence.

Waitangi Tribunal, Department of Justice, Wellington.

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05 The Background to the Purchases: Crown Policy and Settlement

5.5 The Protectors of Aborigines

5.5. The Protectors of Aborigines

5.5.1 Before 1839 there had been little consideration by the Colonial Office of just how Maori interests would be protected should New Zealand become a British colony. Normanby's instructions made protection of Maori interests one of the chief justifications for British intervention and also one of the prime responsibilities of a new administration. These instructions included the appointment of a special protector of aborigines. The protector's role was to include watching "over the interests of the aborigines" as Hobson's representative in negotiating purchases of land from Maori by "fair and equal contracts". The protector was also to ensure that Maori did not alienate lands which would cause them "stress or serious inconvenience" (A8:1:15).{FNREF|0-86472-060-2|5.5.1|37}

5.5.2 George Clarke was appointed the first protector on 6 April 1840. A missionary who had been in the country since 1824, Clarke was fluent in Maori, knowledgeable of tribal custom and well qualified to take on the position. Initially, as Normanby's instructions made clear, he was expected to be the official who bought land from Maori while promoting their amelioration. This dual role was an inherently contradictory one. The requirement to maximise profits from the resale of land created serious difficulties for the protector. It was impossible for him to offer Maori a good price, although he could ensure that sales were otherwise fairly conducted and that sellers did not part with land that they needed. There was a danger that it would undermine the protector's more important tasks if he continued to be an entrepreneur in land dealings, albeit for the Crown. Clarke requested to be relieved of this duty in 1842 and this was accepted.

As it turned out, one of the most important roles of the Protectorate was defusing potentially disruptive situations because the governor had few means to deal with clashes between the races. During the Hobson and FitzRoy period the protectors were an essential arm of government. The protectors' advocacy of Maori interests however, earned them the approbrium of many of the company settlers. In the Spain inquiry, George Clarke Jr, sub-protector and son of the chief protector, actively assisted Maori to provide evidence against the company's claims. It was not a role which endeared him to settlers holding company titles. Although a continuing financial crisis prevented money being available for land purchases, the failure of the Crown to acquire land for settlement was often blamed on the protectors. When tensions in the far north and in Wellington led to war in 1843, this too was seen by many settlers as a consequence of the protectors' actions and those of the missionary families who supported them.

FitzRoy used George Clarke Jr to look after the interests of Ngai Tahu during the Otakou negotiations and chose John Jermyn Symonds, previously a sub-protector, to supervise the company purchase on behalf of the Crown. In the wake of the Wairau disaster the protection of Maori interests and keeping the peace were closely allied.

5.5.3 Prior to 1848 the Crown's principal relationship with Ngai Tahu had been to some degree protective in nature. In 1843, the land claims commission held an inquiry into the pre-1840 purchases from Ngai Tahu. The tensions created by the Crown leading the market for land sales were little in evidence. In the years immediately following annexation, land was not bought on a large scale anywhere in New Zealand by the Crown itself. Shortage of resources made it impossible for governors before Grey to embark on ambitious land purchase programmes or to attempt to extend control over Maori districts. The Imperial government, anxious to save British taxpayers' money, provided the barest elements of a civil administration and virtually no military force. In the circumstances, most tribes, including Ngai Tahu, continued to be regarded as outside the scope of British law. The emphasis was on protection from the adverse effects of encroaching European colonization, rather than on government. In theory, the policy was to protect Maori society in the observance of its own customs while it was gradually adjusting to the presence of Europeans. Hobson's instructions here indicated that there would be occasions when intervention would be necessary, for example for the suppression of cannibalism, infanticide and tribal warfare, for which the Crown would rely on moral influence. By not involving the use of an army on the colonial frontier, this policy was intended both to save money and to satisfy the humanitarian ideal of peaceful coexistence of aboriginal and settler societies.

5.5.4 Despite the essential role the Protectorate had played in both Hobson and FitzRoy's administrations, Grey decided to abolish it only a few months after his arrival. Explaining his actions to Lord Stanley, Grey made a series of accusations against the department and against George Clarke Sr:

when I arrived here, I found that a department termed that of the Protector of Aborigines, was maintained at an annual cost of about œ2500 of which sum about œ1000 was appropriated to the salaries and allowances of Mr. Clarke and two of his sons, and that not a single hospital, school or institution of any kind supported by the Government was in operation for the benefit of the Natives.

I found moreover, the Natives were generally utterly wanting in all confidence in the Government, insomuch as, that several of the Native chiefs refused positively to trust themselves on board a British man of war and visit me... A rebellion was raging in the North, the Native race were paramount in the South. I found that Mr. Clarke and his sons were equally disliked by the Natives and the settlers (X6:appendix:37){FNREF|0-86472-060-2|5.5.4|38}

Grey determined that he would personally control the Crown's dealings with Maori and argued that the sums spent on the Protectorate would be much better spent on schools and hospitals and other means for bringing Maori the fruits of "civilisation". It was quite true that the cost of the Protectorate had been considerable and that little real benefit had been provided Maori by the creation of institutions for their use. However the Protectorate had supervised land transactions and since 1842 had been

able to provide some protection of Maori interests by not being directly responsible for purchasing land. In abolishing the Protectorate at a time when he was about to embark on a massive land purchase programme, Grey recombined the role of land purchase officer with that of the protection of Maori interests. In all the Ngai Tahu purchases after Otakou, Ngai Tahu had no authority to advise them other than the purchasing officer.

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05 The Background to the Purchases: Crown Policy and Settlement

5.6 Endowments for Maori Purposes

5.6. Endowments for Maori Purposes

5.6.1 When the Colonial Office had to turn its attention to how it would run the new colony, it found much in the theory of the Wakefield scheme to recommend it. The prospect of establishing a fund to make the government and public works of the colony self-sufficient and therefore not a drain on the Imperial coffers was particularly attractive. Normanby's instructions to Hobson on buying land from the Maori cheap and then selling it at a very substantial profit have already been discussed. We have seen how the financing of the colony was to be firmly fixed into the policy of pre-emption, and how Sir George Grey saw pre-emption as the means of providing the Crown with sufficient land for colonisation.

The British government believed that not only were Maori entitled to retain the lands they required for their economic needs, both present and future, but that additional measures needed to be taken to ensure their future prosperity and progress. The company scheme, with its reservations held by the company, or later by the Crown, provided one possibility. During the 1840s, as disputes between Maori and the company over the Wellington purchases were worked through, there evolved a three-fold classification of land required by Maori. The first was pa and cultivations. Maori rights to their villages and their actual cultivations after the sale of lands to the Crown were clearly acknowledged by the mid-1840s. The next class of land to be considered was land for additional cultivation. As Professor Ward demonstrated to the tribunal, the Crown realised that larger areas of land would be required to allow for future cultivation and for increased agricultural activity when hunting and gathering declined as a part of the Maori economy (T1:166-167). Finally it was also recognised that additional land could be required as an endowment. These lands would not be directly controlled by Maori, but income from them would be used for Maori purposes. These concepts of Maori needs and endowment were, of course, to apply to lands which Maori were prepared to sell.

The last of these categories, the provision of endowment lands, became somewhat confused by a parallel provision which provided for a fund to be established from the sale of Crown lands for Maori purposes. On 28 January 1841 Lord Russell directed that a sum of not more than 20 per cent and not less than 15 per cent of the proceeds of the sale of lands purchased from Maori be placed in a fund for Maori purposes. These purposes included the costs of the Protectorate Department and the measures recommended by the protector and approved by the governor and his Executive Council for "promoting the health, civilisation, education and spiritual care of the natives" (X6:appendix:1-2).{FNREF|0-86472-060-2|5.6.1|39} Any funds not immediately required were to be invested. The money received from the New Zealand

Company reserves was separately administered and trustees were eventually appointed to administer proceeds from these reserves. In this case, however, no actual funds were made available to the trustees.

5.6.2 Although administrative measures were taken to implement these instructions, in practice they fell far short of what was intended in providing for Maori needs. One of the Crown's historians, Mr David Armstrong, examined these provisions in some detail (X6:3-5). Mr Armstrong agreed with Professor Ward that this fund was only of limited value. The cost of the Protectorate took up a good deal of the money, and the Crown purchased and on-sold so little land that the account was starved of funds. Only in one year following sales of Auckland lands was a considerable sum made available. In the period of severe financial crisis during the early 1840s the fund was severely short-changed.

Following the abolition of the Protectorate more money was spent on the provision of educational and health facilities. Professor Ward considered that Grey also used the fund for immediate political expediencies:

Grey also paid salaries to Maori assessors attached to the Resident Magistrates Courts, and gave additional sums for the building of flour mills, provision of agricultural implements etc. Some of this was useful but it was increasingly condemned by the settlers, as a 'flour and sugar policy' which temporarily enhanced Grey's mana but left a dangerous void in Maori involvement on a regular basis in the colony's affairs. (T1: 401)

The situation was further complicated by the separate provision made for the New Zealand Company. The government used funds from land sales for its overall Maori programme. Until specific provisions were provided in some deeds in the 1850s for a percentage of the returns from Crown sales to be allocated to the sellers, the land fund was used for all Maori. However those tribes included in the company scheme were to be provided for from their own reserves. In granting control over land to the New Zealand Company, the Crown was unable to use a 15 or 20 per cent of company sale proceeds for Maori purposes.

Moves to provide settlers with their own representative government further threatened the provision of Maori services from ordinary revenue. The legislatures of New Ulster and New Munster were followed by provincial and national legislatures with the coming into effect of the 1852 constitution. These settler parliaments were loath to spent money on Maori purposes. Although some Maori were eligible to vote for these assemblies, the vast majority were disenfranchised. Grey was successful in having a œ7000 fund established in the civil list although, as Mr Armstrong pointed out, Grey continued to draw as he saw fit on the land fund.

In considering the Ngai Tahu purchases, we will have to determine what obligation there was, if any, on the part of the Crown to provide either considerable additional reserves as an endowment for the tribe and or an endowment fund for the provision of such amenities as schools and hospitals.

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05 The Background to the Purchases: Crown Policy and Settlement

5.7 Maori and Pakeha Understandings of Land Sales in the 1840s

5.7. Maori and Pakeha Understandings of Land Sales in the 1840s

5.7.1 Both parties to the deeds which were signed between Ngai Tahu and the Crown in the 1840s and 1850s had different assumptions about what these agreements involved. Professor Ward discussed a number of concepts shared by settlers and officials in their dealings with Maori. He identified a degree of "arrogance and condescension and aggressiveness" among many of the Europeans due to an assumption of cultural superiority (T1:5). However he did note that there could also be sense of responsibility and obligation among the more principled Crown agents. In assessing Maori needs Europeans were often convinced that the race was doomed to extinction. This view was at times shared by Maori themselves. Tuhawaiki commented that his tribe was but a "poor remnant now, and the Pakeha would soon see us all die out" (R35(a):33). Officials who believed that Ngai Tahu numbers would inevitably decline were less likely to ensure adequate reserves for the future needs of the tribe. However as we shall see, evidence presented to the tribunal shows that Ngai Tahu's numbers were beginning to improve, even as the later sales were being negotiated.

5.7.2 A sense of cultural superiority led most Europeans to the view that only rapid and complete amalgamation with their own culture-assimilation-would preserve Maori at all. Colonial secretaries urged governors to promote the skills of civilisation and demanded that Maori custom most offensive to European sensibilities be suppressed. Although Maori traditional practices were to be respected and tolerated, it was always assumed that they would be rapidly replaced by European customs. Evidence of a desire to use European technology and culture was often misinterpreted by Europeans as a displacement of things Maori. Tribalism was seen as one of the worst evils of Maori life and strenuous efforts were made to replace the communal rights of the tribe with the individual rights of the chief. Communal reserves were discouraged and Maori were expected to rise by dint of their individual effort. Professor Ward commented that:

there was a deliberate determination on the part of some officials ... to keep them [reserves] small so that Ngai Tahu should not persist with a traditional lifestyle but be obliged to leave reserves and engage with the European order. Capital and training for the purpose was not provided by government because nineteenth century people believed, not in welfare, but in an ethic of individual competition and self-reliance. It should be noted of course that this attitude was applicable to poor settlers as well as Maori-it was not discriminating in that sense. But members of ruling groups often conveniently overlooked the fact that they had not risen entirely on their own merits but had inherited capital or had acquired wealthy or powerful patrons-a usual way to advancement in those days, which even some Maori profited from. (T1:5-6)

Professor Ward went on to comment that European confidence in amalgamation could have been an encouragement for intermarriage with Europeans. By the 1840s Ngai Tahu had themselves assimilated many Pakeha into the tribal community.

5.7.3 Ngai Tahu shared some of the concerns of Europeans, but their perceptions and objectives in dealing with the Crown over land were essentially Maori. The tribe clearly wanted to engage in the new order and profit from opportunities to trade and acquire European goods. The pigs, corn, whaleboats, muskets, blankets and military uniforms were eagerly sought and paid for in the commodities easily provided by Ngai Tahu-fish, flax, timber and labour. Ngai Tahu's rangatira coordinated the tribal effort. Ngai Tahu also saw amalgamation in quite different terms from Europeans. The Europeans who married into the tribe provided the means of strengthening its resources. While for Ngai Tahu the signing of the Treaty roughly coincided with the achievement of peace with the northern tribes, a primary concern was still the desire to enhance tribal mana. In the 1840s this was still seen as best achieved by close contact with the new settlers, through the sale of land if necessary. Two decades later, however, the consequences of settlement and the marginalisation of the tribe which resulted left Ngai Tahu much less certain of the value of land sales. By that time it was too late to turn back the clock.

The fact that both sides to the purchase agreements had different agendas and different perceptions of the agreements they were involved in, leads us to consider how well Maori understood the European concepts of alienation. These concepts were an essential part of the signing of sale deeds. As we have already seen, Ngai Tahu had signed numerous so-called deeds of sale prior to 1844. The vast majority of these deeds, when brought before the land claims commissioners, were found to be invalid. Despite Maori signatures, the wording of the deeds often did not reflect the Maori understanding of these agreements. Misunderstandings about the nature of sale may well have flowed directly from quite different cultural conceptions of the nature of ownership. Professor Ward commented that:

When the British arrived in New Zealand and tried to apply their property concepts they found they did not fit the Polynesian realities. And indeed they do not. There is a fundamental disjunction between the two systems, one derived from the state and centralised law and viewing land largely (though not wholly) as a commodity; the other based on a complex system of kinship, with many different kinds of association with the land, including spiritual. (T1:8-9)

With large cultural differences between Maori and settler and with the new immigrants clamouring for land, there was an enormous potential for cultural misunderstanding. In such an environment, Maori preparedness to welcome new technology and the advantages of economic association with Europeans had the potential to leave them the victims of agreements which came to be interpreted entirely from the European side.

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05 The Background to the Purchases: Crown Policy and Settlement

5.8 Conclusion

5.8. Conclusion

5.8.1 The Treaty had set the stage for the land purchases, providing a guarantee of protection in Ngai Tahu's dealings with the Crown over land. Upon this basis, Ngai Tahu willingly entered into the sale process. In doing so they were left in a vulnerable negotiating position should the Crown ignore the assurances contained in the Treaty. The pre-emption provision prevented them from finding a market price for their lands even if it protected them from exploitation by private individuals. The Native Land Purchasing Ordinance 1846 implemented pre-emption, but also made it illegal to lease Maori land. By this measure Ngai Tahu were prevented from gaining an income from leasing their land to private individuals while retaining title to such lands. Up until 1846 this practice had been common and most Europeans on Ngai Tahu land paid some kind of rent. After 1846 the practice continued informally, but as time went on European officials were in a better position to suppress private leasing. Ngai Tahu, then, could only sell, and they could only sell to the Crown.

Unlike many North Island tribes, Ngai Tahu were unable to rely on the threat of force to assert their position. Weakened by civil war, invasion and imported diseases, they had only a limited ability to dictate terms in any negotiation. Declining economic fortunes were also a consideration. Whaling, which had been a source of considerable wealth prior to 1840, was on the decline and many of the tribe were in situations of considerable poverty. Although Ngai Tahu still had its traditional resources, new commodities had created new dependencies. If anything it would appear that from 1840 the number of Europeans coming to trade with the tribe was actually falling.

5.8.2 Given these circumstances the Treaty provided an essential protection in Ngai Tahu's dealings with the Crown over land. Following the abolition of the Protectorate Department, which had overseen the Otakou negotiation, Ngai Tahu had to rely on the ability and goodwill of land purchase officers to protect their interests in negotiations. 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. Adequate reference to the provisions of the Treaty, particularly the requirement to protect Ngai Tahu's rangatiratanga, could have ensured that Ngai Tahu's willingness to sell land was not allowed to compromise their future as a tribe. Such a concern could have prevented the inevitable cultural misunderstandings which accompanied these negotiations from seriously disadvantaging Ngai Tahu. Given the prevailing European assumptions about land values and ownership, the Treaty was one of the only things Ngai Tahu could rely on to ensure that a Maori perspective of the agreement was given adequate weight. In coming to a conclusion over whether the Crown did take into account Treaty principles we will have to turn to the individual purchases.

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Ngai Tahu Land Report

06 Otakou

6.1 Introduction

6.1. Introduction

On 31 July 1844 "the chiefs and men of the Ngaitahu tribe" ("Ko matou ko nga rangatira me nga tangata o Ngaitahu") sold over 400,000 acres of land at Otakou. This included the present site of Dunedin. A deed of sale was signed by 21 rangatira. They were the principal men from Otakou and included Tuhawaiki, Taiaroa and Karetai. The purchaser was "William Wakefield, the Principal Agent of the New Zealand Company, of London, on behalf of the Directors of the said Company". The price was œ2400. No acreage was mentioned in the deed but the land sold fell within certain stated natural boundaries. Although at the time the area was estimated at 400,000 acres, the Department of Survey and Land Information (DOSLI) have indicated to the tribunal that the block may have been as large as 533,600 acres. Ngai Tahu excepted from the sale four separate parcels of land, the boundaries of which were also recorded in the deed. Before the deed was signed representatives of the Ngai Tahu vendors, the New Zealand Company and the Crown traversed the boundaries of the land being purchased and the land being withheld from sale.

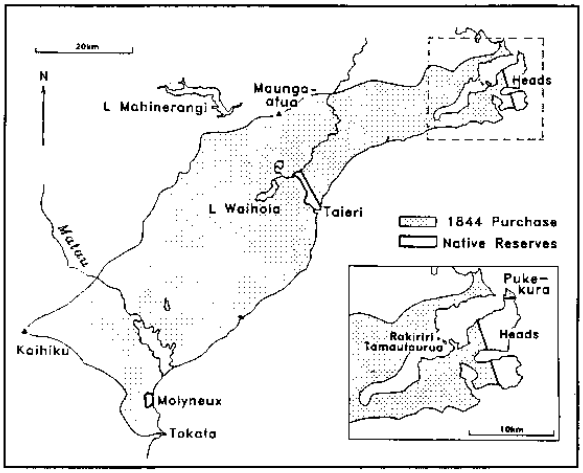

Figure 6.1: The Otakou purchase as defined by DOSLI and estimated at 533,700 acres, showing the reserves at the Otakou Heads, Taieri and Molyneux (O45)

Ngai Tahu Land Report

06 Otakou

6.2 Statement of Grievances

6.2. Statement of Grievances

The claimants say that during the negotiations which led to the sale of the Otakou block the Ngai Tahu chiefs were given to understand, and expected, that they would be granted special reserves, commonly known as tenths-that is, one-tenth of all the land sold. They have, at the hearing before us, made the following five specific grievances concerning this purchase:

1. The Protector, Symonds, failed to discharge his responsibilities at the time of the negotiation and afterwards.

2. The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate.

3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.

4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.

5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation (W6).

The Crown's failure to make provision for tenths is the principal grievance in respect of this purchase. At the heart of the claimants' case is the conviction that Ngai Tahu were either told directly that they would get tenths, or were, at the very least, led to believe that this would occur.

Ngai Tahu Land Report

06 Otakou

6.3 Background to the Purchase

6.3. Background to the Purchase

The New Zealand Company begins colonisation

6.3.1 The Otakou block was bought by Colonel William Wakefield on behalf of the New Zealand Company. We will later show how it came about that the New Zealand Company and not the Crown, exercising its right of pre-emption, was the purchaser. The New Zealand Company and its predecessors had experienced a troubled relationship with the Imperial government. In May 1839 it dispatched its ship the Tory, with Colonel William Wakefield in charge of an expedition to purchase land from Maori in New Zealand. This was to be done as quickly as possible before the Crown intervened. The Colonial Office refused to approve the venture and warned that no pledge could be given that titles to land purchased from the Maori would be recognised.{FNREF|0-86472-060-2|6.3.1|1}

The Tory arrived at Port Nicholson (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased about 20 million acres of land on both sides of Cook Strait and at Taranaki. The first New Zealand Company settlers arrived at Port Nicholson in January 1840. Soon after, on 6 February 1840, Hobson obtained the signatures of northern chiefs to the Treaty of Waitangi. Article 2 gave the Crown the sole right to purchase lands from Maori, that is, the right of pre-emption. Even before the Treaty was signed, Hobson, on instructions from Lord Normanby, had issued a proclamation (on 30 January 1840) that the Queen would only acknowledge titles to land derived from the Crown. A commission would be appointed before which all purchasers would have to prove their claims. A Land Claims Act of 1840 passed by the New South Wales government, which for some time had jurisdiction over New Zealand, provided that no grant was to be recommended by the commissioners for more than 2560 acres unless the governor specially authorised it. This provision was re-enacted by the New Zealand government in 1841. William Spain was appointed by the British government as commissioner on 20 June 1841. He arrived in New Zealand at the end of that year to start work.

6.3.2 Fortunately for the New Zealand Company their relationship with the colonial office in London, which had been seriously ruptured by the dispatch of the Tory, was restored by Lord Normanby's successor as colonial secretary, Lord John Russell. In October 1840 Russell decided to reverse the policy of his predecessors and to recognise the company as an instrument of government in the colonisation of New Zealand. An agreement between the British government and the company in November 1840 was formally incorporated on 12 February 1841.{FNREF|0-86472-060-2|6.3.2|2} It will shortly be necessary for us to examine some parts of the agreement carefully. In the meantime it should be noted that under the agreement:

- a government-appointed accountant, James Pennington, was to ascertain how much the company had spent on colonisation in New Zealand. This included the purchase of land, sending emigrants to New Zealand, the provision of supplies and so on;

- the company would be entitled to a Crown grant of four acres for every pound spent on colonisation as determined by Pennington;

- the lands to be assigned to the company were to be in those parts of the colony at which their settlements had been established. The first 160,000 acres were to be selected in the Port Nicholson and New Plymouth localities; and

- in return the company was to surrender its claims to most of the 20 million acres of its pre-annexation "purchases" (C2:4:1-4){FNREF|0-86472-060-2|6.3.2|3}.

6.3.3 Unfortunately for the New Zealand Company, Commissioner Spain proved to be a thorough investigator. The company's expectation that he would confirm their extensive "purchases" proved illusory. Their strenuous objections, made to the Colonial Office in November and December 1842, met with an unsympathetic response from Lord Stanley (C2:4:5-7).{FNREF|0-86472-060-2|6.3.3|4} As a result the directors of the company in January 1843, concerned at the difficulties of obtaining a conclusive title, announced the cessation of land sales and a drastic retrenchment of their activities.{FNREF|0-86472-060-2|6.3.3|5} For a time the company was buoyed up by Lord Stanley agreeing in May 1843 that the governor should be instructed to grant it a conditional title to lands already selected by its agents. The company did not realise until early in 1844 that it was still obliged to show that its purchases were valid.

Meanwhile, in New Zealand, Spain recognised that it was impracticable to return certain disputed lands to Maori claimants at Port Nicholson. Wakefield offered to pay compensation but agreement could not be reached on the amount (C1:12).{FNREF|0-86472-060-2|6.3.3|6} It was not to be settled until FitzRoy's arrival in Wellington early in 1844.

Rennie's "New Edinburgh" scheme

6.3.4 A Scotsman, George Rennie, devised a scheme for a new settlement of 100,600 acres on the east coast of the South Island. He put his proposals before the New Zealand Company, and on 12 August 1842 the directors expressed support for the scheme but left it to Rennie to obtain the necessary consent of the British government.{FNREF|0-86472-060-2|6.3.4|7} The colonial secretary, Lord Stanley, was not encouraging (C2:5:9).{FNREF|0-86472-060-2|6.3.4|8}

For a time the project lapsed. But in May 1843 Rennie, assisted by one of his Scottish associates, William Cargill, a former army officer, raised the matter again with the New Zealand Company. The company, encouraged by its May agreement with Lord Stanley, had resumed land sales. It approved the scheme on 30 June 1843 and the new prospectus, known as the "terms of purchase", was published on 1 July 1843.

Rennie and Cargill envisaged the new settlement should be a Scottish one, open to all classes of Scottish society; it should include provision for religious and educational

purposes connected with the presbyterian Church of Scotland. The emigration fund arising from the sale of the company's lands at New Edinburgh was to be employed in assisting the emigration of Scottish labourers.{FNREF|0-86472-060-2|6.3.4|9}

6.3.5 Rennie, meanwhile, had been busy recruiting emigrants. Early in January 1844 he was able to announce that some 40 heads of families, in all numbering over 200 people, were enrolled for the first expedition, which it was hoped would sail in the spring. Word was anxiously awaited from Colonel Wakefield of the locality selected for a new settlement. Bad news came instead. A report came to hand of the Wairau affray. In March 1844 Rennie learned of the continuing difficulty the New Zealand Company was experiencing over the validity of their land titles. Negotiations with the Colonial Office were proving fruitless.{FNREF|0-86472-060-2|6.3.5|10}

Plan for New Edinburgh settlement deferred

6.3.6 On 30 April 1844 the New Zealand Company concurred with Rennie's recommendation that plans for the New Edinburgh colony should be suspended pending advice from New Zealand that a site had been chosen. Deposits paid by purchasers were to be returned to them (C2:5:6-7).{FNREF|0-86472-060-2|6.3.6|11} Not until June 1844 did the company learn that Governor FitzRoy had authorised the selection of a site for the New Edinburgh settlement in the South Island (C2:5:8).{FNREF|0-86472-060-2|6.3.6|12} In the event, it was not until three years later, in November 1847, that two emigrant ships finally left the United Kingdom for the Scottish settlement in Otago. In the interval Rennie was displaced by Cargill and the Reverend Burns. An association of lay members of the Free Church of Scotland, formed in May 1845, took over. In September 1845 it entered into a new agreement with the New Zealand Company. The area of the settlement was increased to 144,600 acres. Cargill became resident agent for the new settlement.{FNREF|0-86472-060-2|6.3.6|13}

Ngai Tahu Land Report

06 Otakou

6.4 The Question of Tenths

6.4. The Question of Tenths

6.4.1 Before recounting the steps taken by the New Zealand Company to acquire the Otakou block it is necessary to explore the question of whether the Crown's policy for dealing with the New Zealand Company purchases required the Crown to reserve tenths or other large reserves within the Otakou purchase. To ascertain this it is necessary to go back to Wakefield's 1839 pre-Treaty purchases.

6.4.2 In Wakefield's 1839 instructions from the New Zealand Company, one-tenth of the land purchased by the company was to be reserved for the future benefit of the chief families of the tribe (C2:4:20-21).{FNREF|0-86472-060-2|6.4.2|14} This was done in the first of the pre-Treaty purchase contracts pertaining to Port Nicholson on 14 September 1839 (C2:4:26).{FNREF|0-86472-060-2|6.4.2|15} However the second and third deeds of purchase, dated respectively 25 October 1839 and 8 November 1839, did not refer to tenths but said that, "a portion of the land ceded by them [the Maori owners] suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families", would be reserved (C2:4:28-30).{FNREF|0-86472-060-2|6.4.2|16} The absence of any reference to tenths in the latter two deeds leaves open the question of what portion of land would be "suitable and sufficient".

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

6.4.3 This agreement was completed on 19 November 1840 (C2:4:4).{FNREF|0-86472-060-2|6.4.3|17} We have already referred to a number of its provisions (6.3.2). It was concerned to provide for Pennington's award which would determine the amount spent by the company on pre-Treaty purchases from the Maori and for colonisation expenses. As we have noted, four acres were to be awarded for every one pound of expenditure as found by Pennington.

Under clause 5, the lands to be assigned to the New Zealand Company under Pennington's award were to be within the bounds of Wakefield's pre-Treaty purchases. They would not, for instance, apply to Ngai Tahu land at Otakou (C2:4:1-4).{FNREF|0-86472-060-2|6.4.3|18}

Clause 13 of the agreement referred to the company having entered into engagements for the reservation of certain lands for the benefit of Maori; it being agreed that in respect of all lands to be so granted reservations would be made for the benefit of Maori by the Crown in fulfilment of such stipulations. Clause 13 further provided for "the Government reserving to themselves, in respect of all other lands to make such arrangements as to themselves shall seem just and expedient for the benefit of the Natives" (C2:4:3).{FNREF|0-86472-060-2|6.4.3|19} We note that under this second

part of the clause any reservations made by the government might or might not take the form of tenths.

6.4.4 In April 1841 the New Zealand Company asked the Colonial Office to remove the restriction imposed by clause 5 as to the location of the company's future settlements. On 22 April 1841 Lord Russell gave Hobson a discretion to comply with the company's request, subject to two conditions. One excluded settlements on the future capital of New Zealand or in close proximity to Auckland. The second is the relevant one:

Any lands which may be granted to the Company in exchange for those to which they are at present entitled, [ie within the company's "district"] must be so granted, subject to those reservations, and subject to all the other conditions which would, by the terms of the existing agreement, [of November 1840] attach to lands assigned to the company in the vicinity of their present settlements. (P3:195){FNREF|0-86472-060-2|6.4.4|20}

The question arises as to the application of clause 13 of the November 1840 agreement to lands bought by the New Zealand Company "in exchange" for those they were entitled to under the 1840 agreement. That is, as to land bought, say at Otakou, outside the company's pre-Treaty purchase "district". The question is whether the first or second part of clause 13, referred to above, applies to the Otakou purchase.

There are difficulties about applying the first part of clause 13 to the Otakou purchase in relation to tenths, because the provision of tenths as such was not a common provision in all the pre-Treaty New Zealand Company deeds of purchase. Which pre-Treaty purchase(s) was the Otakou purchase in exchange for? We do not know. So far as we are aware no such decision was ever made. This being so, we believe the second part of clause 13 applies. This left the government with a discretion to make such arrangements as it thought just and expedient for the benefit of Maori sellers. It did not impose any legal obligation to award tenths in respect of a purchase such as the Otakou purchase.

The terms of purchase for the New Edinburgh settlement

6.4.5 As earlier indicated, the New Zealand Company on 30 June 1843 approved a new prospectus known as the "Terms of Purchase". These provided that the New Zealand Company had decided to form a new settlement to be called New Edinburgh, of 120,550 acres in extent. The company offered the land for sale on terms specified in the prospectus. These included provision for the subdivision of the land into 550 town acres, 20,000 suburban acres and 100,000 rural acres with provision for further subdivision. This would enable each purchaser, for œ120, to obtain a quarter acre town lot, 10 acres of suburban land and 50 acres of rural land. Two hundred town lots were to be reserved free of cost for the future municipal corporation of the town. In addition, 200 properties (a property comprising one town lot, one suburban lot and one rural lot) were reserved to the company.

We particularly note clause 6 of the terms of purchase as relevant to the present claims:

It is contemplated that in addition to the Reserves to be made by the Company for itself [200 properties] and for the Corporation [200 town lots], the Local Government will make such further Reserves for the Natives, and for Public Purposes, as it may see fit. (C2:6:2-5){FNREF|0-86472-060-2|6.4.5|21}

This provision left it to the discretion of the local New Zealand government to make such reserves for Maori or for public purposes as it might think fit. It did not specify tenths.

Authority for the New Zealand Company to acquire land outside its districts

6.4.6 The new governor, Robert FitzRoy, was in England at this time. On 15 June 1843 he wrote to Lord Stanley asking (among other things) whether the New Zealand Company could take land "without" (outside) the districts now claimed by them in exchange for an equal quantity of land within those districts. In a confidential reply of 26 June 1843, Lord Stanley merely referred FitzRoy to Lord John Russell's instruction to Captain Hobson of 22 April 1841 (P3:181-182).{FNREF|0-86472-060-2|6.4.6|22}

Quite independently, the New Zealand Company had written to Lord Stanley on 23 June 1843 referring to Lord John Russell's despatch to Hobson of 22 April 1841 and seeking confirmation that the governor of New Zealand could sanction a new body of settlers locating themselves in a place they considered most eligible, subject to the terms and conditions laid down by Lord Russell (P3:192).{FNREF|0-86472-060-2|6.4.6|23}

Stanley referred the company to the commissioners of colonial land and emigration. The New Zealand Company wrote to the commissioners on 7 July, and on 27 July 1843 the commissioners informed the Colonial Office that, as far as they could see, the new governor of New Zealand was still authorised to exercise the powers given to Hobson. Copies of this correspondence were sent to FitzRoy by Lord Stanley on 1 September 1843 (P3:182-185).{FNREF|0-86472-060-2|6.4.6|24}

On 17 August 1843 the directors of the New Zealand Company gave detailed instructions to William Wakefield, their principal agent in New Zealand. It was envisaged the New Edinburgh settlement would be in the South Island. Wakefield was told:

It will be your duty to take Governor FitzRoy's directions with respect to Reserves for the natives, and for public purposes. (C2:5:3){FNREF|0-86472-060-2|6.4.6|25}

Port Cooper, now Lyttelton Harbour, was first envisaged as the likely site for the Scotch colony. The new governor would arrive in New Zealand shortly after Wakefield was likely to receive these instructions. Wakefield was supplied with a copy of the 30 June 1843 "terms of purchase" and told to get in touch with FitzRoy immediately concerning the New Edinburgh plans in particular (C2:5:2).{FNREF|0-86472-060-2|6.4.6|26}

Crown policy towards the purchase of land

6.4.7 The new governor arrived in Auckland on 23 December 1843, and departed for Wellington less than one month later, arriving there on 24 January 1844. His main concern was the Wairau affray of June 1843 and the major crisis in Maori-European relations which related specifically to the question of the New Zealand Company's title to land (P2:24).

On 29 January 1844 FitzRoy held his first conference with Wakefield. This was devoted to a discussion of the New Zealand Company's entitlement to land with particular reference to Maori counter-claims.{FNREF|0-86472-060-2|6.4.7|27} Present were Spain, Richmond, Hamilton (FitzRoy's private secretary), Protector Clarke, Protector Forsaith and Colonel W Wakefield. Dr Evans was sent for to assist Wakefield. The question of whether Maori should be compelled to give up their pa and cultivations was raised by Governor FitzRoy.{FNREF|0-86472-060-2|6.4.7|28} Wakefield equivocated, but under pressure from FitzRoy finally agreed that they should not be. It is apparent that this lengthy conference had its genesis in the difficulties arising from tenths and the Maori desire to remain in their pa and kainga.

6.4.8 Wakefield discussed the New Edinburgh settlement with FitzRoy the next day, 30 January 1844. On the same day Wakefield wrote to FitzRoy referring to their interview. He advised that he proposed, "with your Excellency's sanction", to send an agent to treat with Ngai Tahu for the territory in the neighbourhood of Port Cooper:

To effect this object in the most satisfactory manner to all parties, it would be highly desirable, and would greatly facilitate the transaction, were an officer of the Government, and a Protector of Aborigines, as interpreter, to be instructed by your Excellency to give their assistance and countenance to it on the spot. (P3:191){FNREF|0-86472-060-2|6.4.8|29}

FitzRoy replied to Wakefield on 2 February 1844:

In reply I am happy to inform you that I have no objection to offer to the formation of a settlement in that locality [Port Cooper], provided that a valid purchase can be effected.

Directly that payment of the Compensation to the Port Nicholson natives (now under consideration) is made, I will order a Protector of Aborigines and another officer of Government to proceed to Port Cooper, and there assist in effecting a purchase of land for the contemplated settlement of New Edinburgh. (P3:191){FNREF|0-86472-060-2|6.4.8|30}

On 3 February 1844 Governor FitzRoy sailed for Nelson, and from there to Kapiti on 11 February. He attended a service conducted by Hadfield in the presence of Te Rauparaha. The next day he held a more formal meeting with Richmond and Symonds from Wellington together with George Clarke. He returned to Wellington on 16 February 1844. In Wellington he appointed the former police magistrate Richmond as superintendent of the southern division of New Zealand.

Between 24-26 February 1844 he conducted negotiations with Wellington Maori over compensation, and settlement was effected on 27 February. The same day Bishop Selwyn, Bishop of New Zealand, arrived from Stewart Island and Banks Peninsula in

a small coaster owned and commanded by a chief described by FitzRoy as well known in New Zealand and named "Tou-wha-iki" (Tuhawaiki). They were accompanied by Te Rauparaha's son and five other Maori. FitzRoy gave no details as to any discussion he may have had with Tuhawaiki when Bishop Selwyn introduced the chief to him (C2:3:1-3).{FNREF|0-86472-060-2|6.4.8|31} There was considerable conjecture by counsel for the claimants and to some extent by Professor Ward. But this can only be speculation.

6.4.9 On 27 February 1844 FitzRoy gave written instructions to J J Symonds, a police magistrate based in Wellington. The following are the relevant provisions:

You are hereby required and directed to proceed to New Munster (or the Middle Island), and there superintend and assist the agent of the New Zealand Company in effecting the valid purchase or valid purchases of not more than 150,000 acres of available land, without regard to figure or continuity of blocks.

To such an extent of land, the Crown's right of pre-emption will be waived, upon your report of the validity of the purchase, under certain conditions.

You will be most careful not to countenance any, even the smallest encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate successor. [sic, for 'possessor']

You will inform settlers now established in New Munster, that their cases will be most carefully and kindly dealt with by Government, under existing regulations, or by a special act of grace, such as by waiving the Crown's right of pre-emption in their favour to a reasonable extent.

You will inform the aboriginal native population, that you are sent to superintend and forward the purchase of lands which they wish to sell, and that you, on behalf of the Government will not authorize, nor in any way sanction any proceedings which are not honest, equitable and in every way irreproachable. (C2:7:4-5){FNREF|0-86472-060-2|6.4.9|32}

We note the waiver of the Crown's right of pre-emption and the absence of any reference to tenths or indeed the provision of any other reserves.

6.4.10 On the same day FitzRoy, through his secretary, W J W Hamilton, wrote to W Wakefield. A copy of FitzRoy's instructions to Symonds was enclosed. Wakefield was told that the Crown's right of pre-emption to the proposed purchase would be waived on certain conditions:

The conditions referred to, are-1st. That all existing arrangements made by the Government with respect to the New Zealand Company's settlements shall be strictly observed, except as altered by the present arrangement.

2d. That the land so purchased shall be counted in exchange for an equal number of acres claimed by, and to which a valid title can be proved by the New Zealand Company elsewhere; it being clearly understood, that the purchase-money in both

cases referred to is to be provided by the Company. (C2:7:4){FNREF|0-86472-060-2|6.4.10|33}

A third condition related to the survey of the exterior and interior boundaries of the land to be at the expense and by surveyors of the New Zealand Company.

Nothing is said in either memorandum about tenths or other reserves. The reference in the first condition to Wakefield to "existing arrangements" is a reference to the 1840 agreement as modified by Lord Russell's 1841 instructions (see our earlier discussion of these in 6.4.3-4). As we have earlier held, the second head of Lord Russell's 1841 conditions applies, that is, it was left to the New Zealand governor to make such reserves for the Maori vendors as he might see fit.

6.4.11 Did Governor FitzRoy give Wakefield, Symonds or Richmond either verbal or written instructions to include a provision for tenths (or an equivalent) in the New Edinburgh purchase agreement? The Crown's historian, Dr Donald Loveridge, suggested in his evidence that it was difficult to believe that Governor FitzRoy did not give explicit verbal directions of some kind in February 1844 (P2:34).

(a) Dr Loveridge noted that Wakefield had instructions to take Governor FitzRoy's directions with respect to reserves for Maori (6.4.6). He argued that Wakefield had to know what the governor's intentions were with respect to reserves for Maori people. We note, however, that under the New Zealand Company's terms of purchase it was for the New Zealand government to make such further reserves for Maori and for public purposes as the New Zealand governor saw fit (6.4.5).

(b) Dr Loveridge suggested that Symonds was in a similar position. He needed to know what the governor would define as a valid purchase; a sale agreement which included terms which FitzRoy would not accept, or excluded those which he deemed essential, would be a waste of time if the governor subsequently decided not to waive the Crown's right of pre-emption.

We note, however, that Symonds, as our account of the purchase negotiations will show, was extremely cautious and followed his instructions so carefully that he twice returned to Wellington having broken off his supervision of the purchase. As will be seen, he did not require any provision for tenths to be made in the deed when it was finally signed. In our view this strongly indicates that he was under no requirement from the governor to do so. We find it difficult to believe that he would have omitted to do so had he received instructions, whether in writing or verbal, to provide for tenths. Nor, as will be seen, did Symonds receive any instructions from Richmond to provide for tenths.

(c) As to Richmond, Dr Loveridge thought that he was definitely under the impression at one stage that one-tenth of the land purchased by the company would be returned to the original owners (P2:34).

(d) Dr Loveridge referred to Richmond's despatch of 23 May 1844 to Governor FitzRoy. Richmond informed the governor that:

In relation to the New Settlement, when the choice of Sections are being made, it will be necessary to have an Officer on the spot to select Reserves for the Government and Natives; for this duty (should I not be previously instructed by Your Excellency) it is my intention to appoint Mr. Symonds... I shall endeavour to furnish him with a list of what is required, in the event of my not learning in time what Reserves Your Excellency may consider necessary. (C2:9:1-5){FNREF|0-86472-060-2|6.4.11|34}

We are left wondering why the comment about the expected instructions being received from the governor is made, if Richmond had in fact already received instructions from the governor. In fact, Richmond wrote to Symonds on 30 May 1844 sending him a schedule of proposed reserves for government. But he made no reference at all to reserves for Maori. Why not? We would have expected him to do so had he been verbally told by FitzRoy that reserves (in particular tenths) were to be provided. We note the reservation about his not learning in time what reserves the governor might think necessary.

In fact, the above extract from Richmond's 23 May despatch is from the final two paragraphs. The principal subject of the despatch is a report to the governor explaining the reasons for Symonds' return to Wellington. Richmond gives details of the more stringent directions he has given Symonds to enable him to prevent any measures by Tuckett (the New Zealand Company representative) which might "bring on a collision with the aborigines..." (C2:9:3).{FNREF|0-86472-060-2|6.4.11|35} The paragraph cited above is concerned with an unrelated topic.

Governor FitzRoy evidently saw Richmond's despatch on 18 July 1844. He annotated the despatch as follows:

Dr. Sinclair,
Acknowledge the Receipt-Convey my approval of what the Supt. S.D. has done in these matters.

P.S. Do not express any feeling-or make any remark about the Company's Agents. (C2:9:6){FNREF|0-86472-060-2|6.4.11|36}

There is also a note on the governor's direction, presumably by Dr Sinclair:

General letter to the Supt, No.25; 19.7.1844. (C2:9:6){FNREF|0-86472-060-2|6.4.11|37}

Sinclair's letter to Richmond of 19 July 1844 was in the following terms:

With reference to the report contained in your letter of the 23d of May, No.15, I am to convey to you his Excellency's approval of all that HAS BEEN DONE BY YOU in the matter referred to. (C2:7:12){FNREF|0-86472-060-2|6.4.11|38} (emphasis added)

This is clearly a reference to Richmond's report concerning Symonds' difficulties with Tuckett and the "more stringent directions" and other steps taken by Richmond, as indicated in his report. In short, in FitzRoy's language, to what Richmond "has done". As instructed, Sinclair made no reference to the New Zealand Company agent Tuckett. In our view Richmond was not being commended for his intended actions on

public and Maori reserves, but for his dealings with the New Zealand Company agents.

(e) On 12 June 1844 Richmond wrote again to Governor FitzRoy. He enclosed a copy of his letter to Symonds of 30 May 1844 (see 6.4.11(d)) and added:

In addition to what is detailed in the Memorandum, I have directed Mr. Symonds to require a large space to be set apart as a place of recreation for the Inhabitants. (C2:9:13){FNREF|0-86472-060-2|6.4.11|39}

Did this mean a recreation place for the new settlers or for Ngai Tahu? Given the context, we believe the former.

Richmond then purported to quote from the sixth paragraph of the terms of purchase for the New Edinburgh settlement:

that the provision hitherto made for the Natives by the Directors of the New Zealand Company is left to the Local Government. (C2:9:13){FNREF|0-86472-060-2|6.4.11|40}

This is quite misleading-see clause 6 cited in 6.4.5 which says, "the Local Government will make such further reserves for the Natives and for public purposes as it may see fit".

Richmond then said:

I shall therefore demand on their [Ngai Tahu] behalf one-tenth of each description of Allotments i.e. Town, Suburban and Rural, and arrange with the Principal Agent of the Company, or the Agent for the New Settlement on the mode to be adopted for their selection, should I not receive Your Excellency's instructions on the subject previous to the arrival of the latter with the Emigrants. (C2:9:14){FNREF|0-86472-060-2|6.4.11|41}

In short Richmond advised Governor FitzRoy that:

- he had instructed Symonds in writing to arrange for specified public reserves to be set aside and verbally to reserve a large place for recreation for the settlers; and

- unless advised otherwise, he intended to arrange with either the New Zealand Company principal agent or the agent for the new settlement for tenths to be allotted on behalf of Ngai Tahu.

There appears to be no record of Richmond so instructing Wakefield, presumably because the emigrants did not arrive for some years.

FitzRoy evidently saw Richmond's despatch of 12 June on 10 August 1844. It bears two annotations by FitzRoy:

-I have answered this privately-both verbally & in writing

-Dr. Sinclair, Write to Superintendent-approving of what he has done in this matter and conveying my sanction of the arrangements. (C2:9:12){FNREF|0-86472-060-2|6.4.11|42}

Dr Sinclair did not write to Richmond until 9 October 1844, when he said:

Your proceedings, as reported in your letter No.17 (44/1928) of the 12th June last, relative to the selection by Mr. Symonds of public reserves at the settlement of New Edinburgh, have been approved by His Excellency. (C2:9:11){FNREF|0-86472-060-2|6.4.11|43}

This letter refers only to public reserves and omits any mention of tenths or Maori reserves. The tribunal concludes that there appears to be no record of any instructions, verbal or written, from Governor FitzRoy to Richmond concerning either tenths or reserves for Maori, nor of Richmond implementing what he told FitzRoy he would do.

The tribunal's view that no such record of instructions from FitzRoy to Richmond exists is confirmed by a report of a Joint Parliamentary Committee on Middle Island Native Claims of 1890 (M17:I:doc 2).{FNREF|0-86472-060-2|6.4.11|44} In 1889 a similar committee instituted inquiries to ascertain the nature of the governor's instructions sought by Major Richmond in his letter of 12 June 1844. The 1890 committee reported that, following a reference to the Colonial Office, no evidence could be obtained showing the instructions were ever given by the governor to reserve tenths. The committee advised that after careful consideration it had been "unable to satisfy itself that a principle of tenths was applicable to the Otakou purchase".

The tribunal also finds that there is no evidence before us that Symonds, Clarke or Wakefield received instructions whether verbal or written from Governor FitzRoy to make provision for tenths in the Otakou purchase.

FitzRoy's actions in waiving the Crown right of pre-emption

6.4.12 Before FitzRoy left England for New Zealand he wrote on 16 May 1843 to the colonial secretary seeking Lord Stanley's comments on several questions. His second inquiry was whether:

Under defined restrictions, may the Crown's right of pre-emption be waived in certain cases? (R36(b):II:329){FNREF|0-86472-060-2|6.4.12|45}

Lord Stanley responded on 26 June 1843. He told FitzRoy that:

In the absence of any report from the colony itself, stating the difficulties which you anticipate... I consider it premature to attempt to prescribe the mode in which it will be proper to attempt to meet and overcome them; and I should therefore prefer waiting for a report from you, after your arrival at your government, accompanied by such suggestions on the subject as, after inquiry on the spot, you shall deem it expedient to make. (R36(b):II:329){FNREF|0-86472-060-2|6.4.12|46}

Soon after FitzRoy's arrival in New Zealand he received addresses from the Waikato and Ngati Whatua tribes at a levee at Government House, held at Auckland on 26 December 1843. Both addresses included a complaint about the Crown's exclusive right of pre-emption. In his written reply to Waikato he said:

The Queen has heard of your wish to sell land to Europeans DIRECT, without in the first place selling them to Her Representative, and Her Majesty has authorised me to enquire among you, and make arrangements more pleasing to yourselves. (R36(b):II:439){FNREF|0-86472-060-2|6.4.12|47}(emphasis in original)

And to Ngati Whatua he replied:

The Queen has authorised me to make enquiries among yourselves with the view of altering the present method of selling your lands. (R36(b):II:438){FNREF|0-86472-060-2|6.4.12|48}

It is clear that while Governor FitzRoy was sympathetic to the request that the Crown should waive its right of pre-emption, he proposed to make further inquiries into the matter before settling on any new arrangements. This was still the position when he went to Wellington late in January 1844.

FitzRoy waives the Crown right of pre-emption in respect of the New Edinburgh purchase

6.4.13 We have already noted the instructions given by FitzRoy to Symonds (6.4.9) and his advice to William Wakefield (6.4.10), each given on 27 February 1844, in which he indicated to both his intention to waive the Crown's right of pre-emption in respect of the New Edinburgh purchase.

FitzRoy, in the course of his lengthy despatch of 15 April 1844 to Lord Stanley, explained why he had felt obliged to adopt this course as part of the arrangements for providing more land for the New Zealand Company. FitzRoy made the following points:

- the New Zealand Company had instructions to prepare immediately for the reception of the proposed Scotch settlement in New Munster (South Island);

- the government had no land there. Nor did the company except a small amount at Nelson;

- the government had neither the funds nor the personnel to effect a purchase; and

- the protectorate officers were fully occupied, as was Commissioner Spain.

FitzRoy continued:

In this dilemma, I adopted the only course which appeared to me practicable; namely, to waive the Crown's right of pre-emption over 150,000 acres of land in New Munster, where selected by the company's agent, and to leave it to him to effect the

purchase under the superintendence and with the assistance of the most efficient Government officer of whose services I could then avail myself.

I trusted that the bitter experience which the New Zealand Company's agent has had of the difficulty of effecting valid purchases of large tracts of land in New Zealand, and his present acquaintance with the native habits and customs, would be a security for the bona fide character of any purchase now made under his directions; but, in order to give a character to the whole transaction, to show that the Government gave it countenance, and to be a check on any unadvisable proceedings or over-hasty arrangements, I directed Mr. John Jermyn Symonds to superintend the whole transaction, and gave him the annexed instructions.

Mr. Symonds has been several years in New Zealand. He was employed as a surveyor, then as a sub-protector of aborigines, and is now a police magistrate. He speaks the native language, and bears an irreproachable character.

I have found myself under the necessity, not only of acting without instructions in this important matter, but of acting against the established regulations, with regard to the figure and continuity of blocks of land. (C2:3:5){FNREF|0-86472-060-2|6.4.13|49}

After discussing problems created by the topography of the New Zealand landscape in ensuring continuous blocks of land, he then referred to the need to provide land for New Zealand Company settlers in the region between Port Nicholson and New Plymouth. He enclosed a copy of his instructions to Commissioner Spain to assist the New Zealand Company to acquire specified areas of land in the Wairarapa and elsewhere within the company's areas under Pennington's award. The Crown's right of pre-emption would be waived for such purchases.

6.4.14 Stanley made a lengthy and considered reply to FitzRoy's report on 30 November 1844. After approving FitzRoy's findings in respect to the Wairau confrontation and other actions of the governor, the colonial secretary then discussed the problem of shortage of land for New Zealand Company settlers. In particular he referred to the arrangement made by FitzRoy on 27 February with the agent of the New Zealand Company, William Wakefield, and FitzRoy's reasons for waiving the Crown right of pre-emption in respect of 150,000 acres in New Munster. In the circumstances he approved FitzRoy's action. He also approved the waiver in respect of the purchases to be supervised by Commissioner Spain in the Wairarapa and elsewhere in the company's "district". The arrangement of 27 February was, Lord Stanley said, "adopted under the pressure of peculiar circumstances, limited in its amount, and designed to meet a specific exigency". He then referred to FitzRoy's "more general and extensive measure": the general waiver proclamation of March 1844 (R36(b):320-321).{FNREF|0-86472-060-2|6.4.14|50}

We will discuss this topic shortly. At this point we would emphasise that FitzRoy's action in agreeing, on 27 February 1844, to waive the Crown's right of pre-emption to enable the New Zealand Company agent to purchase direct from Ngai Tahu up to 150,000 acres for the New Edinburgh settlement, was approved by Lord Stanley. This approval was given quite independently and separately from his later consideration of FitzRoy's waiver proclamation of 26 March 1844. It is abundantly clear that the 27 February waiver was seen as a discrete action unrelated to the general waiver

proclamation which followed it one month later. We turn now to the 26 March proclamation.

FitzRoy's waiver proclamation of 26 March 1844

6.4.15 Colonel William Wakefield later reported, that the governor while in Wellington in February 1844 had "intimated to some private land-claimants his intention, at some future period, to allow the natives to dispose of their lands to private individuals upon certain conditions" (P3:148).{FNREF|0-86472-060-2|6.4.15|51} On returning to Auckland the next month, FitzRoy gave the matter further consideration. On 25 March 1844 he secured the approval of his Executive Council to, "the conditions on which he proposed to waive Her Majesty's right of pre-emption over certain portions of land in New Zealand", to enable "the aboriginal owners to sell their lands to certain persons" (C2:3:11).{FNREF|0-86472-060-2|6.4.15|52}

The Executive Council duly approved the governor's proposals which were publicly proclaimed the next day, 26 March 1844 (P3:197). In brief, the proclamation:

- called for an application to be made in writing to the governor to waive the Crown's right of pre-emption over a specified number of acres;

- stated that the governor was free to consent or refuse his consent. In doing so he would have regard to the public interest and the interests of the Maori owners and other considerations; and

- stipulated that sale of pa and urupa would not be approved.

Clause 5 provided for tenths as follows:

Of all land purchased from the aborigines in consequence of the Crown's right of pre-emption being waived, one-tenth part of fair average value, as to position and quality, is to be conveyed by the purchaser to Her Majesty, her heirs and successors, for public purposes, especially the future benefit of the aborigines. (P3:197){FNREF|0-86472-060-2|6.4.15|53}

It will be noted that the tenths were to be vested in the Crown, not the Maori vendors, "for public purposes, especially the future benefit of the aborigines".

6.4.16 On the day the waiver proclamation was made public, 26 March 1844, the governor addressed a meeting of Maori chiefs at Government House, Auckland. He explained his reasons for making the new arrangements, cautioned the Maori not to sell their land hastily and elaborated on the arrangements he had made for the provision of tenths:

In the arrangement I have made for allowing Europeans to buy land from you, I have made distinct conditions that 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 of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there, and teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use.

Provision will thus be made, in order to prevent your children from suffering by neglect and want of education; the management of these reserves will be entrusted to a board or committee, consisting of the Governor, the Bishop, the Attorney-general, the Commissioner of Crown lands, and the Chief Protector of Aborigines. (C2:3:10){FNREF|0-86472-060-2|6.4.16|54}

Again we find the governor making it clear that the tenths were to be vested by the Crown in trustees. The proceeds were to be principally applied for the future benefit of the Maori by the provision of hospitals, schools, religious, moral and vocational training and associated matters.

6.4.17 In his 15 April 1844 despatch to Lord Stanley, FitzRoy explained his reasons for the waiver proclamation. He described the Maori population as being clamorous to sell their lands, asking exorbitant prices, the Crown having no funds itself to purchase lands for resale, and the great discontent caused by the Crown neither buying nor letting others buy. He therefore:

determined to take that step which I proposed in a letter to your Lordship, dated 16 May 1843, on which a qualified opinion was given in your Lordship's answer, dated June 26th ultimo. (C2:3:7){FNREF|0-86472-060-2|6.4.17|55}

As we have seen (6.4.14), Lord Stanley had no difficulty in exercising the royal prerogative and approving FitzRoy's February action in waiving the Crown's right of pre-emption to enable the New Zealand Company to purchase land in the South Island for the New Edinburgh settlement. But the "more general and extensive measure, calculated to make a far more important alteration in respect to the sale of land" caused him very real concern, particularly in the light of a committee of the House of Commons resolution, which had been passed "unfavourable to this measure". Unlike FitzRoy's 27 February 1844 waiver to facilitate the New Edinburgh purchase, his 26 March waiver proclamation received Lord Stanley's somewhat grudging and qualified approval:

While I admit the cogency of the motives by which you have been influenced, and am not prepared at this distance to condemn, or disclaim the arrangement which you have made, I think it necessary to point out to you some objections, to which your plan is obviously liable, and which will require your attention. (R36(b):II:322){FNREF|0-86472-060-2|6.4.17|56}

After setting out his objections Lord Stanley said:

With these observations I am prepared to sanction and approve the step you have taken in admitting the natives, under restrictions, to the privilege of selling their lands directly to settlers. (R36(b):II:323){FNREF|0-86472-060-2|6.4.17|57}

6.4.18 In the course of lengthy closing submissions by Mr Temm, counsel for the claimants, it was contended that Governor FitzRoy, on receiving advice that the Otakou sale had taken place, was under a duty to ensure that the provisions as to tenths in clause 5 of his March waiver proclamation were complied with regarding the 400,000 acre New Zealand Company purchase. The Crown strongly disputed that the March proclamation applied to the Otakou purchase. After careful consideration of the submissions on the point, the tribunal has come to a clear view that the Otakou purchase stood alone and was not covered by, or intended to be covered by, the provisions of the 26 March waiver proclamation.

Governor FitzRoy gave his instructions to Symonds on 27 February 1844, a clear month before the decision was taken to issue the more general waiver proclamation on 26 March. His decision to authorise Colonel Wakefield to purchase direct from the Maori in the South Island was taken for the reasons which he subsequently related to the colonial secretary. Lord Stanley, in exercise of the Royal prerogative, expressly approved FitzRoy's decision to waive the Crown's right of pre-emption to enable the purchase of land for the New Edinburgh settlement to proceed. As we have seen, he was much less enthusiastic about FitzRoy's 26 March waiver proclamation. He clearly saw the two as discrete and unrelated actions on the part of the governor.

6.4.19 The March proclamation called for written application to be made to the governor through the colonial secretary for the waiver of the Crown's right of pre-emption. No such application was made by the New Zealand Company. Nor was it required to do so. There is nothing in the March waiver proclamation to suggest that it was intended to operate retrospectively. Nor is there anything in the proclamation to suggest that it was intended to override or be in substitution for the prior act of the governor in authorising the New Zealand Company purchase, in terms of the conditions conveyed to Wakefield by the governor's secretary on 27 February 1844. These conditions were laid down well before the waiver proclamation was issued. There would need to be clear evidence that FitzRoy, in making his March proclamation, expressly or by necessary implication repealed his earlier authorisation. There is no such evidence. On the contrary the tribunal considers, having regard to all the circumstances, that the only reasonable conclusion is that the March waiver proclamation did not and was not intended to apply to the New Edinburgh purchase. Included among the claimants' grievances are the following:

3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.

4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.

5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation. (W6)

The tribunal finds that none of these grievances are made out, for the reason that the waiver proclamation of 26 March 1844 did not apply to the purchase of the Otakou block for the New Edinburgh settlement. Accordingly there was no obligation on the Crown to comply with its provisions in respect of the Otakou purchase.

We must now turn our attention to the purchase itself to determine whether the claimants' remaining grievances are made out.

Ngai Tahu Land Report

06 Otakou

6.5 The Purchase

6.5. The Purchase

Tuckett's expedition

6.5.1 In anticipation of FitzRoy sanctioning the purchase of land in New Munster, Colonel William Wakefield appointed Frederick Tuckett, the principal New Zealand Company surveyor at Nelson, to select a suitable site for the New Edinburgh settlement. Tuckett accepted the assignment on the condition that he would not be tied to the Port Cooper locality but could look further afield in the South Island (P2:60-62).{FNREF|0-86472-060-2|6.5.1|58} On 2 April 1844 Tuckett, his assistant surveyors, Barnicoat and Davison, and Symonds sailed from Wellington on the Deborah. Earlier that day a meeting was held in the office of the southern district superintendent, Richmond, attended by Symonds, Colonel Wakefield, Tuckett and Commissioner Spain. Richmond gave written instructions to Symonds that in superintending the purchase, no survey was to be carried out prior to the land being purchased by the company (C2:7:7).{FNREF|0-86472-060-2|6.5.1|59} But, at Tuckett's request, it appears Richmond verbally modified these instructions to the extent that Tuckett could take soundings and survey harbours provided that Maori did not object and Symonds' consent was first obtained. Spain later recalled that Richmond instructed Tuckett to "be very cautious and not bring about another 'Wairau affair'" (P2:56-59).{FNREF|0-86472-060-2|6.5.1|60}

These instructions posed a problem for Tuckett in that he would not be able to begin negotiating with Ngai Tahu unless he could give a reasonably precise indication of the land he sought to purchase. The combination of Tuckett's impetuosity and Symond's cautious and somewhat literal approach to his duties was to produce much discord between them.

Following an inspection of the Port Cooper district, the Deborah proceeded south, reaching Waikouaiti on 19 April. Having obtained the consent of the local Maori, Tuckett proposed to survey the Waikouaiti Bay roadstead. Symonds would not consent and, in the face of Tuckett's persistence, departed for Wellington on the Scotia, a vessel owned by the whaler and trader John Jones. Tuckett proceeded on his expedition south without Symonds and made a thorough examination of all the districts between Waikouaiti and Fiordland. By 25 May he had virtually decided on Otago Harbour, the Taieri plains and Molyneux Bay for the settlement (P2:62-63; C2:8:1-8).{FNREF|0-86472-060-2|6.5.1|61}

6.5.2 Tuckett found that nearly 20 Europeans were living at Otakou, on the eastern harbour, with houses and cultivations of enclosed land. His journal continues:

If any claim has been advanced by any of these squatters, none has been approved by the Land Commissioners; yet they will consider themselves aggrieved if ejected from their dwellings without compensation; whilst, on the other hand, if the land is purchased for New Edinburgh, this locality will probably be a portion of the town. (C2:10:10-10a) {FNREF|0-86472-060-2|6.5.2|62}

As Professor Ward noted, this comment of Tuckett's foreshadowed what was to be a major aspect of the subsequent negotiations-who was to own or control the peninsula on the eastern shore of the harbour? Clearly the area was attractive to Europeans. If Ngai Tahu retained the peninsula there was a distinct danger that a settlement there, which included Europeans, would be an economic rival to any new settlement at the head of the harbour. Ngai Tahu had already developed their own social and economic relations with the squatters and, it appeared, wished to maintain that relationship (T1:88).

Because he was prohibited from surveying any land before he purchased it, Tuckett was unable to define with any real precision the 150,000 acres he wished to buy. The only solution appeared to be to purchase a substantially greater area and then survey off the land the New Zealand Company wished to retain. On 25 May 1844 he wrote to Colonel Wakefield. After stating his preference for a site at Otago he said:

I wish to be authorized to purchase and survey 150,000 acres interjacent between Otago and the South Headland of Molineux Bay (called the Nugget) or between Otago and the North Bluff river, or the North Headland of Moeraki Bay, the precise boundaries of such lands to be defined hereafter on completion of the ACTUAL SURVEY, the Reserves within said points to be specified by THE VENDORS in the Deed of Conveyance or agreement of purchase. (C2:8:1-2){FNREF|0-86472-060-2|6.5.2|63}

Tuckett envisaged that it would be easy for Ngai Tahu to define within that larger block (likely to be considerably in excess of 150,000 acres), the areas they did not wish to sell and only then survey the company's 150,000 acres. Professor Ward noted Tuckett's emphasis was on Ngai Tahu defining their own reserves, rather than having them selected by the company. No suggestion was made about tenths (T1:89).

6.5.3 Meanwhile Symonds had arrived back at Wellington on 30 April. In his report to Superintendent Richmond he complained of Tuckett proceeding to survey lands and roadsteads without Symond's consent. He was also critical of the company's intention to pay Ngai Tahu for their land partly in goods and partly by cheque (C2:7:8).{FNREF|0-86472-060-2|6.5.3|64} He was backed up by Richmond who gave him more stringent instructions should Tuckett make any further surveys without his consent. To improve relations between Symonds and Tuckett, Colonel Wakefield decided to send his brother Daniel to Otago to act as an intermediary. Daniel Wakefield was also provided with the purchase money of œ2000.

Symonds now returned on the Scotia, accompanied by Daniel Wakefield, Wakefield's interpreter, David Scott and John Jones, the owner of the vessel. Tuhawaiki and Taiaroa joined them at Port Cooper. They reached the Otakou harbour on 8 June 1844 having left Jones at Waikouaiti the previous day. It appears Jones did not go down to Otago until 18 June (P3:6-7).{FNREF|0-86472-060-2|6.5.3|65}

Tuckett's proposal

6.5.4 Symonds first learned at Waikouaiti of Tuckett's choice of Otago as the site of New Edinburgh. Tuckett arrived three days later on 11 June having walked from Molyneux. By now he had a reasonably clear idea of the land he wanted. He asked Daniel Wakefield to advise Symonds that:

...I wish to effect a purchase of the 150,000 acres allowed for the settlement of New Edinburgh, in a district interjacent between the harbour of Otago and the South Headland (Tokata) of Molineux Bay (Kunesoo), the precise limits of such 150,000 acres to be defined hereafter on execution of an actual survey, the reserves within such limits, if any, are required to be defined by the sellers. It would greatly facilitate a clear understanding with the present proprietors, if a continuous block of land equal to about 12 miles in its extreme breadth, in a course inland about due west by compass, might be acquired. (C2:7:13-14){FNREF|0-86472-060-2|6.5.4|66}

With this letter Tuckett sent a note of his "Remarks on the District". He first described the principal places where Otakou Ngai Tahu were living and went on:

I wish it to be clearly stated in the deed of purchase, or clearly explained to the Maoris and recorded, that the names of such Maoris as are now actually resident and occupiers of land within the district described, and that other Maoris cannot, after the land is paid for, reside within the district, excepting on such land as may be specially reserved for the present residents or others. The two clearings of Te-kaki are near the mouth of the Taiarea; the other, on the plain on the east bank of the river, I have not coloured, supposing he would not part with them, otherwise, the latter I should like to acquire. The native proprietors at Otago are, I believe, known to Mr. Symonds; I do not wish to acquire any of their usual places of residence at the entrance of the harbour, but of a point occupied as a whaling station, and thence inland on the east side of the harbour, on which many Europeans reside, I consider it important that I should be put in possession, either by the magistrate or the aboriginal proprietors. (C2:7:14){FNREF|0-86472-060-2|6.5.4|67}

Professor Ward commented on two notable elements of Tuckett's approach, (the company approach in fact, for Colonel Wakefield shared his views). There was first the desire to assume possession of the land occupied by European squatters, notably on the eastern peninsula. Secondly, the desire, no doubt based on their bitter experience in Wellington and Nelson, to maintain a clear distinction between areas of Maori occupancy, and the lands of the proposed settlement (T1:90).

In a letter to Colonel Wakefield, also on 13 June 1844, Tuckett explained his proposal to purchase a large coastal block. This, he said, would "simplify the definition of the Boundaries between us and the Aborigines with the belief that the whole may be purchased for about the same sum as the half". He was, however, sceptical that the sum of œ2000 provided would be sufficient (P3:82-83).{FNREF|0-86472-060-2|6.5.4|68}

Symonds approved Tuckett's proposals and advised Richmond that the long narrow piece of land extending from the Port of Otago to beyond the Molyneux River would be between 300,000 and 400,000 acres in extent. But Symonds' approval was, as

Richmond later reported to Governor FitzRoy, subject to the condition that "the unappropriated residue after the Company has selected 150,000 acres of available land, should be dealt with in such manner as Your Excellency may deem fit". Richmond advised that he had approved Symonds' decision (P3:97-98).{FNREF|0-86472-060-2|6.5.4|69} Dr Loveridge has shown that this letter, dated 16 July 1844, was misdated in transcription and was probably written by late June (P2:77). Richmond suggested the residue should be retained by the Crown and let to the settlers for grazing. He made no mention of tenths or indeed any other reserve for Ngai Tahu or public purposes, in any part of the block.

6.5.5 When Symonds returned to Otago on 8 June accompanied by the Ngai Tahu leaders Tuhawaiki and Taiaroa, he soon met other Ngai Tahu chiefs. On 10 June 1844 he noted in his journal, "Many natives arrive Tuhawaiki, Taiaroa, Pokene, Karetai, Koroko etc" (P3:8).{FNREF|0-86472-060-2|6.5.5|70} On his way north overland from the Molyneux, Tuckett had told Ngai Tahu that he wished to negotiate a land purchase with them. No doubt they arrived in response to this invitation.

Did Ngai Tahu request two reserves at Otepoti?

6.5.6 Before discussing the negotiations which were set in train a few days later, it is convenient to consider a deposition made 23 years later in 1867. This deposition was made by John Jones in support of a petition of John Topi Patuki pertaining to the Princes Street reserve, which we discuss later in this chapter. In the following discussion we are indebted to an analysis and commentary made by Dr Loveridge (P2:80-84). Jones stated that in 1844 he had taken Symonds, Daniel Wakefield, David Scott as interpreter, and Tuhawaiki from Wellington to Otago on the Scotia. Jones stated that he then returned to Waikouaiti to bring down a large number of other Ngai Tahu. On their arrival a meeting took place at Koputai (Port Chalmers). Reserves were discussed. Wakefield agreed to a burial ground at Port Chalmers being reserved. Jones recited that they (Symonds, Wakefield, Jones and various Ngai Tahu chiefs) then went to "where Dunedin now stands". There, he says, the Ngai Tahu selected two spots referred to in clause 3 of Topi Patuki's petition. These are referred to in our later discussion of the Princes Street claim as the hostelry site and the Princes Street reserve site. Jones described them as being sought for boat harbours. According to Jones, Daniel Wakefield at first assented, but later "insisted upon retaining them". This brought the negotiations to an end. Jones claimed the "whole of the Natives, including Towaki" (Tuhawaiki), returned to Waikouaiti.

Ten days later, Jones claimed, Daniel Wakefield sent a "note" asking Ngai Tahu to return and resume negotiations, which they did. When negotiations resumed, Daniel Wakefield "gave in". Jones "was acting for the Natives". At the end of the deposition it is recorded that Jones was asked what he knew respecting the phrase in Patuki's petition that the petitioner "was also entitled to one-eleventh of the sections into which their lands might after their cession be divided". He answered that he was "quite certain that at the time of the purchase no such question as this was mooted". (A8:I:154-155){FNREF|0-86472-060-2|6.5.6|71}

6.5.7 Jones' testimony can only relate to June 1844. Symonds, Daniel Wakefield and Scott did voyage to Otago on the Scotia in June, accompanied by Jones and, from Port Cooper on, by Tuhawaiki and Taiaroa. But when Symonds returned for a second time

in July 1844 he journeyed on the Deborah with Colonel Wakefield, Spain and Clarke. Daniel Wakefield, who had left Otago with Symonds on 20 June, did not return in July. We agree with Dr Loveridge when he said it is extremely difficult to fit Jones' story of two negotiating meetings in June, between Symonds and Daniel Wakefield on the one side and Jones and Ngai Tahu chiefs on the other, into the chronology of events. Jones claimed:

- that the first meeting took place a few days after Symonds and Daniel Wakefield reached Otago;

- that all the Ngai Tahu involved, including Tuhawaiki, then departed, staying away at Waikouaiti for at least 10 days; and

- that the second negotiations, again with Daniel Wakefield (and presumably Symonds) took place after their return to Otakou.

6.5.8 Dr Loveridge questioned whether Daniel Wakefield met with representatives of Ngai Tahu soon after 8 June as Jones claimed. He thought not. As he said, Symonds was present at Otakou from 8-20 June and makes no mention in his journal of any such meeting, nor do any of his surviving reports to Superintendent Richmond. Tuckett and his assistant Barnicoat were present from 11 June 1844 onwards. Neither Barnicoat's journal nor Tuckett's reports to Colonel Wakefield make any reference to formal negotiations taking place before 18 June. Moreover, neither of the two Ngai Tahu eye-witnesses who testified before the Smith-Nairn commission in 1880 suggest there were two sets of negotiations in June. Horomona Pohio and Rawiri Te Maire both referred to meetings which took place nearer the end of the month. Neither referred to the dramatic breakdown in negotiations and their resumption 10 or more days later (C2:14:18-66).{FNREF|0-86472-060-2|6.5.8|72}

No contemporaneous evidence suggests a large scale exodus by Ngai Tahu earlier in June. Dr Loveridge pointed out that Tuckett noted on 13 June that, "at present the negotiation has not been attempted, all the parties interested not having yet arrived" (P3:82-85).{FNREF|0-86472-060-2|6.5.8|73} Symonds recorded in his journal that Tuhawaiki was in Koputai on 11 June "with a working party, making [a] house" and on 13 June Maori people were still busy building houses (P3:8).{FNREF|0-86472-060-2|6.5.8|74} It appears that the principal Ngai Tahu chiefs were on hand in Otakou from the time of Symonds' arrival up to the start of negotiations on 18 June. Symonds records in his journal for 18 June that Jones arrived at Otago that evening and that on the nineteenth endeavoured "in his way to settle matters but does not succeed" (P3:9).{FNREF|0-86472-060-2|6.5.8|75} Tuckett's report of 20 June 1844 to Colonel Wakefield supports the likelihood of a discussion about reserves at Koputai. But we agree with Professor Ward, who found there to be no 1844 evidence in reference to reserves at Dunedin (T1:95).

6.5.9 The tribunal has come to the clear conclusion that there is no satisfactory evidence that Ngai Tahu, in 1844, requested the setting aside of two reserves in the location of the future Princes Street, as claimed by John Jones. We agree with Dr Loveridge's conclusion, "There was no exodus to Waikouaiti" (P2:84).

June 1844 negotiations

6.5.10 These have been succinctly described by Professor Ward and we largely adopt his account as an accurate record of the principal events (T1:91-95).

Symonds, while agreeing with Tuckett's proposal to acquire a substantially greater area than 150,000 acres, was still anxious that there should be no misunderstandings on the part of Ngai Tahu. Accordingly, he proposed to Tuckett that, before negotiations began in earnest, there should be an inspection of the proposed boundaries. Tuckett, representative Ngai Tahu chiefs and Symonds would all participate in the inspection. He suggested that the meeting with Ngai Tahu to ascertain whether they were prepared to sell, be deferred for a week - the boundary inspection to take place meantime. Tuckett was anxious to press on with discussions. Frustrated by Symonds' cautious approach, Tuckett wrote to Colonel Wakefield on 16 June 1844 asking to be relieved at once "from the vexations of office" (P3:86-89).{FNREF|0-86472-060-2|6.5.10|76} Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" on the part of Tuckett, resolved on 17 June to return to Wellington on the Deborah. Daniel Wakefield supported Symonds and decided also to return to Wellington (C2:7:15-18).{FNREF|0-86472-060-2|6.5.10|77}

6.5.11 As Professor Ward noted, Symonds knew that Ngai Tahu would be displeased at having assembled to no good purpose. A series of meetings therefore took place on 19-20 June. These were, however, preceded by discussions on 18 June which were recorded by Scott, Daniel Wakefield's interpreter. Scott stated that since his arrival in Otago (on 8 June 1844), he himself had a number of conversations with the principal chiefs and Ngai Tahu generally, but more particularly that morning with Tuhawaiki, Taiaroa and other named chiefs:

who severally distinctly expressed themselves highly satisfied with the arrangement of pointing out and fixing the general boundary of the intended purchase, as well as the portions they wish to reserve, to prevent any future misunderstanding with the settlers, and they are all (chiefs and dependents without any exception) to my knowledge, willing to sell the block described in Mr. Tuckett's sketch plan, subject to the reserves I have mentioned, with a copy of which they have been furnished, and which was carefully examined and explained in my presence at a general meeting of the natives this morning, the result of which was an unanimous expression of their anxiety to complete the transaction with as little delay as possible. (C2:7:18){FNREF|0-86472-060-2|6.5.11|78}

At the morning meeting Symonds told Ngai Tahu of his intention to return to Wellington with Daniel Wakefield and to come back as soon as possible, "to which they agree" (P3:9).{FNREF|0-86472-060-2|6.5.11|79} So by the afternoon of 18 June Tuckett became the principal negotiator. He attempted to reach an agreement. He reported on this meeting to Colonel Wakefield the next day:

I addressed the maories and did my best to explain to them the objects of my expedition and pressed them to give me the names of all the Proprietors of Land in the District which I wished to purchase, to state some reasonable amount of payment in money or goods for which they would alienate the Lands, the amount to be paid to each Proprietor[;] also if not disposed to sell the whole District to delineate on the Plan, that which they wished to reserve. Their expectations are perfectly childish in

fact they have no idea of the amounts which they specify and which are too extravagant to be worth recording (C2:11:51).{FNREF|0-86472-060-2|6.5.11|80}

As Professor Ward commented, "this was an early phase, when 'ambit claims' and inflated demands could be expected" (T1:92). Barnicoat noted in his journal that Tuhawaiki mentioned a million pounds as the purchase price (P3:47).{FNREF|0-86472-060-2|6.5.11|81} In his journal for the following day, 19 June, Barnicoat recorded that there were:

now 18 boats belonging to the natives lying on the beach. The number of natives present cannot therefore be less than 150. Today a meeting of the Chiefs took place, at which an attempt was made to get a price named. It was not altogether successful. (P3:47){FNREF|0-86472-060-2|6.5.11|82}

6.5.12 The next day, 20 June 1844, a turnaround took place. Following further public negotiations, agreement was reached which established the main features of the Otago purchase (T1:93). Tuckett wrote the same evening to Colonel Wakefield, enclosing the following agreement:

Otago June 20th 1844.

The Maori Chiefs Tuawaite, Taiaroa and Karetai offer to the Principal Agent of the New Zealand Company the whole tract of Land colored Red and Green on this Plan excepting a Reserve of Land on the East side of the Lower or outer Harbour of Otago from 1 to 2 on the accompanying Plan, being about four miles in length measured along shore at high water mark from 1 to 2 for the sum of Twenty four Hundred Pounds (œ2400) to be paid to them this day month (20th of July) or in default of the payment being made to the parties entitled to receive payment for the Land, at the time above specified, the Company's Acting Agent Frederick Tuckett shall remove his party and effects from the ground which he now occupies and until the 20th of July has their PERMISSION TO OCCUPY

signed on behalf of themselves and others by Tuawaite Taiaroa & Karetai
and witnessed by John Jones, T.H. Barnicoat and Frederick Tuckett. (C2:11:14-15){FNREF|0-86472-060-2|6.5.12|83}(emphasis in original)

Barnicoat's journal for 20 June 1844 records that the three Ngai Tahu chiefs that day "signed a memorandum binding them to sell the whole country from Otago to Molineux...with a single reserve for the sum of œ2,400..." (P3:47){FNREF|0-86472-060-2|6.5.12|84}

6.5.13 What had changed between 18-19 June, when negotiations stalled, and 20 June, when an agreement was reached that remained firm in all essentials and was to be formally concluded on 31 July? In answering this question Professor Ward pointed to two matters in particular:

(a) The price. Whereas on 18-19 June the company appears not to have gone above œ1200 or œ2000 at most, on 20 June the Maori negotiators had come down to œ2400 which presumably they thought realistic. Tuckett, whose limit was œ2000, realised it

would be sensible to agree to œ2400; he agreed to this sum subject to his superiors confirming it.

(b) The inclusion in the sale of part of the eastern side of the harbour. On 18 June Ngai Tahu indicated their wish to retain all the eastern side. Two days later they were willing to relinquish most of the eastern side except for a four mile reserve on the outer harbour. This included land occupied by European squatters which Tuckett was most anxious to acquire and which Colonel Wakefield, a month later would still try to buy. But on 20 June Tuckett must have realised that Ngai Tahu was unlikely to include any more. And so he recommended acceptance (T1:94 & C2:11:13).{FNREF|0-86472-060-2|6.5.13|85}

(c) Professor Ward made a third point, in his view of less importance, but still significant. Tuckett, in his 20 June report to Colonel Wakefield, referred to a piece of land on the western shore of the harbour near Koputai claimed by Taiaroa's sister, married to one Thomas Chasland, an associate of John Jones. The claim was presented by John Jones on behalf of Chasland's wife. However Tuckett was adamant that he would not recommend the purchase if any part of the western side was withheld. Ngai Tahu accepted this. Nevertheless Tuckett recommended to Colonel Wakefield that one of the future town sections near the spot and with a water frontage, be given to either Jones or Chasland's wife. Otherwise Jones might use his influence to have the portion (and Tiarea Island adjacent, where he had part of his fishery) reserved directly to him by Ngai Tahu. Or else, Tuckett suggested (apparently suspecting that there might be other Maori claims to portions on which they were not actually residing) that Wakefield should be prepared to pay one or two hundred pounds over and beyond the œ2400 sought, to extinguish any such claims (C2:11:13).{FNREF|0-86472-060-2|6.5.13|86}

We note that tenths were not mentioned in the agreement of 20 June 1844, or in Tuckett's report to Colonel Wakefield. He simply recommended that the:

offer of the Land...should be accepted, subject to obtaining the approbation of the Government, and its decision to whom the money shall be paid and in what proportions to each Proprietor. (C2:11:10){FNREF|0-86472-060-2|6.5.13|87}

Symonds was not privy to Tuckett's negotiations with Ngai Tahu which led to the 20 June agreement. Further negotiations would be necessary with Symonds present. A decision by the company on the purchase price was required.

The July negotiations and the purchase

6.5.14 Symonds, who had left Otago on the Deborah with Daniel Wakefield on 20 June, reached Wellington on 29 June. Symonds duly reported the reasons for his return to Superintendent Richmond. Tuckett's report to Colonel Wakefield was also on the Deborah. Colonel Wakefield decided to go down to Otago himself in place of his brother Daniel. On the return south on the Deborah, in addition to Symonds and Colonel Wakefield, were George Clarke Jr, sub-protector of aborigines, and Commissioner William Spain. They arrived at Otago on 16 July 1844.

6.5.15 In his report on the purchase of 31 August 1844, Wakefield stated that Tuckett had left little to be done beyond verifying the boundaries in the presence of the principal vendors and effecting payment (C2:11:27).{FNREF|0-86472-060-2|6.5.15|88} Before the boundary inspection commenced however, Symonds was present at a meeting with Ngai Tahu on 18 July. He noted in his journal for that day:

Hold a meeting of natives concerning reserves, the point in question viz their extent having been settled we start for the Head of the Harbour with Col. W[akefield], Mr Clarke and Mr T[uckett]. (P3:10){FNREF|0-86472-060-2|6.5.15|89}

The boundary inspection party set out later on 18 July accompanied by "six natives deputed by the assembled natives of the district..." (C2:11:27){FNREF|0-86472-060-2|6.5.15|90} It went up the harbour, over to the Taieri valley and by boat to Lake Waihola. They camped about 6 miles from the lake by a hill named "Owiti" (C2:11:40).{FNREF|0-86472-060-2|6.5.15|91} From, the top of Owiti they could see the south-western boundaries. On returning to Taieri they reached agreement on the boundaries of the Taieri reserve. They returned to Otakou on 26 July and the following day the party inspected the boundaries of the Ngai Tahu reserve on the south side of the harbour (Omate). Symonds then notes in his journal, "matters satisfactorily arranged" (P3:11).{FNREF|0-86472-060-2|6.5.15|92}

6.5.16 On Monday 29 July Symonds and Clarke prepared the deed of purchase in Maori and English (P3:137-138).{FNREF|0-86472-060-2|6.5.16|93} That day Symonds also obtained Wakefield's signature to a statement in which Wakefield undertook:

to select 150,000 acres, to which the Crown's right of pre-emption has been waived in favour of the said [New Zealand] Company,...leaving the unappropriated residue to be dealt with in such manner as his Excellency the Governor shall deem fit. (C2:7:3){FNREF|0-86472-060-2|6.5.16|94}

The deed is signed

6.5.17 On 31 July 1844 all was ready. Ngai Tahu were assembled and Wakefield had the œ2400 purchase money. Symonds, in his report of 2 September 1844 to Richmond, with which he enclosed a copy of the deed, explained that before it was formally read over and signed he had requested George Clarke, the protector, to explain to Ngai Tahu the nature of the transaction:

that in disposing of their land they for ever surrendered their interest and title to such land; that their consent to sell it was binding on their children, as well as themselves, that they should remove from any portion then occupied by them, and confine themselves exclusively to their reserves, and never expect to receive further compensation, that they should not alienate or let any portion of their reserves without having previously obtained the sanction of his Excellency the Governor; to all which stipulations they unanimously consented. (C2:7:2){FNREF|0-86472-060-2|6.5.17|95}

Symonds further reported that the boundaries were frequently explained by Clarke to Ngai Tahu who "stated that they fully understood all the terms and conditions of the purchase, as specified in the deed" (C2:7:2).{FNREF|0-86472-060-2|6.5.17|96}

Wakefield later reported that Karetai (the senior chief of Otakou itself) then spoke to the assembly, reiterating the need to respect each other's areas to avoid disputes (C2:11:57-58).{FNREF|0-86472-060-2|6.5.17|97}

The deed was then read over in Maori and English. The Maori version was signed by the influential Ngai Tahu chiefs (twenty three in all, plus two by proxy), then by Tuckett and Scott for the company and Symonds and Clarke for the Crown. The purchase money was amicably divided among the different families under Tuhawaiki's supervision. A copy of the deed is in appendix 2.1.

Tuhawaiki then removed a tapu from a burial site at Koputai and took away the remains for reburial. The Union Jack was raised and formalities thereby completed. Wakefield, Spain, Symonds and Clarke immediately departed north on the Deborah (C2:11:60-61).{FNREF|0-86472-060-2|6.5.17|98}

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6.6 The Claim for Tenths

6.6. The Claim for Tenths

6.6.1 The foregoing account is drawn from records made at the time, in 1844. Professor Ward considered they testify to a completed transaction. We agree that this is a reasonable conclusion, but remind ourselves that we have yet to consider later testimony.

Under the English version of the deed, Ngai Tahu consented, "to give up, sell, and abandon altogether" to William Wakefield, on behalf of the New Zealand Company, specified lands within certain named boundaries, together with some eight named islands, for œ2400. The deed excepted certain places "which we have reserved for ourselves and our children". The boundaries of the lands excepted from the sale and reserved to Ngai Tahu were then described in some detail; "which said reserved places we agree neither to sell nor let to any party whatever without the sanction of His Excellency the Governor of New Zealand" (appendix 2.1).

The latter provision reflects Wakefield's concern that Ngai Tahu might sell to the European squatters and that some part of the 6665 acres reserved on the eastern peninsula might be developed in competition with the New Edinburgh settlement. The total area of the four reserves was later found to be 9615 acres. We now know that the land sold, once thought to be 400,000 acres, was more like 533,000 acres. At the time Colonel Wakefield estimated that Ngai Tahu had retained about 13,000 acres for (as he erroneously thought) a resident population of about 60 people (C2:11:49).{FNREF|0-86472-060-2|6.6.1|99}

6.6.2 The deed makes no mention of tenths or anything like them. There was no contractual obligation on the part of the company or the Crown to make further provision by way of reserves for Ngai Tahu. But the subject was adverted to by Symonds in his final report of 2 September 1844. In his account, the question of reserves was linked to the question of who, Ngai Tahu or European, was to have control or management over them. He reported that:

[Ngai Tahu] expressed their anxiety to make some special provision for the future benefit of themselves and children, by reserving certain portions of land within the limits of the purchase, WHICH THEY NOW PARTIALLY OCCUPY, THE MANAGEMENT OF WHICH, TO A CERTAIN EXTENT, THEY WERE DESIROUS OF RETAINING IN THEIR OWN HANDS. (C2:7:1){FNREF|0-86472-060-2|6.6.2|100}(emphasis added)

Symonds approved their selections (those named in the deed). He went on:

I pursued this course as regards native reserves, from the conviction that the system heretofore adopted in other purchases of large tracts, was beyond the comprehension of the aborigines, and at the suggestion of Colonel Wakefield I left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:1-2){FNREF|0-86472-060-2|6.6.2|101}

Both the claimant and Crown witnesses agreed that this statement suggested that some kind of tenths system was probably discussed with Ngai Tahu. But it does not appear to have been their preferred choice. Professor Ward, in his report on the historical evidence, expressed the opinion that this would not be surprising, given that a tenths system in 1844 did not involve the transfer to Maori of sections in the new subdivision, but rather their vesting in the Crown, mainly, but not exclusively, for Maori purposes. He pointed out that Ngai Tahu, by Symonds' account, wanted to have the land in their ownership and control. All the 1844 evidence, Professor Ward suggested, from Tuckett's journal entries to the accounts of Karetai's speech, emphasise the wish on both sides for these separate spheres (T1:98).

6.6.3 We agree with this analysis of the 1844 evidence by Professor Ward and his conclusion that the outcome was exactly what the deed states-an excepting or reservation of the named areas in favour of Ngai Tahu, with them binding themselves not to let or sell the land retained without the governor's consent. Whether the governor, in addition to this, wished to provide for tenths was left entirely to his discretion. On the contemporary (1844) evidence of the negotiations, and on the plain meaning of the deed, no obligation rested on the governor to provide for tenths.

In his report to London Colonel Wakefield expressed regret that the deed did not prevent, as fully as he would have liked, Ngai Tahu from disposing of the land exempted from the sale (C2:11:52-53).{FNREF|0-86472-060-2|6.6.3|102} Later in his report he said:

The right of pre-emption of the excepted land by the Company might have been reserved in the deed or it might have been made a special reserve for the natives as the tenths in the other settlements are; but the latter provision would have placed it in the hands of the trustees lately appointed by an Ordinance and they might hereafter have thought it their duty to grant leases of portions of it to the detriment of the property of the purchasers from the Company. Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements; not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:54-55){FNREF|0-86472-060-2|6.6.3|103}

Wakefield was nervous about land being vested in trustees. Nevertheless he recognised that although special Maori reserves were not contemplated for the New Edinburgh scheme, the possibility remained that the governor, in his discretion, might require tenths to be vested in the Crown.

While we believe the position to be as we have found on the contemporary (1844) evidence, it remains to be seen whether later evidence, both Maori and European, leads to a different conclusion.

A twenty years silence?

6.6.4 Unfortunately Tuhawaiki, one of the principal Ngai Tahu involved in the sale of Otakou, died by drowning in October 1844. It was suggested to us by Dr Ann Parsonson that this was a major calamity for the tribe and that, had Tuhawaiki not died so tragically, the question of the provision of tenths would have been raised much sooner (R35:33-35).

But, as Professor Ward testified, a number of letters from Taiaroa, Karetai, Tiramorehu and other Ngai Tahu leaders to government officers in the 1850s still survive, as does evidence of meetings with Governor Grey in 1848, with Governor Browne in 1857 and with the premier and native minister in 1858. These cover a whole range of contentious matters with Pakeha or among themselves. None has so far emerged which suggests that anything like tenths were to follow on the survey and sale of the Dunedin settlement (T1:100).

6.6.5 On 27 September 1872 Matenga Taiaroa's son, Hori Kerei Taiaroa, produced to a parliamentary inquiry a statement dated 13 February 1862, said to have been made by his father. Included in the statement is the following:

Secondly. After that land purchase commenced in this Island, the first land we sold was Otago; it was sold to Colonel Wakefield. We pointed out all the boundaries, and all stipulations were mentioned to Colonel Wakefield, as follows:- We said the first payment for this land would be œ100,000. Colonel Wakefield said, "That is too much, œ2,400 will be ample, and that is all the cash consideration; it had better be arranged in this manner, viz., that one acre in every ten shall be reserved for you." We agreed to this, and said, "You can have the land according to these terms." We do not know whether these words were written down or not, but all the people present heard these words.

These are the places about which we spoke, and stated that we desired to retain- Otakori, Taiari, Maranuku, Te Karoro, and other places. (C2:21:9){FNREF|0-86472-060-2|6.6.5|104}

We are inclined to agree with Professor Ward, who suggested it is difficult to know what weight to put on this document. While it is very likely that before his death Matenga Taiaroa did make a statement to his people about Ngai Tahu claims, it is surprising, if it was reduced to writing during his lifetime, that it was not produced earlier. While it is true that Ngai Tahu began airing their principal grievance regarding the Princes Street reserve in the early 1860s, by 1867-68 a growing claim for tenths was also coming under parliamentary scrutiny. If not written down until later, its accuracy may be open to question.

Topi Patuki's petition

6.6.6 The first documentary claim to tenths made public by Ngai Tahu was a petition by John Topi Patuki dated 17 August 1867. The petition appears to be principally concerned with the failure of the New Zealand Company and the Crown to set aside two small reserves at Princes Street, Dunedin. But Patuki also claimed that he was entitled, "under the arrangements then existing between your Majesty's Government and the said [New Zealand] Company, to one-eleventh of the sections into which their lands might after cession be divided". (C2:12:5){FNREF|0-86472-060-2|6.6.6|105} We note that Patuki does not claim that the arrangement had its genesis in discussions or an agreement with Ngai Tahu at the time of the sale. Rather he invoked "arrangements then existing" between the government and the New Zealand Company. For reasons we have earlier stated, no such arrangement existed in 1844. Further, in 1844, no tenths arrangements contemplated by the government, or company officials, would have envisaged vesting the sections in the Maori tribes themselves. As Professor Ward indicated, Patuki, in 1867, appears to be beginning to "read back to 1844 a later concept of `tenths'". This, said Professor Ward, is not entirely surprising, for in 1866-67 the tenths in Wellington, plus McCleverty's awards which were already in Maori hands, were processed through the Native Land Court. And in the same year, 1867, preparations were in hand to put the Otago reserves secured under the 1844 deed through the court to obtain the issue of individual Crown grants (T1:101).

Mantell's assertions

6.6.7 Walter Mantell, whose various activities as a commissioner to extinguish Maori claims (1848-1854) and as commissioner of Crown lands in Otago (1851-1854) will engage our attention in the Kemp, Banks Peninsula and Murihiku purchases, and the Princes Street reserve claim, also gave evidence before the 1872 parliamentary inquiry. In 1872 he testified that his official connection with Ngai Tahu commenced in 1848. But before then, he said, he knew Tuhawaiki who told him that he "considered the Natives were entitled to these tenth parts". Mantell added that the "old chiefs Taiaroa and Karetai-in fact all of the older chiefs ... repeatedly asked me about these reserves". He explained his inaction at the time on the grounds that he had no knowledge of the documentary evidence; that for a time he had no authority over Crown lands in the Otago block, and that later he was too busy (C2:21:7).{FNREF|0-86472-060-2|6.6.7|106}

Professor Ward in his report considered Mantell's hypocrisy and deceit to be blatant. He pointed out that since 1855-when he resigned office as commissioner of lands-Mantell had been waging an unrelenting campaign about unfulfilled promises to Ngai Tahu (principally concerning schools and hospitals), some of it to good effect. Moreover, as Professor Ward reminded us, Mantell had twice held office as native minister in the 1860s, making it a condition of his accepting office in 1861 that certain promises be fulfilled, and instructing his officers to investigate other outstanding grievances. He had supported Topi Patuki's petition in 1867. But, Professor Ward said, in all these 17 or more years Mantell did nothing about the Otago tenths-did not even mention them. Quite apart from Tuhawaiki, who died in October 1844, Karetai and Matenga Taiaroa were principal owners in the block and leading participants in the 1844 negotiations. Yet they failed to raise the issue of tenths publicly, as they raised many other issues (T1:101-102). We share Professor Ward's scepticism about Mantell's 1872 recollections.

1872 Maori witnesses

6.6.8 At the same 1872 inquiry at which Mantell gave evidence, the committee heard evidence from two Ngai Tahu witnesses to the 1844 negotiations.

(a) Tare Wetere Te Kahu

The following account is taken from Professor Ward's report and accurately records and comments on the salient points of Te Kahu's evidence (T1:102).

Te Kahu confirmed the general boundary agreed with Colonel Wakefield and Symonds. With regard to reserves he said that one was asked for and granted at Port Chalmers. He went on:

A reserve was then asked for at Dunedin, when Captain Symonds proposed to arrange it in this manner, that Maori and European land should be in alternate pieces, i.e., Maori land, then European, then Maori, and then again European. (C2:21:11){FNREF|0-86472-060-2|6.6.8|107}

According to the witness, David Scott was unable to interpret to Wakefield's satisfaction, Clarke was sent for and "talking then commenced again":

It was then clearly stated that a Native reserve would be made at Dunedin or Otepoti, where it was absolutely decided that a reserve should be made. The lands on either side of Otepoti Creek marked A and C on tracing (made by witness) were reserved for the Natives by Colonel Wakefield. The intervening part marked B was to be European land; these reserves were made to draw up the boats on. (C2:21:11){FNREF|0-86472-060-2|6.6.8|108}

When Kettle came to survey the area, Te Kahu said, he confirmed this arrangement and Ngai Tahu from the Heads lived in three houses on the land. Shortly after this the first two immigrant ships arrived. John Jones built a house on the portion marked B (C2:21:11).{FNREF|0-86472-060-2|6.6.8|109}

Though this evidence tends to telescope time, and probably reflects the fairly common confusion between Daniel Wakefield (with Scott in June) and Colonel William Wakefield (with Clarke in July), it is evidence of a reserve at Princes Street and of the interest and role of the ubiquitous Jones. It also provides the first, and perhaps most authentic reference, to an alternation of Maori and European sections - in one specific location. Te Kahu proceeded:

-There were to be reserves at Taiari, Molyneux, and Kai Tangata. These are the only reserves of which I am aware. I heard the promises made about these reserves.
29. Was anything said about reserves to be made afterwards? -I do not know.
30. If the reserves mentioned in Symond's deed, and which I have now read over to you, together with those at Port Chalmers and Otepoti were made, would you consider conditions of sale fulfilled? -If the reserve at Otepoti was returned to Maoris, I should think all promises made by Colonel Wakefield and Captain Symonds would be fulfilled.
31. Did you ever hear anything about reservation of one section for Maoris to every

ten sections for the Europeans? -I do not know anything about that condition. The alternate sections to which I referred before I understood only to refer to the Otepoti Block.
35. [Mr Macandrew]. How old were you at the time of the negotiations for the land purchases? -I do not know, but I at the time had two children.
36. How many pieces did Colonel Wakefield promise? -He promised us two pieces. The whole block was divided into three allotments, the centre piece to be for the Europeans. I do not know what were the exact boundaries of these pieces. (C2:21:12){FNREF|0-86472-060-2|6.6.8|110}

We conclude this account by observing that this evidence in no way substantiates a claim that tenths were to be provided.

(b) Hoani Wetere Korako

Korako said he was present at the negotiations and signed Symonds' notebook, not the deed itself. The name Korako does appear on the deed as a signatory, but Korako explained it was that "of old Korako", not his. He claimed that Taiaroa, Karetai and Tuhawaiki told Colonel Wakefield they wanted œ800,000 for their land, which Colonel Wakefield refused to give. Later the Maori were told "they were to receive œ2,400 and a piece of land at Port Chalmers and two pieces in the town with allotment of European land between them" (C2:21:12).{FNREF|0-86472-060-2|6.6.8|111} The chairman then read over part of the Otakou deed of purchase to the witness. He was asked:

45. Would you consider that all promises made to you by Colonel Wakefield and Captain Symonds, concerning reservation of land for Natives, had been fulfilled, if you were now to obtain the reserves at Port Chalmers and at Otepoti? -No; I heard that promises were made concerning hospitals and schools.
46. I am not alluding to hospitals or schools, but to the reserves? -There are many things connected with the land sales still unfulfilled.
47. [Mr Taiaroa] If you got reserves at Port Chalmers and at Otepoti, would you consider promises fulfilled? -No, I should not.
48. [Mr Sheehan] How would there, in that case, be still unfulfilled promises? -The reserves were the principal subject of discussion at sale of land, and now the Natives have no reserves.
49. Can you mention hearing of reserves not handed to Natives? -The land at Molyneux, near the present reserve, does not belong to the Natives, as it ought to do. It is situated towards the north of the Molyneux, and called Kaitangata. (C2:21:12){FNREF|0-86472-060-2|6.6.8|112}

As with the evidence of the other Ngai Tahu witness, Te Kahu, there is nothing in Korako's evidence to suggest that tenths or anything like tenths were promised by the European negotiators.

The Smith-Nairn Royal commission

6.6.9 Five Ngai Tahu gave evidence before the Smith-Nairn commission in 1880 concerning the July negotiations. All said that "wakawakas" were discussed with Colonel Wakefield. (Wakawaka is defined by H W Williams, A Dictionary of the

Maori Language, 7th ed, 1985, as "share" or "division"). But the evidence of one Merekeherike Hape, was entirely hearsay as he was not personally present (P3:116-119).{FNREF|0-86472-060-2|6.6.9|113} The evidence of Hone Kahu was brief. He said that Maori portions were to be chosen from the places which had been occupied by their ancestors ("Ko nga whenua Maori hei nga Papatupu") and he claimed four named places (P3:120-124).{FNREF|0-86472-060-2|6.6.9|114} More specific evidence was given by Wiremu Potiki, Horomona Pohio and Rawiri Te Maire. The latter two were present in June 1844 as well.

6.6.10 They told the commission that the purchase price was the first matter discussed and that the question of "wakawakas" was raised in this context. Potiki said:

When I got here I heard that the price of the land was named. Taiaroa, Karetai & Tuhawaiki asked what was the amount of money ... Wakefield said it was œ2,400. Karetai & the natives did not agree to that amount. Then Wakefield told them that the land would be divided, and then they agreed to that amount ... He mentioned that the land was to be divided into sections, and that was the reason why they [the Ngai Tahu] agreed to take the œ2400. (P3:100-111){FNREF|0-86472-060-2|6.6.10|115}

Horomona Pohio first referred to Mr Wakefield (presumably Daniel Wakefield) offering them œ1200, which was rejected. Wakefield then asked to have the land divided into sections but Taiaroa, Karetai and Tuhawaiki told him they would not sell the land. Wakefield then said if the land was divided into sections he would make them an additional payment. "They would not agree to sell the land. Mr Wakefield returned" (C2:14:25-37).{FNREF|0-86472-060-2|6.6.10|116} We note that Pohio had either forgotten, or did not know, that on 20 June 1844 the three chiefs referred to above offered to sell the land for œ2400.

Pohio later testified that he recalled Mr Wakefield coming down a second time about a month afterwards. This is obviously a reference to the arrival in July of Colonel William Wakefield, who came instead of his brother Daniel. Pohio said:

The natives then asked Mr Wakefield how much money he would give for the land. He replied œ2,400, and he said "And the land also shall be divided into sections for you natives ["]. The natives then consented, as the land was to be divided into sections. (C2:14:31){FNREF|0-86472-060-2|6.6.10|117}

The portion of the deed relating to reserves was then read to Pohio. He was asked why Ngai Tahu did not sell those pieces, to which he replied, "Because they considered the payment was too small. It was not what they had asked for" (C2:14:27-35).{FNREF|0-86472-060-2|6.6.10|118}

6.6.11 Rawiri Te Maire early in his evidence related that Wakefield, presumably Daniel Wakefield, came down on the Scotia. He held a discussion about boundaries and offered œ1200 for the land. Te Maire said that Ngai Tahu would not part with the land; that "they would not sell the land, and Wakefield returned". He came back about three weeks or a month later. We note that this account resembles that of Horomona Pohio, except that he makes no reference to Daniel Wakefield offering to divide the land into sections. Like Pohio, he has either forgotten or did not know that Taiaroa, Karetai and Tuhawaiki had offered to sell the land for œ2400 in June. Te Maire then

relates that after Wakefield "returned" in July he offered œ2400 (C2:14:44-49).{FNREF|0-86472-060-2|6.6.11|119} He was questioned by the lawyer Izard:

Did the natives at first refuse to take the œ2,400 altogether for the land? -The natives did not agree to take the œ2,400.

When the natives refused to take the œ2,400 did Wakefield say anything to them further? -He said that he would return a portion of the land he wanted to buy to the natives.

Did he explain in what way the land was to be returned? -There were to be sections made, and the land given to the natives. (C2:14:50){FNREF|0-86472-060-2|6.6.11|120}

A discussion about the sections or wakawaka then ensued. Te Maire said that no size (acreage) of the wakawaka was mentioned. They were to be allocated after the survey was made and were to be in addition to the blocks reserved from the sale. Izard then asked:

Then it was after Wakefield had mentioned these wakawakas that the natives agreed to take this œ2,400; is that not so? -It was after these promises were made that they accepted the money. (C2:7:52){FNREF|0-86472-060-2|6.6.11|121}

When Te Maire resumed his evidence the next day he was asked who had acted as the interpreter at the meeting. He said that Clarke and Scott were involved. Izard then asked:

Was it Scott or Clarke who explained to them what Wakefield said about the wakawakas? -It was Clarke.

Did Symonds say anything to them about the wakawakas? -No; I did not hear him say anything about the wakawakas. (C2:14:62-63) {FNREF|0-86472-060-2|6.6.11|122}

Soon afterwards Izard asked:

Did Mr Clarke explain to the natives that the land would be divided in a similar manner [i.e. into sections in the same manner as Maori cultivations] after the survey? -Yes. Mr Clarke explained to us that the divisions would be the same as in a cultivation. I myself was listening to it. (C2:14:62-63){FNREF|0-86472-060-2|6.6.11|123}

6.6.12 We are unable to reconcile the evidence of Horomona Pohio and Rawiri Te Maire as to Daniel Wakefield's first visit and the alleged refusal of Taiaroa, Karetai and Tuhawaiki to sell the land, with the proved action of those chiefs in signing the 20 June offer to sell for œ2400. As to the July meeting with Colonel William Wakefield, the three witnesses agreed that Wakefield opened the July negotiations by offering œ2400. They do not specify what reserves were offered in conjunction with this offer. Ngai Tahu are said to have rejected it. Wakefield then offered to return a portion of the land in the form of sections or wakawaka, unspecified as to area, after the land was surveyed. Te Maire claimed that George Clarke explained how the system would

work. None of the witnesses stated what proportion of the land was to be returned in this way. They said that Wakefield's offer of œ2400 was accepted after-and because-the promise regarding sections or wakawaka was made.

6.6.13 There are problems in reconciling this evidence with what we know the three leading chiefs-Taiaroa, Karetai and Tuhawaiki-had done on 20 June 1844. The evidence of Potiki, Pohio and Te Maire is that in July, the three chiefs were not willing to sell for œ2400. They made no mention of the chiefs' offer of 20 June to sell for œ2400. Instead they maintained that the Ngai Tahu leaders agreed to the sale in July only after Colonel Wakefield is said to have offered sections or wakawaka. If the recollection of these witnesses some 36 years after the event was correct, we would have expected Symonds, in his daily journal or his final report, or Wakefield in his comprehensive report, or Clarke in his Smith-Nairn evidence or memoirs, to have recorded discussions on such an important matter. In fact Colonel Wakefield's only comment on the œ2400 price was:

It is probable that the natives would have consented to receive something less; but the sum having been fixed upon by Mr Tuckett before my arrival at Otago, I thought it better not to disturb his arrangement and that every security against future dissatisfaction of the natives should be taken by a compliance with their expectations. (C2:11:56-57){FNREF|0-86472-060-2|6.6.13|124}

On the question of tenths we have already cited from Wakefield's report (6.6.3), in which he expressed his reservations about tenths being vested in trustees under the 1844 ordinance. He went on to say:

Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements, not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:55){FNREF|0-86472-060-2|6.6.14|125}

Colonel Wakefield expressly stated that the "special native reserves, as in the other settlements"-a reference it would appear to tenths-were "not contemplated in the Company's New Edinburgh scheme..." Had Colonel Wakefield in fact promised sections or wakawaka to secure the agreement of Ngai Tahu to sell, he must be guilty of practising a massive deception in hiding this from his superiors. He must also have deceived Symonds and Clarke or secured their connivance in his deception. Wakefield's report was written on 31 August 1844, a month after the sale. We have no reason to suspect its accuracy on this matter. We are not able to find that the evidence of the three Ngai Tahu, based on their recollection of events some 36 years later, should be preferred to the contemporaneous evidence recorded in 1844. This latter evidence makes no reference to tenths being part of the bargain for the sale of the Otakou block.

Later European evidence

6.6.14 It remains to consider later evidence of Symonds and Clarke given before the Smith-Nairn commission in 1880.

Symonds gave evidence on 18 February 1880. He said that Ngai Tahu pointed out the land they wished to keep for themselves:

I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them [Ngai Tahu]. I mean the large reserve up to the Heads. (C2:14:2-13){FNREF|0-86472-060-2|6.6.14|126}

Later, asked whether he had any discussion with Maori about the tenths he replied: "No, none whatever". Asked whether Colonel Wakefield had any discussion with Maori about tenths he answered: "I cannot tell". When questioned by Commissioner Smith as to whether he had any knowledge of the fact that Colonel Wakefield alluded to the tenths (to Ngai Tahu), he answered: "No". He made it clear that he himself had not told Ngai Tahu that tenths were part of the agreement. Later, the following dialogue took place:

Mr Nairn -Do you remember any particular spot of land which the natives desired to except from the sale, and which was not reserved? -No, I do not. The places they mentioned to me were reserved by me. I do not know of any reserve which the natives desired to reserve from sale which was not reserved.

Mr Izard -Did the Maoris point down to where Dunedin now is, and say they wanted any land reserved there? -No; I don't know that they did. I was very careful in reserving what they desired, and think I should have remembered it if they had requested land to be reserved which was not reserved. (C2:14:16-17){FNREF|0-86472-060-2|6.6.14|127}

6.6.15 George Clarke, in 1880, was a congregational minister in Hobart, Tasmania. The Smith-Nairn commission sent him a copy of Symonds' evidence to the commission. It asked him to comment. In his affidavit of 7 April 1880 he said that Symonds' report, "accords very well with my recollection of what took place". But he added "some particulars with which I am strongly impressed" (T1:106).{FNREF|0-86472-060-2|6.6.15|128} He went on to say he had gone straight to Otago from assisting Spain to sort out the confusion in Wellington:

I went into the matter with the determination that the whole terms of the purchase should be expressed in the Deed of Conveyance, and that I would have nothing to do with any sort of engagement that was not put clearly on record. I pressed the necessity of this on all the parties concerned and cited the case of other purchases as a reason why we should be specially careful in our conduct of this. (T1:106){FNREF|0-86472-060-2|6.6.15|129}

Therefore he approved of Symonds' insistence on the boundary inspection, although Ngai Tahu themselves were doubtful about the necessity for it. He continued:

Then came the question of Reserves. I need hardly say that before a purchase of this kind is concluded a good many conversations pass, between the contracting parties. All kinds of proposals are made and discussed, and they are accepted, modified, or rejected as the case may be. It is quite possible that in some such conversations Colonel Wakefield may have proposed as a condition of sale that a certain proportion of the alienated land should be set apart for the natives. I think that he did propose it

on the understanding that the natives should make over the whole Block to the Company. But this they were unwilling to do. They said that such promises had been given in the other purchases of the Company, and they feared lest only the worthless sections would be assigned to their use. To the best of my belief such a proposal formed no part of the final arrangement. If it did it would certainly be expressed in the Deed of Conveyance. What happened was, I think, this. There were certain lands about Omate, Pukekura and Taiari which the natives were very anxious to retain, and Colonel Wakefield just as anxious to buy. The Chiefs took us over the ground and pointed out how thickly it was studded with the graves of their relations. They told how only a few years before the tribe had been decimated by measles and other epidemics, and how whole families had been swept off in the course of a few weeks; and when pressed by Colonel Wakefield, they angrily declared that sooner than part with these places they would throw up the bargain altogether. It was then that Colonel Wakefield said that if they would only sell these grounds, the actual burial places should be respected, and ample reserves should be made for the natives elsewhere. The chiefs however were decided, and refused to let these lands be included in the sale. What arrangement Colonel Wakefield may have made with the Government as to the reservation of any part of the alienated land for the Natives I do not know, - but my impression is that there was no such stipulation in the bargain as between the natives and Captain Symonds and myself.

I am not able, Gentlemen, after so many years to recall the provisions of the Deed, but of this I am certain, that whatever its terms, they were most carefully and elaborately explained to the natives at the time (and I was not without experience as an Interpreter)-and I am almost as certain, that NOTHING WHATEVER BEYOND THE CONTENTS OF THE SALE WAS PROMISED AS A CONDITION OF THE SALE. (T1:107){FNREF|0-86472-060-2|6.6.15|130}(emphasis in original)

We note that Clarke gave a similar account in his memoirs, published in 1907 (P3:135-138).{FNREF|0-86472-060-2|6.6.15|131}

Was the provision of tenths a condition of the Otakou purchase?

6.6.16 After carefully considering all the evidence (including more than 1000 pages of documentation put in by Dr Ann Parsonson on behalf of the claimants) and counsel's submissions, the tribunal finds that the deed of purchase, signed on 31 July 1844, accurately reflected the agreement reached between the parties. While a decision remained to be made by the governor, as to whether provision would be made for tenths, this was not part of the contractual arrangements between the parties. Nor was, as we have earlier indicated, the Otakou transaction governed by the waiver proclamation of March 1844.

6.6.17 It was strongly urged on us on behalf of the claimants, that even though no provision was made in the deed of purchase for tenths, Ngai Tahu at the time believed that tenths would be provided after survey. It is certainly possible that Colonel Wakefield discussed with Ngai Tahu leaders the possibility of providing for tenths if they would agree to surrender the whole block free of reserves, especially the eastern peninsula. But other evidence suggests that Wakefield was not keen on the provision of tenths, especially as they would be vested in trustees over whose actions the company would have no control. Reference was made to publication of the March

proclamation in Te Karere (U10(c):27). But Dr Ann Parsonson was critical of the Maori translation as being difficult to follow. We do not know what, if anything, FitzRoy may have said about tenths to Tuhawaiki in Wellington on 27 February. There is no evidence that Symonds had instructions from the governor, or Superintendent Richmond, to ensure that provision was made for tenths. It is clear that he did not discuss the subject with Ngai Tahu. George Clarke, although recollecting events many years later, considered that tenths were no part of the arrangement which he fully discussed with Ngai Tahu. We are disposed to agree with Professor Ward, that Ngai Tahu much preferred to have land they wished to retain set aside as excepted from the sale, and thereby reserved. In short, we believe there is no good contemporary evidence that Ngai Tahu had an expectation that the company or the government would provide tenths on their behalf. Nor are we persuaded by any later evidence that such was the case.

We agree with Professor Ward when he said that the matters raised by Topi Patuki in 1867 probably reflect very well the real and actual concerns of the southern Ngai Tahu at that time. As will be seen in chapter 7 when we discuss the claim over the Princes Street reserve, Ngai Tahu by 1867 felt a genuine grievance about specific pieces of land at Dunedin and, as Professor Ward said, "the beginnings of a wondering about entitlement to 'tenths' in view of the matter having been left for FitzRoy's decision and in the light of general Company/Government undertakings" (T1:109). How was this non-contractual matter, that had been left for the governor's discretion, dealt with? This question and related matters we will consider shortly. But before doing so we must consider a further complaint by the claimants.

Ngai Tahu Land Report

06 Otakou

6.7 Symonds' Responsibilities for the Purchase

6.7. Symonds' Responsibilities for the Purchase

6.7.1 The claimants in their first grievance complained that "the protector Symonds, failed to discharge his responsibilities at the time of the negotiations, and afterwards" (W6).

The claimants referred to Symonds as "the protector". A reference to the instructions dated 27 February 1844, which Symonds received from FitzRoy (6.4.9), shows that Symonds was required:

- to proceed to the South Island and there superintend and assist Tuckett, in effecting a valid purchase of not more than 150,000 acres;

- to be careful not to infringe the slightest way on existing rights or claims, whether Maori or otherwise. (This direction was made with the recent Wairau affray very much in mind); and

- to inform the Maori population that he was sent to superintend the purchase of lands which they wished to sell, and that he, on behalf of the government, would not authorise or sanction any proceedings which were not honest, equitable and in every way irreproachable.

He received no instructions as to reserves for the Maori vendors.

It is apparent from the foregoing that Symonds had dual responsibilities. First, to assist the New Zealand Company agent to make a valid purchase. Secondly, to ensure that the company only purchased lands which the Maori owners wished to sell and that the proceedings were honest, equitable and irreproachable. Symonds therefore had obligations to both parties-the New Zealand Company and the Maori-but he was not designated protector. That role was assigned later to George Clarke Jr, a sub-protector who was sent down by FitzRoy in July, when it appeared an agreement to sell might be finalised.

6.7.2 Counsel for the claimants, in the course of his closing address, made various criticisms of Symonds' conduct:

(a) He complained that Symonds absented himself from the negotiations because of his quarrel with Tuckett in June 1844. We have already related the reasons for Symonds' return to Wellington (6.5.10). He had proposed to Tuckett that before the negotiations began in earnest, there should be an inspection of the proposed boundaries by Tuckett, representative Ngai Tahu chiefs and himself. He suggested

deferring the meeting with Ngai Tahu for a week, to enable this to be done. Tuckett was anxious to press on with the discussions and very reluctant to participate in a prior boundary inspection. He made very clear his opinion of Symonds in a note to Daniel Wakefield. Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" by Tuckett, resolved on 17 June to return to Wellington. Daniel Wakefield, the New Zealand Company agent, supported Symonds and not Tuckett. He also decided to return to Wellington. Symonds told Ngai Tahu the following morning of his decision to return, to which it is said they agreed.

All this, however, did not deter Tuckett, lacking an adequate interpreter, from proceeding with negotiations with Ngai Tahu. We are not able to find that Symonds acted otherwise than as he saw proper in the circumstances. Tuckett chose to proceed with negotiations without Symonds' sanction and knowing that no final agreement could be reached in his absence. In fact, it was more than five weeks later before an agreement was reached.

(b) Mr Temm submitted that from March 1844 to October 1844 FitzRoy, Richmond, Wakefield and Symonds all expected tenths to be made from the Otago purchase (W1:96). The tribunal is not satisfied there is any convincing evidence that Symonds had any such expectation. As he indicated in his 2 September 1844 report to Superintendent Richmond, the question of tenths was left to the discretion of the governor. If FitzRoy or Richmond had any such expectation, they do not appear to have communicated this to Symonds. Wakefield also took the view that it was a matter for the governor.

(c) It was further submitted by Mr Temm that Symonds, on his own admission, took no part in the negotiations and had nothing to do with the price or terms of purchase except to record in the deed the land Ngai Tahu were not willing to sell (W1:111-112). In our opinion this does not fully represent the burden of Symonds' evidence before the Smith-Nairn commission. We set out the following passage from Symonds' testimony on being questioned by Izard, counsel for Ngai Tahu, about the July negotiations:

Mr Izard: -Then negotiations took place with the natives about the purchase of the land, I believe? -Well, that I am not aware of. They were carried on by Mr. Tuckett, and so far completed when we arrived that the sum had been agreed upon.

That is to say, when you arrived you found Mr. Tuckett had agreed with them as to the land and price? -Yes; to give them œ2,400 for such land as they were willing to point out, and they pointed out certain boundaries to him.

Did you go over the boundaries yourself? -Yes, with Colonel Wakefield, Mr. Tuckett and six young natives, sons of chiefs, in order to point these boundaries out and to remember them.

Mr Smith: -You traversed the whole of the boundaries? -No; we went to all the points named in the Deed, from which we could see the boundaries.

Mr Izard: -Then the natives understood, I suppose, that they were parting with all the land within the boundaries, except certain lands which they would not sell at all? -Yes; they are excepted in the Deed.

Did you have any personal negotiations with the natives about the price to be paid? -None.

Or about the boundaries? -No. I was merely there to see fair play, and that the natives were not imposed upon; to see that the boundaries were clearly defined. The Govt wished to avoid anything that might lead to a collision with the natives.

Then, in fact, you considered it no part of your duty to interfere as to the price, or as to the land? What you did was to see that the thing was conducted in a fair, straight-forward, honest way?" -Yes; and that the natives were satisfied.

Then as to the negotiation, you had nothing whatever to do with it? -No.

I suppose the negotiations were quite completed, or did Colonel Wakefield finish them after arrival? -That I can hardly tell you. I imagine they put their heads together, and managed to complete the negotiations.

The natives pointed out to you the land they did not sell? -Yes; what they wished to keep for themselves. I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them. I mean the large reserve up to the Heads. (C2:14:5-8){FNREF|0-86472-060-2|6.7.2|132}

Although he does not say so in his evidence, the boundaries inspection was made at Symonds' insistence. Ngai Tahu were not overly anxious to participate. But Symonds, as he said in evidence, was there to see fair play, that the Maori were not imposed upon and that the boundaries were clearly defined. Not only was he concerned to see that the transaction was "conducted in a fair, straight-forward, honest way", but also that Ngai Tahu "were satisfied". We note too, that despite his agreement that he had nothing to do with the negotiations, he did in fact intervene. How otherwise would he have had "some trouble to get Colonel Wakefield to agree" that "the large reserve up to the Heads" should be kept back for Ngai Tahu. We also recall that Sub-Protector Clarke recorded in his memoirs that:

With Symonds's consent, as well as Colonel Wakefield's, I started with the understanding that the whole negotiation with the Maoris should pass through my hands, and I told the natives that I should be answerable for no conditions or promises whatever, except what I myself should tell them. (P3:135){FNREF|0-86472-060-2|6.7.2|133}

It is clear that Clarke in his role of protector played an active part in ensuring that Ngai Tahu understood the arrangements being entered into.

(d) Mr Temm further submitted that Symonds, Wakefield, Richmond and FitzRoy all knew in July 1844 that the governor was to set aside reserves from the land that was to be sold under the March waiver proclamation. We do not accept this submission. There was no persuasive evidence before us that this was so, quite apart from the

consideration that, in our view, for reasons we have given, the March waiver proclamation did not apply to the Otakou purchase.

6.7.3 We conclude our discussion of this grievance, which we do not find to be made out, by observing that the evidence showed Symonds, if he had a fault, to have been over cautious in his efforts to superintend the activities of the New Zealand Company agents who had the responsibility of negotiating the purchase. But, in so acting, he did not disadvantage Ngai Tahu.

6.7.4 But while we believe Symonds conscientiously followed his instructions, we are bound to say that his instructions were defective. FitzRoy made no reference to the question of reserves when he formally commissioned Symonds, on 27 February 1844, to undertake the supervision of the purchase. Nor did he specifically refer to reserves in his letter of the same date to Colonel Wakefield. He did, it is true, make it one of the conditions of the waiver of the Crown's right of pre-emption, that all existing arrangements made by the government with respect to New Zealand Company settlements should be strictly observed. As we have indicated (6.4.4), these left the government with a discretion to make such arrangements as it thought just and expedient. In the same way clause 6 of the terms of purchase provided that the local (New Zealand) government would make such further reserves for Maori vendors and public purposes as it might see fit. Further, the company's detailed instructions to Colonel Wakefield told him he was to take FitzRoy's directions with respect to reserves for Maori and for public purposes (6.4.6).

Nor did FitzRoy, or anyone authorised by him, give verbal instructions as to what reserves, if any, should be set aside. Their instructions were to purchase the lands which Maori "wish to sell" up to 150,000 acres. FitzRoy failed to give any instructions that Symonds or the others involved in the purchase were to ensure that the Maori retained sufficient land for their present and future needs. In short that they were left with an adequate endowment. The fault, in our view, lay not with Symonds, but with Governor FitzRoy, who failed in his instructions to advert to the question of adequate reserves being secured to Ngai Tahu.

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6.8 Developments After the Purchase

6.8. Developments After the Purchase

6.8.1 Symonds duly reported on 2 September 1844 to Superintendent Richmond on the successful completion of the purchase. As noted earlier, Symonds advised that he had:

left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:2){FNREF|0-86472-060-2|6.8.1|134}

Richmond sent Symonds' report to Governor FitzRoy early in September 1844 (P2:126). By this time news had reached Wellington from London that the company's operations had been suspended due to difficulties between the New Zealand Company and the Colonial Office. Consequently, in September Colonel Wakefield instructed Tuckett to defer any further work in Otago (P3:159).{FNREF|0-86472-060-2|6.8.1|135}

As there was no longer any urgency to advance the proposed New Edinburgh settlement, FitzRoy deferred reporting to the colonial secretary until December 1844. He assembled a large number of documents and correspondence relating to the purchase. These he sent to Lord Stanley with a brief covering letter dated 10 December 1844:

I have the honour of transmitting to your Lordship copies of correspondence relative to the purchase of a tract of land at Otago, in New Munster (Middle Island) accompanied by tracings of the plans made by the New Zealand Company's surveyors.

Mr. J. Jermyn Symonds has acquitted himself of his difficult task more speedily and successfully than I could have anticipated, satisfied, as I felt of his ability and judgment.

The principal known qualifications of Otago as a site for a settlement, are, a moderate harbour (not accessible in strong northerly winds), an extensive tract of country well adapted for pasturage, but without timber; a fine climate, neither too wet nor too windy; and an abundant supply of good bituminous coal.

There are so few natives in New Munster, not more than 1,500 altogether, that colonization might there be carried on unimpeded, if the Government were to buy

from the few native claimants (securing them ample reserves), and then dispose of the land. (C2:7:1){FNREF|0-86472-060-2|6.8.1|136}

Symonds' report of 2 September was with the first enclosure which also included a copy of the deed. FitzRoy spoke of Symonds' conduct in a complimentary manner. But he made no mention of Symonds' action in leaving to him as governor the decision as to whether further reserves in the form of tenths would be provided. He did however suggest that, given the small Maori population in the South Island, colonisation could proceed there unimpeded.

6.8.2 No evidence was put before us that FitzRoy considered that further provision for reserves in the form of tenths, or any other form, should be made for Otakou Ngai Tahu. We infer from his brief uncritical letter to Lord Stanley that FitzRoy entirely approved of the transaction, including the provision for reserves in the deed, and that he did not propose to take any further action as to the provision of tenths. Whatever his intention may have been at the time, in fact he took no further action. Tenths were not provided either by FitzRoy or by Grey who succeeded him as governor soon after in 1845.

The Colonial Office response

6.8.3 FitzRoy's 10 December despatch was received by the Colonial Office on 29 May 1845 (P2:128). It arrived at a time when a fresh round of negotiations concerning the New Zealand Company's entitlement to land was coming to a head. On 6 July 1845 Lord Stanley sent a lengthy despatch to George Grey, who had by then replaced FitzRoy as governor (C2:18:1-6).{FNREF|0-86472-060-2|6.8.3|137} This contained instructions for implementing Pennington's award, under which it appeared the New Zealand Company was entitled to some 885,000 acres. Lord Stanley reviewed the company's claims, district by district, including Otago. Stanley referred to it as having been purchased under "special circumstances", these being that the Crown's right of pre-emption had been waived in favour of the company to the extent of 150,000 acres, the company being limited to that quantity. The colonial secretary went on to say that, as soon as the survey was completed and Colonel Wakefield was able to apply for a Crown grant, Grey was:

to make it to him with the least possible delay, not only for the 150,000 acres, to which the Company would be entitled, under the arrangement sanctioned by Captain FitzRoy, but to any larger extent of available land not already reserved by Mr. Symonds for the natives or Government purposes, out of the tract included in the deed of sale, dated the 31st July 1844. (C2:18:3){FNREF|0-86472-060-2|6.8.3|138}

6.8.4 Dr Ann Parsonson, on behalf of the claimants, suggested to us that:

as Lord Stanley had seen the Otakou deed of sale, he was clearly not referring to the lands named therein which the sellers wished to keep for themselves, but considered that Symonds might since have made further selections for them. (C1:63)

This does not seem to us a tenable view. Lord Stanley also had before him Symonds' report of 2 September 1844. There Symonds referred to Ngai Tahu "reserving certain portions of lands within the limits of the purchase", which he approved

(C2:7:1).{FNREF|0-86472-060-2|6.8.4|139} Moreover, the deed itself refers to Ngai Tahu "excepting the following places which we have reserved". Lord Stanley was saying that the company, in addition to the 150,000 acres, could be given any other lands in the block not "already reserved" by Symonds for Maori or government purposes.

That this was his intention is confirmed by a letter at the direction of Lord Stanley to the company directors on 7 August 1845, in which it was said:

With respect to the proposed settlement at Otago, Lord Stanley will at once instruct the Governor to make to the Company an unconditional grant of the 400,000 acres, purchased at Otago, EXCLUDING, OF COURSE, THE LAND RESERVED TO THE NATIVES; the Company engaging, within a limited period, to select the 150,000 acres proposed, and also such further quantity thereof as they may desire, and to re-convey the remainder to the Crown. (P3:206){FNREF|0-86472-060-2|6.8.4|140}(emphasis added)

On 15 August 1845 Lord Stanley sent two despatches to Governor Grey. In one he requested Grey to convey to Symonds "my approbation of his conduct and my sense of the service which he rendered on that occasion" (P3:211).{FNREF|0-86472-060-2|6.8.4|141} In the other, a copy of the letter of 7 August to the company directors was enclosed, and Grey was instructed "to take the instructions intimated in that letter as here repeated for your guidance".{FNREF|0-86472-060-2|6.8.4|142} That is, as if they were direct instructions from Stanley.

We infer from Lord Stanley's directions to Grey that the British government considered that the reserves already approved by Symonds adequately met the obligations of the Crown so far as land endowment for Ngai Tahu was concerned. The question of tenths was not mentioned. But it does not follow that Grey, who would have had before him Symonds' report on the sale, could not have exercised the discretion vested in his predecessor, FitzRoy, to provide for tenths had he thought this appropriate. In fact, given that the block was surveyed while Grey was governor, he may have had even more responsibility to consider the matter than his predecessor.

The New Zealand Company response

6.8.5 While it is apparent that neither of the governors in New Zealand appear to have given any real consideration to the question of tenths being provided once the Otakou block was surveyed, the New Zealand Company officials did at least discuss the matter. Thus William Cargill, who had replaced Rennie as leader of the New Edinburgh Association, wrote to Harington, the New Zealand Company secretary, on 29 August 1845. He expressed the view that:

inasmuch as the Natives are so few in number (being under 60 in all), and as a distinct block of land, of ample dimensions has been reserved for them at their own desire and not included in the purchase-no other Native reserves ought to be laid out within the boundaries of this Settlement.

Had these people been more numerous it would have given the leaders of our enterprize the greatest pleasure to have forwarded the Company's general views upon

this subject, and to have promoted the location of Natives under their own chiefs and amidst the examples of a civilized community; but it is strongly felt that in the present instance any such reserves would be not only unnecessary but an absolute hindrance to the purposes of the Settlers, by interposing unoccupied wastes, and increasing the expense of roads &c, without benefit to anyone. (C2:6:6-7){FNREF|0-86472-060-2|6.8.5|143}

A meeting of directors on 4 September 1845 accepted Cargill's recommendations (C2:6:9-10).{FNREF|0-86472-060-2|6.8.5|144} Under clause 6 of the 1843 terms of purchase the responsibility for the provision of reserves for Maori and for public purposes rested not on the company but on the New Zealand government. Accordingly the company acted within its rights in deciding that no additional reserves ought to be provided for Ngai Tahu within the boundaries of the purchase.

On 13 April 1846, Grey issued a Crown grant to the New Zealand Company for the whole of the Otakou block, estimated to contain 400,000 acres, but excepted from the grant the reserves named in the deed.

The governors' responsibility

6.8.6 Professor Ward told us that while he could understand FitzRoy's hesitation in taking tenths, especially as the settlement had been deferred, he agreed with the claimants that:

to be consistent with its own public undertakings, the government should have taken an endowment equivalent to tenths, if not within the 150,000 acres (if that were deemed to be already balanced by the agreement over the Heads) then within the balance of the block, before it was Crown Granted to the Company. I have suggested ...that this would have eventually provided useful revenue to government for Maori purposes, and some of the land might, in later generations have come back into Ngai Tahu hands. (V9:13)

Support for this view is to be found in the following:

- Lord Russell's direction of 31 December 1840 that in future sales of public land by the Crown, not less than 15 and not more than 20 per cent was to be appropriated by the governor to the use and benefit of Maori. (Lord Russell said he did not mean that money should be given to them but that the salary of the protector, the cost of agricultural tools, the salaries of schoolmasters etc should be paid partly by this sum) (T1:78);{FNREF|0-86472-060-2|6.8.6|145}

- additional instructions on 28 January 1841 embodying the 31 December instruction were sent to Governor Hobson. It was now contemplated that the fund would, in addition, be used "for promoting the health, civilization, education and spiritual care of the natives" (T1:78);{FNREF|0-86472-060-2|6.8.6|146}

- the action, in July 1842, of the New Zealand governor, in appointing the chief justice, the anglican bishop of New Zealand and the chief protector of aborigines as trustees to administer the funds directed by Lord Russell to be set aside, and also the

New Zealand Company's reservation of "one-eleventh of their town, suburban and country allotments for the benefit of the natives". The chief justice was advised that:

With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made, by the New Zealand Company, and any monies which may prove from time to time to be disposable out of funds, so to be set apart, after paying the expenses of the protector's department, should be vested in one set of trustees (C2:4:36){FNREF|0-86472-060-2|6.8.6|147}

It was made clear that the company reserves were to be legally vested in the Crown. Further, and of special reference to Otago, it was expressly provided that "the funds arising from the company's reserves shall be expended in the promotion of these objects in the settlement or district from which they may respectively arise..." (C2:4:36).{FNREF|0-86472-060-2|6.8.6|148} See our earlier discussion for the problems which the trustees encountered (5.6.2);

- the 26 March 1844 waiver proclamation, although it did not apply to the Otakou purchase, made provision for tenths to be vested in the Crown "for public purposes, especially the future benefit of the aborigines" (P3:197){FNREF|0-86472-060-2|6.8.6|149}; and

- Governor FitzRoy's belief in 1844 that tenths should be provided for Maori vendors as demonstrated by Dr Ann Parsonson. FitzRoy, in a memorandum of 14 October 1844, later sent to the colonial secretary, said:
With respect to the interests of their descendants they [the Maori] are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition. (R36(b):II:374){FNREF|0-86472-060-2|6.8.6|150}

6.8.7 The tribunal can only speculate why FitzRoy, given the Imperial government's directions and his own stated views that tenths should be provided in addition to "extensive reserves", did not in fact make provision for tenths. It may have been that because the purchase coincided with news the New Edinburgh scheme was in abeyance, he simply deferred it. It may be he did not address the question:he makes no reference to it in his December report to the colonial secretary. It may be he decided that the land excluded from the sale and reserved to Ngai Tahu, which amounted, on estimates made at the time, to something approaching one-tenth of the 150,000 acres, substituted for tenths. If so, what of the remaining land, over 380,000 acres, which in the event were also to be vested in the New Zealand Company in April 1846?

6.8.8 The tribunal accepts that, having regard to government policy prevailing in 1844 in relation to the provision of tenths, FitzRoy, or failing him his successor Grey, should have provided for an endowment equivalent to tenths and that this should have been in respect of the whole block. But having said this, the question remains whether the failure of the Crown so to provide constitutes a breach of the Treaty of Waitangi. We turn now to that question.

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6.9 Crown Actions-A Breach of Treaty Principles?

6.9. Crown Actions-A Breach of Treaty Principles?

Grievance no 2: Crown failure to provide Ngai Tahu with an economic base

6.9.1 In our opinion the answer to the question of the Crown's responsibility under the Treaty turns on the issue of whether, given the absence of provision for tenths, the retention by the Otakou Ngai Tahu of some 9600 acres out of 533,600 acres sold was sufficient for their present and future needs and constituted an adequate endowment. The claimants, in their remaining grievance which we now consider, said that:

The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate. (W6)

We see no significant difference in this formulation from the Treaty principle enunciated by us in 4.7.8. Nor could the Crown escape its Treaty obligation by waiving its right of pre-emption, as it did here, and permitting a direct purchase from Ngai Tahu.

6.9.2 Before discussing the question further however, we should consider a suggestion made by counsel for the claimants, that in considering the adequacy or otherwise of reserves made for Ngai Tahu no account should be taken of the land, some 9600 acres, which were excepted by Ngai Tahu from the sale. We do not accept this contention. Among the instructions given Hobson by Lord Normanby was a prohibition on the Crown purchasing from the Maori any land "the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence"(A8:I:15).{FNREF|0-86472-060-2|6.9.2|151} This tribunal has found it to be abundantly clear from these instructions, read in the light of the instructions as a whole, that no land was to be purchased by the Crown which was required for the comfort and subsistence of Maori people. In short, to comply with Treaty principles, they were to be left with a sufficient endowment for their own needs, both present and future. If, however, this requirement was not followed, whether in part or in whole, then the Crown would be obliged, out of the land purchased, to set aside by way of reserves sufficient land to secure an adequate endowment.

6.9.3 In our earlier discussion of Treaty principles we noted various factors to be considered in deciding what constitutes a sufficient endowment (4.7.9). We pointed out that much might depend upon a wide range of demographic factors including the size of the tribal population; the land they were then occupying or over which various members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds and on

seasonal hunting and food gathering. In short, their dependence upon the many forms of mahinga kai.

There is no evidence that the officials involved, whether agents of the Crown or the New Zealand Company, gave any real consideration to these questions. It is true, as we have indicated, that the importance of these various elements could vary depending upon the date at which the Crown sought to acquire tribal land. Otakou was the first official sale of which Ngai Tahu had any experience. They welcomed the prospect of Europeans settling among them. Although they had some years of experience of sealers and whalers living alongside them, in 1844 they had no notion of the likely magnitude and rate of settlement both in their immediate locality and elsewhere where they enjoyed a variety of hunting and food-gathering rights. Nor, as we have earlier indicated, in fairness to the Crown, would the governors of the day have anything approaching a precise knowledge of the timing, scale and momentum of future settlement. Nor, for that matter, did the New Zealand Company have any certain knowledge.

6.9.4 The New Zealand Company, with the consent of the Crown, purchased approximately 534,000 acres from Ngai Tahu. Some 9615 acres was excepted from the sale as follows:

Reserve	Acres	Roods	Perches
Otago Heads	6665	1	12
Taieri	2310	0	0
Te Karoro	640	0	0
Total	9615	1	12

(C2:17:10){FNREF|0-86472-060-2|6.9.4|152}

We have no knowledge of what consideration, if any, the Crown officials or the company agents gave as to the adequacy of 9615 acres to meet present and reasonably foreseeable needs of Ngai Tahu. In part, this would depend upon the number of Ngai Tahu who were dependent on this land. Wakefield appears to have thought there were not more than 50 in the Otago block and about a dozen in the southern part. He was aware of the earlier decimation of the Ngai Tahu population through diseases such as measles, so he may have considered 9615 acres sufficient (C2:11:47-50).{FNREF|0-86472-060-2|6.9.4|153}

6.9.5 We received detailed evidence from Professor Atholl Anderson, an associate professor of anthropology at the University of Otago, on the population of Ngai Tahu in various localities at various periods. He produced a graph showing the estimated Maori population, including those of mixed descent, in east Otago between 1820 and 1870 (H3:fig 13). East Otago included the area of Moeraki in the north, and all settlements on the coastal strip south to a little below Nugget Point. His graph

indicates that, based on the survey made in 1844 by Edward Shortland, there were some 535 Ngai Tahu people in the east Otago area. Detailed figures are shown in Professor Anderson's figure 9, which gives Edward Shortland's population figures for the following settlements, commencing with Moeraki about 45 kilometres north of the present Dunedin and running south to Karoro/Matau just north of Nugget Point. All the settlements, apart from that at Mataipapa/Taieri, were sited on the coast:

Settlement	Population
Moeraki	200
Waikouaiti	101
Otakou	160
Purakaunui	32
Mataipapa/Taieri	19
Karoro	23
Total population	535

(H3:fig 9)

The people at Otakou, Mataipapa/Taieri and Karoro were all occupiers of the land included in the approximately 534,000 acres sold to the New Zealand Company, while those at Purakaunui lived very close by. Those at Moeraki had close links with Ngai Tuahuriri at Kaiapoi. We have no detailed information as to the precise nature of the rights of the 100 or so Ngai Tahu resident at Waikouaiti but it cannot be doubted that they did have rights in the Otakou land. They were only 15 kilometres by sea from the Otago Heads and would appear to have enjoyed some community of interest. If the 200 people at Moeraki are excluded from the population having ownership or associated rights in the Otakou purchase we are left with a figure of some 335 Ngai Tahu. We are also conscious that some Ngai Tahu living further south in Murihiku and Ruapuke also had interests in the Otago land. The figure of 335 may be understated. But we are unable to say by how much.

We are also conscious of the fact that, just as other Ngai Tahu living beyond the boundaries of Otakou had interests in Otakou, so the Otakou Ngai Tahu had interests beyond the boundaries of the purchase. They would have looked to those rights to sustain them and in part at least compensate for the loss of a major portion of their Otakou land. And so the question of the adequacy of the reserves at Otakou is linked to both their then existing, and future, rights in the lands subsequently included in the Kemp and Murihiku purchases. But, as this report will demonstrate, insufficient reserves were made in all the Crown purchases from Ngai Tahu. They were demonstrably and grossly inadequate in both Kemp and Murihiku, as the Crown has conceded in this inquiry.

6.9.6 Had the Ngai Tahu people affected by the loss of some 534,000 acres known that when other land in which they had interests came to be sold the reserves would be so pitiably few, we cannot believe they would have agreed to sell all but 9600 acres out of over half a million acres. While they may have realised that over time, as settlement progressed in Otakou, they would no longer be able to hunt and forage with the same freedom, they would have had little appreciation that their eel-weirs and other important fresh-water based sources of food would diminish, in many cases to the point of extinction. Nor could they have reasonably contemplated that this would occur on a large scale throughout the vast areas of Te Wai Pounamu over which they had rights.

If it had transpired that in later purchases the Crown had recognised the need for generous areas of land to be retained not only for their residences and cultivations, but for their wider hunting and foraging requirements and as a future base for pastoral and other agricultural pursuits, it would perhaps have mattered less that a mere 9600 acres was left with Ngai Tahu compared with 534,000 acres acquired by the Europeans. But this did not happen. In subsequent transactions, as we will demonstrate, the reserves left to Ngai Tahu were infinitesimal. They were totally inadequate for their present, let alone their future, needs.

John Jones' award of 11,060 acres

6.9.7 We have had occasion to refer more than once to the whaler and trader Johnny Jones. In 1843 Jones lodged a claim for the award of 20,000 acres based on alleged purchases of land from Ngai Tahu. On 21 December 1843 the land commissioners, Colonel Godfrey and Major Richmond, reported that Jones had made a bona fide purchase. They recommended that the maximum grant of 2560 acres be awarded to him. Jones was very dissatisfied with this award. He complained to Governor FitzRoy. His claim was re-opened before a third commissioner, R A Fitzgerald, with a recommendation from FitzRoy and his Executive Council for a large extension of the grant. After investigation, Fitzgerald, on 27 December 1844, recommended an award of 10,000 acres. On the same day Fitzgerald's award was confirmed by FitzRoy to the extent of 8650 acres near Otakou. Unfortunately for Jones, Governor Grey replaced FitzRoy in 1845. Grey refused to sanction any award in excess of 2560 acres to Jones. A grant for this area was prepared. Jones refused to accept it until 1849 when Governor Grey gave his personal assurance that such acceptance would not prejudice Jones' claim to the large amount awarded by Governor FitzRoy, should grants in excess of 2560 be agreed to at any future time. Jones never gave up. His persistence was finally rewarded by the passing of a special enactment in 1867 entitled the John Jones Land Claims Settlement Act 1867. Section 2 of this Act empowered the governor to issue a land order to Jones to purchase land to amount to œ8500 subject to the extraordinary provision that such purchase could be made by Jones without his making any payment in cash. His biographers, Alfred Eccles and A H Reed, John Jones of Otago from whose account we have drawn, disclose that Jones' land claims were brought to a close with a total grant of 11,060 acres.{FNREF|0-86472-060-2|6.9.7|154}

It will be seen that FitzRoy, in December 1844, confirmed the award to one man, John Jones, of some 8650 acres. Finally, in 1867, Parliament was to award him 11,060 acres. By contrast, if the land retained by Ngai Tahu, of 9615 acres was divided

among say 335 Ngai Tahu, each of them was entitled on an individualised basis to approximately 29 acres per person. Jones had a wife and seven children. Even if the 11,060 acres is divided by nine, each member of the family would have received approximately 1230 acres. The contrast is startling. We note that in the same month, December 1844, that FitzRoy confirmed an award of 8650 acres to Jones he decided to do nothing about an award of tenths to the 335 or so Ngai Tahu who had reserved to themselves a mere 65 more acres (9615) than FitzRoy thought one European should recieve.

A social and demographic analysis

6.9.8 Mr Bill Dacker, a claimant historian from Dunedin, presented a detailed examination of Ngai Tahu's position in Otakou from the time of the sale, down to the present day (F11). He argued that Ngai Tahu were seriously disadvantaged in not being able to retain sufficient land to ensure their economic and cultural survival as a tribe. His evidence is discussed in more detail in chapter 18. He argued that Ngai Tahu had been able to trade successfully prior to the coming of the Otakou settlers, and for a short period after their arrival, but were soon marginalised and overwhelmed by settlers, unable through a lack of land to profit from the pastoral economy which soon developed across the province as a whole. While in Mr Dacker's view, subdivision and individualisation were welcomed by Ngai Tahu at Otakou as a solution to their difficulties, these only compounded Ngai Tahu's economic and social problems. With the Crown historian and the demographer who gave evidence in response to his paper, Mr Dacker saw Alexander Mackay's 1891 report on the condition of the tribe as clear proof that Ngai Tahu in Otakou were without sufficient land for their needs in the new world.

6.9.9 The Crown called evidence from Tony Walzl, an historian, and Professor D I Pool, a leading demographer and author of The Maori Population of New Zealand: 1769-1971.{FNREF|0-86472-060-2|6.9.9|155} In response to Mr Dacker's paper Mr Walzl gave evidence on the Ngai Tahu economy and society in the areas of Canterbury, Otago and Southland, concentrating on the post-purchase period (Q8 & Q9). Mr Walzl pointed out that although in South Otago there had been little involvement in commercial agriculture, at Otakou Ngai Tahu had become heavily involved in agriculture in pre-purchase days when there was a market. The decline in this agriculture was due to the loss of that market when the whaling ceased. The non-resurgence of large-scale agriculture in the area, Mr Walzl suggested, was because post-purchase European settlement in the area was not conducive to the creation of a new market. It lapsed to a subsistence-based economy off-set for a time by a market in fish. Mr Walzl noted however, that the Otakou reserves in the years immediately post-purchase did not seem to come under pressure. Thus no evidence for this period suggests that Otakou Ngai Tahu fully utilised their reserves agriculturally, or needed to go beyond their boundaries, or seek other solutions as happened elsewhere in Otago and Canterbury (Q8:44-45).

6.9.10 Professor Pool's evidence was concerned with the adequacy of South Island Ngai Tahu reserves based on a demographic analysis (O15). He considered this question on the basis first of "present needs" and then of "future needs". We will confine our discussion of his evidence largely as it relates to the Otakou purchase and

its outcome. In opening his discussion Professor Pool emphasised that any judgment about the adequacy of reserves must depend on the quality of the land.

(a) A suitable amount of land

Professor Pool cited various formula employed at the time of the different purchases and subsequently which suggest that 10-15 acres per person was the range adopted as sufficient for Maori. He compared this with the standard adopted for the contemporary Wakefield system and others. This gives a minimal figure for a European family which, when divided by an average family size of four or five, approximates the level of 10-15 acres as used by most European officials involved with the allocation of Maori reserves. In this sense, Professor Pool said, the formula did not seem out of line with what was considered equitable for Europeans. It needs to be remembered that under the Wakefield scheme only the wealthy would own land at all, the vast majority of the European population was expected to comprise of landless labourers. Professor Pool then said:

In reality, however, the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. Thus it was already clear by 1850 to many observers that pastoralism, implying more extensive holdings, had more potential as a farming system than did cultivation. Indeed, as the several sources quoted above make very clear, in the Otago and Canterbury Provinces Europeans in one way or another had gained access, often through de facto occupation rather than "legally", to extensive pastoral holdings. Thus it can be argued that for Maori land to be viable according to the "normal" use patterns emerging by the 1850's, much higher per capita allocations would have been essential. It is not surprising, therefore, that by the 1880's some observers had already documented that the Maori reserves were inadequate.

He noted Mackay's comments that:

The small quantity of land held per individual [-]viz. 14 acres and in some cases the maximum quantity is less-altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a 100 acres too small to be payable. (O15:12-13){FNREF|0-86472-060-2|6.9.10|156}

(b) Quality of land

Professor Pool pointed out that the adequacy of land reserved to the tribe depended not only on the quantity, but also on the quality of the land. For Canterbury reserves he applied a formula which took in to account the varying quality of the reserves, based on contemporary information. This could not be applied in Southland and Otago due to the absense of such data. However, on the basis of the crude ratio of acres per person, which Professor Pool estimated at 28.4 acres per head, he concluded that provisions for Ngai Tahu at Otago met the prevailing formula of 10-15 acres per head at the time of the sale.

While Professor Pool's conclusion is no doubt logical, we do not consider the "present needs" of Ngai Tahu can be based solely on a narrow and somewhat mechanistic formula. In any event, Professor Pool himself noted that the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. We must remember,

however, that this was Ngai Tahu land which the Europeans wished to acquire. The Treaty required that the interests of Ngai Tahu in retaining land for their present and future needs was to be generously and fully recognised. The rigid application of a formula of say 10-15 acres is totally inconsistent with such an approach. Ngai Tahu, as owners of the land, were entitled to be left with "ample", that is to say more than adequate land. Ten or fifteen acres per head was no more than sufficient for a bare subsistence. The Crown's obligation under the Treaty was to respect the right of Maori, in this case Ngai Tahu, to retain sufficient land to enable them to live comfortably and to prosper. This would be possible only if extensive areas of land remained in their possession and control. While reference is made to both present and future needs, the two are necessarily interwoven. There is an air of unreality about attempting to separate one need from the other.

Future needs

6.9.11 On this question Professor Pool stated:

For future needs several issues stand out. Firstly, it was to become clear, as the earlier quote from Mackay suggests, that the land granted was insufficient. In part this was because needs, some of which were already apparent in 1868 were changing, and in part because of issues such as the distribution of land within the Maori population. By 1881, as the following table shows, Mackay was demonstrating that significant proportions of the Maori were "landless" while even for those with land the majority had "insufficient to achieve a reasonable standard of living". Only a small minority in each province had "sufficient" land.

Mackay's Assessment of the Sufficiency of Land Available to Maori, 1891 (in percentages):

Province	Sufficient	Insufficient	None	Total
Canterbury	12.9	49.7	37.4	100
Otago	12.8	40.5	46.7	100
Southland	7.7	50.6	41.7	100
Totals	11.6	46.9	41.5	100

SOURCERaw data: Dacker appendix 2 table A; Mackay 1891 (O15:29)

In summarising his conclusions Professor Pool acknowledged that the allocation of reserves to Otago Ngai Tahu for their "present needs" was satisfactory in terms of the formula employed at the time, but he concluded that the "future needs" of Ngai Tahu did not seem to have been adequately met. His conclusion comes from both contemporary observation and his analysis of population dynamics (O15:39).

6.9.12 We have found the evidence of Mr Walzl and Professor Pool helpful in considering the question of the adequacy of the 9615 acres retained by Ngai Tahu. But in separately discussing Ngai Tahu's "present" from their "future" needs there is a very real danger that the outcome is distorted. The Crown was under a duty to Otakou Ngai Tahu to ensure that ample land was set aside to provide an economic base for the future. In fact it left Ngai Tahu with sufficient land only for bare subsistence with no opportunity to turn, as European settlers soon did, to pastoral farming on a relatively large scale. Moreover, the Europeans were able, through their immensely greater land reserves, to provide more than adequately for their agricultural products, thereby closing the Maori out of what in pre-purchase times had been lucrative trade. Except for a few individuals, Otakou Ngai Tahu did not prosper. We discuss their subsequent economic plight later in this report. The table in 6.9.11 graphically demonstrates the landless or near landless condition of so many Ngai Tahu some decades later.

6.9.13 The tribunal has no hesitation in finding the claimants' grievance that the Crown failed to provide an economic base is made out. In short, the Crown acted in breach of Treaty principles in failing to ensure Ngai Tahu retained or were allocated sufficient land for their present and future needs.

6.9.14 Governor FitzRoy, in 1844, was committed to a policy that tenths should be provided when Maori sold land, in addition to their retaining adequate reserves. We consider that the Crown was under a residual obligation to make further provision for the Otakou Ngai Tahu, which the provision of tenths vested in the Crown substantially for Maori purposes might have met. We have in mind that, as later occurred for other tribes, some tenths might have become vested in Ngai Tahu as owners. The failure on the part of the Crown either to make such provision for tenths or to make other adequate provision, we consider constitutes a breach of the Treaty principle we have discussed. It is clear that Ngai Tahu have been prejudicially affected by such failure on the part of the Crown. A final comment. Had the Crown granted tenths in respect of this purchase, Ngai Tahu would have secured, in addition to a substantial interest in rural Otago, an interest in the new town, Dunedin, which was to develop at the southern end of the harbour. Had this happened the subsequent events, which we next chronicle, leading to a claim by Ngai Tahu over the Princes Street reserve would almost certainly not have occurred.

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{FNTXT|0-86472-060-2|6.8.6|145}145 Minute of Russell, 31 December 1840, CO 209/8 pp 452-453, NA, Wellington

{FNTXT|0-86472-060-2|6.8.6|146}146 Russell to Hobson, 28 January 1841, BPP/CNZ (IUP), vol 3, p 173

{FNTXT|0-86472-060-2|6.8.6|147}147 Shortland (for Hobson) to the chief justice, 26 July 1842, in Twelfth Report of the N Z Company, p 108g

{FNTXT|0-86472-060-2|6.8.6|148}148 ibid

{FNTXT|0-86472-060-2|6.8.6|149}149 see n 53

{FNTXT|0-86472-060-2|6.8.6|150}150 FitzRoy's memorandum on the sale of lands in New Zealand by the aborigines, 14 October 1844, BPP/CNZ (IUP), vol 4, p 404

{FNTXT|0-86472-060-2|6.9.2|151}151 Normanby to Hobson, 14 August 1839, Compendium, vol 1, p 15

{FNTXT|0-86472-060-2|6.9.4|152}152 Return of reserves set up in the Otakou block, AJHR 1891, sess II, G-7A, p 10

{FNTXT|0-86472-060-2|6.9.4|153}153 see n 88, pp 31-32

{FNTXT|0-86472-060-2|6.9.7|154}154 A Eccles, A H Reed John Jones of Otago (Wellington, 1949) pp 31-40

{FNTXT|0-86472-060-2|6.9.9|155}155 D I Pool The Maori Population of New Zealand: 1769-1971 (Oxford and Auckland University Press, 1977)

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

07 Princes Street Reserve

7.1 Introduction

7.1. Introduction

The claim of Ngai Tahu in respect of a small piece of land which became generally known as the Princes Street reserve has a long history. Its genesis lies in certain actions taken by Governor Grey in 1853. The claim has been pursued at intervals since the 1860s. At the hearing the historian for the claimants gave lengthy evidence supported by some 700 pages of documents. The Crown historian produced additional material. The Ngai Tahu people of Otakou have never abandoned the claim. For the first time they have had the opportunity to advance it in terms of the Treaty of Waitangi.

As the lengthy documentation would indicate, the history of this claim is complex and bedevilled with legal complications and court proceedings. At the risk of oversimplification, it can be described in the following way.

In June 1853, Governor Grey, on the recommendation of Walter Mantell, then commissioner of Crown lands, Otago, approved of a reserve being made for Ngai Tahu for the erection of houses at Port Chalmers and at Dunedin. Subsequently doubts arose as to whether the government had complied fully with legal requirements in approving Mantell's request. A few years later when the then recently created Otago provincial government heard of Grey's action, they challenged it on the ground that the land had earlier been designated as a public reserve for wharves and quays by the New Zealand Company and the Otago Association. The province contended that Governor Grey lacked authority to change that designation. Representations were made to the central government and the issue became thoroughly politicised. In the result, Governor Grey Crown granted the land to the Otago provincial superintendent in circumstances which have never been satisfactorily explained, but in which political considerations clearly played a major role.

Ngai Tahu challenged the issue of the Crown grant in the courts without success. The Privy Council gave them leave to appeal. In 1872, acting on the advice of their lawyers, Ngai Tahu somewhat reluctantly agreed to abandon their appeal and to accept a payment of œ5000 from the Otago province. Ownership of the reserve remained with the province, which in due course transferred it to the fledgling Otago municipality. Ngai Tahu, having settled their claim, then sought the payment of a further œ6000, being rents which had accrued from the letting of the reserve up to the time of it being Crown granted to the province. A committee of the House of Representatives recommended that œ5000 should be paid to Ngai Tahu. Eventually Ngai Tahu felt compelled to accept this sum, although they believed they were entitled to œ6000, plus interest of some œ400.

While Ngai Tahu felt obliged to accept the two payments amounting to œ10,000 in full satisfaction of their claims in respect of the reserves, they have always maintained that they were wrongfully deprived of the reserve. It quickly became a valuable city property. They contend that the land should have been properly vested as a "native reserve". Had that been done they would, it is said, over the years have enjoyed very substantial benefits from the high rental value, always assuming of course that it retained its status as a Maori reserve.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

07 Princes Street Reserve

7.2 The Origins of a Reserve in Dunedin

7.2. The Origins of a Reserve in Dunedin

7.2.1 Some two years before the arrival at Otago of the first emigrant ships, the John Wickliffe and the Philip Laing, the New Zealand Company surveyor, Charles Kettle, had laid out the new town of Dunedin. Princes Street was adjacent to the foreshore of the upper harbour and parts were submerged in tidal waters. Kettle evidently envisaged some reclamation. He subdivided the irregular strip of land on the harbour side of Princes Street into lots. It was on a strip of this land that the "native reserve" was to be approved by Governor Grey in 1853. A stream, some 200 metres west along the foreshore, known to Ngai Tahu as the Toitu, crossed Princes Street and flowed into the harbour. This was a traditional landing place for Ngai Tahu in pre-settler times when they had occasion to land on the upper harbour. They did not reside there, but resorted intermittently to the site. When, in 1848, the first emigrants established their settlement on the present site of Dunedin, the Toitu estuary came to be regularly used by Ngai Tahu for landing, with a view to trading with the settlers.

7.2.2 One of the claimants' grievances concerning the Princes Street reserve is that the Crown failed to set aside the Otepoti (Dunedin) reserves which had been promised to Ngai Tahu as part of the Otakou sale. This claim appears to have been first made by John Topi Patuki in a petition to the Queen dated 17 August 1867 (F2:56-57).{FNREF|0-86472-060-2|7.2.2|1} Topi Patuki claimed that in addition to the lands expressly excepted from the sale in the Otakou deed, the Ngai Tahu chiefs demanded certain small reserves, including two at Otepoti. One was said to be near the stream which crossed Princes Street (the Toitu), and the other fronting a small sandy cove to the east of the site afterwards occupied by the manse, and the land adjoining (the Princes Street reserve). Topi Patuki further alleged that during the negotiations with the New Zealand Company's agent (presumably one of the Wakefields), and the agent representing the government, J J Symonds, they were refused these demands. The chiefs thereupon withdrew from the negotiations and departed. But, Patuki said, after a lapse of some days, "on being assured that the above reserves would be made for them, the said chiefs returned, and the purchase was concluded" (F2:56).{FNREF|0-

86472-060-2|7.2.2|2}

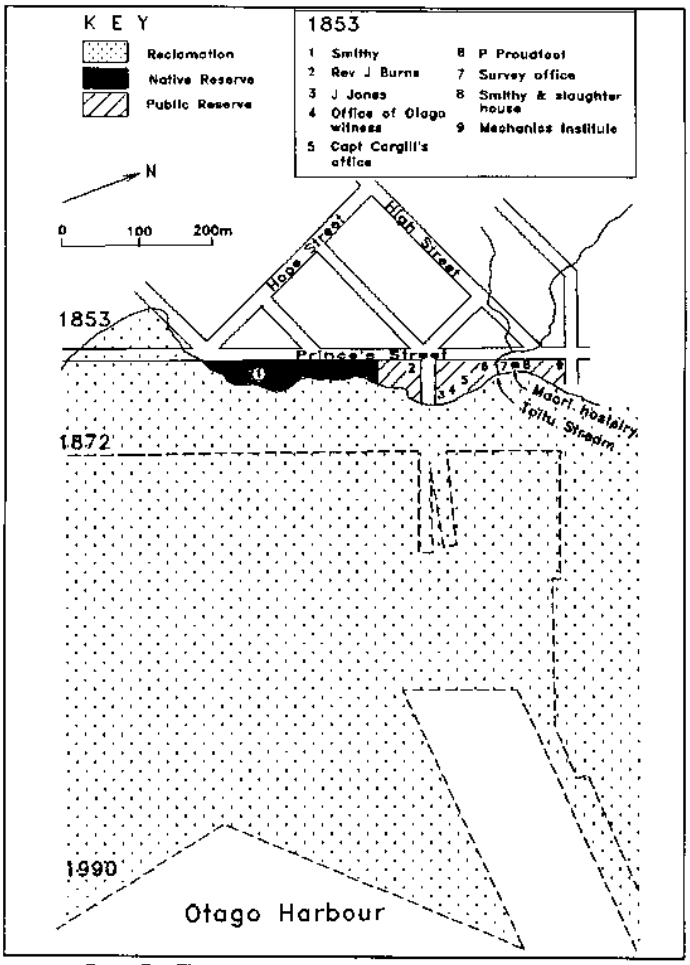

Figure 7.1: The Princes Street reserve from Mantell's 1853 sketch, showing the location of the hostel near the mouth of the Toitu Stream and the extent of reclamation since 1853.

Mr John Jones, a well-known Otago trader, gave evidence to the petitions committee of the House of Representatives in support of this part of Topi Patuki's petition. (He did not support the reference to tenths having been promised). Jones claimed that he was present at Port Chalmers when claims for reserves were discussed and later at Dunedin when Daniel Wakefield and Symonds were present. On proceeding to where Dunedin now stands he said Ngai Tahu selected the two spots mentioned by Patuki in his petition. Wakefield would not agree and negotiations came to an end. Jones claimed that all the Ngai Tahu present, including Tuhawaiki, went back with him in his vessel to Waikouaiti. Ten days had elapsed when a message arrived from Daniel Wakefield seeking a resumption of negotiations. Jones said he took the Ngai Tahu people back to Port Chalmers. When negotiations resumed he claims Daniel Wakefield gave in. "I distinctly state that these two reserves were exempted from the sale of the block subsequently known as the Otago Block..." (F2:62).{FNREF|0-86472-060-2|7.2.2|3}

Counsel for the claimants drew our attention to a memorandum by J C Richmond, then native minister, dated 5 October 1867, in which he said that the allegations contained in Topi Patuki's petition were for the most part correct:

There is good evidence that the Native owners at the time of the first negotiations for the land at Otakou objected to giving up a part of what now forms the reserve, and in consequence of that objection the negotiation was broken off. In the subsequent deed of sale no specific reservation of the land is made, but a general understanding is indicated that some lands are to be surveyed by the Governor for the sellers, and the vague terms of the deed may have been meant to include inter alia a portion of the reserve in question. (F2:60){FNREF|0-86472-060-2|7.2.2|4}

Unfortunately Richmond does not specify the "good evidence" in question. Presumably it referred to Patuki's allegations and John Jones' statement.

The claimants' historian, Dr Ann Parsonson, conceded that these reserves were not in fact mentioned in the Otakou deed. Nor does there appear to be any contemporary written account of any such demands by Ngai Tahu. At the time of the Otakou purchase, the New Zealand Company proposed to establish the new town at the head of the upper harbour but was undecided as to just where it would be sited. Maori Dunedin, a recent study by M Goodall and G Griffiths, discusses the pre-purchase significance of the Toitu estuary landing place:

While this [the Toitu Estuary] was undoubtedly a traditional Maori landing place-probably among the half-dozen or so most used within the Upper Harbour-it was not a focal point for trade and traffic in the way that it became after the settlers built their wharves and township there. Otakou played that role for the Maoris, and the southern routes from Otakou and Purakanui went past urban Dunedin, not through it: along the western hill-tops, the line of Kaikorai Valley, and the sea-coast. Visits to the mouths of the Toitu or Owheo (Leith) would have been an end in themselves, to visit a kaika in older times, or hunt birds and eels, or round up pigs. The most important traditional landing place as far as the pre-European Maoris were concerned might well have been the place where, from Shortland's account, canoes and whaleboats usually landed for the short portage across the neck of land to the open sea. It was therefore not due to any mistake that the Toitu landing place did not appear in the 1844 deed: it simply had no special significance at that time.{FNREF|0-86472-060-2|7.2.2|5}

7.2.3 The contemporary documentation in no way confirms Topi Patuki and Jones' recollection of events. The New Zealand Company surveyor, Tuckett, when reporting on the offer to sell dated 20 June 1844, which was signed by Tuhawaiki, Taiaroa and Karetai, made no mention of the alleged Ngai Tahu demands for reserves at Port Chalmers and Dunedin. He did refer to a place called Otawhakoro on the lower or outer harbour, claimed by Taiaroa's sister, the wife of one Chasland, who had written to John Jones requesting him to maintain his wife's claim and not to sell it. In commenting on Jones' involvement Tuckett said:

The fact is John Jones wishes to establish himself here immediately as a Merchant, and of course does not like to lay out money as a squatter, if a water frontage Section in the Town is given to him by the Company in return for his assistance and influence he will endeavour to persuade the natives to abandon any land which we wish to acquire, if this cannot be done he will probably induce the natives to make a Reserve which will answer his purpose, for the occupation of which he will negotiate with them. (C2:11:11-12){FNREF|0-86472-060-2|7.2.3|6}

Tuckett later recommended giving Jones or Chasland's wife a town section with a water frontage; the alternative being a sum of œ200, beyond the œ2400 asked by Ngai Tahu to extinguish all claims to land on which they were not actually residing.{FNREF|0-86472-060-2|7.2.3|7}

The significance of the foregoing comments by Tuckett is two-fold. They suggest that Jones was very much an interested party and was acting from mixed motives. And it is surely remarkable that in his report of the signing of the 20 June 1844 Ngai Tahu offer, Tuckett did not mention any demands for two reserves at Port Chalmers and Otepoti respectively. Nor did he refer to the somewhat dramatic withdrawal from negotiations and Ngai Tahu's departure for 10 days with Jones to Waikouaiti.

Symonds noted in his journal that Jones, who had arrived at Otago on the evening of 18 June 1844, had spent the next day trying "in his way" to settle matters without success (P3:9).{FNREF|0-86472-060-2|7.2.3|8} It appears Jones' discussion with Tuckett took place the same day. Symonds, in his report on the sale to Richmond, made no mention of any requests for reserves at the upper harbour foreshore. Years later, on 18 February 1880, he was questioned by Commissioner Nairn. Both Mr Nairn and Mr Izard appear to have had in mind the Princes Street reserve in the questions now reproduced.

Mr Nairn -Do you remember any particular spot of land which the Natives desired to except from the sale, and which was not reserved? -No, I do not. The places they mentioned to me were reserved by me. I do not know of any reserve which the natives desired to reserve from sale which was not reserved.

Mr. Izard -Did the Maoris point down to where Dunedin now is, and say they wanted any land reserved there? -No; I don't know that they did. I was very careful in reserving what they desired, and think I should have remembered it if they had requested land to be reserved which was not reserved. (C2:14:16-17){FNREF|0-86472-060-2|7.2.3|9}

Given Symonds' meticulous, if not pedantic, care in his supervision of the negotiations it would be surprising that he would not have recalled the incidents referred to by Topi Patuki and John Jones. Griffiths and Goodall comment on the view that the Maori claim stemmed from mis-kept promises of 1844:

The first recorded reference connecting the landing-place with the 1844 deed does not appear until a quarter of a century later; corroboration is insecure and came from interested parties; and there are strong indications that, as so often happens, the events of 1844 and the Mantell promises of 1852 became telescoped in people's minds.{FNREF|0-86472-060-2|7.2.3|10}

It is difficult to accept that the participants would not have recorded the demands for the two reserves, had they been made in the dramatic circumstances as depicted by Patuki and Jones. Even after a lapse of 26 years Symonds would surely have recollected it.

7.2.4 Having regard to all the circumstances, we are not satisfied that Symonds and Wakefield or Tuckett promised Ngai Tahu the two reserves on the upper harbour

foreshore. As we will explain, we believe the genesis of the Princes Street reserve lies in Mantell's initiatives in 1852. To this and associated matters we now turn.

Ngai Tahu Land Report

07 Princes Street Reserve

7.3 The History of the Princes Street Reserve

7.3. The History of the Princes Street Reserve

Mantell proposes a reserve for Ngai Tahu at Princes Street

7.3.1 Local Ngai Tahu quickly became important suppliers of fish, potatoes and other commodities to the new settlement at Dunedin. Griffiths and Goodall refer to "continual contemporary references to the presence...of the Maoris and their boats" at the Toitu estuary where they did "their briskest trade".{FNREF|0-86472-060-2|7.3.1|11} It became a natural trading post. Ngai Tahu in turn utilised the services of boat-builders and other tradesmen.

7.3.2 On 24 November 1852 Mantell, then commissioner of Crown lands for Otago, wrote to the colonial secretary, Domett (F2:104-105).{FNREF|0-86472-060-2|7.3.2|12} He informed the colonial secretary that Ngai Tahu at Otakou, Waikouaiti, Moeraki and elsewhere had "urgently and constantly" requested him to persuade the governor-in-chief to grant a small portion of land at both Port Chalmers and Dunedin for the erection of houses. Mantell advised Domett that Ngai Tahu had no other shelter than that provided by "their boats, oars and sails over a low unhealthy beach near the survey office" (F2:105).{FNREF|0-86472-060-2|7.3.2|13} Mantell asked the colonial secretary to put this request before the governor. In response to a request from Domett for plans of the proposed reserves, Mantell, on 18 April 1853, sent tracings to the colonial secretary. The tracings showed an irregular-shaped piece of land on the harbour side of Princes Street. Mantell advised that this was:

the only suitable piece of land now vacant; although steep towards the water it has (at X on the tracing) a spot where the Natives could easily construct a place for their boats to lie. (F2:15){FNREF|0-86472-060-2|7.3.2|14}

In a much later memorandum (3 January 1865) for the attorney-general, Mantell advised that he had not recommended the site proposed by Ngai Tahu but "a narrow steep between Princes Street and the mud flats of the harbour which was regarded as of less value, and as at that time almost out of the town" (F2:34).{FNREF|0-86472-060-2|7.3.2|15} Domett duly wrote to Mantell on 6 June 1853 advising, with reference to the two plans Mantell had forwarded in April, that:

His Excellency approves of these reserves being made as recommended by you, and has accordingly directed me to authorise you to purchase section 401 to complete the proposed reserve at Port Chalmers. (F2:16){FNREF|0-86472-060-2|7.3.2|16}

We note at this point that while the governor in June 1853 approved of the two reserves "being made" he had apparently not constituted them as such. Presumably

because the purchase of an additional section at Port Chalmers was first needed to "complete the proposed reserves". As we will see, more than the governor's approval would appear to have been necessary.

We do not really know why Mantell did not meet Ngai Tahu's wishes and recommend a reserve at or near the Toitu estuary. There is persuasive evidence that Mantell (an Englishman and an Anglican), was not on good terms with William Cargill, the superintendent of the Otago province, (a Scotsman and a Presbyterian), and that their somewhat petty rivalry severely strained their relations. The site chosen by Mantell was next to the presbyterian manse site. It was suggested that this may have been intended to be deliberately provocative (F1:12-13). It is possible that Mantell chose it because it was, as he claimed, the only piece of land then vacant, but he later suggested it was of little value and on the edge of town. This is why, perhaps, he does not appear to have told Ngai Tahu of his actions in obtaining Governor Grey's approval to a reserve being made at the Princes Street site adjoining the manse. More than a year later 107 Ngai Tahu signed a petition to Cargill, asking that some place of shelter be provided for them on any part of the beach or other part of the town of Dunedin as Cargill might think appropriate (F2:107-110).{FNREF|0-86472-060-2|7.3.2|17} Ngai Tahu appear at that time to have been unaware of Mantell's initiatives in relation to the site further along Princes Street.

7.3.3 Meanwhile Governor Grey's term of office expired on 31 December 1853 and he left New Zealand. On 12 May 1854 Mantell had forwarded the Port Chalmers conveyance of the section he was authorised to buy to the colonial secretary. On 5 June 1855, in response to an earlier suggestion from Mantell, the colonial secretary wrote-in Mantell's absence on leave-to the acting commissioner of Crown lands, Otago, sending:

certified plans of certain reserves at Dunedin and Port Chalmers, as enclosed in his [Mantell's] letter of the 18th April, 1853, to the Civil Secretary, in order that they may be duly recorded as approved by His Excellency. (F2:19){FNREF|0-86472-060-2|7.3.3|18}

These plans no doubt included the section at Port Chalmers purchased by Mantell on the authority of Governor Grey. There is nothing to suggest that Grey, who had departed some 18 months earlier, or his successor had taken any further steps to constitute the proposed sites as Maori reserves.

A Maori hostelry is erected in Princes Street

7.3.4 It was not until 1858 that the actions of Mantell and Governor Grey in respect to the Princes Street reserve became known to the Otago Provincial Council. In the meantime, the provincial council was contemplating erecting a Maori hostelry. In 1855 it considered there to be an "urgent necessity ...for the immediate erection of a suitable building at or near the beach, for the comfortable lodging of the natives in their visits to Dunedin..." (W2:appendix:1).{FNREF|0-86472-060-2|7.3.4|19} Within two weeks, on 24 April 1855, plans for a building for local Maori were approved by the provincial council (W2:appendix:2).{FNREF|0-86472-060-2|7.3.4|20} Shortly after however, it was decided that the plan was inadequate. Instead, the council approved of the superintendent's proposal to renovate the survey office near the

former Toitu estuary for the Maori people; "the site...being the one of all others most acceptable to the Natives" (W2:appendix:3).{FNREF|0-86472-060-2|7.3.4|21} The council left the superintendent to carry it out, but nothing appeared to come of it.

In 1857 the Otago Colonist, (at the time an anti-Cargill newspaper), reported a number of Maori women "huddled together cold and shivering upon the open beach, with the thermometer below freezing point, exposed to the rain and snow".{FNREF|0-86472-060-2|7.3.4|22} Such a sight, the newspaper claimed, "might have been seen any night during the past week in the Christian town of Dunedin..." (F1:34).{FNREF|0-86472-060-2|7.3.4|23}

7.3.5 It took the visit of Stafford, premier and colonial secretary, and C W Richmond, native minister, to Dunedin in November 1858 to stimulate action. They inspected various sites, including the Princes Street reserve, which they found to be unfit for the erection of a Maori hostelry (F2:26).{FNREF|0-86472-060-2|7.3.5|24} Earlier in the same year the commissioner of Crown lands, W H Cutten, had condemned as "utterly useless" the Princes Street site (F2:26).{FNREF|0-86472-060-2|7.3.5|25} At the same time Cutten questioned the authority of the governor to make the site a Maori reserve, on the grounds that the land in question had already been set apart as a public reserve under the Otago terms of purchase. This and related questions we discuss later.

Following the site visits by Stafford and Richmond, Richmond wrote from Dunedin to the provincial superintendent on 22 November 1858, advising that the general government wished to erect a hostelry for Ngai Tahu visiting Dunedin. He sought the superintendent's cooperation in providing a suitable site. He continued:

The only eligible situations that exist for the purpose are on the Beach frontage of the Reserve No. 7, lately granted to the Superintendent under the Public Reserves Act 1854, or on the adjoining strip of Beach frontage extending from the new Culvert along the line of High Street-on which a Smith's Shop now stands. (F2:245){FNREF|0-86472-060-2|7.3.5|26}

Richmond pointed out that the second piece of land was still in Crown ownership and the government could proceed to build a hostelry on it. But he was unsure, in the absence of the provincial chief surveyor, whether a building on this site might interfere with other contemplated public works. He therefore proposed to leave it to the provincial government to fix on a proper site within the limits proposed in his letter. And he further proposed:

that the Provincial Government will propose to the Provincial Legislature any legislation which may be requisite to secure the site in perpetuity for the use of the Natives, and for preserving a convenient landing place for their canoes at some point on the above-named Beach frontage. (F2:246){FNREF|0-86472-060-2|7.3.5|27}

In conclusion, Richmond sought early advice as to whether the superintendent concurred in his proposals as he was "desirous before leaving Dunedin of giving instructions respecting the erection of the Building"(F2:246).{FNREF|0-86472-060-2|7.3.5|28}

7.3.6 Evidently Richmond and Superintendent Cargill came to an arrangement during this time. The central government was to get a small piece of land for the Maori lodging house and in return:

they gave (or would give) to the Provincial Government the entire right to the ground between the culvert and Gallie's smithy. (along eastern side of Princes Street near intersection with High St.) (F1:37)

It appears that, following approval by central government of the plan prepared by the civil engineer, tenders were called (F1:37). The central government then went ahead without further consultation with the provincial government. In 1859 work began on the building on land known as reserve no 7 which had been granted to the superintendent in trust for public offices in June 1858 (W2:appendix:24-25).{FNREF|0-86472-060-2|7.3.6|29} This site was adjacent to the old survey office near the former Toitu estuary and was a very suitable location for a Maori hostelry.

7.3.7 Commencement of work on the hostelry prompted the provincial government to pass a Bill:

- authorising the superintendent to let part of reserve no 7 for a nominal rent to the governor of New Zealand. (The plan in the schedule to the Bill shows the Maori hostelry being built);

- stating that the lease was to expire whenever the provincial government should resolve that the site was required for town improvements and the building should be removed; and

- stating that the province would pay the cost of erecting a similar building in a convenient locality. (W2:appendix:9-10){FNREF|0-86472-060-2|7.3.7|30}

Cargill declined to approve this Bill. He explained why in a letter of 26 November 1859 to the colonial secretary.

With respect to the "Maori Lodging Bill" which nullifies the arrangement made last year between the General and Provincial Governments, and insomuch as I was a party to that arrangement I now write to Mr Richmond, who concluded it on the part of the General Government, to satisfy him that I was no party to this Bill... (W2:appendix:5-6){FNREF|0-86472-060-2|7.3.7|31}

The governor did not consent to the proposed Bill (W2:appendix:9).{FNREF|0-86472-060-2|7.3.7|32} Stafford wrote on 6 February 1860 to the Otago superintendent explaining why the governor had been advised to withhold his assent (F2:248-249).{FNREF|0-86472-060-2|7.3.7|33} Stafford expressed his regret that the Bill failed to give effect to the arrangement entered into in November 1858 with the general government in relation to the erection of the Maori hostelry, and continued:

On the faith of this arrangement funds have been provided for the erection of an Hostelry on the land agreed upon, being a portion of a reserve for public purposes recently handed over by the Crown to the Superintendent, and it cannot now but be a matter of surprise and disappointment to the Government to find that the Bill under

consideration, would substitute entirely different conditions as regards this building to those originally agreed upon. (F2:248-249){FNREF|0-86472-060-2|7.3.7|34}

It appears from Stafford's letter that in 1858, agreement had been reached with the province that the hostelry would be built on part of reserve no 7-which in fact is where it was built. Unfortunately he does not spell out the "entirely different conditions" which were originally agreed on, but which were not contained in the provincial Bill. In the result, a hostelry was constructed by the central government on land vested in the provincial government, and which consequently had no security of tenure.

According to Griffiths and Goodall the hostelry was a two-storeyed stone building with sleeping quarters upstairs and cooking facilities and market space downstairs. "It was a feature of the township for some years, then became swallowed up in the rapid reclamation of the foreshore".{FNREF|0-86472-060-2|7.3.7|35}

The fate of the Maori hostelry

7.3.8 By 1863 it seems the Maori hostelry fronting Princes Street, erected by the central government on provincial reserve no 7, was in a parlous condition. According to the clerk of the Dunedin Town Board, street-widening earthworks had resulted in the building being almost buried and "altogether unfit for occupation". To make way for necessary town improvements he recommended its removal or increase in height (W2:appendix:30).{FNREF|0-86472-060-2|7.3.8|36}

Nothing further is recorded concerning the fate of the hostelry until 1865 when, on 27 May, the Otago Executive Council received advice from A Chetham Strode, a central government official, that he had authority to remove the building (W2:appendix:39).{FNREF|0-86472-060-2|7.3.8|37} On 30 May 1865 the Otago Executive Council "Agreed to provide a Site for the Native Hostelry on the north side of Stewart Street Jetty" (W2:appendix:40).{FNREF|0-86472-060-2|7.3.8|38} On 8 September 1865 the council decided that "the materials of the Maori House be removed to the site approved by Mr Strode for re-erection" (W2:appendix:48).{FNREF|0-86472-060-2|7.3.8|39} In fact the building was not re-erected. Nor was any other hostelry provided for Maori at Dunedin either by the province or the central government.

Provincial government questions validity of the Princes Street reserve

7.3.9 While, as we have seen, belated provision was made by the Crown for a Maori hostelry in Dunedin, it was on a site with no security of tenure and it survived for no more than five or six years. Having recounted the rise and fall of the Maori hostelry further along Princes Street, we now return to the Princes Street reserve adjoining the manse site, to which Mantell had secured Governor Grey's approval in June 1853. In the year when the provincial council decided to dismantle the Maori hostelry, it instructed the superintendent, on 11 July 1865, to obtain from the colonial secretary the reasons for the delay in deciding "as to the so-called Maori Reserve in Princes Street south", and to suggest that the matter be laid before the general assembly (W2:appendix:42).{FNREF|0-86472-060-2|7.3.9|40}

7.3.10 As earlier indicated (7.3.4), Mantell's initiatives over the Princes Street reserve did not become more generally known until 1858. On 14 April of that year W H Cutten, then commissioner of Crown lands (and also the provincial secretary), reported to the superintendent on the topic of the 16 Maori reserves in Otago. Besides those reserves which he considered to strictly adhere to the description of Maori reserves, he referred to two others:

a reserve...made at Port Chalmers of nearly an acre in extent. It consists of sections 403 and 404, and a portion of unsurveyed land. It is not shown on the record plan. This reserve was recommended by Mr. Mantell, and was sanctioned by the Governor in 1854 and 1855.

A quarter of an acre adjoining, viz. section 401, was purchased by Mr. Mantell from Mr. R. Williams with the sanction of the Governor. The reserve was made under the pretence of its being required for the use of the Natives landing at Port Chalmers; but for that purpose it is entirely useless, as it has a steep frontage to the beach of considerable elevation. It has never been used by the Natives.

A reserve for a similar object was made at Dunedin. Its exact extent is not defined, but comprises all the land between the shore of the harbour and the east side of Princes Street, and abuts upon the land upon which the Manse has been built. This reserve was made upon the authority of the Governor; but it appears to me that His Excellency the Governor exceeded the powers vested in him in this latter case, the land in question having been already set apart as a public reserve under the Otago Terms of Purchase (F2:26).{FNREF|0-86472-060-2|7.3.10|41}

Cutten suggested it would be for the commissioner of native reserves to ascertain the correct legal position of each of these two reserves. Each he considered "utterly useless" for their contemplated purpose. The matter lay in abeyance until 1862 when the Otago gold rush, which had begun the previous year, greatly increased the population and commercial activity in the town of Dunedin. Shipping entering the port of Otago trebled within the year. New jetties in deeper water and reclamation of the foreshore proceeded. This greatly increased activity stimulated the trader John Jones and 18 other merchants to petition the governor to agree to the Princes Street Maori reserve being leased for storing various goods until the government required it for another purpose. In a report of 15 January 1862 to the secretary of Crown lands, Cutten advised that:

The land referred to by the petitioners was in the original survey of the Town of Dunedin laid off in sections, and ran some distance into the water below high water-mark. But as it was deemed advisable by the New Zealand Company that there should be no exclusive privilege to the water frontage, but that it should be made a public quay, the sections were withdrawn from the map and marked as reserved. Subsequently Mr. Mantell, the Commissioner of Crown Lands in Otago, selected a portion of the reserve, and recommended that it should be appropriated to the use of the Natives on their visits to Dunedin, an arrangement which I believe was sanctioned by His Excellency Sir George Grey. The Natives however never made use of the place, it being not suited to the purpose, but continued to land their produce at a small bay where the water is deeper, and upon which latter spot a stone house for their use has been erected by the General Government. A portion of the frontage reserve has

been used by the Provincial Government for the erection of Immigrant Barracks, and for Police Barracks and offices. In all probability the whole of the reserve will be required by the Government for public purposes, as but few reserves have been made in Dunedin. (F2:22){FNREF|0-86472-060-2|7.3.10|42}

In the meantime he recommended that small lots be let on an annual basis.

It is not clear whether Cutten considered the Princes Street land to be a Maori reserve. He pointed to the Maori hostelry and landing place being elsewhere by arrangement with central government. He thought it probable that the whole of the reserve would be required for public purposes. Whatever Cutten's views, the central government clearly had reservations about the position. In 1862 Cutten was required to pay the rents from the lots being leased into a bank account separate from other Crown revenue "to abide the decision of whether the reserve was a reserve for the Natives, or a reserve for the construction of a quay" (F2:34-35).{FNREF|0-86472-060-2|7.3.10|43}

Central government intervention

7.3.11 In April 1864 the central government sent an officer, H T Clarke, to Dunedin to investigate the Princes Street Maori reserve and the provincial government's objections to its designation as such. He discovered that it had now produced some œ5000 by way of revenue but learned little else. In November 1864 Walter Mantell again became native minister in the central government. He was now known as a champion of Ngai Tahu. On 3 January 1865 he wrote to Sewell, the attorney-general, about the Dunedin and Port Chalmers Maori reserves. He related his earlier attempts to secure the two reserves for Ngai Tahu. He concluded his memorandum by saying:

There is now no reason why the title to these reserves for Native purposes should not be distinctly recorded. How can that be done? (F2:34){FNREF|0-86472-060-2|7.3.11|44}

The attorney-general's response was to invoke the New Zealand Native Reserves Act 1856 as amended in 1862. On 6 January 1865 by order in council made pursuant to section 8 of the 1862 amendment, the governor, with the advice and consent of the Executive Council, delegated to A Chetham Strode (a government official) all of the powers of a commissioner appointed under the New Zealand Native Reserves Act 1856, in respect of the two Maori reserves set apart in Dunedin and Port Chalmers. This action necessarily assumed that such reserves did, as a matter of law, exist. The order in council did not, however, constitute them as such.

On 29 March 1865 the colonial secretary advised the superintendent that the general government wished to come to a decision as to the title to the Princes Street reserve site (F2:35).{FNREF|0-86472-060-2|7.3.11|45} The superintendent, J Hyde Harris, replied to the colonial secretary on 13 April 1865 and enclosed a copy of a letter of the same date to Postmaster-General Richardson which set out the grounds upon which he considered the provincial government was entitled to the Princes Street reserve land. In it he registered the province's protest against any act whereby the Princes Street reserve land might be transferred to trustees for Maori purposes (F2:35-36).{FNREF|0-86472-060-2|7.3.11|46}

7.3.12 Before referring further to Superintendent Hyde Harris' letter of 13 April, it is desirable to trace the history of this piece of land from the time it was Crown granted to the New Zealand Company on 13 April 1846 as part of the 400,000 acre Otakou purchase (C2:27:1-2).{FNREF|0-86472-060-2|7.3.12|47} Kettle, the New Zealand Company surveyor, initially provided a line of sections between Princes Street and the foreshore for selection by the colonists (F4).{FNREF|0-86472-060-2|7.3.12|48} However, on 21 October 1846, T C Harington, secretary of the New Zealand Company in London, on Cargill's initiative instructed Colonel Wakefield that all water frontages from about high-water mark should be reserved for public use (F2:123).{FNREF|0-86472-060-2|7.3.12|49} The necessary changes were accordingly made - the map of the south end of Dunedin showing the land having a water frontage as "Reserves for Public Purposes" (F2:47).{FNREF|0-86472-060-2|7.3.12|50} Mantell later testified that he was aware of this designation of the land at the time he recommended it as a Maori reserve (F2:45).{FNREF|0-86472-060-2|7.3.12|51} This raises the question of whether Governor Grey had legal authority to accede to Mantell's request that the Princes Street site be made a Maori reserve.

Legal complexities

7.3.13 In September 1845, prior to the Otago block being Crown granted to the New Zealand Company in 1846, the company had already agreed on terms of purchase with the Otago Association, initially in respect of some 144,600 acres of land including the site of the future Dunedin. By clause 14 of that agreement, if the association failed within five years to sell some 2000 properties, the New Zealand Company had the right to dispose of the remaining land (F2:138-144).{FNREF|0-86472-060-2|7.3.13|52} This provision was modified by revised terms of purchase on 1 August 1849. The five years given the association to sell the 2000 properties was to run from 23 November 1847.

In 1850 the New Zealand Company surrendered its charter to the Crown, pursuant to section 19 of an 1847 Imperial Act to promote colonisation in New Zealand (F2:148-155).{FNREF|0-86472-060-2|7.3.13|53} On doing so all New Zealand Company land in New Zealand reverted to the Crown "as Part of the Demesne Lands of the Crown in New Zealand, subject nevertheless to any Contracts which [should] be then subsisting in regard to any of the said Lands" (F2:154).{FNREF|0-86472-060-2|7.3.13|54} The British government recognised the continuance in force until November 1852 of the 1847 terms of purchase agreement between the New Zealand Company and the Otago Association (F2:163).{FNREF|0-86472-060-2|7.3.13|55} In February 1851 Governor Grey was instructed by the Colonial Office that he was to interfere "as little as possible with the course of management...already established by the New Zealand Company" (F2:173-174).{FNREF|0-86472-060-2|7.3.13|56}

By 23 November 1852 however, the Otago Association had not succeeded in selling sufficient land. Accordingly, the 1849 terms of purchase expired and legal control of all land within the Otago block was assumed by the Crown under the provisions of the New Zealand Constitution Act 1852.

7.3.14 The then colonial secretary, Sir John Pakington, in a despatch of 15 December 1852 advised Governor Grey that, until the general assembly constituted by the Constitution Act determined otherwise, he was to continue to administer the lands in

general conformity with the terms of purchase. The New Zealand Constitution Act 1852 was proclaimed in New Zealand and came into force on 17 January 1853. Section 72 empowered the general assembly:

to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown in New Zealand. (F2:203){FNREF|0-86472-060-2|7.3.14|57}

Pending the making of any such laws the Crown retained the right to regulate such matters. On 24 June 1853, Royal instructions were issued to Governor Grey pursuant to section 72 of the New Zealand Constitution Act 1852, requiring him to observe the 1849 terms of purchase in respect of all sales of land and licences until the New Zealand general assembly enacted otherwise (F2:190c).{FNREF|0-86472-060-2|7.3.14|58} This instruction was despatched to Grey by the colonial secretary, the Duke of Newcastle, on 1 July 1853. What is not clear is whether Governor Grey received Pakington's earlier despatch of 15 December 1852 (gazetted in New Zealand on 13 June 1853) before he approved the Princes Street Maori reserve being made in June 1853. Given the date of gazetting it seems likely he had. He is unlikely however, to have received the Duke of Newcastle's despatch of 1 July 1853 before he left New Zealand at the end of December of that year.

7.3.15 The position is further complicated by the possible application of the Royal instructions of 1846. Chapter 13 of these instructions related to the settlement of waste lands of the Crown. But these provisions were suspended from operation in New Munster (including Otago) until 5 July 1850. Until that date section 2 of Act 10 and 11 Victoria, chapter 112 (1847) provided that all rights, powers and authorities of the Crown might be exercised by the New Zealand Company. No direction was given by the Imperial Parliament for the extension of the suspension beyond 5 July 1850. Accordingly, chapter 13 of the 1846 Royal instructions again appears to have become fully operative in relation to the South Island. By additional instructions of 12 August 1850 (L4:appendix A), chapter 13 of the 1846 instructions was not to apply to the New Zealand Company and the Otago and Canterbury Associations to the extent they were inconsistent with the contracts entered into by the New Zealand Company with (inter alia) the Otago Association. But as a result of a further provision in the additional instructions, the whole of chapter 13 of the 1846 instructions became fully operative as from 23 November 1852 when the Otago Association, as we have seen, ceased to exist. What is not certain is whether chapter 13, and in particular section 17 which enabled the governor, with the advice of the Executive Council, to set aside reserves, continued to apply after the New Zealand Constitution Act 1852 came into force on 13 January 1853. Neither this nor other relevant issues were argued before us and we make no decision on the point. We will later discuss the implications of the litigation brought by Ngai Tahu in the case of Regina v Macandrew (1869) 1 CA 172 in which section 17 of chapter 13 played a central role.

The provincial government claims entitlement to the reserve

7.3.16 In the meantime we return to our consideration of the fate of the Princes Street reserve. We resume our narrative at the point in 1865 when, by a letter of 13 April, the Otago superintendent advised the New Zealand colonial secretary of the grounds upon which the province claimed to be entitled to the Princes Street reserve. These related to the action of the New Zealand Company in October 1846 in instructing

Wakefield to reserve all water frontage land above high-water mark for public use; and the failure of Mantell to consult with or advise the Otago Association of his actions and associated matters. The Otago province had at least an arguable case:

- Mantell acted the very first day after the Otago Association ceased to have control over the Otago block land;

- he did not, when seeking to have the land reserved for Maori purposes, advise the governor of the then status of the land;

- there is no evidence that Governor Grey knew the status of the site of the proposed Princes Street reserve when he approved it being made a "Native Reserve";

- Mantell did not seek clarification from the civil secretary of his powers in relation to former New Zealand Company sections, and in particular, sections reserved for a future municipal corporation; and

- he was advised by the civil secretary, Domett, on 9 November 1853 that "With the sections reserved for a contemplated Municipality the Government cannot interfere" (F2:223).{FNREF|0-86472-060-2|7.3.16|59}

7.3.17 On 20 October 1846 Wakefield was expressly instructed with regard to water frontages that instead of being sold they should:

REMAIN IN EVERY INSTANCE, THE PROPERTY OF THE PUBLIC - OR OF THE MUNICIPALITY AS THE REPRESENTATIVES AND TRUSTEES OF THE LOCAL PUBLIC. (F2:113){FNREF|0-86472-060-2|7.3.17|60} (emphasis in original)

Had Mantell, before he initiated his application for a reserve in 1852, consulted with Cargill (at that time both superintendent and commissioner for Crown lands for the Otago block), he would no doubt have been told of the status of the land, assuming he did not already know. The province would have had notification and could have communicated with the governor. Instead, as we have seen, Mantell's actions in relation to the Princes Street reserve did not become generally known until 1858, from which time the governor's authority to create the Princes Street reserve was questioned by the Otago province.

7.3.18 Further correspondence ensued between the province and the postmaster-general designed to establish that the New Zealand Company had withdrawn the harbour-fronting sections from sale and reserved them for public purposes (F2:37).{FNREF|0-86472-060-2|7.3.18|61} A provincial council select committee reported on the reserve. The council adopted the committee's report, which reached a similar conclusion, on 17 May 1865. It pointed out that when he left office in 1855 Mantell had "stripped his office of all official documents" (F2:39).{FNREF|0-86472-060-2|7.3.18|62} The committee recommended the issue of a Crown grant be sought from the general government and the accrued rents be paid to the province.

Meanwhile, Mantell lost the support of Postmaster-General Richardson, a Dunedin politician who for a time was also acting-superintendent of Otago. Richardson urged that the province be given an opportunity of a fair hearing of its claim to retain the

reserve (F2:40).{FNREF|0-86472-060-2|7.3.18|63} Although on 29 June 1865 Attorney-General Sewell gave an opinion that the Princes Street site had been "duly reserved as a Native Reserve..." (F2:42){FNREF|0-86472-060-2|7.3.18|64}, the government appointed a select committee of the House of Representatives which reported on 25 August 1865 its conclusion that:

After a careful consideration of the above facts, as to the equity of the case, your Committee have arrived at the conclusion that the land forming the Dunedin Reserves, having been reserved from sale for a specific public purpose, was wrongfully set aside for the use of the Natives, and therefore recommend that a Crown Grant be issued in favour of the Municipality of Dunedin, as trustees and representatives of the local public, as was evidently the intention of the New Zealand Company, conveyed in the instructions of Mr T. C. Harington to Colonel Wakefield. (F2:44){FNREF|0-86472-060-2|7.3.18|65}

The reserve is granted to Otago province

7.3.19 The issue was soon to become embroiled in provincial politics. Professor Alan Ward in A Show of Justice succinctly describes how a cabal of politicians came to strike a bargain. Late in the 1865 session the new native minister, J E FitzGerald, (Mantell having resigned at the end of July), introduced a Native Provinces Bill which Ward relates:

envisaged the creation of semi-autonomous Maori provinces...

The Bill was regarded as a serious issue, especially by the Auckland members who stood to lose most by the making of three Maori Provinces within the existing Auckland Province. It was defeated by a formidable display of 'log-rolling', Auckland gaining the support of Wellington and Otago in return for agreeing to a clause in the Native Lands Act reserving to Wellington monopoly rights of purchase in the Rangitikei-Manawatu block, and (for Otago) the transfer of the Princes Street Reserve to that Province.

Thus was policy made in the Parliaments of the 1860s. (F1:54){FNREF|0-86472-060-2|7.3.19|66}

On 13 September 1865 the following resolution was carried by the House of Representatives:

That in the opinion of this House, the public reserve in the City of Dunedin, which was set aside by the New Zealand Company as trustees for the settlers in 1846 for the purpose of a wharf and public quay, and on which the police and immigration barracks at present stand, should be vested in the Superintendent of Otago, in trust for the municipality of Dunedin, as originally intended. (F2:258){FNREF|0-86472-060-2|7.3.19|67}

7.3.20 On 4 November 1865, no doubt as a result of the resolution of the House, two Crown grants were sent by the Otago Crown grant clerk to the secretary for Crown lands, Wellington, for the governor's signature. One of these, grant 4871, was for a "Piece of land situate in Princes Street Dunedin" for "Public utility".{FNREF|0-

86472-060-2|7.3.20|68} The colonial secretary, Stafford, on 21 November 1865 demanded more specific details of the purpose of the reserve. In his reply of 28 December 1865, the superintendent advised that it was "a reserve for wharves and quays", that being the purpose for which it was originally set apart" (F2:49-50).{FNREF|0-86472-060-2|7.3.20|69}

The Crown grant was placed before Governor Grey at a meeting of the Executive Council on 11 January 1866 and duly signed by the governor, who is stated to have done so on the advice and consent of the council. Present as members of the Executive Council were Stafford (the premier), Russell and Paterson. It granted one acre, two roods and thirty four perches to the superintendent of the Otago province:

in trust as a reserve for public Wharves and Quays and other purposes connected therewith of public utility to the Town of Dunedin and its inhabitants. (F2:282-284){FNREF|0-86472-060-2|7.3.20|70}

7.3.21 Governor Grey, in reporting to the Duke of Buckingham on Topi Patuki's petition to the Queen of 17 August 1867, enclosed a report by J C Richmond, native minister. Grey informed the duke that he:

will find from this Memorandum that my Responsible Advisers, at a meeting of the Executive Council, inadvertently advised me to sign a Crown Grant, dated the 11th January, 1866 by which the reserve in dispute was granted to the Superintendent of the Province of Otago, and which grant I signed in ignorance of what I was doing. (F2:60){FNREF|0-86472-060-2|7.3.21|71}

In the enclosed memorandum Richmond, after referring to the resolution of the House of Representatives based on the select committee report declaring that a grant to the superintendent should be issued under the Public Reserves Act, said:

The Government of the day proposed that an amicable suit should be instituted to try the questions of authority on one side and the other which had been raised. The Provincial Government never acquiesced in this proposal. Mr. Stafford, then Colonial Secretary, was advised that to bring the matter into Court a grant must issue to one party or the other, and had intended to recommend a grant; but in the meantime, inadvertently as regards His Excellency and the Colonial Secretary, a grant which had been prepared on the authority of the resolution of the House of Representatives was presented for signature and issued. (F2:61){FNREF|0-86472-060-2|7.3.21|72}

Some 10 years later Grey, by then a member of the New Zealand House of Representatives, gave a more detailed explanation to the Native Affairs Committee on 1 November 1877 (F2:368-9).{FNREF|0-86472-060-2|7.3.21|73} He recalled that following discussions with the law officers, he had decided he ought not to sign the grant until further discussions took place. Grey continued:

A number of grants were formally presented to me in Executive Council for my signature, and I signed them. I believed that one of the grants presented to me for signature was the grant for this land in question, but I could not positively identify it; and as the Colonial Secretary, who presented the grants to me, was perfectly satisfied that it was not the grant for this reserve I signed it. Subsequently it turned out that the

grant had been signed. It was done under a mistake, or, as Mr. Richmond put it here, "inadvertently as regards His Excellency and the Colonial Secretary." I believe there is further evidence of that in existence in the shape of a report of a speech delivered by the Hon. Mr. Stafford. It was discovered the same day that the grant had been signed improperly, and the Government tried to recover possession of the grant, but it was found the grant had been sent off that day in a vessel going to Otago, and in that way the land passed into the possession of the Municipality or the Provincial Government of Otago. (F2:368){FNREF|0-86472-060-2|7.3.21|74}

On 21 August 1867, 18 months after the Crown grant was signed, Stafford also explained how the grant came to be signed:

Of the three Ministers whose names were attached to the grant, not one was aware of it. He was bound to say how the irregularity occurred. As far as he could remember, there had been an application for a grant for a reserve, which turned out to be this one; and there were, at the same time, other grants, which were addressed in the ordinary way to the Secretary for Crown Lands, and he, not finding it stated for what purposes the grant was sought, referred it back to the Commissioner in Dunedin. The Commissioner stated, in reply, that it was for certain public purposes, which appeared to the Secretary sufficient. It happened, at that time, that His Excellency was about to make a visit to the North, and there were arrears of business at the end of the session, and after the Executive Council had commenced to sit, these grants were forwarded from the Crown Lands Office without the customary schedule showing what they were for; and it so happened that a number of grants which then came from the Secretary for Crown Lands, were signed hastily by His Excellency and countersigned by his Ministers. He was unaware of the purpose of the grant at the time, but he did not wish the House to think that if he had known it he would not have recommended it; for his desire was to have the grant signed, so that there might be a status for a case in the Supreme Court. (F2:260){FNREF|0-86472-060-2|7.3.22|75}

It will be recalled that on 21 November 1865 Stafford had written to the Otago superintendent for more details of the purpose of the reserve referred to in the Crown grant, and the superintendent replied as late as 28 December 1865, only two weeks before the grant came before the Executive Council at which Stafford was present and at which it was signed. Yet Stafford says he was unaware of the purpose of the grant at the time. Moreover, both Grey and Stafford assert that several grants were formally presented to the governor at the Executive Council for his signature. But as the claimants have shown by producing a copy of the minutes of the Executive Council for 11 January 1866 (W2:appendix:17-19){FNREF|0-86472-060-2|7.3.21|76}, only one grant, and that being in respect of the Princes Street land, was that day in fact presented to and approved by the Executive Council, comprising Governor Grey, Stafford (described as Prime Minister), Russell (native minister), and Paterson.

7.3.22 It strains our credulity to accept that the signing of the grant was "inadvertent" as claimed by both Grey and Stafford. Rather, as Professor Ward, in discussing this incident pointed out:

The Stafford Government had come into office dependent upon support from Otago members, secured by promises to give the Otago Provincial Council a grant for the Princes Street reserve.{FNREF|0-86472-060-2|7.3.22|77}

The evidence compels us to the view that the decision to sign the Crown grant was essentially a political one; a decision moreover taken without consultation with Ngai Tahu and with no apparent regard for their interests.

On 20 December 1866 the provincial council passed the Dunedin Reserves Management Ordinance to transfer certain lands, including the Princes Street reserve, from the superintendent to the Dunedin City Corporation. But because the dispute over the reserve was not yet settled, the governor, on the advice of the general government, disallowed the ordinance. It did not receive the governor's assent until 1873 when, after litigation and a negotiated settlement, the title to the land was finally settled in favour of the province (F8).{FNREF|0-86472-060-2|7.3.22|78}

Ngai Tahu Land Report

07 Princes Street Reserve

7.4 Ngai Tahu are Forced to Litigate

7.4. Ngai Tahu are Forced to Litigate

7.4.1 No sooner was the Crown grant received in Dunedin than the council applied to the general government for payment of the accrued rents on the Princes Street reserve (F1:60). The government was uncooperative and Stafford questioned the right of the province to the rents accrued prior to the Crown grant (F2:50).{FNREF|0-86472-060-2|7.4.1|79} In August 1866 H K Taiaroa wrote to the governor protesting that the Princes Street reserve had been taken from Ngai Tahu. The Stafford government, apparently troubled by the course of events, wrote to the Otago superintendent in October 1866 (F2:51){FNREF|0-86472-060-2|7.4.1|80} advising that the government had decided "the question of the validity of the grant should be submitted to a proper judicial tribunal". The superintendent was invited to bring the matter before the Supreme Court by writ of intrusion. Not surprisingly the superintendent declined to do so.

7.4.2 The matter dragged on. It appears to have been brought to a head by Topi Patuki's initiative, with support from Mantell, by now a member of the Legislative Council, in petitioning the governor on 15 July 1867 to support proceedings in the Supreme Court:

to ascertain...whether or not a remedy can be found for a great wrong and infringement of our rights which we conceive to have been committed. (F2:53){FNREF|0-86472-060-2|7.4.2|81}

The petition requested the governor to appoint a lawyer for Ngai Tahu:

in order that our right to this reserve and to these funds [the accrued rents] may be fairly tried in the Supreme Court. (F2:54){FNREF|0-86472-060-2|7.4.2|82}

Topi Patuki complained that Ngai Tahu had never been warned that the Maori reserve was about to be handed over to the provincial authorities, nor had they been given a chance to defend their title to the land.

7.4.3 The government responded promptly on 18 July 1867 by advising Patuki's lawyer, C B Izard, that the governor had assented to legal proceedings being taken in the name of the Crown by way of scire facias or such other means as Izard thought appropriate. It was to be understood that in agreeing to this course the government expressed no opinion on the validity or otherwise of the Crown grant (F2:54).{FNREF|0-86472-060-2|7.4.3|83} Later that month the native minister, J C Richmond, advised Mantell that the government would guarantee Ngai Tahu legal expenses up to œ200 (F2:54-55).{FNREF|0-86472-060-2|7.4.3|84} A few weeks

later, however, Richmond advised Mantell by letter (19 August 1867) that the government felt obliged to withdraw its offer to guarantee Ngai Tahu's costs so far as the future was concerned, but undertook to meet costs incurred up to the date of the letter. Not surprisingly Mantell was greatly incensed and he protested in the strongest terms to Richmond (F2:58-59).{FNREF|0-86472-060-2|7.4.3|85} Two months later, on 26 October 1867, Governor Grey authorised the payment of œ400 from the proceeds of other Ngai Tahu funds on the basis of a loan (F2:64){FNREF|0-86472-060-2|7.4.3|86}, and so early in August Izard issued proceedings and a writ of scire facias was served on the superintendent of Otago on 13 August 1867.

7.4.4 At much the same time, 7 August 1867, Stafford introduced a (Dunedin) Princes Street Reserve Bill in the House of Representatives (F2:59).{FNREF|0-86472-060-2|7.4.4|87} Its purpose was to authorise the payment of the accrued rents on the Princes Street reserve site, amounting to œ6031 18s 9d, to the Otago province, to be held in trust for the same purpose for which the land had been Crown granted to the superintendent. It contained no provision protecting the rights of Ngai Tahu in the event of the legal proceedings authorised by the government being successful. Strong protests by Mantell (F2:59){FNREF|0-86472-060-2|7.4.4|88} and further petitions by Topi Patuki, including one to the Queen, praying that the Bill be not passed, resulted in an amendment to the Bill, before being passed by the House of Representatives. Clause 3 now protected Ngai Tahu rights in the event of the court proceedings upholding their right to the land (F2:330).{FNREF|0-86472-060-2|7.4.4|89} The Bill in fact lapsed in the Legislative Council on 12 September 1867 (F1:72).

The Otago province offers a settlement

7.4.5 The general government deferred reporting to the Colonial Office on Patuki's petition to the Queen in the hope that:

an arrangement of an equitable kind might be effected between the two claimants to the reserve-the Province and the Ngaitahu tribe. (F2:60){FNREF|0-86472-060-2|7.4.5|90}

The provision inserted in clause 3 of the (Dunedin) Princes Street Reserve Bill protecting Ngai Tahu interests appears to have stimulated the Otago province into seeking a compromise. The superintendent, Macandrew, advised Richmond, native minister, by letter of 27 August 1867, that the province was prepared to set aside for Maori purposes a piece of land at Pelichet Bay of equal area to the Princes Street reserve. Further, the province would undertake to expend not less than œ1000 on erecting a suitable home, or Maori hostelry, to be built in brick. This offer was made without prejudice to the province's rights in the Ngai Tahu proceedings before the Supreme Court (F2:383a-b).{FNREF|0-86472-060-2|7.4.5|91} Izard was not impressed with the offer (F2:334).{FNREF|0-86472-060-2|7.4.5|92} In September the mayor of Dunedin and the Otago province decided to withdraw their Pelichet Bay offer and to defend the Supreme Court proceedings. On 12 September 1867 the superintendent agreed to refund the back rents if the Ngai Tahu action was successful, and to accept the rents in the meantime, on those terms. The sum of œ6031 18s 9d was paid over by the colonial treasurer on 24 September 1867 on that condition (F2:67).{FNREF|0-86472-060-2|7.4.5|93}

7.4.6 In May 1868 the Native Land Court held its first sitting at Dunedin. An application on behalf of Ngai Tahu to have matters relating to the Princes Street reserve investigated was declined by the court on the ground that the land had been Crown granted. The applicants were told they would have to go to the Supreme Court (F2:340).{FNREF|0-86472-060-2|7.4.6|94}

The Ngai Tahu proceedings known, as Regina v Macandrew (1869) 1 CA 172, were brought in the name of the Queen, on behalf of Ngai Tahu, against the superintendent of Otago, J Macandrew (F2:341-362). They sought a declaration by the court that the Crown grant of the Princes Street reserve be set aside, on the ground that the governor had previously reserved the land for the use of Ngai Tahu visiting Dunedin. It was claimed, on behalf of Ngai Tahu, that the reserves, recommended by Mantell in his letter of 18 April 1853 and Domett's letter of 6 June 1853 advising the governor's approval, "were duly made". Reliance was placed on section 17 of chapter 13 of the Royal instructions of 1846. This and all other claims made on behalf of Ngai Tahu were disputed by the superintendent.

Court of Appeal judgment

7.4.7 In the Supreme Court Mr Justice Ward held that section 17 of chapter 13 of the Royal instructions did not give the governor power to make the reserve in question. In the Court of Appeal the court assumed (without deciding) that section 17 of chapter 13 applied to the making of the Maori reserve. They disagreed with Mr Justice Ward's Supreme Court decision that section 17 was not wide enough to cover the making of such a reserve. However, they went on to point out that the power to make such a reserve was not given to the governor alone, but to the governor with the advice and consent of the Executive Council. As the court emphasised, it had not been pleaded or proved that the application for the reserve had been submitted to the Executive Council and approved by it. This was held by all five judges to be fatal to the proceedings. But Mr Justice Richmond went on to stress in his judgment that the court had acted on an assumption that the power of the governor, with the advice of the Executive Council, to make such a Maori reserve, depended upon the Royal instructions of 1846. He then said:

I believe I express the opinion of the whole Court when I say that, although we have necessarily pressed upon that point, we have in the course of the argument felt that the Instructions of 1846 did not regulate the matter. (F2:362){FNREF|0-86472-060-2|7.4.7|95}

What Mr Justice Richmond is saying is that the case was put on the basis that the Royal instructions of 1846 applied. The court itself dealt with the case on that assumption but it did not consider the assumption to be sound.

Unfortunately the official report of the case does not give details of the argument of counsel or the judges' comments on this critical point. It is not clear why all members of the court considered that the 1846 Royal instructions did not apply. It may have been because of the uncertainty engendered by the coming into force of the New Zealand Constitution Act 1852 in January 1853, and the consequential doubt as to just what power the governor had in June of that year to make the reserve in question. The effect of the judgment is that Ngai Tahu were wrong in assuming they could rely on

section 17 of chapter 13 of the Royal instructions as giving the governor power to make the reserve. Further, even had the governor been entitled to act under section 17, it had not been shown that he had acted with the advice and consent of the Executive Council, and so the Crown grant to the Otago superintendent remained in force.

A settlement is reached

7.4.8 In April 1870 Ngai Tahu's lawyer, Izard, wrote to the attorney-general confirming that an appeal would be taken to the Privy Council (F2:385-6).{FNREF|0-86472-060-2|7.4.8|96} Not until February 1872 was advice received from London that the Privy Council had given leave to appeal (F2:576-7).{FNREF|0-86472-060-2|7.4.8|97} In August 1872 on Taiaroa's application, the government agreed to grant œ500 to meet Ngai Tahu's legal costs and œ150 was sent immediately to England (F2:394a).{FNREF|0-86472-060-2|7.4.8|98} Soon after this Superintendent Macandrew suggested that the "proceedings [be] stopped, to save the money being squandered in law" (F2:373).{FNREF|0-86472-060-2|7.4.8|99}

On 22 November 1872 Izard wrote to Topi Patuki as follows:

I have been endeavouring to make a compromise with regard to the claims of yourself and your tribe to the Princes Street Reserve.

It is the best bargain I can make, and is approved of by Mr. Mantell. I do not think that the Maoris are entitled to anything less, in strict justice, than the whole of the land, but we must consider the chances of their success in the suit that you have commenced. Before it could be brought to a conclusion a very long and expensive litigation would have to be gone through, and one that might not result in the Native claims being established. If the suit failed, the Natives would get no part of the land at all.

Considering all these points, I recommend that you should agree to the terms I am about to mention. They were settled in a long interview between Mr. Vogel and myself, and have been submitted to Mr. Mantell, who agrees with me in thinking that the best thing to do is to accept them.

The terms of agreement, of which I send a copy, amount substantially to this, viz:- The present suit to be stopped, and each side to pay its own costs. The Provincial Government of Otago to pay to Mr. Mantell, and Mr. McLean, if he will consent to act, the sum of œ4,650, and to pay to the General Government the sum of œ500 to cover an amount advanced by the Government for the purposes of the suit. The sum of œ4,650 and the sum of œ350 which Mr. Mantell has now, making altogether œ5,000, to be divided among the Natives according to their own wish. This sum of œ5,000 will therefore be free from deductions, and the Natives are not to pay anything to refund the moneys that have been advanced for the purposes of the suit. In addition to the sum of œ350 mentioned above, œ150 has been sent to England, and I fully believe that this œ150 will fully pay all expenses. Of course the suit is not to be stopped until the money is paid.

This arrangement requires your sanction. Think over it carefully, and let me have your answer as soon as possible, because, if you agree to it, the sooner I can stop

proceedings in England and any further expenses there the better. If you do not agree to the above terms, the suit must go on; but I strongly recommend you to accept them. They are, in my opinion, as good terms as can be got, and the sum of œ5,000 will fully represent the value of the ultimate chance of getting the land. Do not delay in giving me your answer; let it be in Maori, written by yourself, and get some friend to turn it into English that I may understand it. (F2:379-380){FNREF|0-86472-060-2|7.4.8|100}

7.4.9 Mantell also approved the proposed settlement. In a letter to the Reverend Wohlers on Ruapuke at the same time as he wrote to Patuki, Mantell said:

the terms offered are beyond what I dared to hope, considering the overwhelming odds against them. (F2:573-575){FNREF|0-86472-060-2|7.4.9|101}

In making his recommendation Izard no doubt had full regard to all the legal difficulties and uncertainties. He would almost certainly have known, as we have learnt from a search of the Executive Council minutes for the relevant period in 1853, that in fact Governor Grey did not obtain the advice and consent of his Executive Council to his approving a reserve being made in Princes Street, as recommended by Mantell. Doubts as to whether the 1846 Royal instructions applied must also have concerned Izard, given Mr Justice Richmond's statement in his Court of Appeal judgment. The legitimacy of the New Zealand Company's prior action, in setting aside the land in question as a public reserve for wharves and quays, must also have weighed with him. At this distance it is difficult to escape the conclusion that, given all the legal uncertainties and the failure of the governor, assuming he was entitled to act under section 17 of chapter 13 of the 1846 Royal instructions, to comply with his terms, the settlement was not only justified but was the wisest course for Ngai Tahu to adopt.

7.4.10 As will be seen, the agreed sum of œ5000 was paid out to the Ngai Tahu people in January 1874. We received evidence from Mr Ah-Lek Tay, a registered valuer called by the Crown, that in 1866 the value of the Princes Street reserve, of one acre, two roods and 34 perches, was œ12,600; in 1877 it was œ25,200 (O1:1). The land was Crown granted in January 1866 to the Otago superintendent. How good the settlement was in monetary terms depends on what date is thought appropriate as the base date.

7.4.11 Patuki and H K Taiaroa both sought to have the œ5000 divided between them, and each would make part of their share available for distribution to the tribe. Patuki wanted to use his share to build a house (F2:426-7; 422-3).{FNREF|0-86472-060-2|7.4.11|102} Eventually, on 30 September 1873, the trustees of the fund, W Rolleston and D McLean, agreed that œ1000 would be paid to each of Topi Patuki and H K Taiaroa in recognition of their initiative in instituting the proceedings and obtaining a settlement; the balance to be distributed as agreed upon by Patuki and Taiaroa "and some European gentleman to be selected by them to assist" (F2:436-437).{FNREF|0-86472-060-2|7.4.11|103}

In January 1874 the monies were distributed. Patuki and Taiaroa each received œ1000; T Karetai and K Karetai and family, œ225; T Ropitini and others of Otakou, œ850; H Nani and others, œ225; A Kihau, œ200; Te Koti, Te Rato, Ihaia Tainui and

others, œ120. œ15 went to Rakiura, œ20 to Ruapuke, œ25 to Hokitika, œ20 each to Moeraki and Waikouaiti, and œ50 to all the Canterbury kaika (F2:454-475; F1:88).{FNREF|0-86472-060-2|7.4.11|104}

Ngai Tahu claim the accrued rents

7.4.12 The sum of œ6031 12s 9d had accrued by way of rents paid up to the time of the Crown grant to the Otago superintendent in January 1866. On 6 March 1874 Taiaroa wrote two letters to McLean, the native minister. In one he reported the distribution of the œ5000 as having taken place except for some œ700 (F2:477-479).{FNREF|0-86472-060-2|7.4.12|105} In the second he wrote claiming the accrued rents from the Princes Street site up to the date of the Crown grant (F2:580).{FNREF|0-86472-060-2|7.4.12|106} Taiaroa renewed his application for the back rents to Julius Vogel on 21 July 1874 (F2:580).{FNREF|0-86472-060-2|7.4.12|107} Further unacknowledged efforts were made by Taiaroa in 1875 and 1876 (F1:90). Finally, in 1877 Taiaroa petitioned Parliament for the payment of the œ6000 back rent, plus interest. The Native Affairs Committee of the House of Representatives held a hearing on the petition. Predictably, Macandrew from Dunedin claimed the earlier payment of œ5000 was "a complete and final settlement of the whole thing" (F2:373-4).{FNREF|0-86472-060-2|7.4.12|108} Izard testified that the question of back rent had not come up at the time of the compromise of the court proceedings. The œ5000 was accepted, he said, for the sake of peace and quietness, and Ngai Tahu were "paid" to leave them in possession of the land (F2:371).{FNREF|0-86472-060-2|7.4.12|109}

The Native Affairs Committee, chaired by John Bryce, reported that:

there appears to have been a misapprehension as to the full extent of the compromise enacted by the payment of the sum of œ5,000 to the Natives, and the two parties understood the agreement differently. That, under all the circumstances, it is highly desirable to remove all further grounds of complaint; and the Committee is of opinion that a further payment should be made to the Natives of the rents which had accrued prior to the issue of the Crown grant, or a reserve should be made of land to that value, for the benefit of the Natives interested. (F2:364){FNREF|0-86472-060-2|7.4.12|110}

7.4.13 In December 1877 the government approved the payment of œ5000 out of the œ6031 12s 9d accrued by way of rents. Why only œ5000 was to be paid and not the full sum, as recommended by the Native Affairs Committee, is not known. Nor is it known whether the committee's alternative suggestion, that a reserve should be made to the value of the accrued rents, was considered. On 7 June 1878, œ1000 of this money was paid, with the agreement of Patuki and Taiaroa, to certain Ngai Tahu assembled at Kaiapoi by the Reverend James Stack (F2:506-507).{FNREF|0-86472-060-2|7.4.13|111} The remaining œ4000 was remitted to Dunedin on 17 June 1878 and credited to the official account of Newton Watt, the resident magistrate, who in turn, without authority, paid it into a deposit account in the Bank of New Zealand in the joint names of Taiaroa, Patuki and himself, but subject to the condition that it could not be withdrawn except on the authority of the colonial treasurer. There the money remained until May 1880, earning interest amounting to some œ400 over the period of nearly two years. It lay there because Taiaroa refused to sign the receipt and

discharge for the œ4000 in full satisfaction of all claims to the rent, because of the œ1000 which the government had declined to pay over. In short, Taiaroa sought payment of the full œ6000 whereas Ngai Tahu were being asked to accept œ5000 in full satisfaction, of which they had already received and paid out œ1000 (F2:592).{FNREF|0-86472-060-2|7.4.13|112}

7.4.14 Eventually the patience of the native minister Bryce wore thin and he threatened, unless the œ4000 was accepted in full satisfaction, to have the funds returned by Mr Watt to the public account. In fact the Bank of New Zealand, in compliance with instructions, transferred the œ4000 to Mr Watt's official account, while the interest of œ400 was paid direct to the public account. This occurred on 4 May 1880, on which day Mr Watt withdrew the œ4000 from his official account and the following day paid it over to the Ngai Tahu people at Otakou Heads, in the presence of Patuki and Taiaroa. The next day he advised the Native Department that the previous day he had paid over the œ4000 and "a receipt in full" was taken from Ngai Tahu (F2:593).{FNREF|0-86472-060-2|7.4.14|113} This receipt, which Taiaroa had earlier refused to sign, was in the following form:

We, the persons whose names are attached, certify that the œ4,000 we have received is the balance of the final payment on account of the Princes Street Reserve, Dunedin. This is the final payment for that reserve to us, nor shall any person or persons claiming that land through us ever make a further demand for payment on account of that land hereafter for ever upon any ground whatsoever. This is the last and final payment, in final and complete extinguishment of the title of all of us for that land. (F2:598){FNREF|0-86472-060-2|7.4.14|114}

Subsequent unsuccessful efforts were made by Taiaroa to obtain payment of the œ400 interest on the accrued rents while they were held in the deposit account (F1:96-97).

Watt, in reporting on the distribution of the œ4000 at Otakou Heads, gave no particulars as to precisely how the money was divided up, but on 14 March 1879, on instructions from Sheehan, the then native minister, Watt was advised that the minister had agreed with Taiaroa on the following distribution:

- œ1000 to Topi Patuki;

- œ1400 to Taiaroa; the extra œ400 being in consideration of the work done by him and lawyers' fees paid by Taiaroa; and

- the balance to be divided by Watt, Patuki and Taiaroa among the people entitled to receive it, as was formerly done.

We think it likely that the distribution would have followed this pattern.

7.4.15 Dr Ann Parsonson (F1:98-100) provided details of various later attempts by Ngai Tahu to obtain further compensation for the loss of the Princes Street reserve. These included a hearing before the Native Land Court in 1939 which rejected a submission made on behalf of Ngai Tahu that the Maori had never had their claim tested on its merits (F1:104). Judge Shepherd, whose report on the case was delayed

until 1945, concluded that the two payments received by Ngai Tahu meant they could not claim to have been unfairly treated.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

07 Princes Street Reserve

7.5 Ngai Tahu's Grievances

7.5. Ngai Tahu's Grievances

7.5.1 Throughout the long and tortured history of the Princes Street reserve it appears that Ngai Tahu, the ostensible beneficiaries, were rarely, if ever, consulted. There could be no doubt they needed, in the short term at least, a suitable landing place and adequate shelter, including a base for their trade, in the new settlement. It was reasonable for them to apply, as they did, to Mantell in 1852, and again in November 1854 to the provincial superintendent, for the provision of accommodation during their visits to Dunedin to trade. While Mantell responded promptly, he recommended an unsuitable site both in terms of the landing place and for accommodation. Nor, having obtained the governor's assent in 1853, does he appear to have told Ngai Tahu of what had been approved.

We do not know when Ngai Tahu first learned of the Princes Street reserve. It may not have been for some years. We do know that Ngai Tahu continued to use the Toitu estuary site as a landing place, making shift as best they could on the beach. Not until 1859 was a stone house, near the old survey office, erected as a Maori hostelry. While it was located where Ngai Tahu wanted it to be, it remained for no more than five or six years. It was not replaced. The Princes Street reserve was perhaps used intermittently by Ngai Tahu. We have one account of crayfish being sold from the site in 1864, but it never served the purpose for which it was ostensibly set aside by Grey in 1853.

7.5.2 The manner of it being Crown granted to the Otago province in January 1866 reflects no credit on the Crown. It is difficult to escape the conclusion that Governor Grey and his three ministers, including Premier Stafford, did not act "inadvertently". The most likely explanation is that given by Professor Ward, that it was the result of a "deal" between northern and southern politicians, with a new government seeking parliamentary support. The feeling that they were unfairly, indeed unjustly, deprived of "their" reserve has remained with Ngai Tahu down to the present day. While their counsel recognised in his closing address (W1:124) that a binding settlement had been reached in 1880, and that could not now be challenged, it was urged upon us that:

- Ngai Tahu were promised land (in 1844);

- if there had not been some bungling or incompetence by the Crown's administrative staff in 1853, a Crown grant would have been issued for the land at that time; and

- the tribunal's examination should be of a breach of the Treaty by the Crown, not the settlement of 1880, but rather the failure to grant them effective control of the land, promised and designated in 1853. (W1:125)

7.5.3 In his final reply (Y1:49) Mr Temm, for the claimants, invoked the "deliberate political decision" to issue a Crown grant to the Otago province as being a breach of the Crown's duty under the Treaty to protect Ngai Tahu interests. It was described as the basis for the claim made in respect of the Princes Street reserve. Later in his reply (Y1:52) Mr Temm submitted, in reference to the settlement, that the "real point" is whether there was a breach of the Crown's duty to protect, in failing to set aside the land and in failing to do it properly. It was the failure to complete the designation in 1853, Mr Temm submitted, of which the claimants complained, and they have been deprived of the benefit of the land because of the Crown's administrative bungling. Their rights, it is said, were not protected, and that failure was a breach of the Crown's Treaty obligations.

Statement of grievances

7.5.4 In their statement of grievances relating to Otakou the claimants included three grievances concerning the Princes Street reserve. They were:

6. The Crown failed to set aside the Otepoti reserves which had been promised to Ngai Tahu as part of the sale.

7. The Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations.

8. The Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for their personal use and occupation and as a base for their commercial activity. (W5)

7.5.5 Before considering these various claims we must first determine whether the 1880 settlement (which claimants' counsel admitted cannot be challenged) precludes any claim now being made to us under the Treaty of Waitangi Act 1975, in respect of alleged breaches of the Treaty. We do not think the fact of such a settlement necessarily excludes claims in respect of the Princes Street reserve being made under the Treaty. Our reasons are substantially those which we elsewhere articulate in respect of the Ngaitahu Claim Settlement Act 1944 (21.4). In 1880 there was no way by which Ngai Tahu could have claimed relief for the breach of the Treaty. The Treaty at that time was considered to be a nullity. There was no legal provision such as there now is, whereby Ngai Tahu could advance their claim before a tribunal having jurisdiction to entertain it. While, therefore, as Mr Temm conceded, the settlement may be taken into account, we do not consider that it precludes our entertaining a claim under the Treaty of Waitangi Act 1975. We turn then to consider whether any act or omission of the Crown in relation to the Princes Street reserve constituted a breach of one or more principles of the Treaty.

Finding on grievance no 6: Crown failure to set aside Otepoti reserves

7.5.6 We can deal briefly with this grievance, which is, that the Crown failed to set aside the Otepoti (Dunedin) reserves which were promised to Ngai Tahu as part of the Otakou sale and purchase. We have discussed this claim in some detail in the preceding paragraphs (7.2). For the reasons given we are not satisfied that the company or Crown representatives made any such promises for the two reserves at

the upper harbour foreshore. It follows that the claimants have not established any breach of the Treaty in this respect.

Grievance no 7: Crown failure to create Princes Street reserve

7.5.7 We turn next to the complaint that the Crown failed to create the Princes Street reserve in 1853, which failure it is said prejudiced the position of Ngai Tahu in later litigation and negotiation. It was put to us by Mr Temm that this failure was due to incompetence by the Crown's administrative staff in 1853 and but for this a Crown grant would have been issued. This submission assumed that it was legally competent, had the correct procedures been followed, for a Maori reserve in respect of this land to have been created for the permanent benefit of Ngai Tahu. The Crown, in lengthy submissions, disputed this and invoked the Court of Appeal decision in Regina v Macandrew (1869) 1 CA 172. We did not receive any detailed response to these submissions from claimants' counsel. Accordingly, we are in no position at this distance to come to any conclusion on the question of whether there was any legal basis at the relevant time which enabled Governor Grey to create the Maori reserve on the Princes Street site, in favour of Ngai Tahu. We are, however, left with very real doubts as to whether such power did exist from the comments of Mr Justice Richmond in Regina v Macandrew, to which we have earlier referred.

However, as the matter was pressed upon us in such detail by the claimants' historian we will assume that it was competent for the governor, provided he followed prescribed procedures, to create such a reserve. Would his failure to comply with prescribed procedures constitute a breach of Treaty principles? We also for the purposes of this discussion set aside the fact that Governor Grey, assuming he were purporting to act under section 17 of chapter 13 of the 1846 Royal instructions, failed to obtain the advice and consent of the Executive Council. It is presumably this failure which is characterised by claimants' counsel as "administrative bungling". Behind this claim is a further assumption, that is, that in failing to create the Princes Street reserve in 1853 the Crown was under a duty to Ngai Tahu to take such action. The Crown, through its counsel, Mrs Kenderdine, submitted to us that, if a reserve were promised as part of the sale and purchase transaction in 1844, Ngai Tahu would be entitled to be compensated for breach of contract or breach of trust (with due allowance for the monies paid in settlement last century). But Crown counsel submitted that, if no promise were made in 1844 (and we are not satisfied that such a promise was made), then the Crown was under no obligation to create a reserve. She submitted that:

It is not a breach of the Treaty for the Crown to perceive a need which has arisen for one of its subjects and to fail to remedy that need effectively. (L4:7)

7.5.8 In her closing address Mrs Kenderdine discussed further the question of whether the non-allocation of the reserves was a breach of the Treaty. She was concerned with the implications of certain passages in Professor Ward's report which we here reproduce, the first quotation being quoted more fully:

However, no proprietary title to land was ever granted to Ngai Tahu and there is no indication that government ever intended to do that. Phrases in the evidence and the submissions which refer to 'Maori land' or 'the Maori title' are therefore misleading. What the government set out to do was to ensure that a portion of central government

reserve was made a 'Native Reserve' for a hostelry and market, with the land title still in the Crown. It is doubtful therefore whether the added-value of the land could be properly claimed by Ngai Tahu, as if the land had been theirs, as distinct from entitlement to compensation for the loss of a facility with which they had been provided, and then had seen removed. Arguably the government had a duty to replace the hostel on other land rather than pay compensation. Indeed this was offered by the Provincial authorities in 1866-7, but rejected by Mantell, on Ngai Tahu's behalf. (T1:427)

In summarising his overview of the various Ngai Tahu claims in the second passage quoted by Crown counsel, Professor Ward said:

The Princes Street case illustrates particularly well the nature of Ngai Tahu's grievance. Taken by itself as a claim about a particular reserve, and measured in terms of formal law or obligation, it is not especially strong. Considerable compensation were paid in any case. But seen in terms of Ngai Tahu's reasonable and legitimate aspirations to engage with the commerce and development of Dunedin, the disappointment and frustration must have been great indeed and the failure of officialdom to assist that reasonable and legitimate aspiration is manifest. For, although many of their actions were taken to conserve valued traditions and lifestyle, Ngai Tahu had engaged successfully before 1840 with the modern order and wished to continue to do so, trading for its commodities, learning its skills and sharing in its enterprises. Every aspect of the claim bears on this aspiration in one way or another. Whatever the technical shortcomings in some aspects of the Princes Street claim, or any other, as matters of law or contract, all have to do with the conservation and development of a basis of self-determination, a basis combining traditional resources and skills with new learning and new forms of wealth. From such a basis Ngai Tahu could engage further still with the settlers on terms of economic, social and racial equality. (T1:25-26)

In commenting on these two passages Crown counsel first referred to earlier findings of this tribunal that article 2 of the Treaty required the Crown to ensure that Maori were left with sufficient land for their maintenance and livelihood or, put in another way, that each tribe maintained a sufficient endowment for its needs (Orakei and Waiheke Reports). We would affirm this proposition.

We would accept Professor Ward's view that Ngai Tahu's aspirations to engage in the commerce and development of Dunedin were legitimate aspirations. For a few years, during the life of the Maori hostelry in Princes Street, built by the general government for Ngai Tahu visiting Dunedin, that aspiration was materially assisted by the Crown. But, because ownership of the land lay with the provincial council, the Crown had no effective long-term control over the hostelry and was powerless, it seems, to prevent it being dismantled.

7.5.9 Mrs Kenderdine, for the Crown, rejected the notion which she found implicit in Professor Ward's statement, that the Treaty guaranteed Ngai Tahu, via the Princes Street reserve, a share in the Dunedin economy and that the arbitrary ending of the arrangement was a genuine deprivation in breach of the Treaty. She submitted:

- the so-called "Princes Street reserve" was integrally bound up with the Otakou purchase;

- that Ngai Tahu chiefs at Otakou selected the land they wished to exclude from the sale and chose not to exclude the Princes Street site; and

- that the land once sold passed absolutely to the Crown and Ngai Tahu then have, in respect of it, only such privileges (if any) as other British subjects have (X1:196).

7.5.10 We would agree that it is unrealistic to consider the claim of the Princes Street reserve independently of the wider claim for tenths made with respect to the Otakou purchase. We have earlier found that the Crown failed to ensure that Ngai Tahu, in retaining only 9600 acres out of over 533,000 acres sold to the Crown, retained sufficient land for their present and future needs. We have suggested that the additional provision of tenths vested in the Crown, substantially for Maori purposes would, along with the 9600 acres retained, have provided Ngai Tahu with an adequate endowment. Obviously, had the Crown secured a suitable reserve on Princes Street for use by Ngai Tahu, this would have served to meet part of its wider obligation.

But having said this, we find difficulty in holding that the Crown was under a Treaty obligation to provide in perpetuity a specific piece of land in the new town of Dunedin for the purposes of a Maori hostelry and trade. Clearly it was highly desirable, while the new town was in its infancy and accommodation was scarce, that the Crown or the provincial government should take steps to assist Ngai Tahu with accommodation. The steps taken by Mantell led to the government approving a site which was unsuitable and largely unused by Ngai Tahu. It is not easy to reconcile the contemporary rejection of the site by Ngai Tahu with the later claim that the Crown had a duty to retain it for Ngai Tahu. In fact, as we have seen, the Crown in 1859 provided adequate accommodation suitably sited for a few years. Preferably this should have been done earlier and some such provision maintained for a longer period, but in our view the need was of a relatively transitory nature, until accommodation became more readily available in Dunedin. The Crown's failure to meet its Treaty obligations in our view rested not on the limited accommodation provided, or the disposition of the Princes Street reserve site, but on its failure, as we have found in respect of the Otakou purchase, to ensure that Ngai Tahu retained an adequate endowment for their present and reasonable future needs. If, as a result of our findings, Ngai Tahu are compensated for this breach of the Treaty, such compensation should in our view more than encompass any perceived loss by Ngai Tahu of "their" Princes Street reserve.

Finding on grievance no 7

7.5.11 We can now deal quite shortly with the claimants' grievance that the Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations. There are two distinct problems with this claim. First, it assumes that at the time it was competent, as a matter of law, for the governor to create the reserve in question. But, as Mr Justice Richmond indicated in Regina v Macandrew, this is problematical. It is simplistic to suggest that only "administrative bungling" prevented it being done. Secondly, the reserve, although recommended by Mantell and approved by Governor Grey, was by all accounts

unsuitable for the purpose for which it was ostensibly created. We find it somewhat incongruous to be asked to hold that it was a breach of the Treaty by the Crown, to fail effectively to create a reserve which was not suitable for the purpose for which it was needed.

Grievance no 8: the provision of a permanent hostelry

7.5.12 Finally, we consider the claim that the Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for the permanent use and occupation by Ngai Tahu, and as a base for their commercial activity. This claim has wide implications. Implicit in it is the assertion that if, and when, the Crown purchased blocks of land from Maori to facilitate Pakeha settlement, it was obligated under the Treaty to ensure that in any town that resulted from such settlement, permanent accommodation was provided for Maori wishing to visit the town to trade. We find difficulty in discerning any such obligation under the Treaty, or any principle which imposes such an obligation on the Crown. We have already indicated that Ngai Tahu had, in Professor Ward's words, "reasonable and legitimate aspirations to engage with the commerce and development of Dunedin". The failure of the Crown adequately to assist them, by providing suitable accommodation throughout the period of time that was required, was both disappointing and frustrating for Ngai Tahu. But any such assistance would have been necessary only so long as other accommodation was not available and, had it been provided, it need not have been vested in Ngai Tahu. The Crown could well have retained ownership.

Finding on greivance no 8

7.5.13 We are unable to find that the Treaty imposed any obligation on the Crown to provide a permanent hostelry vested in Ngai Tahu, to meet a temporary need. In the event, Ngai Tahu did receive some œ10,000 for the "loss" of the Princes Street reserve and the accrued rents. Regrettably, but understandably, this money was not invested by Ngai Tahu in a property of their own in Dunedin, but was, as we have seen, distributed quite widely among the tribe. Had it been so invested, and the property retained, almost certainly we would never have heard of this claim.

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Ngai Tahu Land Report

08 Kemp's Purchase

8.1 Introduction

Chapter 8
KEMP'S PURCHASE

8.1. Introduction

On 8 February 1848 Governor George Grey arrived at Akaroa from Nelson, accompanied by Colonel William Wakefield. They had been settling the revised terms of the Nelson Crown grant. This was the governor's first visit to Banks Peninsula.

Soon after arrival Grey met with certain chiefs of the South Island. According to Grey, in a later despatch to the colonial secretary, Earl Grey, the chiefs agreed that after reserves were set aside for their present and reasonable future needs, they would relinquish the remainder of their land between the Nelson and Otago blocks. The Crown was to pay such sum as might be arranged. Detailed negotiations did not take place on this occasion.

On his return to Auckland Grey instructed Lieutenant-Governor Eyre, who was based in Wellington, to appoint a suitable person to negotiate with Ngai Tahu for the purpose of extinguishing their title to the tract of country lying between the district purchased from the Ngati Toa tribe the previous year, and that bought by the New Zealand Company at Otago. Grey stressed the way in which the arrangement should be concluded. First, there should be reserved to the Maori "ample portions for their present and prospective wants". Secondly, the boundaries of these reserves were to be marked out and then thirdly, the Crown agent was to buy from the Maori their right to the whole of the remainder of their claims to land in the South Island.

Lieutenant-Governor Eyre appointed Henry Tacy Kemp, native secretary at Wellington, to undertake the purchase. Eyre passed on to him Governor Grey's instructions. He was authorised to pay œ2000 for the land, payable by instalments over a period of years.

Kemp reached Akaroa early in May and set up a meeting with Ngai Tahu for early June to negotiate the purchase. He called at Otakou for a few days at the beginning of June. There he took on board a dozen or so leading Ngai Tahu chiefs who, according to Kemp, had authority to speak for their people. He was accompanied by the New Zealand Company surveyor Charles Kettle. The party arrived at Akaroa on 7 June 1848. Discussions were held over the next few days about the purchase. On Saturday 10 June some 500 Ngai Tahu were assembled at Akaroa. Lengthy discussions were held with Kemp about boundaries, the claimants and related matters. Kemp offered œ2000 for the land. He understood from Ngai Tahu that the whole of Banks Peninsula had already been sold to the French. After a further meeting on Monday 12 June 1848, agreement appeared to have been reached. A deed of purchase was prepared by

Kemp and a map showing the boundaries drawn by Kettle was attached to it. The leading chiefs were invited on board the Fly, the deed was read over to them and then signed or assented to.

Kemp had not complied with his instructions. He did not first find out and reserve to Ngai Tahu the land they wished to keep, which Kemp was to ensure was ample for their present and future needs. Consequently no reserves were surveyed or marked out although Kettle, the surveyor, was available. It was winter, rivers were difficult to ford and the journey on foot to the various Ngai Tahu settlements between Kaiapoi, in the north, and Waikouaiti, in the south, would have been unpleasant and time consuming. Instead, Kemp provided in the deed that their kainga and mahinga kai (which Kemp translated as plantations) would be reserved to them, and when the land was surveyed the governor, in his discretion, would make additional reserves. The price was to be œ2000, payable by instalments of œ500. The deed and map were intended to show that the purchase went from east coast to west coast between the Wairau and Otakou purchases. Other promises not referred to in the deed as to the retention of eel-weirs and landing places (to be shared with the Europeans) were made by Kemp. Ngai Tahu were also told by Kemp that their reserves would be "ample and in addition to their villages and cultivations."

Ngai Tahu's understanding of the agreement was not the same as Kemp's. Ngai Tahu had no intention of parting with the land they needed for their future livelihood. They intended to retain considerable areas for producing and gathering food, including foraging and hunting. They anticipated being able, as settlers arrived, to participate in agricultural and pastoral activities and benefit from the new economy. They certainly did not agree, as soon unfortunately transpired, to being confined to minuscule reserves barely capable of maintaining them at a mere subsistence level.

Kemp, on his return to Wellington, was reprimanded by Lieutenant-Governor Eyre for not following his instructions. Eyre appointed a new commissioner, Walter Mantell, to replace Kemp. Mantell was commissioned to make an overland journey from the northern to the southern boundaries with a surveyor to mark out on the ground appropriate reserves for Ngai Tahu. A liberal provision was to be made by way of reserves for both their present and future wants. Due regard was to be shown to the interests of Ngai Tahu and in meeting their wishes.

Unfortunately Mantell also failed to comply with his instructions. While he travelled throughout the area on the east coast over several months, he ended up, out of an area of 20 million acres included in the deed, reserving a mere 6359 acres for the estimated 637 Ngai Tahu. This averaged out at 9.98 acres per individual Ngai Tahu. The failure of the Crown's agent Mantell, to set aside adequate reserves lies at the heart of the present claim. But included is a claim which came to be made 20 or so years after the deed was signed, that Ngai Tahu did not sell more than the land on the eastern coastal plains up to the foothills, an area of some seven million acres. The Crown later purchased (or repurchased) the west coast. The land lying between the west of the eastern seaward range of mountains and the Southern Alps has come to be called the "hole in the middle", which it is said was not sold to Kemp.

The foregoing, as the subsequent detailed account will show, is no more than a very bare sketch of the Kemp purchase and Ngai Tahu's principal grievances. We turn now to a detailed discussion of the claims.

Ngai Tahu Land Report

08 Kemp's Purchase

8.2 Statement of Grievances

8.2. Statement of Grievances

We set out here the claimants' grievances relating to Kemp's purchase. We will consider each of these at the appropriate time and state our conclusions and findings. While all are of importance to the claimants, the principal grievances are nos 2, 3 and 4. Most, if not all, of the remainder stem from, or are related to, the three main complaints. The grievances are:

1. That the Crown's inclusion of Kaiapoi in the Wairau Purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with Kemp's Block on unfavourable terms.

2. That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemps Purchase, in particular -

(a) Ample reserves for their present and future benefit were not provided, and

(b) Their numerous mahinga kai were not reserved and protected for their use.

3. That the Crown declined the Ngai Tahu request to exempt from the sale the area between the Waimakariri and Kowhai rivers, or to reserve it for their future exclusive use, to which they were entitled under Article II of the Treaty.

4. That on the matter of boundaries the Crown enforced an interpretation which had not been agreed to by Ngai Tahu: in particular with regard to -

(a) the western boundary, which Ngai Tahu wanted to follow the "foot-hill" ranges from Maungatere to Maungaatua as had been previously agreed with Governor Grey, and

(b) the eastern boundary, which Ngai Tahu wanted to follow the line-of-sight from Otumatua to Taumutu and thus to exclude from the sale Kaitorete, most of Waihora (Lake Ellesmere), and its north-eastern shoreline with the adjoining wetlands.

5. That the Crown failed to ensure that a claim was lodged on behalf of Ngai Tahu to protect their interests under the New Zealand Company Land Claimants Ordinance of 2nd August 1851.

6. That the Crown on 7th August 1851 passed the Canterbury Association Amendment Act without providing for the protection of Ngai Tahu interests derived from the unfulfilled promises of the Crown under Kemps Purchase.

7. That the Crown under the Native Land Act of 1865 failed to provide for adequate protection for Ngai Tahu in the conduct of the Native Land Court.

8. That the Crown passed the Ngai Tahu Reference Validation Act of 1868 to the detriment of Ngai Tahu.

9. That the Crown aborted the Royal Commission of Smith and Nairn and suppressed its evidence to the detriment of Ngai Tahu.

10. That the Crown in the years 1893-1909 under the Land for Settlements Acts resumed some sixty valuable estates in Kemps Block at a cost of some œ2,000,000 (A9:12) for the benefit of landless Europeans but failed to do likewise for landless Ngai Tahu, in breach of Article III of the Treaty.

11. That the Crown by the South Island Landless Natives Act of 1906 assigned to Ngai Tahu lands, none of which were in Kemps Block, and which were much inferior to those provided contemporaneously for landless Europeans under the Land for Settlements Acts-a breach of Article III. (W4)

Ngai Tahu Land Report

08 Kemp's Purchase

8.3 Background to the Purchase

8.3. Background to the Purchase

The 1847 Wairau purchase

8.3.1 Kemp's purchase was the second of Grey's large acquisitions of South Island Maori land. On 18 March 1847, just over a year before Kemp was sent to negotiate his purchase with Ngai Tahu, Ngati Toa rangatira signed a deed of sale with the Crown, which became known as the Wairau purchase. This deed was seen by the Crown as extinguishing Maori title to the disputed area of the Wairau, and thereby resolving the impasse which had resulted from the killings there in 1843. The sale provided land for the Nelson settlers to expand into the rich valleys of what was to become Marlborough.

This purchase has to be considered for two reasons. First the question of the location of the northern boundary of the Kemp purchase has been a matter of some considerable discussion before the tribunal. According to Kemp's deed, the southern boundary of the Wairau purchase is also the northern boundary of the Kemp block. The maps to both deeds identify their common boundary on the east coast at a place labelled "Kaiapoe" or "Kaiapoi". To find the Kemp boundary we have to consider the location of the Wairau boundary. In August 1848, Walter Mantell fixed the northern boundary of the Kemp purchase at Kaiapoi pa and there it has remained ever since. However the Crown's historian, Dr Donald Loveridge, has argued that the actual boundary agreed between Grey and Kemp and Ngai Tahu was not at the pa but near the mouth of the Hurunui River, a considerable distance to the north. Secondly, because Ngati Toa had invaded Ngai Tahu little more than a decade prior to the Treaty, how far south Ngati Toa's rights went was a question of the respective mana of the two tribes. Only a few months after the Kemp purchase was signed Ngai Tahu were complaining bitterly that a considerable amount of Ngai Tahu's land had been purchased by the Crown as if it belonged to Ngati Toa.

8.3.2 The claimants in their first grievance have alleged that, in including Kaiapoi in the Wairau purchase, the Crown exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms. To consider this question we will have to review the background to the Wairau purchase in some detail. This agreement was the culmination of the series of events which began with the attempts of the New Zealand Company to purchase lands in the country prior to Captain Hobson's arrival to negotiate the Treaty of Waitangi. We have seen how these purchases allowed Wakefield to claim to have acquired around 20 million acres of land from Maori for his New Zealand Company settlers. These lands extended from the 41st parallel in the north to the 43rd parallel in the south. We have also seen that when these purchases were examined by Commissioner William Spain in 1843 he found that the company's

claims were wildly exaggerated and that Maori title to all but relatively small areas of land on both sides of Cook Strait remained firmly intact.

8.3.3 The New Zealand Company's claims to land in the South Island were based on the two deeds negotiated with William Wakefield in late 1839. In the first, that of 25 October 1839, the chiefs of Ngati Toa at Kapiti, including Te Rauparaha and Te Rangihaeata, were purported to have sold all their rights to land down to the 43rd parallel (L9:8).{FNREF|0-86472-060-2|8.3.3|1} A fortnight later, on 8 November 1839, a deed was signed by Te Atiawa chiefs at Queen Charlotte Sound which also purported to sell their lands down to the 43rd parallel (L9:9-10).{FNREF|0-86472-060-2|8.3.3|2} It was the attempt of company settlers to enforce these deeds while they were still being considered by Spain which led to the tragedy at Wairau in June 1843.

When Spain finally completed his report on the New Zealand Company's claims to lands in the Nelson district on 31 March 1845, he found that the New Zealand Company had not acquired any title to the Wairau from the tribes involved. Spain outlined the principle on which he acted in deciding who, among competing Maori claimants, had the right to alienate any land:

I have set it down as a principle in sales of land in this country by the aborigines, that the rights of the actual occupants must be acknowledged and extinguished before any title can be fairly obtained upon the strength of the mere satisfaction of the claims of the self-styled conquerors, who do not reside on nor cultivate the soil. In short, that possession confers upon the Natives of one tribe the only and real title to land as against any of their own countrymen; and that the residents, whether they be the original unsubdued proprietors, the conquerors who have retained their possession acquired in war, or captives who have been permitted to re-occupy their land on sufferance"in all cases the residents, and they alone, have the power of alienating any land. (L9:5){FNREF|0-86472-060-2|8.3.3|3}

Spain then went on to consider the Wairau. He found no evidence that the owners, Ngati Toa, had sold the district of Wairau and accordingly he was not prepared to recommend that the Wairau district should be included in the Crown grant to be made in favour of the New Zealand Company. He referred to Ngati Toa, assisted by the Te Atiawa and Ngati Raukawa tribes, as:

making frequent efforts to subjugate the tribes along the eastern coast as far as Banks Peninsula, which to this day bears marks at Akaroa of the incursions of these ferocious conquerors, and sometimes carrying war, though with less success, into their enemies' country as far south as Foveaux Strait. (L9:5){FNREF|0-86472-060-2|8.3.3|4}

Spain later proceeded to define the various districts within the areas included in the two deeds, which were "in real and bona fide possession of the Ngatitoa Tribe" as including "on the Middle [South] Island in Cloudy Bay, comprising the Wairau, a part of Queen Charlotte's Sound". This land he held not to have been sold to the New Zealand Company.

Out of the vast area in the South Island which the New Zealand Company had purported to purchase under the Kapiti and Queen Charlotte deeds, Commissioner Spain awarded only 151,000 acres in and around Nelson. All these areas were well distant from the 43rd parallel of latitude, the southern boundary as defined in the deeds (L9:7).{FNREF|0-86472-060-2|8.3.3|5}

8.3.4 In 1847 the New Zealand Company was having difficulty in meeting its obligations to its purchasers in respect of certain Ngati Toa land in the North Island and in "the district of Wairau, in the Middle Island, and the country lying immediately to the southward of that district".{FNREF|0-86472-060-2|8.3.4|6} Governor Grey decided that he himself would have to take steps to remedy the position, and negotiate a purchase with the Ngati Toa tribe. Containing Ngati Toa was also on his mind. He later explained to Earl Grey that, in agreeing to pay Ngati Toa œ3000 for the land in five annual instalments of œ600 each:

the fact of the Ngatitoa Tribe receiving for several years an annual payment from Government, will give us an almost unlimited influence over a powerful and hitherto a very treacherous and dangerous tribe. (L9:15){FNREF|0-86472-060-2|8.3.4|7}

Spain had identified Ngati Toa's rights to the Wairau as based on occupation and cultivation. He did not specify the geographical limits of these rights. Following the purchase, Grey described to Earl Grey the size of the block involved and explained his reasoning in making such a large purchase. He suggested that in recognising Ngati Toa's title to the Wairau, Spain had in effect acknowledged title to a much larger area. This decision he said:

really gave a claim to the Ngatitoa Tribe to a tract of country in the Middle Island extending to about 100 miles south of Wairau, as their claim to the whole of this territory is identical with their claim to the Valley of the Wairau. (L9:14){FNREF|0-86472-060-2|8.3.4|8}

Grey went on to advise the colonial secretary that in reference to the Wairau district he:

thought it advisable not only to purchase this district, which was estimated by the Surveyor- General to contain 80,000 acres of the finest agricultural land, and about 240,000 acres of the finest pastoral land, but also to endeavour to purchase the whole tract of country claimed by the Ngatitoa Tribe, and extending about 100 miles to the southward of that valley... (L9:15){FNREF|0-86472-060-2|8.3.4|9}

Grey envisaged much of this land as being suitable for grazing sheep and cattle by European settlers "almost immediately". Relying on Spain's investigations into the company's title to the Wairau, Grey made no attempt to determine if tribes other than Ngati Toa held rights within the block.

Grey therefore saw himself as buying Maori rights to the Wairau and an additional area of land running to about 100 miles south of the Wairau. Since the 43rd parallel is approximately 100 miles south of the valley, it may be assumed that Grey had in mind the southern point of the original Kapiti and Queen Charlotte deeds of 1839. Further confirmation of this comes from an 1847 letter of Colonel Wakefield which described

the southernmost point of the purchase as on the coast by "Table Island", or Motunau, which is a few miles south of the 43rd parallel (L8:12).{FNREF|0-86472-060-2|8.3.4|10}

The wording of the deed, however, identified the southern point of the purchase as Kaiapoi:

Beginning at Wairau, running along to Kaiparatehau (Te Karaka) or Cape Campbell, running along to Kaikoura until you come to Kaiapoi. (A8:I:204){FNREF|0-86472-060-2|8.3.4|11}

8.3.5 The Crown historian, Dr Donald Loveridge, proposed to us that it is clear from Grey's geographical descriptions that the Kaiapoi named in the deed could not have been the famous old pa near the mouth of the Ashley River. This pa lay considerably more than 100 miles south of the Wairau valley.

Dr Loveridge suggested that the Kaiapoi here was either another Kaiapoi altogether, or that the purchase extended to the northernmost edge of the "Kaiapoi district". In her closing address, Mrs Kenderdine argued that the Hurunui was a suitable location for such a boundary:

there may have been a Maori component in this designation as well. According to Dr Anderson the Hurunui marked the northern limit of the territory which Ngai Tahu continuously occupied throughout their wars with Te Rauparaha. (X1:224)

The claimants have vigorously opposed any suggestion that there were two Kaiapoi, one near the Ashley River which was sacked by Te Rauparaha and another on the Hurunui. They said that they know of no such place on the Hurunui (O46:5-6). We find it difficult to accept that, given the history of Kaiapoi pa, another Kaiapoi could have existed in 1847 and played such an important role in the events of the times, only to disappear from memory or written record. Whether Kaiapoi can be interpreted as a district we shall discuss later when we come to consider the Kemp purchase itself.

As Dr Loveridge pointed out there is a considerable weight of evidence to support his view that the Hurunui or the 43rd parallel was associated, at least in the European mind, with Kaiapoi. The Nelson Crown grant of 1848 has its southern point identified as Kaiapoi, and the map locates this point as "Kaipoe", just north of the 43rd parallel. The Kemp deed map too, as we shall see, locates its Kaiapoi near a river not far from the 43rd parallel, as does another more detailed map also drawn up by Charles Kettle at the time. The simplest explanation is that the Europeans involved did not actually know where Kaiapoi pa was. For convenience they placed it at the 43rd parallel near the Hurunui. In neither the Kemp nor Wairau purchase negotiations was the place visited. For Ngai Tahu and Ngati Toa the boundary issue had little to do with parallels, but with places indelibly etched in memory because of their significance in

the tribes' recent histories.

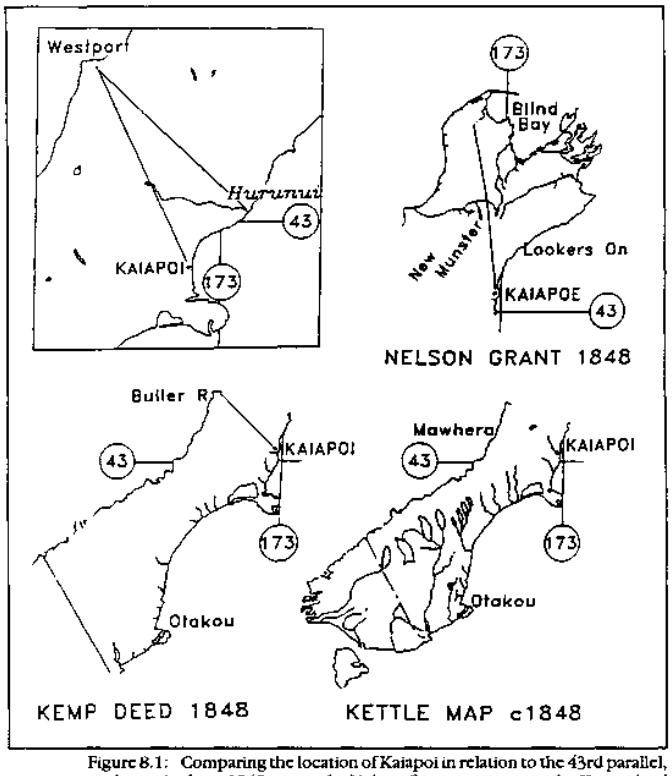

Figure 8.1: Comparing the location of Kaiapoi in relation to the 43rd parallel, as shown in three 1848 maps—the Nelson Crown grant map, the Kemp deed map and Charles Kettle's map. This shows the common but erroneous belief that Kaiapoi was located above the 43rd parallel, rather than further south at the mouth of the Rakahuri (Ashley) River.

8.3.6 Some light on this question may be provided by a memorandum made in 1850 by Lieutenant W F G Servantes explaining why Kaiapoi had been chosen as the "nominal" boundary of the Wairau deed:

The Natives were in the first place asked to dispose of the Wairau valley only, but they themselves proposed to cede all their lands as far as Kaiapoi to which point they stated that the property to which they had a sole title extended.

Doubts were at the time entertained of the Ngatitoa Tribe having an undisputed title to the land further south than Kaikoura, but at the same time it was known that they had a claim to a certain extent as far as Kaiapoi, the point mentioned by them in consequence of several of their principal chiefs having been murdered there, and their having in revenge nearly exterminated the original tribe, the few that escaped having sought safety by flying to the Southward. [marginal note: "From Kaikoura To Kaiapoi"]

On this account it was thought advisable to include the land in question in the Deed of Sale in order to extinguish whatever claim the Ngatitoas had to it [,] for if excluded and the boundary fixed at Kaikoura, it was certain that they would dispute the right of any tribe or persons who might afterwards wish to dispose of it, and would moreover if their title was found to be valid, demand as much for the alienation of that portion, as they received for the whole Block including the Wairau.

Although the right of the above named Tribe was considered doubtful, I beg to add that I believe it is very questionable whether according to Native customs the Ngaitahu people have a better one. (L9:552-553){FNREF|0-86472-060-2|8.3.6|12}

Servantes makes it clear that the extension of the purchase to Kaiapoi was initiated by Ngati Toa and that it was a question of utu. In Ngati Toa eyes Kaiapoi was the place where Te Pehi and their chiefs had been slain. This can only have been the pa. However, Servantes emphasised that other rights were known about and that the southern boundary was a nominal location. As a result of this memorandum Grey was prepared to see Ngai Tahu paid for their rights to land "...South of the Kaikouras" (L9:551).{FNREF|0-86472-060-2|8.3.6|13}

8.3.7 In her closing address Mrs Kenderdine presented the view that Grey was purchasing the Wairau completely from Ngati Toa and the rest of the land only to the extent that Ngati Toa had rights to it. Other tribes could also have had rights which the Crown would have to have dealt with at a later date. However this is not what the governor told Earl Grey he had done when he stated that Ngati Toa rights to the larger area were "identical with their claim to the Valley of the Wairau" (L9:14).{FNREF|0-86472-060-2|8.3.7|14} The fact that, as we shall see, Grey then proceeded to have a Crown grant prepared as far south as the 43rd parallel, without any further investigation of Maori title, supports the idea that he believed he had extinguished aboriginal title over the whole of the block. By 1850, when Grey suggested the possibility of making Ngai Tahu a further payment, the governor was well aware of the location of the pa, and his "South of the Kaikouras" can be seen as the area between the southern boundary of the Wairau purchase as at 1847 and the pa.

It is clear that the Crown's understanding of the limits of the Wairau purchase stopped at about the Hurunui. There was no intention on the part of Grey or any other of the Crown's agents to purchase from Ngati Toa as far down as the Ashley River, where Kaiapoi pa was located. In fixing the boundary of the Wairau purchase in so vague a manner significant problems were later created when this was used as the boundary of the block purchased by Kemp from Ngai Tahu.

We will defer reaching a conclusion on the question of the claimants' first grievance until we have considered the Kemp purchase itself. This we will do after discussing Governor Grey's negotiations with Ngai Tahu early in 1848.

Grey's negotiations in 1848

8.3.8 Governor Grey, accompanied by Colonel Wakefield, arrived at Akaroa from Nelson on 8 February 1848. On his return to Auckland after this South Island visit, Grey made no mention of it in his despatches to the Colonial Office until some six months later, well after Kemp's deed had been signed. In a despatch of 25 August 1848 reporting on Kemp's purchase, Grey advised Earl Grey that he had earlier found all the principal chiefs of the South Island acquiesced in the propriety of an immediate settlement of their claims to land upon the following basis:

that the requisite reserves for their present and reasonable future wants should be set apart for themselves and their descendants, and should be registered as reserves for such purposes, and that they should then relinquish all other claims whatever to any

lands lying between the Nelson and Otago Blocks, receiving for so doing such sums as might be arranged, in four annual payments. (L9:16){FNREF|0-86472-060-2|8.3.8|15}

Grey went on to say that, considering the number of Maori involved, he thought a total sum of œ2000 divided into four annual sums of œ500 would suffice.

8.3.9 Colonel William Wakefield, however, reported to London on 29 February 1848, soon after his return to Wellington. From this report it appears that:

- Grey met with all the "native men of Ports Cooper and Levi and the neighbouring plains" at Akaroa;

- they all proposed to sell the block of land between that lately purchased from the Ngati Toa (the Wairau purchase) and Otakou, including the portion of Banks Peninsula not sold to the French;

- such sale was to include the country as far south as Otakou and "the level country back to the central range of mountains"; and

- the party then travelled to Otakou where Grey saw the few Maori living near the anchorage at the head of the upper harbour and discussed with them the purchase of their claims to the above block of land and gave them the same assurances he had given at Akaroa. For the "extensive district" Grey thought œ2000 would be ample payment (L9:57-58).{FNREF|0-86472-060-2|8.3.9|16}

According to Wakefield, Grey's discussions with Ngai Tahu at both Akaroa and Otakou involved a willingness on their part to sell "the level country back to the central range of mountains" lying between the Wairau purchase and the Otago Block. The "central range of mountains" we would expect to be a reference to the Southern Alps. But "level country" does not extend all the way to the alps. Wakefield may not have known this. It is not possible to be certain what area Wakefield had in mind. We believe his apparent confusion is best explained in Professor Ward's report. The report referred to the suggestion that Wakefield's account shows that the purchase discussed by Grey at Akaroa involved an offer of the plains, or at most the land to the main divide. Grey then changed the scope of the intended purchase to include the west coast before sending Kemp on his mission. Professor Ward commented:

This argument is difficult to sustain. There is no indication that Grey regarded the purchase as having an inland boundary. Grey seems to have believed that he had arranged to purchase all Ngai Tahu had a right to between the Wairau and Otakou blocks and subsequently issued instructions to this effect. To understand Wakefield's comment it is necessary to distinguish between the question of where Ngai Tahu might have rights and the question of the scope of the intended purchase. There is nothing in either Governor Grey or Lieutenant-Governor Eyre's correspondence to suggest that the purchase of a coastal strip was first contemplated, then rejected, in favour of a coast to coast block. On the other hand, the notion that Ngai Tahu might not have rights over the interior of the island or on the west coast was very much at the forefront of official thinking. The mention of the central range of mountains in Wakefield's account is not difficult to explain. Wakefield's suggestion that a coastal

strip was going to be purchased reflected his understanding, or rather lack of understanding of the nature of Ngai Tahu's rights. At Akaroa Grey was discussing a prospective purchase with Ngai Tahu's Ngai Tuahuriri hapu. Ngai Tuahuriri did not have rights west of the main divide, but this did not mean that other sections of the tribe did not have rights there. Wakefield left with the impression that the purchase would involve a strip of land on the east coast because he did not understand that rights were not held uniformly over all sections of the tribe and that other sections of the tribe would have rights which had not been discussed with Grey. (T1:124)

We consider Professor Ward's explanation to be a persuasive one.

8.3.10 It does appear from Wakefield's report that Ngai Tahu agreed to accept the southern boundary of the Wairau purchase as the northern boundary of the lands to be sold. Dr Loveridge claimed this is confirmed by Matiaha Tiramorehu in a letter written in October 1849 to Lieutenant-Governor Eyre. Included in Tiramorehu's letter was the following statement:

I also remember the conversation that Governor Grey had at Akaroa with the Natives of Port Levy; Ngaituahuriri spoke to the Governor concerning the payment for Kaikoura and KAIAPOI; he (the Governor) told the Ngaitahu Tribe that (the payment for) KAIAPOI should not be given to the Ngatitoas, but that for Kaikoura was already gone to them. Upon which Te Uki said to the Governor, Do not hide from us what you may have wrongly done with our place or country, but tell us that we may all know what you have done. After which conversation Governor Grey asked Ngaituahuriri if he [sic] would part with some of his land; upon which the Ngaitahu Tribe hearing, gave their consent that KAIAPOI should be given up to the Governor, relying implicitly on his former promises; but no, it (the payment for KAIAPOI) has been given to the Ngatitoas. When Mr Kemp came here, he placed the boundary of the Ngatitoas' land at KAIAPOI; this mistake caused our hearts to be darkened. (L9:23-24){FNREF|0-86472-060-2|8.3.10|17} (emphasis added)

Dr Loveridge commented that this as it stands is somewhat obscure, but said that if the passage is suitably amended it is much clearer:

After which conversation Governor Grey asked Ngaituahuriri if he would part with some of his land; upon which the Ngaitahu tribe hearing, gave their consent that KAIAPOI DISTRICT should be given up to the Governor relying implicitly on his former promises; but no, it (the payment for KAIAPOI DISTRICT) has been given to the Ngatitoas. When Mr Kemp came here he placed the boundary of the Ngatitoas' land at KAIAPOI PA; this mistake caused our hearts to be darkened. (emphasis added)

Dr Loveridge argued that in February 1848, looking back to the Wairau purchase and Grey's recent discussion in Nelson about the new Nelson Crown grant, Grey would have been quite prepared to accommodate the Ngai Tahu claim to lands as far north as the 43rd parallel. He contended that Tiramorehu's statement that Kemp placed the boundary of Ngati Toa land at Kaiapoi pa was mistaken and this change was made later by Mantell. It is true that Mantell did later fix the boundary of Kemp's purchase at Kaiapoi pa.

Mr Evison, for the claimants, disputed Dr Loveridge's comment on Tiramorehu's view of where Kemp put the boundary of Ngati Toa land and cites some Maori evidence before the Smith-Nairn commission which suggests Kemp knew where Kaiapoi pa was (O46:6). But this is questionable. Kemp may well have thought the Kaiapoi referred to was at the 43rd parallel near the Hurunui River. It is possible that Kemp saw the map of the 1848 Nelson Crown grant in Eyre's office in Wellington in April 1848. If so, he would have seen Kawatiri and the Buller River shown on the plan of the Crown grant. That being the point to which the northern boundary on the Kemp deed plan goes across to the west coast.

8.3.11 Professor Ward pointed out to us that Kaiapoi could mean different things to Maori and European. Thus, in European terms Kaiapoi was simply a location which could be used as a boundary as readily as any other:

It was entirely realistic to purchase one block from Ngati Toa and another from Ngai Tahu, placing the dividing line at the heart of Kaiapoi pa. In Maori terms this was inconceivable. Either Ngati Toa got the money for Kaiapoi or Ngai Tahu got the money for it. Ngai Tahu's claim to Kaiapoi involved not just the pa. Kaiapoi was the hub from which a network of rights radiated. An offer to purchase FROM KAIAPOI could only be interpreted as recognition of Tuahuriri's right to that place and all that went with it. (T1:126) (emphasis in original)

We believe this explanation legitimises the addition of the word "district" in Tiramorehu's letter as proposed by Dr Loveridge (8.3.10). It is consistent with Professor Ward's view that when Ngai Tahu referred to Kaiapoi they referred not only to that place but all that went with it in the district throughout which their rights radiated.

8.3.12 The Ward report also cites and discusses the passage from Tiramorehu's letter under discussion. Professor Ward inferred from it that Ngai Tahu understood the governor to have agreed not to pay Ngati Toa for Kaiapoi. The Ward report comments that although Grey was not prepared to accept that Ngai Tahu had rights in Kaikoura, he had at least shown he was prepared to restore to Ngai Tuahuriri the mana of Kaiapoi. This is described as a "major victory". It would be left to Ngati Kuri to establish their claim to Kaikoura. Tiramorehu is said to have made it clear that Ngai Tuahuriri were prepared to sell at least some of their land. The report points out that Grey was interested in buying land but not in renegotiating the Wairau purchase. "His goal remained the purchase of the area connecting the Wairau and Otakou blocks and he left under the impression that Ngai Tahu had agreed to this" (T1:123).

It seems to us reasonable to infer from Tiramorehu's letter that Grey in 1848, in agreeing that payment for Kaiapoi should not be given to Ngati Toa, was recognising Ngai Tahu rights to Kaiapoi. And by Kaiapoi, Ngai Tahu would mean not simply the pa but the Kaiapoi district. This was confirmed by Professor Ward, who in cross-examination said that "from the Maori point of view Kaiapoi would have been seen as a district" (tape T8:5740).

8.3.13 Mr Temm, for the claimants, made passing reference only to Grey's visit in 1848. The Crown cited a passage from the Ward report (T1:122-123) to the effect that the Wairau purchase was in the forefront of Ngai Tahu concerns and that Grey seems

to have used this as an opening to discuss the purchase of Ngai Tahu interests in the area between Wairau and Otakou blocks. The Crown refuted the implication that Ngai Tahu were reluctant to sell land to the Crown in 1848, or that Grey had to create an "opening" by the exercise of some kind of pressure. On the contrary, the Crown said such evidence as there is points to the opposite conclusion: that Ngai Tahu were more than willing to sell. Reference was made by the Crown to correspondence from Ngai Tahu which suggests that negotiations came about as a result of an invitation from Ngai Tahu (L8:4).{FNREF|0-86472-060-2|8.3.13|18} It is of course always possible that such invitation arose in part because of Ngai Tahu concern about the extent of the Wairau purchase and its encroachment onto Ngai Tahu territory. The Crown further suggested that the purpose of Governor Grey's visit (his first to those parts) may merely have been to open the way for full negotiations and not to undertake them himself. This does seem a likely scenario.

The Crown, in discussing Tiramorehu's 1849 letter, referred to Professor Ward's acknowledgement that from the "Maori point of view Kaiapoi would have been seen as a district" (tape T8:5740). That district, it was said, was also the northern limit of the territory continuously occupied by Ngai Tahu during their wars with Te Rauparaha. Professor Anderson is also cited as confirming this (X1:230-231). The dividing line between the Ngai Tuahuriri district, with rights centred on Kaiapoi pa, and the district claimed by the Kaikoura people, lay in the vicinity of the Hurunui near the 43rd parallel. Accordingly, the Crown submitted that Grey and Ngai Tahu were in substantial agreement in February 1848 as to the location of the north-eastern boundary of the proposed purchase. On giving the matter careful consideration, we believe that the weight of evidence supports this view.

8.3.14 It is, we believe, also possible to infer from the limited contemporary evidence available that Governor Grey very probably thought he had a broad agreement with the Ngai Tahu people to sell all their land between the Wairau and Otakou blocks. But the contemporary evidence is such that no firm conclusion can be drawn as to the Ngai Tahu state of mind at the time.

Ngai Tahu Land Report

08 Kemp's Purchase

8.4 The Purchase

8.4. The Purchase

Grey's instructions to Eyre

8.4.1 Governor Grey, on his return from his South Island trip early in 1848, gave verbal instructions to Eyre to make arrangements for the purchase of lands from Ngai Tahu. He indicated that he hoped to be able to send the surveyor-general to conduct the purchase (L9:16).{FNREF|0-86472-060-2|8.4.1|19} This proved to be impossible. Instead, in his despatch of 8 April 1848 to Lieutenant-Governor Eyre, he suggested that Kemp be appointed commissioner, or, failing Kemp, that Kemp should go as an interpreter to the commissioner. Governor Grey instructed Eyre that:

In reference to the anxiety which has been manifested by some of the Natives inhabiting the Middle Island to dispose of the tract of country lying between the district purchased from the Ngatitoa Tribe and that purchased by the New Zealand Company, at Otago, I have the honour to acquaint you that I have found it impossible to dispense with the services of the Surveyor-General from this part of the Colony, and it will therefore be necessary for you to appoint some person for the purpose of extinguishing any title to the tract of country in the Middle Island lying within the limits before alluded to, which may, upon inquiry, be found to be vested in the Native inhabitants thereof.

The mode in which I propose that this arrangement should be concluded, is by reserving to the Natives ample portions for their present and prospective wants; and then, after the boundaries of these reserves have been marked, to purchase from the Natives their right to the whole of the remainder of their claims to land in the Middle Island. (L9:16){FNREF|0-86472-060-2|8.4.1|20}

Governor Grey's instructions were brought to Wellington from Auckland on the sloop HMS Fly and were in Eyre's hands on 21 April 1848. Eyre offered the commission to Henry Kemp the next day. Kemp, aged thirty, was bilingual, being the son of a Keri Keri missionary and born in New Zealand. He had been a secretary and interpreter to the lands claims commissioners (Colonel Godfrey and Major Richmond) in the early 1840s. In 1846 he became the native secretary at Wellington, replacing Dr Edward Shortland. He assisted Grey in making the Wairau purchase in 1847 and claimed to have personally drawn up the Wairau purchase deed (L8:31).{FNREF|0-86472-060-2|8.4.1|21} Kemp received his written instructions from Eyre on 25 April 1848. Discussions and correspondence took place between Eyre and Colonel William Wakefield on the same day. Wakefield agreed to pay up to œ2000 for the proposed purchase, in annual instalments of œ500 and offered to make œ500 available to Kemp to take with him (L8:34-35).{FNREF|0-86472-060-2|8.4.1|22} Also on 25 April, Eyre

formally requisitioned the Fly's services, requiring Captain Oliver to visit Akaroa and Otago with Kemp. Oliver agreed but made it clear that he must sail no later than 29 April as he was under orders to proceed to the Auckland Islands without delay.

Eyre's instructions to Kemp

8.4.2 Lieutenant-Governor Eyre's instructions, dated 25 April 1848, were written on his behalf by his private secretary, W Gisborne, and included a copy of Wakefield's letter to Eyre of 25 April 1848. Among other things, Kemp was told that:

The object of your mission is the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitoa tribe and that purchased by the New Zealand Company at Otakou.

In entering upon the arrangements necessary to effect this object, it would be your duty to reserve to the natives ample portions of land for their present and prospective wants, and then, after the boundaries of these reserves have been marked, to purchase from the natives their right to the whole of the remainder of their claims to land in the Middle Island. The payment to be made to the natives must be an annual one, and be spread over a period of four or five years, as the only means of removing all possibility of the occurrence of any future disputes or difficulties regarding native claims to land in that part of the Middle Island. (L9:68){FNREF|0-86472-060-2|8.4.2|23}

We note that in the first of the above paragraphs the object of Kemp's mission is the extinguishment of any Maori title to land within the boundaries mentioned. But in the second paragraph Kemp is told that to effect this object he is to mark off ample reserves and then to purchase from Maori their right "to the whole of the remainder of their claims to land in the Middle Island". We interpret this as meaning the whole of their claims to land between the two districts mentioned in the first paragraph. A literal interpretation would take the purchase beyond these boundaries and extend into Murihiku in the south and areas to the north not covered by the Ngati Toa purchase, which is clearly inconsistent with the expressed object in the first paragraph.

At the last moment (27 April) Eyre instructed Daniel Wakefield, the Crown solicitor for New Munster, to prepare a draft deed of purchase (L8:40). The draft was clearly inadequate. It stated that the purchaser was to be William Wakefield, as principal agent of the New Zealand Company of London, instead of the Crown (L9:486-488).{FNREF|0-86472-060-2|8.4.2|24} Eyre appears to have sent the hastily prepared draft to Kemp without comment and possibly without having perused it. The arrangement was that Kemp would proceed to Otakou on the Fly, having first made a stopover at Akaroa on the way to see Maori there and prepare them for entering into negotiations on his return. The Fly would then go on from Otakou, after leaving Kemp there, to complete its mission at the Auckland Islands, then return to pick up Kemp and Charles Kettle, the New Zealand Company surveyor assigned by Wakefield to assist, and "such Native Chiefs" as necessary, and carry them all to Akaroa (L9:68).{FNREF|0-86472-060-2|8.4.2|25}

Kemp then, on the eve of his departure:

- had orders to extinguish Maori title to all land lying between the districts purchased from Ngati Toa and that bought by the New Zealand Company at Otakou;

- was not provided with any maps;

- had authority to pay up to œ2000 over a period of four to five years, a sum fixed by Governor Grey after consultation with Wakefield but not with Ngai Tahu. Kemp was not told how the first payment of œ500 was to be distributed;

- had orders to reserve to Ngai Tahu "ample portions of land for their present and prospective wants";

- was to mark out the boundaries of these reserves;

- having surveyed the reserves, was to then purchase from the owners their rights to the whole of the remainder of their claim to land within the limits earlier described;

- was not given any guarantee of a vessel at his disposal for the whole time he might be engaged on these duties; and

- had a defective draft deed of cession.

Kemp departs for the south

8.4.3 HMS Fly left Wellington on 29 April 1848 and reached Akaroa on 2 May. Captain Oliver had hoped to stay for four days only at Akaroa while Kemp made arrangements for Ngai Tahu to meet with him on his return from Otakou. In the event, bad weather detained the sloop at Akaroa until 17 May. Kemp, as a consequence, spent some two weeks there (L8:44). From there the Fly proceeded to Otakou and again encountered strong winds which prevented it entering the harbour. Captain Oliver decided to sail directly to the Auckland Islands, further south, which he reached on 23 May 1848. Kemp was forced to accompany him, it being impossible to disembark at Otakou as instructed by Lieutenant-Governor Eyre. He finally arrived at Otakou on 31 May 1848, where he spent three to four days in discussions with Ngai Tahu chiefs and made contact with Charles Kettle. Presumably because Kemp was due back by a pre-arranged time to meet with the other Ngai Tahu chiefs at Akaroa, no reserves were marked out near Otakou.

When the Fly sailed north on 4 June 1848 it had on board, in addition to Kemp and Kettle, a dozen or so Ngai Tahu chiefs from Otakou and Waikouaiti (L9:70).{FNREF|0-86472-060-2|8.4.3|26}

8.4.4 Kettle had been assigned to Kemp by Colonel Wakefield. A mathematics teacher, Kettle had emigrated to New Zealand from England in 1840 at age twenty. He became assistant surveyor for the New Zealand Company in 1841 and worked around the southern end of the North Island. He went back to England in 1844 and returned to New Zealand two years later. While in England he gave evidence before the House of Commons select committee on New Zealand in June 1844. He claimed to know the Maori language well. In 1846 he became the New Zealand Company's senior representative at Otakou until William Cargill's arrival as the new resident

agent in 1848. In the intervening period Kettle, in addition to overseeing the work of contract surveyors, personally carried out a detailed survey of Otakou harbour and laid out much of the Dunedin town site along with the "suburban" lots around it (L8:45). Wakefield told Cargill that Kettle's "acquaintance with the southern Natives" particularly qualified him for the task (L8:46).{FNREF|0-86472-060-2|8.4.4|27} Wakefield had earlier in the year seen something of Kettle as he, along with Grey's party, stayed in the Kettle house in February 1848. Kettle had then acted as Grey's guide on trips to the Taieri plains and other parts of the Otakou block (L8:47).

Dr Loveridge considered that at this time Kettle probably knew more about the geography of the southern part of the South Island than any other European. Kettle had received detailed descriptions from William Fox (the New Zealand Company's resident agent at Nelson) of Fox's trip inland with Heaphy and Brunner, and of Brunner's journey to the west coast. Kettle was probably the first European to set eyes on central Otago (L8:47-48).

Maps

8.4.5 Kemp had been unable to obtain maps from either Eyre or the New Zealand Company's Wellington office. He told the Smith-Nairn commission in 1879 that the map drawn up at Akaroa was based on:

plans on board of different kinds belonging to the ship [HMS Fly], as well as the surveyor's plans, which I think Mr Kettle furnished me with....I think the plans we were more particularly guided by was the plan which Mr Kettle was instructed to bring up with him. (L9:95-96){FNREF|0-86472-060-2|8.4.5|28}

8.4.6 Dr Loveridge discussed in some detail what he referred to as the Turnbull map (L8:48-51). He produced a photocopy (L21(a)) and a re-drawn enlargement (L21(b)). The tracing of the Turnbull map shows the southern two-thirds of the South Island plus Stewart Island. It starts part way along the Kaikoura coast on the east, and shows Cape Foulwind on the west. It incorporates among other things:

- extensive information about trails, lakes, rivers and terrain in the interior of the island;

- many coastal place names including Milford Haven, Awarua and Mawhera on the west coast; and

- information about Kemp's purchase. The southern boundary is drawn in and Maori settlements are indicated with numerals showing their population.

The presence of the southern boundary of Kemp's purchase on the Turnbull map indicates that it was completed at some time after 12 June 1848 (the date of the Kemp purchase deed). As the tracing had reached London by 31 October 1848, it appears to have been forwarded by Colonel Wakefield with a letter to the London secretary of the New Zealand Company dated 26 June 1848. There is also clear evidence that the map, or a copy from which this tracing was produced, was in existence in Wellington barely a week after Kemp's purchase was completed. This appears from a detailed description of the lakes shown on the map (not shown on the deed map) which

appeared in the issue of the New Zealand Spectator published in Wellington on 21 June 1848, nine days after the Kemp purchase and five days after Kemp and Kettle reached Wellington on the Fly (L8:50; for the full press report, L9:615).{FNREF|0-86472-060-2|8.4.6|29}

It is not disputed that both the Kemp purchase deed map and the Turnbull map were drawn by Kettle; the place names and numbers on both are in the same hand and the coastal outlines are the same (L8:51). It seems probable that Kettle had an earlier version of the Turnbull map in his possession when he left Otakou in June 1848 and used this to produce the deed map. Dr Loveridge suggested that while at Akaroa, Kettle added more information to his original map (in addition to the purchase details) to produce the final version of the Turnbull map (L8:51).

The Ward report, however, while considering it to be clear that the Turnbull map was prepared at a similar time as the deed map, pointed out that the latter is not simply a summary of the Turnbull map (T1(d)). It agreed that the information on the Turnbull map must have come from Ngai Tahu sources, but not necessarily at Akaroa. The report thought it more likely the information was obtained on the voyage to Akaroa when more time was available. While some information may well have been obtained during the voyage from Otakou in the course of discussions, it is also quite possible, as Crown counsel suggested, that the source of the names on the northern part of the west coast and especially for the northern trails, would have been the Poutini people present at Akaroa, whether Wereta Tainui or any other Poutini. The Crown pointed out that Kettle was present in Akaroa for eight days, five before the signing and three after (the trip north to Akaroa on the Fly took three days). Given that the "census" figures were on the deed map on 12 June, the Crown considered all the information on both maps was collected from Ngai Tahu before that date and while negotiations were underway (X1:295A). This seems to us a reasonable conclusion.

Kemp's negotiations

8.4.7 As we know, Kemp spent 15 days at Akaroa delayed by bad weather when he first called there on his way south. Professor Ward was reluctant to agree that Kemp could have had discussions with the Ngai Tahu present because of the absence of any record by Kemp (tape T8:1693-1807). Clearly Kemp made arrangements for all the Ngai Tahu chiefs on Banks Peninsula and the coastal plains to assemble in June for the purposes of discussing the proposed purchase. It is difficult to imagine that he did not, on his first visit, explain what his instructions were as to the land the Crown wished to purchase, even if he may have held back on the purchase price. He could,

after all, speak Maori and was a well-versed negotiator.

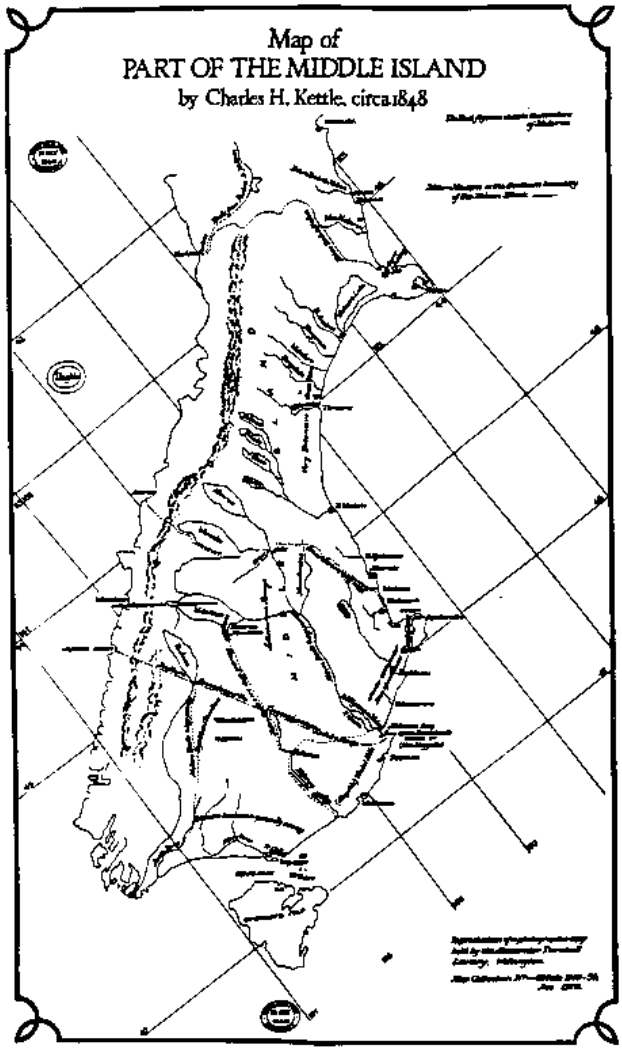

Figure 8.2: The Turnbull map as reproduced for Dr Loveridge and originally drawn by Charles Kettle, Kemp's surveyor, during the negotiations for the Kemp purchase in June 1848 (L21(b)). Courtesy of Alexander Turnbull Library, Wellington.

Kemp spent three or four days at Otakou following his arrival there on 31 May. In the course of his discussions some 12 or so leading chiefs, including Taiaroa and Karetai, assembled and then travelled north on the Fly. Kemp, in evidence to the Smith-Nairn commission said, "We brought up all those who were deputed by their own people to represent them in the negotiations of the purchase"(L9:77){FNREF|0-86472-060-2|8.4.7|30}. As the Ward report indicated, and Professor Ward agreed under examination, the Otakou chiefs were "probably" involved in the discussions. Again, it stretches credibility to imagine that Kemp and Kettle remained mute throughout three days on the voyage from Otakou to Akaroa, when the very purpose of their lengthy trip was to negotiate a purchase. It is not difficult to contemplate long and animated discussion of the Crown proposals. It is likely the names of Milford Haven and Wakatipu-Waitai were given to Kemp during the voyage as being the boundary points on the west coast.

By the time Kemp arrived in Akaroa on 7 June 1848 he had already spent 15 days there in the first half of May, where he had the opportunity to discuss the sale with

those Ngai Tahu living in Akaroa and probably with members of Ngai Tuahuriri and other hapu who were living on and around Banks Peninsula. The trip to Otakou had given Kemp from three to six days to discuss the purchase with rangatira from the southern extremities of the block. Once returned to Akaroa, Kemp had major discussions with the assembled Ngai Tahu hapu for between two and five days. Among the 500 present at these discussions were rangatira from all the hapu of Ngai Tahu from Kaikoura to Otakou, including at least some Poutini Ngai Tahu from the West Coast. We shall discuss the evidence for the Poutini present later in this report. Only Ngai Tahu from Foveaux Strait and Ruapuke appear not to have been present. Finally, on the day the deed was signed, Kemp dealt with the leading rangatira on the deck of the Fly. In all, Kemp had opportunity to discuss the purchase with a portion of the tribe for up to 22 days and with all the hapu present for a further five days with the tribe assembled as a whole. We do not know how many of these days were actually used in discussion. Unfortunately, if Kemp kept a record during this lengthy period, it is not available to us now.

The only contemporary record is that of Kettle who made daily journal entries from the time of his departure from Otakou (L9:387-396).{FNREF|0-86472-060-2|8.4.7|31} Kettle's entries for 3-6 June 1848 covering the journey north from Otakou refer only to the weather and the sloop's progress. Those for 7-9 June indicate that the negotiations were delayed due to the late arrival of the Port Levy Maori and others, and inclement weather. Kettle lived ashore at Akaroa in the resident magistrate's house, while Kemp spent two nights ashore also at Mr Watson's. In his evidence before the Smith-Nairn commission, Kemp stated that they had several meetings and discussions on shore with the Ngai Tahu chiefs (L9:80).{FNREF|0-86472-060-2|8.4.7|32}

8.4.8 On 10 June all was apparently ready. As Kettle related it, by noon that day some 500 Ngai Tahu were gathered at the French blockhouse with Kemp and Kettle. As Kettle noted, most of the Maori "who live along the coast and on Banks Peninsula" were assembled (L9:70).{FNREF|0-86472-060-2|8.4.8|33} Kettle recorded that by noon:

Most of the natives from the opposite side had arrived numbering altogether about 500-The "correro" commenced by the chiefs coming forward and calling the names of the lands to be sold-Commencing from Kaikora one chief went down to the Peninsula-Then Tairoa called the lands from the Peninsula to Waitake-Then Soloman from Waitake to Moeraki. Portiki and others southward from thence to the Heads of Otakou. Tikau, a native who lives on the western side of Akaroa and who appears to be an influential person from his superior intelligence though a chief of no importance by birth, was at the head of the natives living on the Peninsula and to the North[war]d of it-He began his speech by stating that he thought that the natives were not all fully agreed as to the sale of the land-Mr. Kemp then interrogated him with regard to the Claim of the French Company, and he very clearly stated that they (the natives) had sold the whole [sic] of the Peninsula to them, and amongst all the natives present there was not a dissentient.

It was then made known to them the sum which was offered-net œ2,000 in four half yearly instalments of œ500 (originally intended to be yearly instalments). -They seemed very much surprised at the small sum and stated that they had originally asked

œ10,000, and in a letter lately written to the Governor in Chief had reduced it to œ5,000. There was considerable hesitation amongst them as they argued that the sum was so small that many would receive no benefit from it and from what they had heard from the Governor in his late visit they were induced to hope that they would be placed in such a position as to be able to purchase sheep and cattle - We informed them that we were bound down to instructions and that we would give them till Monday Morning to consider the matter, and if they did not then come to terms the ship would sail as the Captain was very anxious to get back to Wellington - Tairoa and other chiefs stated that they would come to terms if they had œ1,000 to distribute amongst them at once - At dusk the meeting broke up. (L9:390-393){FNREF|0-86472-060-2|8.4.8|34}

Kettle's report to Wakefield on 19 June provides some additional information about this meeting:

After a day's discussion respecting the boundaries and the claimants, we informed them that the sum to be paid was 2,000 l. in half-yearly instalments of 500 l., one of which would be paid as soon as the deed was signed. It appeared that this was below their expectations as they stated that they had originally asked 10,000 l.; but in a letter lately written to the Governor-in-Chief they had reduced the sum to 5,000 l.. We explained to them that ample reserves would be made for them, and that, under those circumstances, the sum offered was in fact a gratuity. After some hesitation they agreed to accept the 2,000 l., provided they had 1,000 l. as the first instalment. But we informed them that there were only 500 l. on board the "Fly", and as the ship could not be detained, we would give them a day to consider the matter, and, if they did not come to terms, she would sail.

... With regard to Banks' Peninsula, all the natives acknowledged having sold the WHOLE of it to the French Company. (L9:70){FNREF|0-86472-060-2|8.4.8|35} (emphasis added)

It appears from the foregoing that there were discussions respecting the boundaries and the claimants, as well as negotiations over the price and method of payment. A further day was given Ngai Tahu to consider the matter. It is clear that Ngai Tahu had previously been in correspondence with Grey over the sale of their land. They originally sought œ10,000 and later reduced this to œ5000. This suggests they were willing to sell to the Crown provided they were satisfied with the price. It may very well be that they were induced to accept so small a sum as œ2000 in reliance on the assurances, to which Kettle refers, "that ample reserves would be made for them". Tikao was later said by Waruwarutu to have asked Kemp for œ5 million for the land. When this was refused Tikao is said to have responded:

If I accept your offer, I expect to have returned me the eel weirs, the mahinga kai, the places of settlement, the burial places, the landing places and also additional reserves out of the land. (B2:doc 3/11: 182)

After a long debate Kemp was said to have accepted these terms.

Kettle noted on Sunday 11 June that:

In the evening Tairoa came up to Mr Watson's and told us that sooner than the sale of the land should not take place he would give up his own portion in the present instalment and receive it in the next-Mr Kemp then told him that we would go on board in the morning and if they made up their minds to receive the œ500 they were to follow us. (L9:393-4){FNREF|0-86472-060-2|8.4.8|36}

The deed is signed

8.4.9 Again, the only contemporary account of events surrounding the signing of the deed is that of Kettle. On Monday morning, 12 June 1848, Kettle and Kemp "saw the Natives...and found that they were inclined to come to terms":

About 10 AM went on board the "Fly" whither we were followed by the Principal chiefs-Mr Kemp drew out the deed in the Maori language and I executed a plan to connect with it-The northern boundary to be at Kaiapoi, adjoining the Nelson Crown Grant, and across the island to the west coast-The southern boundary a line from the Kaihiku range to Milford Haven on the West Coast As the localities of the native settlements and cultivations were not known it was stated in the deed that such lands would be reserved for them together with other blocks of land which should hereafter be determined upon when the surveys should be made-Tairoa and the Otakou natives were quite ready to sign the deed, but Tikau made a long speech and hesitated for some time-but on seeing Tairoa and others signing the deed Tikau and his party came forward and subscribed also-Tairoa took œ250 for his own party South of the Peninsula and Tikau took the other half for his party North of the Peninsula and it was further arranged that the same chiefs should take the next instalments in the same way for their respective people-[The journal ends here in mid-page] (L9:394-396).{FNREF|0-86472-060-2|8.4.9|37}

A week later Kettle reported in similar terms to Wakefield on the signing of the deed:

On the 12th instant we went on board the "Fly", and were followed by the principal chiefs. Mr. Kemp drew out the deed in the Maori language, in which it was stated [that] the northern boundary was to be from Kaiapoi, adjoining the Nelson Crown grant, across the island to the west coast, the southern boundary, a line from the Kaihiku range, south of the Molyneux, to Milford Haven, on the west coast. I executed a map of the boundaries, which was attached to the deed.

As the localities of the native settlements and cultivations were not known, and it being impossible to convey any idea of extent in the native language, it was stated in the deed that such lands should be reserved for them, together with other blocks which should hereafter be determined upon. The deed, after being read aloud, was then signed by the chiefs, in the presence of Captain Oliver, Lieutenant Bull, Mr. Kemp, Mr. Bruce and myself. The money was afterwards divided without any difficulty, Taiaroa taking 250 l. to be subdivided amongst the natives south of Banks' Peninsula, and Tekau the other half, for the natives north of the Peninsula, and it was unanimously agreed to, that the same chiefs should receive the future instalments, in the same proportions, for subdivision. (L9:70){FNREF|0-86472-060-2|8.4.9|38}

The following points might be noted from Kettle's account at this stage:

- Kemp drew the deed in Maori and Kettle executed a plan which he says "was attached to the deed";

- the deed "after being read aloud" was then signed by the chiefs; and

- Kettle erred in stating in his report to Wakefield that the northern boundary, as read out in the deed, was to be from Kaiapoi, and across the island to the west coast. In his earlier journal entry he correctly attributes that boundary to the plan attached to the deed.

Agreement by threat of force?

8.4.10 The question of whether Kemp used threats of force to obtain Ngai Tahu agreement to the sale is usefully discussed in the Ward report (T1:131-132) and we set out here the discussion by Professor Ward:

Evidence given to the Smith-Nairn Commission in 1879 stated that Kemp used threats of force to obtain Ngai Tahu agreement to the sale. There is no contemporary evidence to support this claim. The allegations do have some basis however, in that they are a commentary on the way Ngai Tahu saw their position in 1848. The 1847 purchase from Ngati Toa and the New Zealand Company plans for further settlement of the Middle Island have been discussed as part of the background to the purchase. These were seen by Ngai Tahu as threatening their mana and conceptualised in terms of a threat of force.

The report quotes Kemp's testimony to the Smith-Nairn commission:

I was to take care to explain to the Natives that in selling the block there was a promise of settlement under the Canterbury Association. I was instructed to say positively that the Company was coming out, and would occupy the land; and I was to call their attention to the fact that in ceding the block they would derive very great advantages from these people coming to settle on the land. (L9:75){FNREF|0-86472-060-2|8.4.10|39}

The report continues:

It is likely that Grey made a similar 'promise' in 1848. From the Government's point of view there was little point negotiating the purchase of the land unless Ngai Tahu also understood that it was going to be settled by Europeans.

Matiaha Tiramorehu's testimony before the same commission illustrates how such a "promise" might have been interpreted by Ngai Tahu.

[Kemp] said "Well, if you choose to keep hold of Kaiapoi, I shall take this money, and pay it over to the Ngatitoa". He said "If you are still further obstinate, I will bring soldiers to occupy all your land". This is what he meant, but he has turned it in another way by saying that a number of people from England were expected to arrive in New Zealand. (L9:191-2){FNREF|0-86472-060-2|8.4.10|40}

From this the report concluded that:

It is hardly surprising that Ngai Tahu conceptualised the displacement of their mana in terms of a military threat. The Wairau affray had shown Ngai Tahu that land sales and settlers brought soldiers. After 1847 the government was committed to defending an agreement between Ngati Toa and the Crown. If Ngai Tahu were to challenge Ngati Toa's right to sell they would also be directly confronting the settlers and the Crown who derived their title from the sale. There was always the possibility that Ngati Toa rights would be recognised further south. (T1:131-132)

Our understanding of this discussion is that the Ward report is suggesting that Ngai Tahu may in retrospect have inferred from Kemp and possibly Grey's reference to the coming of settlers to settle on the land, that soldiers might be brought to enforce this. That is to say, that Ngai Tahu "conceptualised this displacement of their mana in terms of a military threat". Professor Ward does not seem to be saying that actual threats were made by Kemp to bring soldiers. Nor, on the evidence, are we satisfied that such threats were made.

The deed

8.4.11 The following is Kemp's deed as drawn up by him in Maori and signed by Ngai Tahu:

WAKARONGO mai e nga iwi katoa. Ko matou ko nga Rangatira ko nga tangata o Ngaitahu kua tuhi nei i o matou ingoa i o matou tohu ki tenei pukapuka i tenei ra i te 12 o Hune, i te tau tahi mano waru rau wha tekau ma waru ka whakaae kia tukua rawatia atu kia Wairaweke (William Wakefield) te Atarangi o te Whakaminenga o Niu Tireni e noho ana ki Ranana, ara ki o ratou Kaiwhakarite, o matou Whenua, o matou oneone katoa e takoto haere ana i te taha tika o tenei moana timata mai i Kaiapoi i te tukunga a Ngatitoa i te rohe hoki o Whakatu, haere tonu, tae tonu ki Otakou, hono tonu atu ki te rohe o te tukunga a Haimona, haere atu i tenei tai a te mounga [sic] o Kaihiku, a puta atu ki tera tai ki Whakatipu Waitai (Milford Haven) otira kei te pukapuka Ruri te tino tohu, te tino ahua o te whenua. Ko o matou kaainga nohoanga ko a matou mahinga kai me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou; a ma te Kawana e whakarite mai hoki tetahi wahi mo matou a mua ake nei a te wahi e ata ruritia ai te whenua e nga Kai Ruri-ko te nui ia o te whenua, ka tukua whakarereretia mo nga Pakeha oti tonu atu.

Ko te Utu kua tukua mai mo matou e Rua mano pauna moni (œ2,000) e tuawhatia mai te utunga mai o enei moni ki a matou, utua mai kia matou inaianei, e Rima rau pauna (œ500), kei tera utunga e œ500, kei tera atu œ500, kei tera rawa atu e œ500, huihuia katoatia, e œ2,000.

Koia tenei tuhituhinga i o matou ingoa i o matou tohu, he whakaaetanga nuitanga no matou, i tuhia ki konei ki Akaroa i te 12 o Hune, 1848. (appendix 2.2)

Kemp translated his deed into English as follows:

Know all men. We the Chiefs and people of the tribe called the "Ngaitahu" who have signed our names & made our marks to this Deed, on this 12th day of June 1848, do consent to surrender entirely & for ever to William Wakefield the Agent of the New Zealand Company in London, that is to say, to the Directors of the same, the whole of

[the] lands situate on the line of Coast commencing at "Kaiapoi" recently sold by the "Ngatitoa" & the boundary of the Nelson Block continuing from thence until it reaches Otakou, joining & following up the boundary line of the land sold to Mr. Symonds; striking inland from this (the East Coast) until it reaches the range of mountains called "Kaihiku" & from thence in a straight line until it terminates in a point on the West Coast called "Wakitipu-Waitai" or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same (the condition of, or understanding of this sale is this) that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the land shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.

We receive as payment Two Thousand Pounds (œ2,000) to be paid to us in four Instalments, that is to say, we have this day received œ500, & we are to receive three other Instalments of œ500 each making a total of œ2,000. In token whereof we have signed our names & made our marks at Akaroa on the 12th day of June 1848. (L9:416-418){FNREF|0-86472-060-2|8.4.11|41}

Following the signing of the deed the money, according to Kettle, was divided without any difficulty. Taiaroa took œ250 to be divided among the Ngai Tahu south of Banks Peninsula, and Tikao took the other half for Ngai Tahu north of the peninsula. Kettle says it was unanimously agreed that the same chiefs would receive the future instalments in the same proportion for "subdivision" (L9:70).{FNREF|0-86472-060-2|8.4.11|42}

Other promises

8.4.12 It is apparent from the evidence that the deed did not contain all the terms of the agreement between the parties. This point is well made and appropriate details are given in the following passage from the Ward report:

The deed signed on 12 June 1848 was not a full or accurate expression of the agreement Kemp had come to with Ngai Tahu. It is apparent that Kemp gave Ngai Tahu a number of undertakings which were not written into the deed. Although Kettle's diary indicates that some arrangements were made regarding payment of the balance of the purchase money, the deed made no mention of this. Kemp later recalled the discussion of eel weirs and landing places, which were 'promised by me in a more or less fair proportion'. (L9:86) Some promises were made about the size and value of the reserves. Ngai Tahu were told that their reserves would be 'ample' and that the real payment for their land was the increase in value of these reserves once adjacent areas had been settled by Europeans. That is the tribe was promised an endowment in land as well as land for their sustenance. The localities of reserves were not discussed. (L9:89) Later accounts by Ngai Tahu signatories suggested that Kemp promised Ngai Tahu would retain their burial sites and sacred places in addition to eel weirs and other fisheries, mahinga kai, kainga, landing places and reserves, and that together these promises induced Ngai Tahu to sign. (L9: 146, 189-190, 242, 259, 291, 323-4) Kemp himself acknowledged that there had been discussion of landing places and eel

weirs, (B3, 3/7:21-2) though he did not understand the reservation of eel weirs to be an exclusive one. (T1:138)

Ngai Tahu Land Report

08 Kemp's Purchase

8.5 The Boundaries of the Purchase

8.5. The Boundaries of the Purchase

Claimants' criticisms of the deed

8.5.1 The claimants made a variety of criticisms of the deed (B2:8-22). In outlining their chief concerns, they:

- said the plan was not attached to the deed or, if it was, Ngai Tahu did not see it at the time;

- said that many of the names on the deed are not accompanied by any signature or mark, suggesting that the deed did not necessarily have the consent of all those whose names are recorded;

- criticised the descriptions in the deed and the deed plan of the boundaries, in particular the western and northern boundaries;

- were emphatic that "Kaiapoi" named in the deed and the deed plan was Kaiapoi pa, not the Kaiapoi district; and

- denied the boundary went beyond the foothills and relied principally on the evidence to this effect given some 30 years later at the Smith-Nairn hearing.

Was the plan attached to the deed at the time of signing?

8.5.2 As we have seen, Kettle stated clearly in both his journal for 12 June 1848 and his official report to Wakefield on 19 June, that the deed was read out before it was signed. In the latter report he confirmed that the map was attached to the deed. He later referred to the deed being read aloud and then being signed by the chiefs. Kemp made no record at the time, but gave evidence many years later to the Smith-Nairn commission. While somewhat uncertain initially, he was recalled after Mantell gave evidence confirming both Kettle's and Kemp's writing on the map, as well as the note on the deed stating that the map was attached and signed by Lieutenant Bull of the Fly, (one of the witnesses to the deed). Kemp then recalled the plan being attached to the deed at the time and the seal being on it. After examining the deed Ngai Tahu's counsel, Mr Izard, accepted that the map had been attached to the deed (L8:60-63).

Mr Evison, in his comment on Dr Loveridge's evidence (O46), referred to Maori testimony before the Smith-Nairn commission. He cited Waruwarutu (B3:doc 3/11:192){FNREF|0-86472-060-2|8.5.2|43} and Te Uki (B3:doc 3/13:286){FNREF|0-86472-060-2|8.5.2|44} as each saying they saw no map. He quoted Tiramorehu as

saying variously that, "we saw no map", "there was no map", and that the plan was not fixed to the deed at the time he signed it. It was only when Mantell came to Akaroa that he saw there was a plan attached to the deed (B3:doc 4/2:270-271).{FNREF|0-86472-060-2|8.5.2|45} Mr Evison, later in his comment, did not dispute that the deed was read out but suggested that, whatever Kettle recorded as having been done, it was not done effectively, because the Maori evidence is that they saw no map or plan until Mantell showed it to them when he arrived at Akaroa in August 1848 (O46:12). Mr Evison's complaint was that the Crown failed to ensure that the Maori vendors knew of the plan and agreed it was an accurate representation of the extent of the land they were agreeing to sell.

In assessing this evidence it is necessary to bear in mind that it was given 30 years after the event and tended to concentrate on specific issues as to whether the deed was read out and whether the map was attached to the deed at the time it was signed. But the parties' knowledge of the proposed boundaries would not be confined to these specific incidents. For instance Kemp told the Smith-Nairn commission that he frequently talked over the boundaries of the land he proposed to buy "both on board and on shore too" (L9:85).{FNREF|0-86472-060-2|8.5.2|46} This is what one would expect; two questions would be uppermost in the minds of both parties, namely, the extent of the land which Kemp wished to buy, and the price the Crown was prepared to pay. Kettle recorded that at the lengthy korero attended by some 500 Ngai Tahu on 10 June, boundaries, claimants and the price were discussed. Clearly there were various such discussions, including on the morning of 12 June when the deed was later signed. We have no reason to doubt that Kemp and Kettle would have been concerned to ensure that the deed and map conformed with the oral agreement reached with Ngai Tahu.

Signatures on the deed

8.5.3 The claimants also argued that the Kemp deed was not signed by the majority of those chiefs whose names are written on the deed, and that one chief, Metehau, named on the deed, denied signing it and did not agree to the Kemp purchase (Z14(b)). Mr Evison maintained that this suggests that "the majority of Kemp's signatories did not sign the Deed at all, and that Kemp and Mantell were at pains to override and discredit their objections" (Z14(b):2). Mantell was well aware that the deed had not been signed by all those named and divided the list of names into those who signed in their own hand, those who marked the deed, those whose names were written by the commissioner, and proxies. Mantell's own list differs from Mr Evison's (X12(a):39).

According to Mr Evison, the deed was signed by ten people, had the tohu of six others and two possible duplications ("Te Hau" and "Tiraki"). He argued that the remaining 20 names, including the two proxy signatures, were written only by Kemp, without signature or tohu (Z14(b) and modified in Z41). Mantell believed that in addition to those named by Mr Evison, Ihaia, Waruwarutu, Taki, Rangi Whakana and Te Whaikai Pokene signed with their own names. On examination of the deed it would appear that at least some of the names claimed by Mantell as signatories were not.

Signed	14 10
Marked	8 6
Commissioner's hand	13 16
Proxy	3 3
Total	38 35

Those chiefs who did sign with their own names were identified by Mr Evison as:

John Tikao John Pere Te Uki

Matiaha Koreke Pukenui

Pohau Wiremu Te Raki Tiari Wetere

Solomon Pohio;

and those who marked the deed as:

Taiaroa Maopo Paora Tau

Tainui Koti Potiki.

Given the difficulty of associating marks with names and with identifying the handwriting of many of the names on the deed, it is impossible to be definite about who signed and who did not. Nevertheless it is clear that a large number of chiefs, possibly a majority, did not actually mark the deed.

Among the explanations suggested for this was the possibility that Kemp had made a list of the names whom he considered should be included, but when the deed came to be signed only a portion of these came forward and, due to their rank, Kemp considered these were sufficient. This scenario must be discounted as the names, signatures and marks are interspersed on the sheet. Secondly, it was suggested that the names could have been added later. This too must be discounted, for the same reason. While those who did not sign tend to be grouped towards the bottom of the sheet, a number have had their names recorded between the signatures of others. The deed was witnessed by officers of the Fly, the resident magistrate at Akaroa and the local store keeper, all of whom would have been well aware if Kemp had tampered with the deed in some way. No evidence was produced to suggest that Kemp would have undertaken so fraudulent an action.

The second question raised by Mr Evison relates to Metehau's possible non-adherence to the Kemp agreement, despite Mantell's insistence that he signed the deed (Z14:10). Metehau certainly was no friend of Mantell and he opposed the setting aside of the Tuahiwi reserve, disrupted the survey, and, so Mantell suggested, threatened him with

a mere. There are two Te Hau on the deed, both written by Kemp, but one is marked with a double cross. Mr Evison did not believe that this mark was made by Metehau. Whether the deed was signed by Metehau or not, there is no statement in the evidence which suggests that he did not take part in the Kemp agreement. His hostility to Mantell can be explained entirely by his concern that the commissioner was not implementing the agreement as he understood it. As we shall see, Ngai Tahu believed that they were entitled under their agreement with Kemp to reserve a very substantial area of land for Ngai Tuahuriri. Metehau's resistance to Mantell was due to the commissioner's determination to reduce this reserve to only 2650 acres.

There has never been any previous suggestion in the 142 years since 1848 that the signatories' names were fraudulently attached to the deed. With the possible exception of Karetai, leading rangatira such as Taiaroa, Tikao, Horomona Pohio, Tiramorehu, Paora Tau and Wiremu Potiki either signed or placed their marks on the deed. Given that the deed was witnessed by reputable men and that the signatures and marks are interspersed on the sheet, the tribunal can only conclude that those who were named but did not sign still gave their consent to the agreement.

The boundaries in the deed and deed map

8.5.4 The deed does not give a clear or full description of the boundaries of the block purchased. Only three of its corners are identified by name. These are conveniently summarised by Dr Loveridge:

1) the northeastern, at "Kaiapoi"-identifying this as the southernmost point of the Wairau Purchase and the "Nelson Block".

2) the southeastern, where the southern boundary of the Otago Block (which ran through the Kaihiku Range) reached the sea, and

3) the southwestern, at "Wakitipu Waitai, or Milford Haven". (It should be noted that, according to one authority, "Whakatipu Waitai" is the Maori name for Lake McKerrow, on the "Whakitipu Katuka" or Hollyford River. This flows in Martin's Bay, a few miles north of Milford Haven-which was more commonly known as "Piopiotai". This being the case, there are in fact two possible southern boundaries for the Purchase).

The northwestern corner is not identified by name, nor is there any indication in the Deed as to how or where the boundary ran between Milford Haven and Kaiapoi. (L8:56-7)

The map attached to the deed was intended to "more particularly describe" the boundaries and size of the land sold. It included two important features not explicitly described in the deed itself. Here again, for convenience, we quote from Dr Loveridge

as follows:

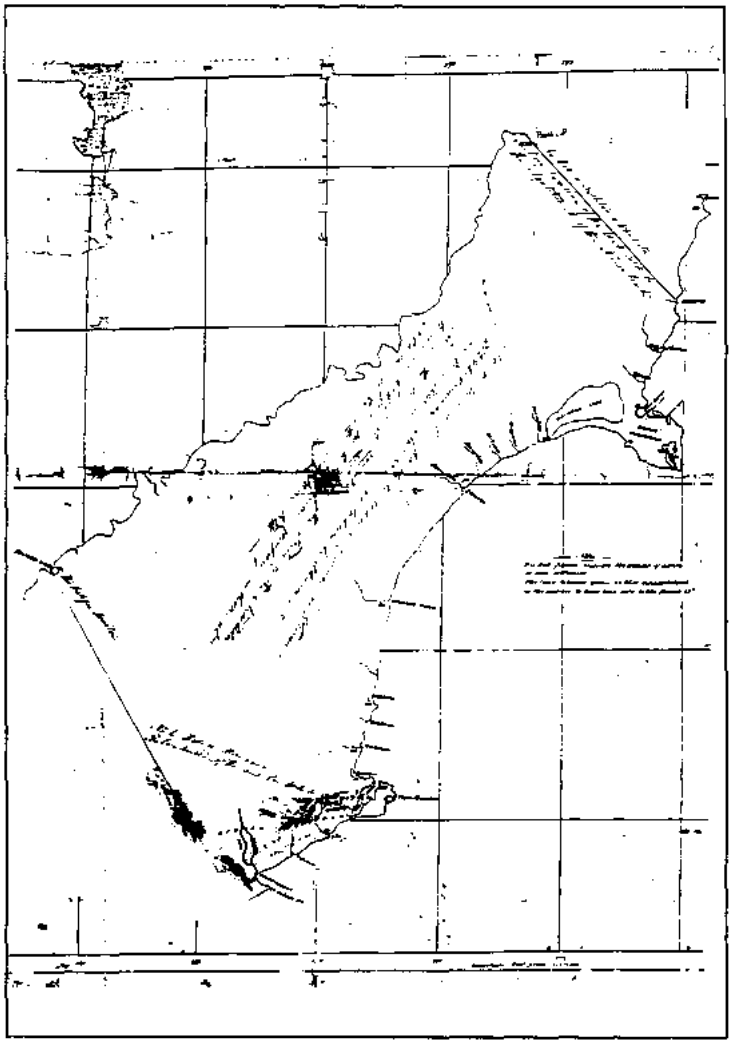

Figure 8.3: The Kemp deed map. On the original there is a blue border around the coast line, Banks Peninsula is coloured green and the Otakou purchase is coloured yellow. Courtesy of DOSLI, Wellington.

1) the northern boundary is shown as a straight line running due northwest from [a] place labelled "Kaiapoi" on the east coast, across the Island to the west coast. The line itself bears the bilingual legend "Ko Rohe a Ngatitoa o Whakatu-The boundary line of the land sold by the Ngatitoa and of the Nelson Block".

2) Bank's Peninsula is separated from the mainland by a line across its base, and is tinted in green. A caption reads "The land coloured green is that acknowledged by the natives to have been sold to the French Co[mpan]y".

The map also has red numbers inscribed at several points along the coastline. A caption reads "The Red figures indicate the number of natives at each settlement". Kemp later explained (L9:424-425) that these were to serve "for a guide as to the quantity of land it may be thought desirable to set apart for their use; a matter which, I believe, may be easily and finally settled as the surveys of the coast line progresses.(L8:57)

We note that "Kaiapoi" is shown on the deed map as being placed a short distance to the north of the 43rd parallel, at the mouth of a river, well to the north of the old Kaiapoi pa. The Turnbull map puts it in the same position, with the river being labelled on that map as the Hurunui. Kettle used this "Kaiapoi" as his starting point and drew a line across to the opposite coast, coming out at Kawatiri at the Buller river mouth.

A "hole in the middle"?

8.5.5 The boundaries described in the deed and more particularly defined in the attached map have already been discussed. In essence the question is whether, as the Ngai Tahu later claimed, the land sold was the eastern seaboard from Maungatere to Maungaatua or, if not, what were the boundaries agreed upon. It is this land west of the foothills above the Canterbury plains, and east of the main divide, which the claimants say was never purchased, and which was referred to by them as the "hole in the middle". The land west of the Southern Alps was later part of the Arahura purchase. It is necessary at this point to look closely at the evidence relevant to each of the four boundaries.

The northern boundary

8.5.6 The deed referred to lands situated on the line of coast, commencing at Kaiapoi recently sold by the Ngati Toa and the boundary of the Nelson block continuing from there until it reached Otakou. It says the boundaries and size of land are more particularly described in the map.

The map attached to the deed (L23) showed the northern boundary as starting on the east coast at a point labelled "Kaiapoi". It is at or very near the mouth of an unnamed river just to the north of the 43rd parallel. On the Turnbull map (L21(b)) which the Crown submitted was the model for the deed map, the river is identified as the Hurunui. The northern boundary runs in a straight line from "Kaiapoi" in a north-westerly direction until it reaches a black line with blue shading at a point to the north of the 42nd parallel. This blue-shaded line runs south and west to Milford Haven (or Wakitipu-Waitai) and was clearly meant to represent the western coast line. Above and below the northern boundary line is a bilingual legend: "Ko Rohe a Ngatitoa o Whakatu-the boundary line of the land sold by the Ngatitoa and of the Nelson Block". The caption "Buller R" next to the western end of the northern boundary appears to have been a later addition in pencil (T1:136).

The "Kaiapoi" shown on the deed and the Turnbull map is situated at a point well to the north and east of the position of Kaiapoi pa. The pa lies some 45 kilometres south and 45 kilometres west of the Hurunui-almost 70 kilometres away (X1:269).

The Crown contended that there was little doubt that both Kemp and Kettle:

- thought that the Kaiapoi referred to in the Wairau deed and the "Kaipoe" of the Nelson Crown grant map were the same place; and

- believed that the northern boundary of the Ngai Tahu purchase should start at the mouth of the Hurunui. (X1:269-70)

It will be recalled that this location for Kaiapoi has already been discussed as the point regarded by Grey and other European officials as the southernmost point of the Wairau purchase.

The Smith-Nairn commission requested Kemp to clarify earlier comments about "Te Rohe a Ngatitoa". In a written response Kemp said:

I think I should be right in saying that Either of those lines eg. Sir Geo: Grey's & that on the Deed, were known at the time to the Ngaitahu as the Southern boundary of the Ngatitoa Purchase, & as such, formed the Northern outlying Boundary (as then UNSURVEYED) of the Canterbury Purchase. (T6:141){FNREF|0-86472-060-2|8.5.6|47} (emphasis in original)

As the Crown pointed out, the line of "Sir Geo: Grey's" referred to by Kemp was the unmapped southern boundary of the Wairau purchase. The Wairau deed defined the southern limits of the purchase solely in terms of "Kaiapoi". Kemp, in his deed map, used "Kaiapoi" as the eastern anchor for the northern boundary of the Ngai Tahu purchase. In 1848 he adopted the point at which the Wairau and Nelson Crown grant boundary lines started in defining "Te Rohe a Ngatitoa". As the Crown suggested, Kemp could not have adopted the line of the Wairau purchase boundary as such, because this did not exist. Nor could he have adopted the line of the southern boundary of the Nelson Crown grant (assuming he knew more or less where it went) because it did not run across to the west coast. The Crown suggested, for reasons which are referred to later, that Kemp evidently took "Kaiapoi" as the proper starting point for a "purpose drawn" Ngai Tahu boundary (X1:271).

8.5.7 Did Ngai Tahu consider, as the claimants insisted, that "Kaiapoi" in Kemp's deed and on the plan referred to Kaiapoi pa and not the northern point of a Kaiapoi district? The claimants were adamant that there was only one Kaiapoi, that is, Kaiapoi pa, and that Kemp's plan was defective because it put Kaiapoi pa in the wrong place on the east coast (Y1:76).

The Crown relied on the following:

(a) Charles Kettle recorded in his journal for 10 June that:

the correro commenced by the chiefs coming forward and calling the names of the lands to be sold-commencing from Kaikora one chief went down to the Peninsula. (L9:390){FNREF|0-86472-060-2|8.5.7|48}

The Crown suggested the first speaker was probably John Tikao, who would have been describing the Ngai Tuahuriri claim. Statements made later during the negotiations for the purchase of the North Canterbury and Kaikoura blocks in 1856 and 1859 showed that Ngai Tuahuriri asserted exclusive rights as far north as the Hurunui River, with the area between the Hurunui and Waiau Rivers overlapping with the Kaikoura people, whose undisputed area began on the Waiau (M10:17). In the later North Canterbury and Kaikoura purchases the shared area was included in both purchases, that is to say, the Crown bought it from both hapu.

(b) The Crown said that Ngai Tahu came away from the Kemp negotiations with the same impression-that they had sold lands to the north of the Ashley River and the nearby Kaiapoi pa. On 1 September 1848 Mantell went to Kaiapoi pa. He was aware that the northern line started in the deed map "at a point on the east coast considerably to the North of Kaiapoi Pa" (L9:357).{FNREF|0-86472-060-2|8.5.7|49}

He later told the Smith-Nairn commission that:

Beyond the mark on the plan attached to the Deed, no line was known to me [in 1848], or I think to Ngaitahu, as "te rohe a Ngatitoa", before I went on to the ground. I believe that the Deeds of Cession by Ngatitoa to the Government [referring to the Wairau Deed of 1847] describe Kaiapoi as the southern boundary of their claims on the East Coast of the Middle Island ... acting on that belief, and finding it necessary in my transactions with the natives to have some fixed northern boundary mutually understood between me & them, I made it my first business as reported at the time, to find out Kaiapoi. Arrived there (at Kaiapoi pa) I pointed out to the Natives a line in a north-westerly direction by compass as being "te rohe a Ngatitoa", and as being the boundary to the northward of which my distributions of money in respect of the Ngaitahu Block, made by me, would not extend. (L9:356-7){FNREF|0-86472-060-2|8.5.7|50}

Mantell appears to be suggesting here that Ngai Tahu did not know where the northern boundary lay and it was necessary for him to establish it. In fact, the Crown claimed, Mantell's own evidence of discussions at Kaiapoi pa on 1 September 1848, shows otherwise. The following extract is cited from his Outline Journal of 1 September 1848:

...I had to listen to nineteen or twenty speeches referring almost exclusively to the Ng[ati]toa sale and to the manner in which at the June payment [by Kemp] the natives had not devoted any money to Kaiapoi but to the Land thence to Kaikoura. [I] Told them that if they conducted themselves better I would report their case to the Lieut. Govr. and returned to the camp having first pointed out the boundary. (M3:136){FNREF|0-86472-060-2|8.5.7|51}

In his January 1880 evidence to the Smith-Nairn commission Mantell told the commission that:

...The Natives told me, and I dare say you have had it in evidence, that a considerable portion of Kemp's first distribution was allotted to lands north of this boundary. A considerable portion was allotted by the Natives themselves to land north of this boundary. (L9:358-359){FNREF|0-86472-060-2|8.5.7|52}

Immediately after the above passage there is the following very interesting dialogue between Commissioner Nairn and Mantell:

Mr Nairn -I cannot see how the Maoris should recognise the line by your merely pointing out a line in a north-west direction, unless there was some particular point or feature to which their attention was drawn? -I think the line went near to Maungatere (Mount Grey).

Was that mentioned at the time as being on the boundary do you think? -No; it certainly was not mentioned as being on the boundary. Nothing was mentioned. We all saw the direction. The Natives came to my standpoint, and looked in that direction.

Mr Smith -That was done when you were at Kaiapoi? -Yes, at Kaiapoi. (L9:359){FNREF|0-86472-060-2|8.5.7|53}

We think this passage may offer a clue as to how Ngai Tahu came to regard the north-western boundary as commencing at Maungatere.

8.5.8 To resume the account of the Crown's view of events. On 5 September 1848 Mantell had reported to Eyre:

that, at the last payment for the Ngaitahu Block [in June], the sum apportioned by the Commissioner [Kemp] for the Kaiapoi District, was by the Natives allotted to the land between the Waimakariri and the Peninsula, and to that [land] from Kaiapoi Pa to the Waipara purposely to exclude the plain between Waimakariri and Kaiapoi, and to give them some sort of ground for asserting that they had not sold it. (L9:19-20){FNREF|0-86472-060-2|8.5.8|54}

The Crown observed that the Waipara River in effect marks the northern limit of the plains. The coastline between it and the Hurunui River is relatively rough country. The river valley, however, penetrates northwards behind the coastal mountains as far as the 43rd parallel.

The Crown concluded from the foregoing that part of the œ250 given to Tikao by Kemp for the "Kaiapoi district" had been allotted as payment for that part of the Canterbury plains lying between Kaiapoi pa and what the Ngai Tahu then believed to be the northern boundary of the purchase (X1:275).

In the same report of 5 September 1848, Mantell informed Eyre that a Ngai Tahu delegation was coming to Wellington "to assert their right to the land between Kaiapoi and Kaikoura included in the Nelson Block sold by the Ngatitoa" (L9:19).{FNREF|0-86472-060-2|8.5.8|55}

The Crown cited the Ward report as pointing out that:

Ngai Tahu's claim to Kaiapoi involved not just the pa. Kaiapoi was the hub from which a network of rights radiated. An offer to purchase FROM KAIAPOI could only be interpreted as recognition of Tuahuriri's rights to that place and all that went with it. (T1:126) (emphasis in original)

The Crown said this was precisely the point.

The Crown maintained that Grey in February of 1848 offered to purchase, and Kemp in June of 1848 actually purchased, the whole of the Kaiapoi district up to its northern boundary on or near the Hurunui River. This included the purchase of the rights relating to Kaiapoi pa and those "radiating" out from the pa.

Our observation is that it is difficult to believe that Ngai Tuahuriri would have agreed with Kemp that the Ngati Toa boundary came right down to the Kaiapoi pa, and that they would not have claimed rights to the Kaiapoi district at least up to the Hurunui (as subsequent protestations to Mantell clearly show they did). In the lengthy discussions about boundaries and claimants which culminated in the signing of the deed this boundary would have been of particular concern to them. Given the importance of manawhenua, we believe they would have strongly resisted any suggestion by Kemp that the Ngati Toa purchase line came to Kaiapoi pa. But there is every indication that Kemp and Kettle both thought Kaiapoi was at or near the Hurunui, and they would have had no difficulty in agreeing with Ngai Tahu that that was where the north-eastern boundary should be.

8.5.9 The claimants, particularly in their comments on Dr Loveridge's evidence, strongly contested this conclusion. Mr Evison (O46:33-40) made numerous comments, the main purport of which was to assert that Ngai Tahu understood the north-east boundary agreed with Kemp was at Kaiapoi pa. For instance, in response to Mantell's statement that at the old pa of Kaiapoi he listened to many speeches on the subject of the Ngati Toa boundary, which they said should be north of Kaikoura, Mr Evison commented that it was clear that Ngai Tuahuriri were disputing the Ngati Toa boundary not the boundary of Kemp's purchase as such. In particular he invoked the following evidence of Ihaia Tainui before the Smith-Nairn commission:

next morning we and Mantell went to the Kaiapoi pa. When we got there Mantell went right in the centre of the pa. Then Mantell said -"This is the boundary of Ngatitoa, from here to the north side of Maungatere." Then the Maoris said -"No; we shift the line further to Oteruawhare, further north from Kaiapoi pa". Then Mantell said -"No; this is the boundary at the centre of Kaiapoi pa". They had a long argument over it. Paora Tau told the rest of the natives to sit down. Paora Tau also told Mantell to sit down. After the natives and Mantell sat down, Paora Tau got up and made a speech. Paora Tau said -"I don't want the boundary to be left at Oteruawhare; I want the Ngatitoa boundary to be put right back to Te Parinuiowhiti". The reason Paora Tau told Mantell to put the boundary right back to Te Parinuiowhiti was, that there are a good many dead people along the coast right to Te Paruparu. Paora Tau said to Mantell "The reason Ngatitoa sold this block up to Kaiapoi was, that it should be a payment for the pakeha blood spilled at Wairau. I have also got a lot of my dead people at Oraumoa." When the rest of the people heard Paora Tau make this speech they agreed to what Paora said, and asked to have the boundary shifted back to Te Parinuiowhiti. The most of those people who agreed with Paora Tau's proposal are dead. There were 35 people who took part at Kaiapoi in that conversation with Mantell. Mantell did not agree to Paora Tau's proposal, and the Maoris did not agree to Mantell's proposal. Of course both Mantell's and the Maoris' boundary was not fixed; it was left unfixed, and the sun was nearly going down, and they came back. Mantell said -"We will go back to where we slept last night." The next morning they began to talk about the Kaiapoi reserve. They were about 2 days engaged in that matter. In about a week afterwards there was a fire-signal from Port Levy, that there was a vessel ready there to take Taiaroa and others to Wellington. That evening, the people said to Mantell that they were going to Port Levy to see Taiaroa and those who were going to Wellington to see the Governor and try and shift the line back to Te Parinuiowhiti. Mantell replied -'Very good; the Governor is in Wellington'. (G2:773-775){FNREF|0-86472-060-2|8.5.9|56}

This outline of events corresponds very closely to those described by Mantell in his various journals.

Mr Evison, after referring to this evidence argued:

This particular argument was not about the boundary of Kemp's Purchase, but about the boundary of the Wairau Purchase, -the "Ngatitoa boundary". That Ngai Tahu were prepared to sell the bulk of their land to the Crown was one thing. That the Crown should prefer the manawhenua of a rival tribe over Ngai Tahu ancestral lands was entirely another, and struck at the heart of Maori sensibilities. The sale of Ngai Tahu lands to the Crown by Ngai Tahu would not diminish their manawhenua; rather, it would vindicate it. But the sale of the Ngai Tahu lands between Kaiapoi and Te Parinuiowhiti to the Crown by Ngatitoa had been an insufferable blow at Ngai Tahu manawhenua there. Ngai Tahu had paid for the recovery of this land in blood, in the course of their successful reprisal raids against Ngatitoa at Cloudy Bay and Queen Charlotte Sound in the 1830s, and Ngatitoa had let their fires go out. Therefore it was an over-riding concern-an obsession-in all their dealings with Grey, Kemp and Mantell, that the blot on Ngai Tahu manawhenua embodied in Grey's Wairau Purchase should be removed by the Crown acknowledging that the true Ngatitoa/Ngaitahu boundary was back at Te Parinuiowhiti. (O46:36)

8.5.10 In response to these arguments Dr Loveridge made the following points:

- it is clear from Ihaia Tainui's testimony that the speeches referred to by Mantell took place after the latter had declared that Kaiapoi pa was the starting point for the boundary of Kemp's block;

- the northern boundary of Kemp's block was by definition, the same line as the Ngati Toa boundary (see the deed and deed map);

- since the Ngati Toa boundary and Kemp's purchase boundary were synonymous it is "splitting hairs" to say that Ngai Tuahuriri were disputing the Ngati Toa boundary, not the boundary of Kemp's purchase as such;

- to dispute one was to dispute both: Mantell had just declared that the Ngati Toa boundary lay some 40 kilometres further south than Grey in February, and Kemp in June 1848, had defined;

- Ngai Tahu evidently interpreted Mantell's action as an explicit repudiation of the agreements which they had made in February with Grey and in June with Kemp. This, in their view, provided ample justification for a reassertion of their claims to all the lands between the Wairau and the 43rd parallel which the government had purchased from Ngati Toa in 1847; and

- Mantell's report of 5 September 1848 referred to "repudiation of the sale" by Ngai Tahu during his trip to Kaiapoi (L9:19).{FNREF|0-86472-060-2|8.5.10|57} This can only mean that the boundary of Kemp's purchase was disputed by them, that is, the boundary as modified by Mantell (R2:13).

8.5.11 We agree with Mr Evison that Ngai Tahu had an over-riding concern to assert their manawhenua over the Kaiapoi district and indeed further north. It is for this reason, as we have earlier indicated (8.5.8), that we do not believe Ngai Tuahuriri would have agreed in their negotiations with Kemp that the Ngati Toa purchase line came to Kaiapoi pa. We consider that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui. Consequently we also agree with Dr Loveridge that it was Mantell's subsequent action later in the year, in asserting arbitrarily and categorically that the north-eastern boundary line was at Kaiapoi pa, which immediately triggered Ngai Tahu's strong and concerted objection. For this would have required them to concede that Ngati Toa, not Ngai Tahu, had manawhenua over the Kaiapoi district. We do not believe they would have conceded this in their negotiations with Kemp, any more than they accepted Mantell's unilateral decision. For this involved redefining the north-eastern boundary of Kemp's purchase at Kaiapoi pa and hence redefining the Wairau purchase line as also being at Kaiapoi pa.

Why Mantell chose to arbitrarily fix the boundary of the purchase at Kaiapoi pa remains something of a mystery. A map he made at the time compares his understanding of the line of coast of Pegasus Bay with that of the deed map (X13(b)). This suggests that he felt Kemp and Kettle had got the geography wrong. They had put Kaiapoi up at the 43rd parallel in error and he simply corrected their mistake. Eyre's instructions to Mantell at Akaroa were also ambiguous:

'Kaiapoe' being the Southern boundary of the "Ngatitoa" Purchase you are not to set apart any reserves to the NORTH OF THAT point but as there is reason to believe that a considerable number of Natives wish for their reserves in that immediate neighbourhood, His Excellency wishes you to endeavour to meet their wishes and requirements by appropriating as reserves, for their benefit such land as they may desire, and as you may consider it equitable for them to possess south of Kaiapoe. (M2:30){FNREF|0-86472-060-2|8.5.11|58} (emphasis in original)

These instructions suggest that Eyre and Mantell remained unaware that Kaiapoi pa was not on the 43rd parallel even after both men had had several days discussion with Ngai Tahu at Akaroa. Once Mantell had located the pa and fixed it as the boundary of the two purchases, he was forced doggedly to maintain his position. He was relying on a deed he believed to be faulty, and was faced with opposition from Ngai Tahu on a number of fronts. When Ngai Tahu raised the matter directly with Mantell's superiors (in Kemp's presence) they too saw it as expedient to stand behind Mantell's decision.

Finding on grievance no 1

8.5.12 It is appropriate that we here record our finding on the claimants' first grievance:

That the Crown's inclusion of Kaiapoi in the Wairau Purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with Kemp's Block on unfavourable terms.

In our discussion of the Wairau purchase we noted the doubts as to how far south the Wairau purchase extended. Lieutenant Servantes' memorandum (8.3.6) referred to the

"nominal" boundary of the Wairau purchase being placed at Kaiapoi. But he added that there were doubts entertained at the time that Ngati Toa had an undisputed title to land further south than Kaikoura.

We recall that Matiaha Tiramorehu recorded, in a letter written in October 1849 to Eyre, that the previous year, when Governor Grey had discussions with Ngai Tuahuriri at Akaroa, the governor told them that the payment for Kaiapoi should not be given to Ngati Toa but that the payment for Kaikoura had already been given to them. Tiramorehu complained in his letter that when Kemp came he placed the boundary of Ngati Toa's land at Kaiapoi. As we have just indicated, we believe this error should be attributed to Mantell, as Kemp believed he was purchasing up to the Hurunui on the 43rd parallel.

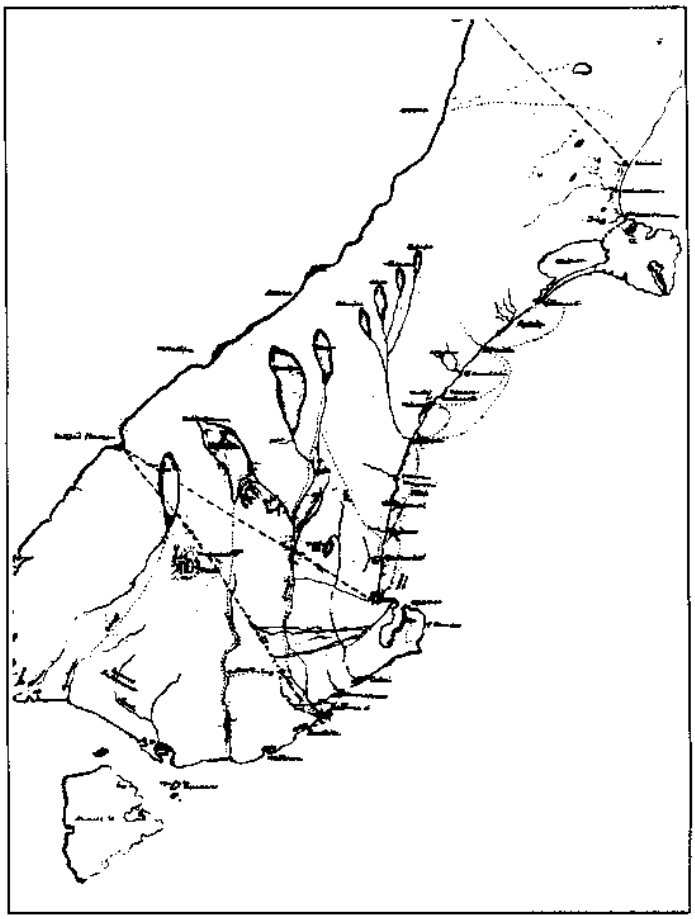

Figure 8.4: Mantell's redrawing of Charles Kettle's Turnbull map (see figure 8.2) relocating Kaiapoi at Kaiapoi Pa and redrawing the boundary between Banks Peninsula and the Kemp block to run around the hills. The dotted semi-circular lines on the east coast from Taumutu to Otakou are Mantell's attempt to divide the territory between the various Ngai Tahu rangatira and their hapu. Mantell Collection, Alexander Turnbull Library, Wellington.

As earlier indicated (8.3.12), we consider it reasonable to infer from Tiramorehu's letter that Grey, in 1848, was recognising Ngai Tahu's right to Kaiapoi district. We believe that Grey and Ngai Tahu were in substantial agreement in February 1848 that the north-eastern boundary lay in the vicinity of the Hurunui near the 43rd parallel (8.3.13), and that Ngai Tahu and Kemp were of the same mind (8.5.8).

There is evidence that Ngai Tahu were willing to sell land, and indeed, that negotiations came about as a result of an invitation from Ngai Tahu. But, as we have

noted (8.3.13), it is always possible that such invitation arose in part at least because of Ngai Tahu's concern about the extent of the Wairau purchase.

While we accept that the inclusion of Kaiapoi pa in the nominal boundary of the Wairau purchase would have been a source of anxiety to Ngai Tahu, we believe it was substantially mitigated by Governor Grey's 1848 assurances, and by the arrangement reached by Kemp and Ngai Tahu at the time of the purchase. We are not able, therefore, to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms.

The north-western boundary

8.5.13 The Crown in its final submissions (X1:278) commenced its discussion of the western or north-western boundary by challenging the following statement from the Ward report:

At the time of the purchase Europeans knew little about the west coast of Te Waipounamu. Neither Kemp nor Kettle could have predicted where a line drawn from Kaiapoi across the island would come out (T1:136)

Crown counsel, Mrs Shonagh Kenderdine, claimed the deed map (L23) was clearly based on Kettle's Turnbull map (L21). The surveyor took his outline of the western boundary from the current admiralty chart of the South Island (L20), which would have been available on the Fly. He would have observed, the Crown claimed, that the northern-most point on the western coastline was Cape Foulwind (so labelled on the admiralty chart).

We here summarise the main points made by the Crown:

- as earlier indicated (8.4.4) Kettle knew about Heaphy and Brunner's 1846 expedition from his correspondence with Fox;

- the Kawatiri (Buller) River, and Cape Foulwind were shown on the map of the Nelson Crown grant incorporating the Wairau purchase (L19), a version of which Kemp may have seen in Eyre's office before leaving Wellington;

- the "Mawhera" shown on the Turnbull map is clearly meant to represent the mouth of the Mawhera (Grey) River;

- the evidence suggesting Kettle drew the north-western boundary on the deed map by compass-direction is derived from Mantell, but on examination it appears that all Mantell said was that on the deed map the boundary was a line running in a north-westerly compass direction from its starting point on the east coast-not that it was originally defined in that manner (R1:10);

- that the point chosen on the west coast-at or near the Kawatiri-corresponds exactly to the division of territorial rights recorded by Brunner in 1847, which in turn is said by Crown counsel to echo a comment which Heaphy made in his report on their 1846 trip. Heaphy reported that some "Ara[h]ura natives have a few rods of land planted

with potatoes" in order to "obtain a title to the Kawatiri district by occupation" (N2:9).{FNREF|0-86472-060-2|8.5.13|59} It is inferred by the Crown that Kettle may well have known of Heaphy's comments; and

- that Poutini Ngai Tahu would have claimed undisputed control of the west coast as far north as Kawatiri (where the north-western boundary on the deed map comes out).

As the Crown conceded, the significance of these latter elements depends on the question of whether the Poutini people were present at Akaroa in June of 1848. We turn next to that question.

Poutini Ngai Tahu presence at the negotiations

8.5.14 If Poutini (west coast) Ngai Tahu were present at the negotiations and if, as the Crown contended, Tuhuru signed the deed, this is strong evidence that Ngai Tahu intended to sell from coast to coast. The presence of Poutini Ngai Tahu could also have meant that Kemp or Kettle or both obtained information from them as to their occupation of Kawatiri. The Crown criticised the Ward report for "glossing over" the involvement of Poutini Ngai Tahu in the purchase and for suggesting that they tried to associate themselves with Kemp's purchase after it had taken place (X1:284).

According to Natanahira Waruwarutu (a party to the deed) Poutini representatives included "Old" Tainui, Hakiaha, Waipapa and Korako, and their wives, from the west coast, and Tainui (presumably Werita Tainui) and Ihaia Tainui (Werita's son) who then lived on the east coast. Waruwarutu added that Werita Tainui "received the money" (presumably on behalf of the west coast chiefs present) (L9:170-171).{FNREF|0-86472-060-2|8.5.14|60} Another witness, Wiremu Naihira, listed Tainui, Hakiaha, Mokohuruhuru, Ihaia Tainui and Te Waipapa as being at Akaroa "in Mantell's and Kemp's time" (L9:328-9).{FNREF|0-86472-060-2|8.5.14|61}

Dr Loveridge claimed that the reference to "Old" Tainui refers to Tuhuru, the principal chief of Poutini Ngai Tahu. And he argued Tuhuru must in turn be "Tuahuru" who signed the deed. The Ward report commented that this may be so but there is no conclusive evidence. The name, it was suggested, may also be that of Huruhuru, a Waitaki chief, or indeed someone else. The Ward report also questioned whether Poutini Ngai Tahu could have got to Akaroa in time (T1:143). The Crown, however, responded that a Poutini party may have gone across in the summer or autumn and, in any event, news of Grey's February 1848 visit could have been sent to Poutini Ngai Tahu and a Poutini party could easily have travelled to the east coast in the time available (X1:287-288).

8.5.15 The Crown disputed the Ward report's suggestion that the Poutini people attempted to attach themselves to the purchase after the event (T1:144). In support, they relied on the evidence as to the arrangements made for payment to Poutini chiefs of the first payment of œ250 by Kemp to Tikao, of which Werita Tainui received a part (L9:22).{FNREF|0-86472-060-2|8.5.15|62}

We should explain here that Werita Tainui was a younger son of the principal Poutini Ngai Tahu chief Tuhuru. Werita Tainui fled the west coast in the early 1830s at the time of the invasion of Poutini Ngai Tahu territory by a war-party led by Niho and

Takerei of Ngati Rarua and Ngati Tama (L8:6). Werita Tainui settled among his fellow Ngai Tahu at Kaiapoi. He was a signatory to the Kemp deed of purchase. That he retained extensive rights to land on the west coast will be demonstrated in our later consideration of the Arahura purchase, in which he played a leading part.

8.5.16 Walter Mantell was aware of west coast interests in the purchase and attempted unsuccessfully to include them in the second payment. But he was silent at the time as to the extent of west coast involvement in the original purchase. In 1888 a parliamentary commission asked Mantell about the extent of the purchase:

204 ...You stated to the Committee that Kemp's proceedings and yours acquired for the Government the Ngaitahu Block-an area of twenty million acres? -I do not know what is its exact area.

205 That went from coast to coast, did it not? -Yes.

206 How is it that further purchases have been made from the West Coast Natives? -I am not in a position to explain that thoroughly; but it might be because the West Coast Natives, with the exception of Tainui, were not all consulted in the Ngaitahu purchase. (M17:I:doc 2){FNREF|0-86472-060-2|8.5.16|63}

Before the second payment, Mantell obtained from Werita Tainui details of the "principal men on the West Coast" and made the following allocation:

West Coast

Mawhera 10 Tainui* for Tahura and Tarapuhi

Okarito 10 Matiaha } { Taitai
} * for {
Tikao } { Ruerau

Aurhura [sic] 10 Matiaha* for Koura

Okahu 10 Huri* for Warekai (L9:22{FNREF|0-86472-060-2|8.5.16|64}

Mantell noted that, as far as he could learn, the Poutini named in the last column were the principal men on the west coast. Those marked with an asterix were to receive the money for them and were related to them. In fact, Mantell did not pay out the œ40 but deposited it with Mr Watson, the sub-treasurer at Akaroa, on 22 February 1849 for payment with the final instalment in December 1849.

The third and final payment for the Kaiapoi purchase was made at Akaroa on 28 December 1849. Unfortunately the Poutini Ngai Tahu did not arrive in time. Instead of depositing the further instalment with the sub-treasurer, Mantell gave the amounts owed from both payments to Werita Tainui, Tikao, Tiramorehu and others to pass on to the rightful recipients (L8:71). A week later, after this distribution, a large Poutini Ngai Tahu party arrived at Kaiapoi from the west coast. W J W Hamilton reported them as being highly indignant that the money "...given as payment for the West Coast" had been paid out to others. Charles Torlesse also reported that Maori from the

west coast had arrived in January "in expectation of receiving the payment for their land" but found that the money had been "paid by the Commissioner in trust to various Natives who have spent it" (L9:607).{FNREF|0-86472-060-2|8.5.16|65}

Dr Loveridge noted that at the distribution on 28 December 1849 Werita Tainui received a œ10 share of his own in addition to the œ20 to be held for Tuhuru and Tarapuhi (L8:78). If all of the œ30 had been intended for Poutini Ngai Tahu claims in the Kaiapoi area, it was suggested it would have been allocated in one lump sum.

8.5.17 If the evidence of Natanahira Waruwarutu and Wiremu Naihira (8.5.14) is correct, then it would appear that some leading Poutini Ngai Tahu were present when Kemp negotiated his purchase in June 1848. We note, however, that while Werita Tainui signed the Kemp deed, we cannot say with any certainty that the name Tuahuru, appended to the deed, is that of Werita Tainui's father Tuhuru, the principal chief of the Poutini Ngai Tahu. While Werita Tainui undoubtedly retained substantial rights on the west coast, he had been living on the east coast for upwards of 16 or 17 years. He clearly had rights at Kaiapoi where he resided.

Two letters from Werita Tainui, written in 1852, suggest that as far as he was concerned the west coast had been included in the purchase. In asking for payment for the places north of Kawatiri, Tainui defined the area paid for by Mantell as lying between Kawatiri and Wakatipu, the same area as defined in the Kemp deed map.

E ta, titiro mai koe ki tenei pukapuka e mea ana au ki nga Pakeha e noho ana ki waenganui o Kawatiri puta atu ki te hauauru ki tatahi; ko te mutu tenei o ka utu a Matara, takoto haere ki Wangatipu. Kei kon[a] i takoto ki tena pihi. Kaore ano kia utua [a] Oruaaiti, Wareatea, Waim[]hangarua, Te Puru, Ka Koau, Poinaki, Mokihiwi, Wanganui, Karamea, Oparara, Ohaehae, Wangapoui, Toropihi, ko te mutunga tenei. (Z10:8){FNREF|0-86472-060-2|8.5.17|66}

Sir, consider this letter; I am speaking of the Pakeha living in the centre of [Kawatiri] and westwards to the coast. This is the end of Mantell's payments, lying along to Wakatipu. [The payment] lay there on that piece. Not yet paid for are Oruaiti, Wareatea, Waimahangarua, Te Puru, Ka Koau, Poinaki, Mokihiwi, Wanganui, Karamea, Oparara, Ohaehae, Wangapoui and Toropihi completes it. (Z10:9)

Another letter written a little later, on 12 November 1852, in the names of Werita Tainui and six others, again urged the governor to pay the œ200 for the land north of Kawatiri, commenting that "it is not alright that one portion of the land be paid for, and another portion left" (Z10:11).{FNREF|0-86472-060-2|8.5.17|67}

All this would suggest that as far as Werita Tainui and the six others were concerned the west coast was included in the sale, and the definition of the Kemp boundary as it applies to their own land accords to that in the Kemp deed map. However, this does not necessarily prove extensive Poutini Ngai Tahu participation or adherence to the Kemp purchase. We already know that Werita Tainui was present at Akaroa in June 1848. He signed the deed and received some of the payment. These letters were written to Grey not from the west coast but from Kaikainui, not far from Kaiapoi.

It also appears that some sums were set aside by Mantell for Poutini Ngai Tahu. But there is no evidence that other than Werita Tainui they received any part of these payments. Moreover, no reserves were set aside by Mantell on the west coast. Given these two circumstances it is not surprising that, some 12 years later, the Crown was to negotiate directly with Poutini Ngai Tahu for the purchase of the west coast. While it is clear that Poutini Ngai Tahu did cross the alps in an attempt to collect payments and that Werita Tainui considered the west coast had been sold under the Kemp deed, there is a possibility that such payments were viewed by the tribe as a whole as being for Poutini interests on the east coast not the west coast.

While we cannot exclude the possibility that Poutini Ngai Tahu were present and participated in the Kemp purchase, we are left in too great a state of doubt to find that this was the case.

8.5.18 But, irrespective of their presence at the time, it is clear that Werita Tainui was present. He could well have been the source of information about that coast and his 1852 letters suggest he was well aware of the Kawatiri at the north-western corner of the block. It is clear from the Turnbull map that Kemp and Kettle did obtain information about west coast places and Poutini trails. The Turnbull map in fact terminates just above Cape Foulwind at the approximate point where the Kawatiri River meets the coast, as does the Kemp deed map. We find it difficult to accept that, in fixing the north-western boundary on the deed map at Kawatiri, Kemp and Kettle acted arbitrarily or capriciously. The most reasonable inference, having regard to the information before us and to Crown counsel's submissions, is that that point was chosen as a result of discussion with Werita Tainui and possibly other Ngai Tahu who were familiar with the extent of re-occupation by Poutini Ngai Tahu of their lands on the west coast.

8.5.19 The claimants strenuously and consistently maintained that, notwithstanding the evidence of the deed and the attached map, the western boundary of the Kemp purchase ran from Maungatere (Mount Grey) in the north, then along the foothills to Maungaatua and Kaihiku in the south. Mr Evison, for the claimants, relied on the evidence of the following witnesses in relation to the inland boundary of the Kemp purchase.

Natanahira Waruwarutu, who states that Paora Tau, after some argument said:

This is what I agree to; the boundary is from Kaiapoi to Purehurehu, the inland boundary from Maungatere to Maungaatua. The Maoris agreed to this... (L9:151){FNREF|0-86472-060-2|8.5.19|68}

Matiaha Tiramorehu:

Paora spoke again. He said "Let the boundary be from Maungatere to Maungaatua". That gave rise to a long discussion... It was the Maoris who proposed there should a boundary between Maungatere and Maungaatua. (L9:187){FNREF|0-86472-060-2|8.5.19|69}
Wiremu Te Uki:

Had anything been said on shore about the boundaries of the land? -Yes. Mr. Kemp said he wished to purchase the land between Kaiapoi and Purehurehu. That was his boundary. Paora, Tikao and myself then said, "Let the boundary be from Maungatere to Maungaatua-Write that down.["] These were the boundaries that were mentioned on shore.

You say those boundaries were mentioned on shore-Did Kemp agree to them or not? What did Kemp say about the boundaries? -Mr. Kemp agreed to his own boundary, but we proposed the boundary from Maungatere to Maungaatua to which Mr Kemp also agreed.

Do I understand you to say that Mr. Kemp agreed to the boundaries from Maungatere to Maungaatua? -Yes. (L9:244-245){FNREF|0-86472-060-2|8.5.19|70}

Later in his evidence Wiremu Te Uki said:

What did he [Paora] say? -He said "Mr. Kemp, look here.["] He pointed and he said, "This land will be given up to you; the boundary runs from Maungatere to Maungaatua". That was all. We then agreed to accept this money... (L9:248){FNREF|0-86472-060-2|8.5.19|71}

Wiremu Naihira, after saying the deed was read over after but not before it was signed and that he could not recollect what was in the deed, was asked:

Do you recollect anything about the boundaries of the land mentioned in the deed? -Yes.

What do you recollect? -That the boundaries were from Kaiapoi to Purehurehu and Maungatere to Maunguatua [sic].

Do you mean to say that that was in the deed, or that it was the land spoken about? -If they are not mentioned in the deed then they were only spoken about. If they are in the deed then they are the lands mentioned in the deed.

What boundaries did you hear spoken of, or which were in the deed? -Kaiapoi to Purehurehu and the boundary from Maungatere to Maungaatua.

Did you hear anything about Whakatipu-Waitai? -I never heard Paora or any of them talking about that.

Did you hear anyone else speaking about it? -I never did. (L9:321-322){FNREF|0-86472-060-2|8.5.19|72}

A further signatory to the deed, Tare Wetere Te Kahu, not mentioned by Mr Evison, also gave evidence which was discussed by Dr Loveridge. This evidence is lengthy and is not reproduced here but it is referred to in the following analysis of the evidence of the various Ngai Tahu witnesses by Dr Loveridge (L8:76-85).

8.5.20 After pointing out that Ngai Tahu began to agitate against the north-eastern boundary as soon as Mantell made "his unauthorised and unjustified 'Kaiapoi'

revision", Dr Loveridge claimed that many years after Kemp's purchase a totally different claim was advanced. This, he said, first appeared in the 1874 Ngai Tahu petition to Parliament, which stated that in June of 1848:

The Native chiefs entered [into negotiations] with Kemp to define the boundaries-namely, the seaboard, breadth limited by a chain of hills, ceded to Kemp; the inland to remain ours. This was the then settlement of boundaries. Recently, when we got a copy of the deed drawn out by Kemp of that transaction, we find that what he put down in that paper differed from what we said above. (L8:77){FNREF|0-86472-060-2|8.5.20|73}

Professor Ward later provided evidence of a petition in 1867 which asked for the reservation of lands "lying between the seaward range on the east and the seaward range on the west of the province" (T2:125).{FNREF|0-86472-060-2|8.5.20|74} As the Crown acknowledged, this is the first statement we have in the evidence of the claim to the "hole in the middle" (X1:239). There is also a vague reference to "ka whenua ki waekanui o te tuawhenua" (lands in the midst of the interior), which Tiramorehu suggested had not been paid for, in an 1863 letter to Mantell (Z10:29).{FNREF|0-86472-060-2|8.5.20|75}

Dr Loveridge summarised the evidence of five of the six original Ngai Tahu parties to Kemp's deed who testified before the Smith-Nairn commission (Waruwarutu, Tiramorehu, Te Uki, Naihira and Te Kahu). Because of the central importance of this evidence to the "hole in the middle" issue we quote much of it from Dr Loveridge's evidence:

1) four of the five stated that the Ngai Tahu had offered to sell Kemp the lands bounded on the north by a line from Kaiapoi to Mount Maungatere (Mt. Grey), on the south by a line from Purehurehu to Mount Maungaatua (on the northern boundary of the Otago Block), on the east by the coastline (excluding Banks Peninsula) and on the west by the foothills of the interior mountain ranges. All four claimed that these boundaries were discussed with Kemp, and physically pointed out to him by one or more persons. The fifth witness (Wiremu Naihira) could not remember any discussion of boundaries before the Deed was signed, but had thought that those described above had been agreed upon.

With respect to the Crown's version of the boundaries, two witnesses (Matiaha Tiramorehu and Tara Wetere Te Kahu) agreed that Wakatipu-Waitai had been mentioned in discussions in June of 1848, and rejected as a boundary-point by the Ngai Tahu. Tara Wetere Te Kahu, however, also admitted that this place was referred to in the Deed, which he heard read out, and signed. Two men (Wiremu Te Uki and Wiremu Naihira) stated that the name Wakatipu-Waitai had not been mentioned at all. The other did not comment on this point.

2) One witness (Tara Wetere Te Kahu) stated that the Deed had been read out by Kemp before the signing. Three (Natanahira Waruwarutu, Matiaha Tiramorehu and Wiremu Te Uki) were not sure-two whether anything was read out; one whether the Deed was the document read, and one (Wiremu Naihira) thought that it had not been read out beforehand. Three of the five, incidentally, mentioned that there was a great deal of noise and confusion on the deck of the "Fly" at the time. (L8:77-78)

Dr Loveridge proceeded (L8:79):

Some of this evidence must be discounted-that of Wiremu Naihira and Tara Wetere Te Kahu in particular. The first, at 70 years of age, had no recollection of the negotiations which preceded the signing of the Deed, and could not remember if he himself had signed it. Tara Wetere Te Kahu also had memory problems, of a different kind. His testimony opened with a series of declarations about the negotiations in Otago, on the "Fly" on the trip north, and at Akaroa which indicated that Commissioner Kemp had fully understood and had indicated his acceptance of the Ngai Tahu version of the boundaries.

Dr Loveridge then quoted Te Kahu's response to a question about the deed itself:

Witness: In that document were mentioned those boundaries and a sum of œ2000. It was further set out that œ500 would be paid into their hands; that afterwards œ500 were to be paid. Those statements were made in the deed. The same boundaries were mentioned in this document; that is to say Maungatere to Maungaatua & from Kaiapoi to Purehurehu-these were the names of the boundaries mentioned in the deed that was read to us [on the "Fly" at Akaroa on June 12th]... (L9:293){FNREF|0-86472-060-2|8.5.20|76}

Te Kahu described the signing of the deed and the payment of the first instalment of money under Izard's questioning and continued:

Could you read at that time? -I could read printed books in Maori at that time.

Could you read writing? -Yes, I could write. I was a catechist at that time.

Did you read the deed before you signed it? -No, I did not read it. Mr. Kemp read it.

Are you sure that the boundaries you mentioned to us were those that were put in the deed, or were they those that were talked about by the natives? Are you sure they were in the deed? -The boundaries were in the deed; that is to say, Mr. Kemp read them out, and the ears of the people heard them.

Mr. Izard [to Commissioners]: Will you allow Mr. Young to read the boundaries that are in the deed?
Mr. Smith: Yes. (Kemp's Deed was then read aloud)

Witness: Where is the plan that is referred to?

Mr. Izard: I will come to that afterwards. Keep to one thing at a time. Now, you have heard the words that are in the deed; are you quite sure your memory was quite correct when you told us about the boundaries just now? -What I said was the correct statement.

As to the boundaries? -Yes. These came after. The others were at the beginning of the deed.

Mr. Smith: The witness states "as read by Mr. Kemp". That is his evidence.
Witness: Yes, as read by Mr. Kemp... (L9:298-300){FNREF|0-86472-060-2|8.5.20|77}

Then followed questions about the map, about conditions at the time of signing of the deed and about discussions of "Wakatipu-Waitai" prior to it, in which Te Kahu stated that the name was discussed and "not agreed to" by Ngai Tahu. At this stage Commissioner Smith intervened and asked:

You say you heard Mr. Kemp read over the deed? -Yes.

And afterwards you signed that deed? -Yes, I signed it.

When you heard the name of Whakatipu-Waitai did either you or anyone else object to it? -Yes; objections were raised.

Why didn't you say that before in your evidence? -There was no reference made to Whakatipu-Waitai.

Tell us what was said in objecting to this name of Whakatipu-Waitai? -People did not know, did not understand, about Whakatipu-Waitai when Mr. Kemp was reading it.

By Mr. Izard: Were no questions asked of Mr. Kemp about it when Mr. Kemp read the word Whakatipu-Waitai? -Mr. Kemp was asked about it.

What was said? -All the people did not know. If all the people had understood about it at the time, he would have heard everyone talking about it. (L9:303-304){FNREF|0-86472-060-2|8.5.20|78}

Dr Loveridge commented that this part of Te Kahu's evidence raises two possibilities, which he considered are equally difficult to entertain:

1) that Kemp added a clause [referring to Maungatere to Maungaatua] when reading out the deed which directly contradicted the written clause in it relating to boundaries (which Tara Wetere Te Kahu says was also read out)...

2) that none of the other [Ngai Tahu] men present would have remembered either a verbal reference by Kemp to the Maungatere-Maunguatua [sic] boundary, or a discussion of the significance of "Whakatipu-Waitai" immediately before the deed was signed. (L8: 81)

Tare Wetere Te Kahu gave evidence in support of a petition to Parliament in 1884. The report of the petitions commission stated that:

This petitioner positively denied the identity of the deed (Kemp's Deed) which he declared had been fabricated for the occasion: but his own signature as one of the sellers appears both on the deed of sale and on a receipt for the purchase-money on behalf of his tribe, and Tara Wetere ultimately acknowledged that this was so. (B3:6/8:3){FNREF|0-86472-060-2|8.5.20|79}

The committee rejected his claim.

8.5.21 We find that after more than 30 years Wiremu Naihira's testimony reflects some confusion. The evidence of Te Kahu, which we have quoted extensively, is plainly wrong in a critical respect, that is, in his insistence that Kemp's deed described the boundaries as being from Maungatere to Maungaatua and that Kemp actually read out those boundaries. No other Ngai Tahu supported these propositions and the deed, of course, does not give those boundaries.

8.5.22 Dr Loveridge commented that if the evidence of Naihira and Te Kahu on the various matters adverted to is set aside as possibly suspect (as we believe it to be), there remains the testimony of three chiefs, in which:

- all agreed the Maungatere-Maungaatua boundary was discussed with, and pointed out to, Kemp before the deed was signed. Tiramorehu agreed with Te Kahu that Wakatipu-Waitai was mentioned during the negotiations, while Te Uki said it was not. Waruwarutu did not refer to this matter;

- Waruwarutu and Tiramorehu were not sure if Kemp read anything out before or after the signing. Te Uki said something was read out, but thought it was a receipt for the money; and

- none of the three acknowledged seeing any map or plan at the time of the signing (L8:81-82).

Dr Loveridge claimed that there is no obvious way to reconcile the Ngai Tahu statements with respect to the reading of the deed or, especially, the presentation of the deed map with the version put forward by Kemp (in his Smith-Nairn evidence) and Kettle (in his 1848 journal and report). As for the Ngai Tahu description of the boundaries, Kemp made a statement which Dr Loveridge claimed left no room for compromise:

I presume you [Kemp] told them [the Ngai Tahu] that you wanted to buy from Kaiapoi down to the Otago Block. Substantially something to that effect? -Yes.

What were the back boundaries? The East Sea Coast is one boundary: was there any discussion as to the other boundary? -I do not remember any particular discussion: I told them the Govt. desired to carry through to the other Coast, and they gave me the name of Milford Haven.

Do you recollect the Native names of Maugatere and Mauguatua being mentioned to you? -I don't remember now.

The Natives all assert their understanding of the block you were buying corresponded with what you have said, except that the back line was Maugatere, which is the Western line of ranges here, and Mauguatua was the northern boundary of the Otago block. They say that Tikao and Matiaha both asserted before all the people that the boundary would be from Maugatere to Mauguatua. Do you remember that statement being made? -I have not the slightest recollection of such a statement. I should say that if the boundaries had been proposed in that form I must have withdrawn entirely

from the negotiations, because my instructions were imperative from the Govt. I may state also in addition that the Govt at that time had a special reason for extinguishing what was then called the Native title to the whole Southern Island.

Then I understand you do not recollect these names being mentioned? -No, I do not.

And you fully understood that you were buying right from Sea to Sea? -Oh, clearly. (L9:82-83){FNREF|0-86472-060-2|8.5.22|80}

Later, in response to further questioning, Kemp said:

If the point had been raised, namely, that the boundary was to be the foot of the hills, most decidedly I could not have agreed to it. (L9:85-6){FNREF|0-86472-060-2|8.5.22|81}

8.5.23 Dr Loveridge claimed that Mantell's evidence before the Smith-Nairn commission is supportive of Kemp and Kettle's version of what happened in Akaroa at the time of the purchase in June 1848. He made the point that by the 1870s Mantell had been a vocal critic of the government's dealings with Ngai Tahu for more than two decades. If anyone was in a position to undermine Kemp's version, or to suggest Kemp or Kettle had given a different account of events, it was Mantell, said Dr Loveridge. But Mantell did not do so. Rather, apart from the controversial question of "Kaiapoi" he supported Kemp.

Mantell told the Smith-Nairn commission that he had constantly explained the boundaries of the purchase to Ngai Tahu (L9:355).{FNREF|0-86472-060-2|8.5.23|82} Later, in his evidence in response to questions from Commissioner Nairn, he said:

Mr Nairn -You say that at each place you arrived at you read the Deed over and explained the boundaries on the map to them? -I did not do that as a sort of service at every place. I had the thing constantly with me for reference, and if any question arose as to the sale or as to the boundaries of the land sold, as it almost invariably did at every place I visited, then I would read the Deed to the Natives and shew them the plan.

Did they accept the boundaries of the block marked on the plan? -They thought that such they were.

You could not point out the boundary to them by calling their attention to certain land marks? -On pointing to the map one could say "There is Kaiapoi, and it goes in a north-west direction; then comes down the West Coast to Whakatipu Waitai".

Still the Maoris might remain in utter ignorance of the boundaries? -There is no doubt whatever in my mind that every Maori with whom I discussed it knew that the boundaries were included in Kemp's Deed. (L9:383-385){FNREF|0-86472-060-2|8.5.23|83}

On 5 September 1848 Mantell reported to Gisborne (for Eyre) that a party of Ngai Tahu was proceeding to Wellington "to assert their right to the land between Kaiapoi and Kaikoura, included in the Nelson block sold by the Ngatitoa" (L9:19).{FNREF|0-

86472-060-2|8.5.23|84} In a later letter of 21 September 1848 to Eyre's private secretary, Mantell makes a further reference to the Ngai Tahu being "much excited at the cession of land north of that place [Kaiapoi] by the Ngatitoa" (L9:20).{FNREF|0-86472-060-2|8.5.23|85}

This meeting took place at Wellington in September or early October 1848 between Taiaroa (and possibly other Ngai Tahu) and Governor Grey and Lieutenant-Governor Eyre, when Ngai Tahu complained about the northern boundary. Taiaroa was told that any question affecting the Wairau purchase could not be reopened (M11:5-6).{FNREF|0-86472-060-2|8.5.23|86} There is nothing to suggest that at this meeting any question was raised by Ngai Tahu about the western boundary which Mantell had made clear extended to the west coast.

Nor, it appears, was the western boundary challenged at a later meeting when Eyre, Mantell and Kemp met with Tikao, Taiaroa, Topi Patuki, Tiramorehu and other Ngai Tahu early in February 1849 (A8:I:221).{FNREF|0-86472-060-2|8.5.23|87}

Nor, in October 1849 when Tiramorehu wrote to Eyre, did he challenge the western boundary. "The principal cause of all the disputes in this Island", he said, "is that of your having given payment of a part of our Island to the Ngatitoas, it is this which has caused all the disputes amongst the Natives of this Island" (L9:23).{FNREF|0-86472-060-2|8.5.23|88}

Dr Loveridge therefore claimed that while the Ngai Tahu of Kaiapoi wanted their rights in the north recognised, they evidently did not reject Mantell's claim that the northern boundary of Kemp's purchase ran across the island from coast to coast (L8:66).

Mr Evison (O46:13) disputed Dr Loveridge's claim and quoted from Tiramorehu's testimony before the Smith-Nairn commission some 30 years later as follows:

We told Mr. Mantell to be off, and he said he would not go. We said that the thing was not clear, and that it was not right to extend the boundary right over to the Western Coast. Mr. Mantell, in reply to our statements of objection, said -"I don't come here to lay off boundaries...you have received Mr. Kemp's money." (L9:205){FNREF|0-86472-060-2|8.5.23|89}

Dr Loveridge, in responding to Evison's comments, reiterated that all of the objections recorded related to the north-eastern boundary-to the area which Dr Loveridge said Mantell had taken out of the block himself by altering the northern boundary. As far as we know, Dr Loveridge said, Ngai Tahu were repeatedly told during the period August-September 1848 that the purchase block extended across the island to the west coast. There is, he said, correctly we believe, no contemporary record of the rejection by Ngai Tahu of this claim. Dr Loveridge maintained (a view which we share) that it is difficult to understand why Mantell carefully recorded Ngai Tahu objections to the location of the boundary on the north-eastern coast and yet would have suppressed their alleged objections about the boundary extending to the west coast. Despite Tiramorehu's testimony before the Smith-Nairn commission three decades later, Dr Loveridge argued that the most tenable conclusion is that such objections were not

made in 1848 (R1: 13). For reasons which we later give this seems to us the more likely explanation.

The south-western boundary

8.5.24 The deed refers to the boundary line:

striking inland from this (the East Coast) until it reaches the range of mountains called "Kaihiku" & from thence in a straight line until it terminates in a point on the West Coast called "Wakatipu-Waitai" or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same. (appendix 2.2)

The deed map shows the line of the western boundary terminating at Milford Haven (evidently in Kettle's printing) with the words "or Wakatipu-Waitai" added by Kemp. No other place name is indicated on the west coast.

8.5.25 The Turnbull map, completed at much the same time, shows four separate place names on the west coast, "Milford Haven", "Wakatipu or the Waipounamu", "Awarua"and "Mawhera", which is shown adjoining the western end of the "Native route to Poutini" across the alps marked on the Turnbull map. Routes to Nelson from both Kaiapoi and Mawhera are also shown. In addition a variety of rivers and the major southern lakes are shown. The curious and unexplained circumstance is that very little of this information is on the deed map, perhaps because that map was drawn in some haste.

The Ward report stated:

There is no indication that Kemp discussed either the interior of the island or the west coast during the purchase negotiations. With the exception of Whakatipu Waitai at the southern extremity of the block, no interior or west coast names were placed on the map. For Ngai Tahu to have understood that the west coast was being sold the name Mawhera, Arahura or Poutini would have had to be mentioned. Although population estimates were made for each of the east coast kainga, no such information was collected for the west coast. When Kettle recorded the calling out of the names of the places to be sold, he noted only names on the east coast. (T1:142)

The Crown contended that the fact that so much information was in the Turnbull map constitutes clear evidence that the west coast was discussed at the time of the Kemp negotiations (X1:296). The Ward report suggested that:

the information on the Turnbull map must have come from Ngai Tahu sources, but not necessarily at Akaroa, during the actual negotiations. It would seem more likely that the information was obtained on the voyage from Otakou when there was more time available. (T1(d):136)

The Crown disputed this, arguing that the most likely source for the names on the northern part of the west coast, and especially for the northern trails, would have been the Poutini people present at Akaroa-either Werita Tainui or any other Poutini

(X1:294A). Kettle was present in Akaroa for eight days-five before the signing and three after. The trip north on the Fly took three days.

8.5.26 It seems to us reasonable to infer that some information was obtained at Otakou, some on the Fly proceeding north, and some at Akaroa. If this is so, then it is difficult to believe that the west coast was not discussed during the Kemp negotiations. To hold otherwise would necessitate our finding that it was an invention resulting from collusion on the part of Kemp and Kettle. We have earlier cited Kemp's Smith-Nairn evidence where he told Ngai Tahu that, "the Government desired to carry through to the other Coast, and they gave me the name of Milford Haven". Had the boundaries of Maungatere to Maungaatua been proposed, he would have withdrawn and he fully understood he was buying right from sea to sea (8.5.22). We have also seen that both Kemp and Kettle referred to various discussions taking place about boundaries and claimants before the deed was signed (8.5.4). We have already discussed the considerable time Kemp spent with Ngai Tahu before the deed was signed. While we do not know on how many of the 26 days Kemp and Kettle and the Ngai Tahu chiefs were involved in discussions, there was clearly ample opportunity during nearly four weeks for full discussions about the boundaries of the proposed purchase to take place. Given that Kemp's mission was to extinguish Ngai Tahu's title to the land, between the named boundaries to the north and south, we believe he would have used the time available to secure agreement through discussion and debate. This would have required him to ascertain from Ngai Tahu the extent of their claim to land within these boundaries. It is apparent from the deed and deed map that he was told by Ngai Tahu that their interests extended to the west coast.

We are therefore not able to accept the suggestion in the Ward report that there is no indication of Kemp discussing either the interior of the island or the west coast during the negotiations, with the exception of Whakatipu-Waitai at the southern extremity of the block. We believe it is implicit in the evidence and records of Kemp and Kettle that such discussions took place. But at the same time it does not necessarily follow that Ngai Tahu and Kemp's conceptions of what they were agreeing to were the same. We will later be discussing Professor Ward's insightful comments on Ngai Tahu's perspective on the agreement. And in due course we will be weighing this less tangible but nonetheless real evidence against the contemporary records of the Europeans involved, as well as later testimony from both parties.

8.5.27 The Crown invoked other factors as indicating that the west coast was discussed:

- Topi Patuki's letter to Governor Grey, written on 12 February 1849, records Ngai Tahu's understanding that the southern boundary of Kemp's purchase ran "over towards Wakatipu" (Q3:4-5; 40-42 of supporting papers).

- The request of Ngai Tahu for a reserve which ran across the island to the west coast. Mantell gives various descriptions of the width of the strip sought:

(a) In his Outline Journal for 2 September 1848 he recorded:

...Having combatted this notion I set out with them for the sandhills to shew what I would consent to give them arrived at the sandhills I led them on till the N. point of

the bush bore N.W. from me and pointed out the limits of the reserve almost as it was eventually settled. (M3:136-137){FNREF|0-86472-060-2|8.5.27|90}

(b) In notes made in his Sketchbook No 3 for 5 September 1848 Mantell records:

About 1/2 past 10 set out for the sand hills. The natives demanded a block from K. North to the Domett S. to run right across the island and stated themselves [ ] to take nothing less. [ ] on the sand hills they demanded from the Kawari to the Domett right across. (X12(b):141){FNREF|0-86472-060-2|8.5.27|91}

The "K" almost certainly refers to the Kawari, a stream which Mantell and his party crossed on a day trip from Tuahiwi to Kaiapoi pa. The Domett is believed to be Mantell's alternative name for the Waimakariri.

(c) In a letter of 21 September 1848 Mantell reported that:

Their demand was for a tract of country bounded by the Kawari and Waimakariri Rivers, to extend thence, of the same width, ACROSS THE ISLAND TO THE WEST COAST" (L9:20){FNREF|0-86472-060-2|8.5.27|92} (emphasis added)

(d) In evidence to a parliamentary select committee given on 24 July 1888 (some 40 years after the event) Mantell confused the Kowai River, which runs further north, with the Kawari. He described a request for "a block commencing at the Kowhai on the north and south to the Waimakariri, or Waikirikiri, or Selwyn, and extending that width across to the West Coast"{FNREF|0-86472-060-2|8.5.27|93} which the Ngai Tahu made to Lieutenant-Governor Eyre when he and Mantell first arrived at Akaroa in August 1848. This occurred before proceedings commenced and in the presence of a large number of Kaiapoi Ngai Tahu and those having interests in Kaiapoi. Mantell testified that Lieutenant-Governor Eyre said they could have that land but Mantell, in a low voice, pointed out this would create an embarrassing precedent. He claimed the lieutenant-governor left it to him to decide (A9: 9:87).{FNREF|0-86472-060-2|8.5.27|94}

8.5.28 The Crown asked why Ngai Tahu requested a block of land running right across the island if they did not think that Kemp's purchase extended from coast to coast. If they thought the interior had not been sold to the Crown why would they have asked for a large portion of it to be set aside for their own use? (X1:297)

The Crown also relied on the absence of protest concerning the sale of the west coast to government until the 1867 petition, as already discussed.

Although in no way conclusive, Mantell, in notes made at the time, recorded "Their wanting grounds reserved for Kauru & forests for cooking it-other forests for weka hunting-whole districts for pig runs"(X12(b)).{FNREF|0-86472-060-2|8.5.28|95} These notes suggest that Ngai Tahu were seeking substantial reserves in the interior and beyond the foothills.

8.5.29 Mr Temm, in his reply, dealt in some detail with the boundary question (Y1). Before summarising his submissions it may be helpful to refer to Matiaha Tiramorehu's Smith-Nairn evidence, a small quotation from which appears in Mr

Temm's closing address (W1:186-187). This evidence was relied on as showing that Ngai Tahu rejected Mantell's claim that the northern boundary of Kemp's purchase ran across the island from coast to coast. The quotation cited by Mr Temm is identified below. Tiramorehu gave extensive evidence before the Smith-Nairn commission in May 1879. It covers 54 pages and covered dealings with both Kemp and Mantell (L9:188-237). The following quotations relate to the boundary question:

It is only LATELY we have ascertained that the boundary runs over to Milford Sound and also from near Kaiapoi to Cape Foulwind. (L9:194-195){FNREF|0-86472-060-2|8.5.29|96} (emphasis added)

We note that this statement may derive from the Ngai Tahu petition of 25 March 1874 which states that recently the tribe had got a copy of the deed drawn out by Mr Kemp of that transaction (L8:77).{FNREF|0-86472-060-2|8.5.29|97} Tiramorehu was then questioned about discussions on the Fly on the day the deed was signed at Akaroa:

Who was it pointed out the boundaries on board the vessel? Was it Paora who pointed out the boundaries? -Yes; the boundaries that have already been referred to, from Kaiapoi to Otumatua & Taumutu.

Did Paora point out them again on board the vessel? -Of course he did. He pointed to the Akaroa hills, and said the boundary should extend as far as Purehurehu and also from Maungatere to Maunguatua. (L9:195-196){FNREF|0-86472-060-2|8.5.29|98}

This evidence seems to suggest that although Ngai Tahu sought these boundaries, Kemp and Kettle ignored them and wrote quite different boundaries in the deed and map. If so, such action was fraudulent and collusive.

In the following evidence Tiramorehu said that, while all the chiefs were at Akaroa, discussions were held with Mantell over several days. He does not say whether the meeting was when Mantell first arrived in August 1848 with Lieutenant-Governor Eyre, or in December 1848-January 1849 when Mantell returned to Akaroa, after laying out the reserves, with a view to making the second payment of the purchase money. But Tiramorehu recorded that Mantell was told that the reserves "were not made so large or so numerous as they should have been" (L9:208){FNREF|0-86472-060-2|8.5.29|99}, which implies the discussions related here by Tiramorehu took place after Mantell returned to Akaroa in December 1849. Asked by Mr Izard what Mantell had said about the payment of the money, Tiramorehu said that Mantell commenced by reading out what Mr Kemp had said:

What did he read from? -He read from Mr Kemp's deed.

What took place then? -When we heard distinctly Mr Mantell's reading the deed over, we found that it was wrong.

In what respect was it wrong? -It was wrong in this respect; that the Maori had made one arrangement and had stated certain things. They found, when the deed was read over, that it comprised all the land between Kaiapoi and Kaihiku, and thence to Whakatipu-Waitai. That means all the land between the boundary of Capt[ai]n Symonds' purchase and Kaihiku...

...Mr Smith -The witness says that the boundary as given in Kemp's deed commences at Kaiapoi, goes down to Purehurehu and then crosses the island to Whakatipu-Waitai. When it came to that part of going across the island to Whakatipu-Waitai, the witness says that part was wrong. In what respect was it wrong? -[Answer] The only boundary that we mentioned to Mr. Kemp was from Maungatere to Maungaatua. Mr. Kemp, however, did not lay off the boundary as we wished, and we did not find out it until Mr. Mantell came.

Then did you point out to Mr Mantell that the boundaries were not the correct boundaries? -Yes, we objected in Mr. Mantell's presence and wanted him to depart from amongst us. We wanted to hunt him off...

When you pointed this out to Mr. Mantell, what happened then? -We told Mr. Mantell to be off, and he said he would not go. We said that the thing was not clear, and it was not right to extend the boundary right over to the Western Coast. Mr. Mantell, in reply to our statements of objection, said -"I don't come here to lay off boundaries." But all our spokesmen, of whom there were a great many, united in desiring Mr Mantell to go away. Mr Mantell said -"You have received Mr. Kemp's money"... (L9:202-205){FNREF|0-86472-060-2|8.5.29|100}

The last passage immediately above was that cited by Mr Temm in his closing address.

He [Mantell] said to us -"I did not come here to buy land. Where were you that you did not state everything to the end and state everything you had to say in Kemp's presence?". We said to Mantell, in reply to that, that the extension of the boundary to Whakatipu-Waitai was done SECRETLY. We were not aware of it. That was all that was said. [emphasis added]...

...Mr. Nairn: Who defined the southern boundary to Mr Kemp? -Perhaps some of us defined the southern boundary to Mr Kemp. As for ourselves we knew nothing about it. (L9:206-207){FNREF|0-86472-060-2|8.5.29|101}

This evidence is confusing because it suggests that it was not until after Mantell had laid off all the reserves, and Ngai Tahu had gathered at Akaroa to receive the second payment, that they first heard Mantell read the deed and learned of the boundaries going across the island. But Mantell, as we have earlier recorded (8.5.23), told the Smith-Nairn commission that at almost every place he visited while laying out reserves he would "read the Deed to the Natives and shew them the plan".

8.5.30 We here refer, by way of interpolation, to other related evidence of Tiramorehu. This concerns certain undertakings said to have been given by Mantell during his discussion with Ngai Tahu in 1848.

Following his evidence about boundaries and the reserves being too small and too few, Tiramorehu indicated that two mistakes were made. One was that the boundary was wrong, and the second that the promises regarding reserves and other matters were not carried out. He went on to say that there was a great deal of talk, taking up several days, and Mantell then made statements similar in effect to those of Kemp.

Mantell is then said to have stated that he was not there on the same mission as Kemp, but on different grounds (L9:209). Mantell was then told by Ngai Tahu:

If you are obstinate you may take back your money, and you won't get any land for it, but if you choose to give us five millions, you can have the land.

Tikao said that? -Tikao said it, and I said it, and others said it. Mr Mantell said - "Sufficient; I will try what I can do by making a representation to the Govt of New Zealand. It will be for the Govt to pay you money, and if the New Zealand Govt do not agree to what I propose, then I will take the matter across the water to England."

By Mr Smith: Were those the words of Mr Mantell - that he would take the matter to England? Was that spoken at that time or afterwards? -We had been three days discussing the matter and had agreed to have nothing to do with Mr Mantell. He said on that occasion that if his proposals to the Govt of New Zealand were not approved of, he would take the matter to England... Mr Mantell said we should have a large price. He said that we would gain a large price for our land. Mr Mantell spoke of money on that occasion.

By Mr Izard: Anything else? -He (Mantell) said -"I will also request the Govt to establish schools for you". (B3:4/1:247){FNREF|0-86472-060-2|8.5.30|102}

Mantell was also reported as saying, "I will ask the Govt to establish hospitals for you" (L9:211).{FNREF|0-86472-060-2|8.5.30|103}

Then followed a general discussion about hospitals and their uses and the following passage occurs:

I [Tiramorehu] said to him -"When are we to see the fulfilment of these words?". He said -"After the last instalment of Mr Kemp's money has been paid". I said -"What are you going to do then? Are you going to carry out what you have just promised, and are you going to pay us a large final payment for this island? Are you going to carry out the promises for the establishment of schools and hospitals? Will you be able to do it." He said -"If it cannot be done in New Zealand I will apply to the Home Govt-to her Majesty's Secretary of State on the subject". I said -"Don't take it right away to England; let us have the matter done on the spot, so that we may have a speedy fulfilment of the promises which you have made, don't let any very long delay take place." (L9:213-214){FNREF|0-86472-060-2|8.5.30|104}

These foregoing discussions took place at Akaroa after Mantell had completed laying off the reserves. A little later Tiramorehu produced Mantell's letter, written from London on 8 August 1850, advising that he was taking certain matters up with the principal secretary to the Queen (L9:225).{FNREF|0-86472-060-2|8.5.30|105}

It is difficult to escape the conclusion that Tiramorehu was here, due no doubt to the passage of time, relating back to 1848 actions which Mantell took some seven or eight years later. By then Mantell's attitude to Ngai Tahu had undergone a major turnaround. It defies credibility that a youthful and ambitious officer on his first Crown assignment, whose high-handed and autocratic conduct seemed motivated by a strong desire to prove himself an effective Crown agent, should have even

contemplated, let alone openly spoken, in terms of such disloyalty to the governor who had commissioned him and to whom he was beholden.

8.5.31 We here summarise Tiramorehu's evidence. He says he signed the deed but saw no map: "There was no map". It was only when Mantell came to Akaroa that Tiramorehu says he saw there was a plan attached to the deed. He further says that he did not hear the deed read out by Kemp, there was so much confusion going on at the time he did not hear it (L9:235).{FNREF|0-86472-060-2|8.5.31|106}

By Mr. Smith: Who told Mr. Kemp where Whakatipu-Waitai was? Who was it mentioned the name of Whakatipu-Waitai to him? -IT WAS SOMEONE OF OUR PEOPLE.

...Did you hear the name mentioned while Mr Kemp was present? -Yes, I did. We heard the boundary mentioned from Kaiapoi down to the boundary of Symonds' purchase; thence to Whakatipu-Waitai-we heard the name Whakatipu-Waitai mentioned in our proceedings with Kemp and we objected to it.

Did you agree to accept that boundary or did you stand out for the boundary between Maungatere and Maungaatua? -We objected to the boundary extending as far as Whakatipu-Waitai. He said the matter remained unsettled.

And I suppose you thought the boundary was as you suggested, and Mr. Kemp thought it was as he stated? -That was the case. Mr Kemp argues that he purchased the whole country or supposed he purchased it from sea to sea, and we supposed all we sold was from Maungatere to Maungaatua. (L9:235-236){FNREF|0-86472-060-2|8.5.31|107} (emphasis added)

8.5.32 Perhaps not surprisingly there are some problems with Matiaha Tiramorehu's evidence, given 31 years after the events he attempts to recall. He appears to have transposed Mantell's actions in the mid-1850s in taking up Ngai Tahu's cause, particularly in relation to schools and hospitals, back to 1849. Further, whereas in 1879 he said that it was only "lately" that he discovered the boundary ran over to Milford Sound and Cape Foulwind, he shortly after described how they learnt from Mantell in 1848 that the deed went across to Wakitipu-Waitai and they wanted him to be off. According to Tiramorehu, Paora Tau pointed out the boundaries on board the vessel before the deed was signed. Paora said the boundary should extend as far as Purehurehu and also from Maungatere to Maungaatua. Yet shortly after, it appears, if this recollection be correct, Kemp read out the deed which contained quite different boundaries. Tiramorehu suggested that the boundary to "Whakatipu-Waitai was done SECRETLY" (emphasis added). Given that the deed was read aloud this is surely problematical. It is, we think, straining credibility to accept that Kemp should have brazenly prepared and read out a deed with a boundary extending to the west coast if Paora only shortly before had proposed quite different boundaries. We are at a loss to know how Kemp, with Kettle's complicity and presumably that of the ship's officers present and the resident magistrate, concealed his alleged deception from Ngai Tahu.

Summary of claimants' view of the boundaries

8.5.33 We now summarise and discuss the main points made by Mr Temm in his reply on the boundary question.

(a) Kemp's discussion with Ngai Tahu enabled him to say that the northernmost point on the east coast was "Kaiapoi". There is only one Kaiapoi, it being a distinct place marked by a pa. When Ngai Tahu were talking to Kemp about Kaiapoi there was no doubt about which place they spoke.

We note that this assumes that Kemp spoke only of Kaiapoi pa and not, as appears in the deed and the attached map, of "Kaiapoi, recently sold by the Ngatitoa and the boundary of the Nelson Block...". We have earlier discounted the likelihood that Ngai Tahu would have accepted that the Ngati Toa purchase ran down as far as Kaiapoi pa. Moreover Mr Temm's comment implies that Ngai Tahu were willing to sell Kaiapoi pa. Professor Ward's comments when questioned on this point are of interest. Professor Ward was asked:

5368 S. Kenderdine: Now in your view of Ngai Tahu would you think that they would sell Kaiapoi pa...?
5377 Professor Ward: They were anxious to receive the payment for Kaiapoi. The district, Kaiapoi.
5388 S. Kenderdine: Right, the district. But I am asking you about Kaiapoi...pa?
5391 Professor Ward: No they would have wanted to reserve that and Mantell undertook to do so. (W12:43)

(b) Mr Temm criticised Dr Loveridge's "theory", adopted by the Crown, which involved the proposition that Kaiapoi is "not where it was", but was to be found at a place to the north of the 43rd parallel.

We would comment that Dr Loveridge did not claim that Kaiapoi pa was not where it was. His contention was that "Kaiapoi", in the context of the deed and deed map, indicates the northern point of the Kaiapoi district and this was just north of the 43rd parallel.

(c) The line of the "west coast" on the map is obviously distorted and is unrecognisable to anyone who knows that part of the country.

This comment overlooked that the deed expressly refers to "a point on the West Coast called 'Whakatipu- Waitai', or Milford Haven" and that the deed map, which was edged blue along the western coast line, was marked "Milford Haven or Wakatipu Waitai" on the western coast line.

(d) The eastern starting point of the northern boundary remains a mystery if it is not Kaiapoi pa.

In fact the deed map locates the starting point above the 43rd parallel.

(e) If Kaiapoi pa is taken as the starting point, as Mantell did, then it begins well south of the place shown on the map. But with the true position of Kaiapoi pa as the starting point, where does the boundary go from there? The deed does not answer the question and the map is no help. Mr Temm added orally at this point, that the pivotal point is

whether the Crown was buying from Kaiapoi pa. If so you have a "hole in the middle" because there is no northern boundary.

In our view, if in fact there was general understanding, as we believe there was, that the north-east boundary commenced as described in the deed map, there is no problem as to where it started. But there remains a problem as to whether Ngai Tahu had a very accurate idea of where it came out on the west coast. If, as the claimants contended, Ngai Tahu understood that it started at Kaiapoi pa, then there is an even greater problem.

Mantell in effect redrew the northern boundary line, (that is, he altered it from the position on the plan) by starting it from Kaiapoi pa and then bringing it out on the west coast near Cape Foulwind and Kawatiri, in the position indicated on the deed map. But we lack information as to how detailed Kemp's discussions were with Ngai Tahu, including any Poutini Ngai Tahu present, about the location of the north-western boundary. The two 1852 letters from Werita Tainui would suggest that he for one was well aware of the Kawatiri as the northern boundary of the purchase on the west coast. However this was clearly not the limit of his people's rights on the west coast.

(f) During 140 years following Mantell's first visit to Kaiapoi in September 1848, no one ever mentioned he was in error in taking that place to be "Kaiapoi" referred to in Kemp's deed as the boundary of Kemp's purchase.

We believe this assertion is difficult to reconcile with the vigorous Ngai Tahu protests to Mantell (and later government officials) that Mantell had in effect fixed the boundary of the Ngati Toa sale at Kaiapoi pa. As we have seen, Ngai Tahu were very unwilling to accept that place as the boundary and contended for a boundary considerably to the north. Eventually they were to publicly argue for a northern boundary at Maungatere (Mount Grey). We agree with the observation in the Ward report that:

For Ngai Tahu the northern boundary issue was a complex one. They expected to get the money for Kaiapoi only to find that Ngati Toa rights were going to be recognised right up to the centre of the pa. Mantell was deaf to the complexities of the arguments about utu and stuck to the words of the deed, insisting that the purchase stopped at Kaiapoi. Further north he would not go, though he did make a minor compromise and shift the boundary slightly so that it ran just to the north of the pa rather than straight through it, promising Ngai Tahu that the pa site should be reserved to them. (T1:158)

It is clear from the correspondence that government officials did not wish to re-agitate the Ngati Toa purchase boundary and hence the Kemp boundary, and were content to let the matter lie as decreed by Mantell. Later the Crown was to purchase (or repurchase) the North Canterbury land north of Kaiapoi pa.

(g) The Crown cannot decide whether the fictitious "Kaiapoi-on the Hurunui" was a point (X1:230-264) or a district (X1:244) and the Crown cannot have it both ways. Either Kaiapoi was a place or it was a district.

There is some force in this contention, but Ngai Tahu were told not only of Kaiapoi (from which, as they well knew, their interests radiated out) but also of the Ngati Toa purchase boundary as being the northern boundary. While Kemp clearly erred in not being more precise, it does not necessarily follow, as Mr Temm seems to imply, that Ngai Tahu did not have a reasonable understanding of where the northern boundary was, that is, at the northern end of the Kaiapoi district at a point on the coast near the Hurunui River and the 43rd parallel.

(h) The northern boundary on the plan which Kemp had Kettle prepare is a fiction. And when the plan was first produced to the Ngai Tahu in August 1848 they protested immediately. The difficulty was that Mantell overrode their objection.

The evidence suggests that it was not the production of the plan as such which gave rise to Ngai Tahu's strenuous objections, but rather Mantell's arbitrary decision that the north-eastern boundary started at Kaiapoi pa and not, as stated in the deed, on the southern boundary of the Ngati Toa purchase, shown in the deed map to be just north of the 43rd parallel of latitude.

(i) If it is accepted that the northern boundary of Kemp's purchase was never determined then it inevitably follows that the western boundary was never determined either.

The deed and the deed map between them defined all four boundaries. It is a question of how well Ngai Tahu understood and agreed to this. There is evidence that they believed they had sold across to the west coast as well as evidence that they did not. They sought a large reserve from coast to coast within three months of the sale. They made no public protests about the west coast boundary for more than two decades. All the available evidence has to be weighed and considered. But having said this it may be that while Ngai Tahu agreed to sell from coast to coast, they did not have a precise idea of where on the west coast the northern boundary came out.

(j) The Crown's assertion that Kemp was buying from east coast to west coast is contradicted by the Crown's decision in 1860 to buy the west coast from Poutini Ngai Tahu.

The Crown contended that its principal reason for "repurchasing" the west coast was because it became clear that Poutini Ngai Tahu did not receive their share of the Kemp purchase monies; nor were any reserves set aside for them on the west coast. In these circumstances it was reasonable for the Crown to renegotiate a sale.

(k) Lieutenant-Governor Eyre never intended Kemp to buy from coast to coast. Two main reasons were advanced, first because:

it was never contemplated by H.M. Government that the very few individuals within the limits referred to should be considered the owners or occupiers of that immense District...(L9:429){FNREF|0-86472-060-2|8.5.33|108}

The short answer to this contention is that Kemp decided (correctly) that Ngai Tahu did in fact own and occupy the "immense district". Eyre, not Kemp, was in error.

Secondly, reference was made to Grey's instructions to Eyre and those from Eyre to Kemp. In essence, as Mr Temm agreed, Eyre repeated Grey's orders to him word for word. Mr Temm quoted only the first of the following two paragraphs which are part of Eyre's instructions to Kemp:

The object of your mission is the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitoa tribe and that purchased by the New Zealand Company at Otakou.

In entering upon the arrangements necessary to effect this object, it would be your duty to reserve to the natives ample portions of land for their present and prospective wants, and then, after the boundaries of these reserves have been marked, to purchase from the natives their right to the whole of the remainder of their claims to land in the Middle Island. (L9:68{FNREF|0-86472-060-2|8.5.33|109}

Mr Temm argued on the basis of the first paragraph above, that in neither Grey's letter to Eyre nor Eyre's letter to Kemp is there any reference to buying from coast to coast on the South Island. Each letter, it was said, contained an instruction to buy the land "lying between the districts purchased from the Ngatitoa Tribe and that purchased from the New Zealand Company at Otakou". Such land, it was argued, can only be found on the east coast of the South Island.

While it is possible to engage in a semantic argument as to this interpretation, the second paragraph in the instructions cited above (not referred to by Mr Temm) puts the matter in its true perspective. It will be noted that after setting aside ample reserves and marking their boundaries, Kemp was to "purchase from the natives their right to the whole of the remainder of their claims to land in the Middle Island". It seems difficult to argue that Kemp exceeded his instructions in purchasing from coast to coast between the northern and southern lines indicated in his instructions, although it is clear that as on the east coast so on the west coast he failed first to mark out reserves. In any event, even assuming that Kemp exceeded his instructions, that does not invalidate the purchase. It will be recalled that in his Smith-Nairn evidence Kemp was emphatic that his instructions were to purchase from coast to coast. But Lieutenant-Governor Eyre's report to Governor Grey of 5 July 1848 (L9:397-400){FNREF|0-86472-060-2|8.5.33|110} reveals no complaint that Kemp exceeded his instructions in buying beyond the coastal strip, rather that he recognised Maori rights over the whole of the country lying between the given limits. Eyre makes three other complaints about Kemp's conduct of the purchase and concentrates on those, saying nothing more about the first point.

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8.6 The Maori Dimension to Kemp's Purchase

8.6. The Maori Dimension to Kemp's Purchase

8.6.1 The foregoing lengthy discussion of the boundaries of the Kemp purchase is largely confined to an examination of the contending views of the claimants and the Crown. On occasions we have indicated our view on a particular issue. Perhaps inevitably the written contemporary or near contemporary records, mainly European in origin but not exclusively so, are relied on especially by the Crown. But in an earlier chapter we have recorded from Professor Ward's "Overview" evidence a number of contemporary Maori and European assumptions which underlay the acquisition of Maori land by the Crown.

Professor Ward also discussed the Maori view of what happened in land transactions both generally and in relation to Kemp's purchase. For instance, Professor Ward pointed out that with little or no experience of the sheer scale of settlement, Ngai Tahu must have expected many of their customary usages to continue over much of their land. Thus, as Professor Ward remarked, throughout the 1850s at least, Ngai Tahu cultivated or grazed stock beyond the reserves and must certainly have hunted and gathered very widely (T1:13). This could not last, as the Ward report explained:

Unfortunately for Ngai Tahu, as settlement pressed upon the land, power relationships changed and the British interpreted arrangements according to their notions of ownership and sale. Ngai Tahu have never ceased to protest at the narrowing interpretation of their transactions, and as they learned the European concepts of boundary and the language of deeds they began to express their protests that way. In the transactions themselves, each culture only partially understood the other, the more cosmopolitan Ngai Tahu leaders perhaps having more understanding of the Europeans' intentions than many of their kin could have. (T1:13)

Professor Ward then stressed the probability that Ngai Tahu and Crown representatives would have had differing impressions of what had been agreed:

The likelihood that Maori and Pakeha could take away different understandings of what was agreed was increased by the two cultures' perceptions of the very processes of making an agreement. To Europeans, for centuries accustomed to giving legal recognition to the written, documented records of land tenure or contracts affecting land, the deed was all-important. What was not on the deed had slim chance of later being supportable in law. For the Maori, working with an oral culture, the spoken words were all-important, especially if spoken publicly and solemnly by important men. Thus the agreement could be understood to include matters discussed and agreed, as well as what was in the final deed. The agreement was the process, not just the single final act. Thus what was agreed with Governor Grey, the Queen's

representative in New Zealand, about the sale, could be at least as important, or even more important, in Ngai Tahu understandings and tradition, than Kemp's deed. And what Kemp and Mantell added was all part of the process of the agreement. This probably explains why many Ngai Tahu who participated in the land transactions had rather different recollections of what was agreed, depending upon at what stage they were involved. In Otago, for example, those present at the preliminary, June, agreement with Tuckett and Daniel Wakefield but not at the July final agreement with William Wakefield, had different recollections from those who took part in both. Equally, if Mantell made statements about schools and hospitals after Kemp's deed had been signed, they would still be regarded as part of the contractual arrangements of the purchase. (T1:13-14)

8.6.2 Towards the end of his closing address on Kemp's purchase Mr Temm quoted comments in the Ward report which were critical of the way Kemp conducted his purchase. These are contained in the following more extended quotation from the Ward report, as orally amended and amplified at the hearing by Professor Ward:

Because he [Kemp] believed that the tribe was willing to sell all of its rights, he saw no need to define the rights of either the iwi as a whole, or of its constituent parts. The problem was that this sort of indiscriminate catch-all purchase was virtually incomprehensible to Ngai Tahu in 1848. Ngai Tahu understood their rights in terms of specific individual or group relationships, current and historic, with collections of places, not as an undifferentiated collective property right over the whole block. Kemp [was] operating within a framework of official attitudes which was sceptical about the Ngai Tahu claims to the interior. This combined with his decision not to precisely define the tribe's rights would have allowed him to proceed with a purchase which purportedly included the whole block without fully discussing the future disposition of interests in the block with Ngai Tahu. Because agreement on detail, especially oral agreement, was so important to the Maori world, failure to discuss and specify that distributions of interest in any part of the purchase amounted to a failure to complete the purchase of it. It is important to have regard to the complex of interests and a blanket agreement without specificity would not be a completed agreement in Maori eyes. (T1:142-143)

There is much weight in these comments, but they require amplification. In the tribunal's view the real vice of Kemp's conduct lay in his failure to carry out his instructions. He was instructed:

- first, to reserve to Ngai Tahu ample portions of land for their present and prospective wants;

- secondly, to then mark out (survey) the boundaries of those reserves; and

- thirdly, to purchase from Ngai Tahu their right to the whole of the remainder of their claims in the South Island (within the parameters set).

Kemp did none of these things. Instead he purchased, or believed he had purchased, the whole of the land in question; agreed that their places of residence and mahinga kai would be reserved to them and, when the land was properly surveyed, the government would have the power and discretion to make additional reserves of land.

The scope of this will be considered later along with any oral undertakings given by Kemp at the time.

Had Kemp followed his instructions there would have been ongoing dialogue between him and the various hapu of Ngai Tahu. The interests of each hapu would have been ascertained. Kemp would have learned what land they wished to keep and what they were prepared to sell, he would have ensured they retained ample land for their present and prospective wants. Boundaries would necessarily have been defined with more particularity. Had this been done in an appropriate way the principles of the Treaty could have been honoured.

In fact the principles were not honoured. Kemp failed to ascertain what land Ngai Tahu wished to keep before determining what they wished to sell. He failed to ensure they retained "ample" land. No specific reserves were made-merely an agreement to buy the whole, subject to certain reserves which would only later be identified, with provision for additional discretionary reserves. Having agreed, or appearing to agree, to sell all their land, Ngai Tahu were placed at an enormous disadvantage when it came to dealing with the Crown's agent Mantell over reserves. The Crown, through its agents, failed lamentably to provide adequate reserves.

But did Ngai Tahu agree to sell their kainga and mahinga kai? We doubt that this could have been their intention. It is surely inconceivable that they would agree to part with their villages, their cultivations, and other food producing places on the basis that these would later, after survey, be returned to them. They were agreeing to part with land surplus to their requirements within the boundaries specified. The extent and location of such surplus land would be the subject of ongoing discussion with the Crown's representatives and settled after they had indicated the land and sources of mahinga kai they wished to retain. We do not believe they contemplated that a Crown agent and not themselves would determine how much land they would be left with or that the Crown's agent would deny them their mahinga kai or fail to leave them with ample additional land for their wider needs. They would not have agreed to surrender their rangatiratanga over valued lands and food resources.

8.6.3 Had the Crown sent, instead of Mantell, a commissioner with a concern to conform to Treaty principles, it is possible, although far from certain, that justice would have been done. It is possible for instance that Ngai Tahu requests for extensive reserves and appropriate provision for mahinga kai would have been met. But this would have depended upon full dialogue between the Crown representative and the various hapu and, desirably, oversight by an independent protector. It is the absence of this full dialogue which lies at the heart of Professor Ward's concern. But notwithstanding Kemp's inversion of his instructions, his agreement with Ngai Tahu did not, in its terms, preclude this happening; indeed it may be said to be implicit in it. The trouble was that Mantell, as will be seen, so narrowly defined his mandate and acted in so high-handed a manner that the provisions of the deed were never implemented in the way they should have been, and in the way contemplated by Ngai Tahu when the deed was signed. Nor, given the power lying with the Crown as a result of Ngai Tahu apparently signing away their rights, was it by any means certain that they would be treated in conformity with Treaty principles. Given the situation at the time there is good reason to suspect that the odds were against this happening. The process of completing the agreement would have taken considerably longer than

Grey, Eyre, the New Zealand Company and other European officials envisaged. The surveying of the very considerable areas Ngai Tahu wished to reserve would have involved much more labour and expense than anyone anticipated. The officials concerned would have had to accept Maori definitions of use and occupation and defend their actions to Eyre and Grey. Grey in turn would have had to explain to the colonial secretary why he had acknowledged Maori ownership to huge areas of uncultivated land. It will be remembered that Earl Grey rejected any idea that Maori owned large areas of land beyond their immediate cultivations and villages.

It is abundantly clear, as will be shown, that the Crown failed to ensure Ngai Tahu were left with an adequate endowment for their present and future needs. Professor Ward was correct in saying that "having regard to the complex of interests a blanket agreement without specificity would not be a complete agreement in Maori eyes". But Kemp's deed did not in its terms exclude further discussion; indeed, as we have indicated, it required that there would be further discussions centering around individual hapu rights and interests leading to agreement on the provision of reserves in various localities as required by Ngai Tahu. While Mantell in fact went to considerable trouble to ascertain and record the interests of the various hapu and to note their leading chiefs, he failed miserably to meet their wishes as to reserves and mahinga kai. The ultimate failure, assuming there to have been an agreement by Ngai Tahu with the Crown to sell a coast to coast block, was not so much in the deed of purchase itself, as in the failure of the Crown to honour its terms and conditions in conformity with Treaty principles. This is a failure which has carried down to the present day and resulted in grievous harm to Ngai Tahu.

Finding on grievance no 1

8.6.4 The tribunal notes that in his 1887 report Royal Commissioner Alexander Mackay pointed out that many of Ngai Tahu's grievances resulted from the failure of the Crown to appoint a protector.

Owing to the non-appointment of an official protector for the Natives in the South, as was promised them at the cession of their land, these people have suffered a serious loss, for, had any person been clothed with the necessary authority to look after their welfare in the early days, a great deal of the irreparable neglect they have suffered from the non-fulfillment of the promises made them at the cession of their lands would probably not have occurred. (A9:9:65){FNREF|0-86472-060-2|8.6.4|111}

The tribunal would go further and say that, had a protector been appointed to look after the interests of Ngai Tahu during Kemp's negotiations for the land, he would have insisted that Kemp followed his instructions and first marked off the reserves requested by Ngai Tahu before a deed of purchase was signed. The tribunal finds the failure of the Crown to appoint a protector to assist Ngai Tahu was in breach of the Crown's Treaty obligations and resulted in grave detriment to Ngai Tahu.

Before stating our conclusions on the question of the boundaries of the Kemp purchase and in particular the question of a "hole in the middle" we propose to discuss the Crown's actions in the provision of reserves under the deed, including the provision for mahinga kai. It will also be necessary to examine how, when, and in what circumstances, the claims in respect of Kemp's purchase came to be brought by

Ngai Tahu. Only then will we be in a position to make a considered judgment on the boundary and related questions. There remains one boundary question, the subject of a grievance by the claimants, which we have not so far considered. This relates to whether the Kaitorete Spit and most of Waihora (Lake Ellesmere) was intended to be excluded from Kemp's purchase. This matter is capable of resolution at this stage and we now proceed to consider it.

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8.7 Waihora (Lake Ellesmere) and Kaitorete

8.7. Waihora (Lake Ellesmere) and Kaitorete

8.7.1 The question of whether Ngai Tahu sold Waihora and Kaitorete is the subject of part of the claimants' fourth grievance (W4). The claimants alleged that the Crown enforced an interpretation of the eastern boundary which was not agreed to by Ngai Tahu. They claimed Ngai Tahu wanted the eastern boundary to follow the line-of-sight from Otumatua to Taumutu and thus to exclude from the sale Kaitorete, most of Waihora and its north-eastern shoreline with the adjoining wetlands (B2:38-39).

The geography of the area

8.7.2 As we have seen, Kemp excluded from his purchase the land coloured green on the deed map and marked Banks Peninsula. The map (L23) bore an endorsement that "the land coloured green is that acknowledged by the Natives to have been sold to the French Company". In fact the straight line is inaccurate in that it fails to take into account the outwardly curving nature of the hills on the westward side of the peninsula. But it does show the peninsula starting at a point a little north of Port Cooper (Lyttelton Harbour) and terminating at the foot of the hills near the coastline just to the east of Kaitorete. It clearly excludes both Kaitorete and Waihora from Banks Peninsula. Waihora is in fact shown (somewhat out of scale) on the deed map. A current map of Banks Peninsula published by the New Zealand Department of Lands and Survey (NZMS 281 Banks Peninsula) clearly illustrates the configuration of the peninsula. It consists of a series of hills and mountains which surround Lyttelton Harbour running in a westerly, then southerly, then easterly direction from the harbour across to the commencement of Kaitorete Spit and thence around the coastline back to the harbour. For a certain distance to the north-west of Kaitorete Spit the hills come down virtually to the shore of Waihora and adjacent to the Kaituna lagoon. In 1848 much of what is now pasture on the plains was low-lying swamp. The peninsula was almost an island. In our view, it is unlikely that any observer of the landscape then or now would consider that either Kaitorete or Waihora were geographically part of the peninsula, which is markedly different in character, given its hilly and undulating configuration and extensive coastline.

The Turnbull map (L21(b)) which we have earlier discussed clearly shows the peninsula reaching out into the sea. In part because of its scale and better definition it gives a clearer indication of the contours of the peninsula. It is easy to see why on the deed map, which follows the general outline of the Turnbull map, a straight line was drawn in the position shown. Waihora and the adjoining Kaitorete Spit are clearly not part of the peninsula. It seems obvious that Kemp and Kettle considered they were purchasing both Waihora and Kaitorete. Nor would they have had reason to think

otherwise when, as Charles Kettle recorded, the various Ngai Tahu chiefs called the eastern boundaries:

Commencing from Kaikora one chief went down to the peninsula. Then Taiaroa called the lands from the Peninsula to Waitaki. Then Solomon from Waitaki to Moeraki. Portiki and others southward from thence to the Heads of Otakou. (L9:390){FNREF|0-86472-060-2|8.7.2|112}

Claims made about Waihora

8.7.3 The first recorded claim of which we are aware concerning Waihora is in a letter of 9 September 1865 to Native Minister FitzGerald, from Natanahira Waruwarutu on behalf of the whole of the runanga of Kaiapoi:

Friend Mr. FitzGerald. Here is one word to you about our land about Waihora; you yourself have seen that sheet of water which lies behind the mountains of Port Cooper; the Maoris catch eels there, and now we wish to sell that land (?water), because during the time that the lake was full of water, Mr. Kemp and Mr. Mantell laid down their money (in payment for the surrounding land); therefore they thought it not necessary to make any further payment for that land, and now the water is being let off by the Pakehas, that is to say by the Government, so as that land may be made a sheep station by the Europeans, and now there is very little (or no) water, it has to be left for two or three years before there is sufficient water to overflow so as to enable us to catch eels; but no, it is being drained off by the Government, so as to be a source of emolument for them. (A8:I:238){FNREF|0-86472-060-2|8.7.3|113}

Waruwarutu here seeks payment for the land which he said had been previously part of the lake. He claims Ngai Tahu received no payment from either Kemp or Mantell for such land. The commissioner of Crown lands reported that the provincial government had not done anything to draw off the lake. He suggested that periodically the lake discharged itself into the sea by breaking through the shingle beach, the effect of which had been to lower the lake considerably (A8:I:240). Waruwarutu was not satisfied with the replies he received from officials and again wrote to the native minister (by now Russell) on 1 February 1866 in which he said he was writing to the government:

because that water was not included in the sale made to that sold to Mr. Kemp and Mr. Mantell; it is still ours, the Maoris. (A8:I:241){FNREF|0-86472-060-2|8.7.3|114}

We note that no reference is made to the Kaitorete Spit nor is any suggestion made that it had not been sold.

8.7.4 In April 1868 the Native Land Court sat at Kaiapoi. Chief Judge Fenton presided. Among other matters, the court considered a claim brought by Heremaia Mautai and others, to Kaitorete Spit, described as "all that piece of land, containing from 12,000 to 15,000 acres which lies between Lake Ellesmere and the sea on the East Coast of Canterbury"(A8:II:204).{FNREF|0-86472-060-2|8.7.4|115} Mautai said in evidence that the spit belonged to his ancestors and that he never sold it or gave authority to anybody to sell it. He was living at Kaitorete at the time and remembered Mantell's visit. Later, on being re-called, he said:

There were 10 of us on the land when Mr. Mantell was there. None of us spoke to him. Mr. Mantell only came to our pah to get persons to carry his goods. (A8:II:204){FNREF|0-86472-060-2|8.7.4|116}

Henare Watene Tawa, who lived at Wairewa, claimed the land had not been sold. Kiriona Pohau (later to give evidence before the Smith-Nairn commission) told the court that:

I came from Taumutu and found Mr. Mantell at Wairewa at the time referred to. I belong to the same hapu as Heremaia [Mautai], and am one of the claimants. I recollect Mr. Kemp's coming here. I went to Akaroa at the time. My name is to the deed produced [Kemp's deed]; I wrote it. I said nothing to Mr. Mantell at the time he was at Wairewa. (A8:II:204-205){FNREF|0-86472-060-2|8.7.4|117}

Mantell also gave evidence at the court hearing as follows:

I was here in 1848 and 1849, as Commissioner for extinguishing Native claims. I remember walking along the Lake Ellesmere spit at that time, in company with Natives and Europeans. I went for the purpose of making a reserve, in accordance with instructions. The only Maoris living there resided at Lake Forsyth. On arriving at Wairewa, I proposed to the Natives to make a reserve there, but they said it was within the French boundary. On referring to the map, I found such to be the case, and I pointed out the block in which it was competent for me to make a reserve. There was no application by the Natives for a reserve on the spit. Nothing was said with regard to it by the Natives. I was informed that their cultivations were towards the Peninsula at that time. (A8:II:204){FNREF|0-86472-060-2|8.7.4|118}

There is a clear conflict between the evidence of Mantell, who related his discussion about possibly making a reserve at Wairewa and being told that it was within the French block and his verifying this by checking on the map, and Mautai's evidence that "none of us spoke to him". Pohau also claimed to have said nothing to Mantell at Wairewa. Some twelve years later before the Smith-Nairn commission on 17 March 1880, however, Pohau described travelling from Wairewa to Taumutu with Mantell:

Did you see Mr. Mantell near Kaitorete? -I saw Mr. Mantell at the Little River.

Did you go with him anywhere? -Mantell was going to Taumutu, and on his way I went with Mantell down to Te Puna o Pohau.

At the time you saw Mr. Mantell, was that after the purchase of the Ngaitahu Block by Mr. Kemp? -Yes, it was after Kemp's purchase.

Was it after Mr. Mantell himself had met the people, and had his negotiation with them? -This time Mantell came to mark off the reserves.

Why did you meet Mr. Mantell? -I did not come to meet Mantell at Wairewa. When I came to Wairewa Mantell happened to be there.

Where did you go with Mantell, and what conversation had you with him? -When I came to Wairewa I saw Mantell there. Mantell and I were going back to Taumutu. On

our way back we went to this place, Te Puna o Pohau. Then when we got there I said to Mantell -"Taiaroa has a claim to Kaitorete; this land was not sold to Kemp". Mantell asked me -Where is Kemp's boundary, then?" and I said "at Otumatua-from Otumatua in a straight line to Taumutu"-That is all that passed between Mantell and myself.

Mr. Smith -Was Otumatua the only place you pointed out to Mr. Mantell? -I pointed out the boundary at Taumutu, then to Waikirikiri (the Selwyn) and then to Taumutu.

Mr. Nairn -Do you know any line on the Kaiapoi side? -Yes; the boundary was from Kaiapoi pa to Otumatua.

Mr. Smith -Does the boundary from Kaiapoi go along the beach? -No; it is a direct line from Kaiapoi to Otumatua.

According to you, all the land between this line from Kaiapoi to Otumatua and the beach was not sold? -The beach side of the boundary from Kaiapoi Pa to Otumatua was not sold at all, but the boundary was made from Kaiapoi Pa to Purehurehu. (P14(b):24-27){FNREF|0-86472-060-2|8.7.4|119}

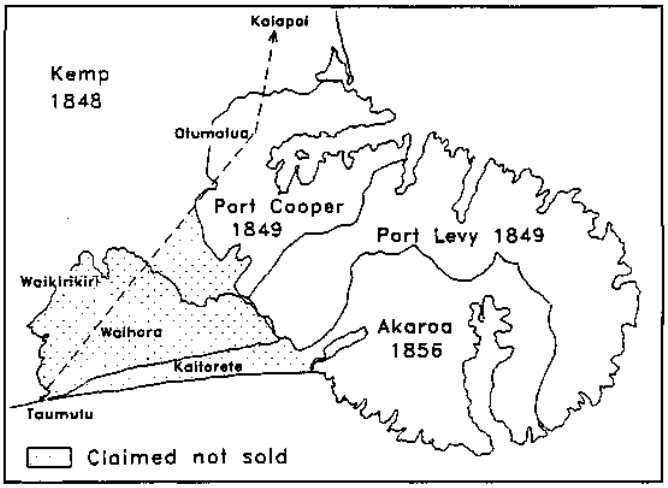

Figure 8.5: The boundary between Banks Peninula and the Kemp purchase showing Waihora and the line between Taumutu and Otumatua, which the claimants maintained was not included in the Kemp purchase.

We note that Pohau, in recounting his answer to Mantell's question as to where Kemp's boundary was, replied "at Otumatua-from Otumatua in a straight line to Taumutu". But then, in response to Smith's question of whether Otumatua was the only place he pointed out to Mantell, Pohau is recorded as saying, "I pointed out the boundary at Taumutu, then to Waikirikiri (the Selwyn) and then to Taumutu". We assume Taumutu, where it first appears in this sentence, should read "Otumatua". If not, it is meaningless. If so, it contradicts Pohau's earlier account of a straight line; a line from Otumatua to the Selwyn and then to Taumutu would be triangular in shape and would enclose most of Waihora. By contrast Waruwarutu in 1880 speaks only of a line from Otumatua to Taumutu, cutting approximately two-thirds of the way through Waihora.

8.7.5 The claimants based their claim not to have sold most of Waihora and Kaitorete on the evidence of Pohau and Natanahira Waruwarutu before the Smith-Nairn

commission. Waruwarutu gave evidence that the back boundary of the Kemp purchase was from Maungatere to Maungaatua. He was then asked by Izard:

Was Kaitorete within the boundaries mentioned? -No.

Then on which side of the Lake (Ellesmere) did the boundary go? -If we were outside, I could point out the direction in which the boundaries went.

Mr. Nairn -I want to learn where Otumatua is? -I could point out Otumatua; it is a hill about 20 miles south of Christchurch. The boundary runs through Lake Ellesmere; not through the centre of it exactly, but cutting off a good piece of it, and thence to Taumutu. It runs in a direct line from Kaiapoi to Otumatua and then to Taumutu, and when it gets to the line of the sea it follows the Coast. (B3:3/11:194-195){FNREF|0-86472-060-2|8.7.5|120}

Although Waruwarutu does not say so, we infer that he is claiming that this quite detailed description was given to Kemp during the negotiations at Akaroa. From there Kaiapoi, Otumatua and Taumutu would not have been visible. Given Kemp's belief that Kaiapoi was many miles north of Kaiapoi pa and his ignorance of where a spur on the other side of the Port Hills called Otumatua was, he would have had difficulty in comprehending such a detailed specification, assuming it had been given. It is possible that Taumutu, and quite likely Waihora, were pointed out to him on his journeys between Akaroa and Otakou. Waihora was shown on the deed map. He would have sailed quite close to it on both his southern and northern journeys.

We recall that when Waruwarutu was corresponding with the native ministers, FitzGerald and Russell, some 15 years earlier, he made no reference to this boundary discussion during the Kemp negotiations. Whereas in 1880 he was claiming ownership of part only of Waihora, in 1865-66 he was asserting that none of the lake had been sold. We find it improbable that in 1848 Ngai Tahu would agree to sell part of Waihora simply because a straight line between two points so divided it. We think it very much more likely that Ngai Tahu would have vigorously insisted on their mahinga kai rights to the whole of Waihora, given its great importance as a source of tuna and patiki to several hapu in the vicinity. It is this topic which Mantell records as having discussed with Ngai Tahu and as having acted in a high-handed manner.

8.7.6 Apart from Mantell's 1868 Native Land Court account of his meeting with Ngai Tahu in 1848 at Wairewa and Kaitorete, other records were made by him of events during 1848 and 1849 while these were fresh in his mind. We set out here his journal entry for 23 September, when he arrived at Wairewa and then travelled to Taumutu:

23 September Saturday Taumutu.
Crossed the remaining hills of the peninsula and reached Wairewa by tea a.m. Here tried in vain to engage natives remained in the very dirty Kaika nearly two hours and was at last obliged to send back half of the provisions and set out with the additional assistance of only one native.

In an hour reached the bed of the Waihora, a wide margin of which had been left dry since the opening of its mouth-continued to walk on this until dark when we had reached the point where the narrow spit consisted only of sand hills-walked along for

an hour or two. We reached the mouth, crossed in a canoe and took shelter in a rather dilapidated grass hut at the Kaika. (P14(b): 4B:19-20){FNREF|0-86472-060-2|8.7.6|121}

In his entry for 25 September Mantell recounted, after taking the census, going with Maopo and Pohau to explore Taumutu and crossing the sandy spit to the edge of the Waihora bar. The next two days involved him in setting aside reserves. It is curious that he did not record travelling with Pohau from Wairewa to Taumutu. He described journeying with one unnamed Maori who was acting as a bag carrier and was unlikely to be Pohau. Nor did he mention being told by Pohau or anyone else that the boundary of the Kemp purchase ran through or around the lake, as was much later suggested by Pohau.

In his Sketchbook No 3 for 1848-1849 Mantell recorded miscellaneous memoranda for his report. Against a side-heading "Eel Weirs" he notes:

Why not specially reserved
Waihora etc. eventually disused
The existence of legal right inconveniences.(X12(a): 25){FNREF|0-86472-060-2|8.7.6|122}

In a letter of 12 April 1866 to Rolleston, Mantell (to whom Waruwarutu's correspondence had been referred) observed:

Bound as I then felt, pending the execution of the new deed which the Government deemed absolutely necessary, to maintain the validity of that under comment, I treated with the Natives in all matters connected with their reserves with a high hand, and as if I possessed the unquestionable right to do so. At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no case would I give way upon this point, although unfortunately my difficulty was much increased by their knowledge that at a sale then recently made in this Island, a general reservation of this right to the Natives had been conceded.

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it.

All that I promised at any place to the Maoris on this subject was, that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans; and this promise I hope the Government may for a time permit to hold good. (A8:I:242){FNREF|0-86472-060-2|8.7.6|123}

We cite this statement here because of the light it throws on Mantell's perception of the ownership of Waihora and the surrounding country, including the Kaitorete Spit. It is implicit in what he said that he discussed the lake and eel fishery questions in the context of the Crown having acquired the lake and spit. We will discuss in another

place the totally unjustifiable attitude to Ngai Tahu's rights, to their fisheries and their eel weirs in particular, adopted by Mantell.

Also in Mantell's sketchbook is a map of the South Island showing Mantell's adjusted northern boundary line from east to west and showing also the boundary of Banks Peninsula with a line across Kaitorete a short distance down the spit (X13(a)).{FNREF|0-86472-060-2|8.7.6|124} It is apparent from this map, which is Mantell's handiwork, that he considered the Kemp purchase included Waihora and virtually all of the spit.

But Mr Temm for the claimants pointed out to us that when Mantell in June 1849 received instructions from Domett to proceed to Banks Peninsula to negotiate with Ngai Tahu, he made a note which read:

Require map of Peninsula-I took french claim round hills including Wairewa and Kaitorete etc. (G2:320){FNREF|0-86472-060-2|8.7.6|125}

Mr Temm submitted that from this it could be inferred that so far as Mantell was concerned the peninsula for which he was to negotiate included both Wairewa and Kaitorete (W1:48). Or in other words, that Kaitorete was not included in the Kemp purchase as part of the Canterbury Plains. But such a construction is at odds with Kemp's deed map which clearly shows Waihora and Kaitorete as included in the purchase. Moreover, it is clearly inconsistent with Mantell's views, which we have earlier discussed, and with the boundaries he in fact drew when he later went to Banks Peninsula in 1849.

We note that on Mantell's map of his Port Cooper purchase (M34(f)){FNREF|0-86472-060-2|8.7.6|126}, the boundary terminates at the western boundary of Waihora excluding both the lake and spit, just as it does on a sketch of the Port Cooper block boundary he drew on a letter of 16 August 1849 to his father (T2:24). In the same way, Mantell's map of the Port Levy purchase (M34(c)){FNREF|0-86472-060-2|8.7.6|127} has its boundary on the western edge of Waihora, and it too excludes Kaitorete. The plan in Mackay's Compendium (A8:I: following 254), showing the Ngai Tahu claims referred to in Mantell's letter of 28 November 1849 to the colonial secretary (A8:I:255){FNREF|0-86472-060-2|8.7.6|128}, is based on a tracing Mantell enclosed with his letter. The plan shows the balance of the land on the peninsula again having a boundary on Waihora and shows a line crossing the head of the spit as being Kemp's boundary. Again both the lake and the spit are excluded.

Finding on grievance no 4(b)

8.7.7 After weighing all the available evidence we consider the better view is that Ngai Tahu, in excluding Banks Peninsula from the sale to Kemp, did not intend to exclude Waihora or the Kaitorete Spit. But Waihora was an extremely valuable food resource to various Ngai Tahu hapu in the district. It was exceptionally rich in tuna, patiki, piharau, aua and inaka. There were pipi and large cockle beds. The streams that fed into the lake provided kanakana, inaka and fresh water koura. Putakitaki were also caught on the lake and were important for food. They were gathered when they were moulting and hence unable to fly and herded by canoe into different areas around the lake so different kaika received a share (H9:39-40). Access to Kaitorete was essential

to open and close the lake periodically for both fisheries and drainage purposes. It is clear that Ngai Tahu did not intend to part with this treasured fishery. We are satisfied they fully intended to retain unimpeded access to both Waihora and the spit. This they made abundantly clear to Mantell. He deliberately chose to disregard their rights. In doing so he failed to comply with the terms of the purchase which preserved to Ngai Tahu their mahinga kai, and acted in breach of the Treaty. Serious detriment to Ngai Tahu has continued down to the present day.

8.7.8 We were deeply impressed with the very real sense of loss and deprivation which the failure of the Crown to preserve Ngai Tahu's rights to the food resources of Waihora has caused past and present members of the Ngai Tahu people. We would recommend that the Crown recognise that it failed to meet Ngai Tahu's legitimate expectations in 1848 and takes appropriate action to remedy the situation. Because this issue is so deeply intertwined with Ngai Tahu's mahinga kai, we defer our discussion of how the Crown could work to remedy this grievance to that part of this report.

Ngai Tahu Land Report

08 Kemp's Purchase

8.8 The Provision for Reserves

8.8. The Provision for Reserves

Events following the purchase

8.8.1 Kemp and Kettle left Akaroa for Wellington on 15 June 1848. They took with them the original deed. Kemp failed to give Ngai Tahu a copy of the deed or attached deed map. Shortly after the HMS Fly arrived in Wellington, Kemp called on Lieutenant-Governor Eyre. His written reports were made in instalments on 19, 20 and 21 June (L9:420-427). In his first report Kemp referred to his instructions to purchase the tract of country lying between the Nelson and Otago districts, thereby making one continuous and complete block of land. He advised Eyre that:

The deed of conveyance comprising the district referred to, extending over to the West Coast, was duly executed by the Native Chiefs on the 12th instant in the presence of, & with the consent of the people & I have every reason to believe that the whole of the proceedings gave them general satisfaction. (L9:420){FNREF|0-86472-060-2|8.8.1|129}

The next day Kemp discussed the provision made for reserves for Ngai Tahu. He wrote:

with reference to the Reserves intended for the Natives in the newly acquired Block of land between the "Kaikoras" & Otago, that in obedience to the Lieut.-Governor's instructions their Pas & Cultivations have been guaranteed to them as expressed in the Deed of Sale [;] they are generally speaking of comparatively small extent [.] beyond these I have not felt myself authorized in making any guarantee, & with the consent of the people, have thought it better to leave the subject to be considered & decided upon between the Govt. & [New Zealand] Company so soon as the Survey of the District shall take place. (L9:423){FNREF|0-86472-060-2|8.8.1|130}

Kemp went on to observe that while there were several Maori settlements on the coastline between Akaroa and Otago the inhabitants were small in number. Because they were widely scattered he envisaged great difficulty in inducing them to concentrate into one or even two blocks. We note in passing that Kemp, unlike Mantell, had no written instructions to attempt to relocate Ngai Tahu into fewer localities. His comment suggests however, that he may have had verbal instructions from Eyre to attempt this. Kemp then noted that, should the government decide to reserve blocks next to each of the settlements, it would cause little or no interference with the New Zealand Company's interest in the survey and division of the district (L9:423-4).{FNREF|0-86472-060-2|8.8.1|131} Kemp appears here to have in mind the 1847 agreement with the British government under which the New Zealand

Company was to take control of all Crown lands in New Munster once Maori title had been extinguished.

In his report of 20 June Kemp also discussed Banks Peninsula:

The Natives clearly admit to have sold the whole of Banks Peninsula to the French Company. With the resident Natives chiefly at Port Cooper & Pigeon Bay, I did not think it advisable on this account to enter into any arrangements with regard to the Reserves &c, knowing also that the question was one at present pending between the English & French Govts. My impression is that no definite Reserves were made for them by the French Agent at the time of Sale, & that they continue to occupy the Cultivation Grounds they formerly did & without any limitation whatever. (L9:424){FNREF|0-86472-060-2|8.8.1|132}

In his third report of 21 June 1848 Kemp explained why he had agreed to pay the remaining œ1500 due under the deed by half-yearly rather than yearly instalments. He recommended that half of each future instalment should be paid over to Tikao at Akaroa and the other half to Taiaroa at Dunedin, in each case on behalf of the tribe and in their presence. This arrangement, he said, had been proposed by the chiefs "in the presence and with the consent of their people" (L9:426-7).{FNREF|0-86472-060-2|8.8.1|133}

Kemp incurs Eyre's displeasure

8.8.2 The lieutenant-governor lost no time in advising Kemp of his great concern and dissatisfaction with the way Kemp had managed the purchase. On 21 June, the day of Kemp's third report, Eyre, through Gisborne his secretary, told Kemp:

that upon perusing these Documents [Kemp's first report and the deed] he has learnt with surprise and very great regret that you have altogether deviated from the instructions which were given you for your guidance, and have left unsettled the very points you were sent to adjust. (L9:428){FNREF|0-86472-060-2|8.8.2|134}

A footnote acknowledged the receipt of Kemp's second and third reports after the main letter had been written, but Eyre was unable to see in them "any explanation whatever given of the total disregard of your instructions".{FNREF|0-86472-060-2|8.8.2|135} Eyre's letter was characteristically lengthy and discursive. It levelled numerous charges against Kemp. We will discuss only the more significant.

(a) Eyre complained that the deed of purchase had been made between Ngai Tahu and the New Zealand Company instead of the Crown (L9:433). This was indeed unfortunate, given that the Crown had not waived its right of pre-emption. Kemp was held responsible. As he pointed out in his reply to Eyre of 22 June, in which he dealt with all Eyre's complaints (L9:428-437){FNREF|0-86472-060-2|8.8.2|136}, the deed had been drafted by Daniel Wakefield, the Crown solicitor. He, not Kemp, was responsible for the blunder.

(b) Eyre was disturbed at Kemp's recognition of Ngai Tahu title to the whole of the area purchased. "It was never contemplated by HM Government," he complained, "that the very few individuals within the limits referred to should be considered the

owners or occupiers of that immense District" (L9:429).{FNREF|0-86472-060-2|8.8.2|137} Eyre alleged he had expressly warned Kemp against:

the error of acknowledging a validity of title in the few resident Natives to vast tracts, the larger portion of which had probably never even been seen and certainly never been made use of by them.(L9:428){FNREF|0-86472-060-2|8.8.2|138}

We would observe that Eyre lacked an appreciation of the extent of Ngai Tahu familiarity with their extensive lands. All rivers, mountains, lakes, notable physical features and localities had long since been known to and named by Ngai Tahu. They had a network of trails, including crossings over the Southern Alps. They hunted and foraged extensively throughout their large domain.

Kemp responded by pointing out that Ngai Tahu believed "that they, & they only, were the Proprietors of the land". Moreover, "the mere fact of entering into a negotiation with the Natives for the purchase of the district in question, implies a recognition of their rights to the whole". In any event, Ngai Tahu had ceded "ALL THEIR LANDS, that is to say, THEIR RIGHTS OF OWNERSHIP in the lands described in the Deed and Plan annexed" (L9:439){FNREF|0-86472-060-2|8.8.2|139} (emphasis in original)

(c) A much more serious complaint in our opinion related to Kemp's failure to carry out his instructions to reserve to Ngai Tahu "ample portions of land for their present and prospective wants", then to mark off the boundaries of these reserves, and only then to purchase the remainder of their land. Kemp, as we have seen, failed to comply with these instructions. Ample portions of land for their present and prospective wants were neither reserved nor marked off.

Kemp sought to justify this fatal dereliction. He claimed his action, in guaranteeing in the deed pa and cultivations, with such other additional reserves as the government might think desirable to make for them when the survey took place, was the only arrangement he could make with any degree of satisfaction to Ngai Tahu. He justified the course he had adopted principally on the grounds that the weather made the six month journey of 200 miles of coast in the depth of winter over country intersected with scarcely fordable rapids, a most hazardous undertaking. In the result he did not actually set foot on a single piece of the vast territory he had acquired.

8.8.3 We can well understand Eyre's concern at Kemp's failure to obey his instructions. On Kemp must rest substantial responsibility for initiating the ensuing 140 years of Ngai Tahu disillusionment at the failure of the Crown and its agents to treat with them fairly and in good faith. But in fairness to Kemp, it must be said that he could not have anticipated that his successor, Walter Mantell, would have failed so lamentably to provide adequate reserves for the present let alone future needs of Ngai Tahu. Had Mantell acted otherwise and provided ample reserves for Ngai Tahu, much of the potential for great harm to Ngai Tahu resulting from Kemp's actions would have been largely, if not entirely, mitigated. Nor should Kemp be held responsible for the action of his superiors, Eyre and Grey, in endorsing Mantell's niggardly allocation of reserves.

8.8.4 Eyre wrote a lengthy despatch to Governor Grey. He told Grey that Kemp had acted in "direct disobedience of his instructions upon all the more important points connected with the Negotiations entrusted to him" which he went on to itemise (L9:397-415).{FNREF|0-86472-060-2|8.8.4|140} Grey, however, was not greatly perturbed. On 25 August 1848 he reported to the colonial secretary and said:

It may, however, be sufficient for me to say, that although I regret Mr. Kemp should have departed from his instructions, I still do not view his proceedings in so unfavourable a light as the Lieutenant-Governor does; and I entertain no doubt that the transaction has been fairly and properly completed, and that the arrangements since adopted by the Lieutenant-Governor will satisfactorily dispose of any questions which might have resulted from any informalities in Mr. Kemp's proceedings. I speak with the more confidence on this subject from my personal knowledge of the Natives concerned, and from my acquaintance with their views and wishes. (L9:16){FNREF|0-86472-060-2|8.8.4|141}

Promises not in the deed

8.8.5 The deed of purchase did not contain all of Kemp's promises. In Kemp's own translation of the deed which he originally wrote in Maori (8.4.11) it was provided:

that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the land shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land... (L9:416-418){FNREF|0-86472-060-2|8.8.5|142}

In a memorandum of June 1876 from Kemp to Chief Judge Fenton, Kemp said:

And in reference to that part of the deed which refers to the setting apart of further reserves by the Government, I think that the impression on my mind, and on the minds of the Natives made at the time, was, that the provision hereafter to be made was one which was to be carried out in a liberal spirit, and in such proportions as to meet the wants and provide for the general future welfare of the Natives resident at the different settlements at the time the purchase was made. (L9:602){FNREF|0-86472-060-2|8.8.5|143}

8.8.6 In May 1879 Kemp was examined in some detail by the Smith-Nairn commission about his discussions with Ngai Tahu before the sale as to the provision of reserves. He described several meetings and discussions. Among matters raised were:

- an assurance by Kemp that with the arrival of a large body of settlers, the value of the land retained by Ngai Tahu would increase substantially; this would give the major chiefs income and property which could be handed down to the next generation;

- that when summer came a survey would be made and "ample" reserves set apart for Ngai Tahu in such localities as was agreed on; and

- promises by Kemp that their eel weirs would be retained along with sheltered landing places "in a more or less fair proportion" (L9:80-81).{FNREF|0-86472-060-2|8.8.6|144}

Later he was further questioned and the following additional points were made:

(a) He agreed he had promised reserves which would also be ample for their prospective wants.

(b) By prospective wants Kemp explained that he referred to Ngai Tahu's habit of clearing new lands after having cropped a field for two or three years. So he promised that:

a sufficiency of land was to have been set apart for them under that particular heading, that is to say "Mahinga Kai" that is to say grounds fit for cultivation of their crops and to extend over any period of years, in order to give them ample time to clear on and bring in new fields for their special use. (L9:87){FNREF|0-86472-060-2|8.8.6|145}

(c) He confirmed that these reserves were quite distinct from and in addition to the reservation of their pa and cultivations around their pa.

(d) They were also in addition to and distinct from the other reserves to be made by the government after the survey.

(e) The reserves to be set aside by the government would, Kemp said, "IN COURSE OF TIME BE AN ENDOWMENT OF VERY LARGE PROPORTIONS AND DIMENSIONS" (L9:86-88).{FNREF|0-86472-060-2|8.8.6|146} (emphasis added)

(f) Questioned further about landing places, Kemp said they were to be of "very small extent" (L9:91) and that they would be used in common with Europeans, not exclusively (L9:99-100). {FNREF|0-86472-060-2|8.8.6|147}

8.8.7 Kemp made it very clear in his evidence to the Smith-Nairn commission that three categories of reserves would be made for Ngai Tahu and that these were discussed with Ngai Tahu chiefs before the deed was signed. First, their kainga and adjacent cultivations; secondly, additional land for fresh cultivations in the future; thirdly, additional reserves which would constitute an endowment of "very large proportions and dimensions".

We would observe:

- that the deed makes no express provision for the second category, which Kemp saw as falling within the term "mahinga kai" in the Maori text; and

- that whereas the deed, at least in its English translation, leaves it to the discretion of the government as to whether the third category of reserves would be provided and makes no reference to their size, it is clear that Kemp assured Ngai Tahu that such additional reserves of "very large proportions and dimensions" would in fact be provided.

No doubt Kemp assumed that when the weather improved he would be sent back to complete the purchase by supervising the survey of the reserves as he had discussed them with Ngai Tahu. He appears not to have anticipated Lieutenant-Governor Eyre's angry reaction to the way he had conducted the purchase. How much he told Eyre of the promises he had made following his discussions with Ngai Tahu we do not know. Eyre resolved that he would dispense with any further assistance from Kemp.

Mantell's appointment to complete the purchase

8.8.8 Without first consulting Governor Grey, Eyre decided to appoint Walter Baldock Durrant Mantell to conclude "the arrangements with the Natives" (M3:8).{FNREF|0-86472-060-2|8.8.8|148} Mantell was the son of a prominent English geologist. After studying medicine at London University (but before gaining a degree) he emigrated to New Zealand. Mantell was nineteen when he arrived in January 1840. Following a brief period of employment with the New Zealand Company he joined the civil service. He was a magistrates' clerk in 1841, and a postmaster in 1842. In 1845 he was involved in the construction and maintenance of military roads in the Porirua district. By 1848 Mantell could speak Maori reasonably well but was less proficient in reading or writing the language. Mantell was offered the position of "Commissioner to Extinguish Native Claims in the Middle Island" on 2 August 1848. He would be required:

to make an overland journey from Akaroa to Otakou, in company with a Surveyor who will be appointed to attend him, delaying at such places and for such time as may be necessary to MARK ON THE GROUND and map the Reserves which the Commissioner may consider it requisite should be set apart for the Natives who may be found resident within the limits of the District to which his negotiations relate. (M3:89-90){FNREF|0-86472-060-2|8.8.8|149} (emphasis in original)

Mantell accepted the same day (M3:1).{FNREF|0-86472-060-2|8.8.8|150}

Mantell's instructions

8.8.9 Mantell's written instructions were set out in a letter, also of 2 August 1848, written on Eyre's behalf by J D Ormond, one of his secretaries (M3:91-102).{FNREF|0-86472-060-2|8.8.9|151} These stated that Mantell's primary duty as commissioner was:

to complete the negotiations connected with the purchase of certain Districts of land in the Middle Island which were partially entered upon by Mr. Kemp in June last. (M3:91){FNREF|0-86472-060-2|8.8.9|152}

Enclosed with the instructions were Kemp's original reports, a copy of Eyre's letter to Kemp "pointing out the particulars in which Mr Kemp had either deviated from his Instructions or had failed to carry them out"(M3:92){FNREF|0-86472-060-2|8.8.9|153} and extracts from Kemp's instructions of 25 April 1848.

Mantell was required to traverse the whole of the district "between the Ngatitoa boundary line & that of the Otakou block". He was to see all Ngai Tahu, or at least the principal men. And he was to decide upon and see marked on the ground "the various

Reserves which you may consider necessary to be set apart for the use of the Natives" (M3:93).{FNREF|0-86472-060-2|8.8.9|154} This appears to leave the discretion as to the number and extent of reserves with Mantell. Eyre continued, "you will be guided by the following considerations", namely:

That Mr. Kemp guarantees to the Natives in the Deed of Sale executed by them "that their places of residence & plantations are to be left for their use & the use of their Children" and provides further that other additional Reserves to be determined on by the Gov[ernmen]t should also be set apart for the same purpose; to the first class of Reserves therefore they are strictly & literally entitled. (M2:23){FNREF|0-86472-060-2|8.8.9|155}

Eyre feared that "the existence of innumerable small & irregularly shaped Reserves dotted all over the country" would create difficulties in laying out the land for settlers. He required Mantell to:

use your influence to induce the Natives to take their Reserves in as few localities as possible, in as limited a number of Reserves in each locality as you can persuade them to agree to, & in as regular shaped blocks as circumstances will admit of.

Much may be done towards accomplishing this by inducing the Natives of very small settlements to unite in taking their Reserves at one locality & by getting them to consent to give up the smaller patches of cultivations, in exchange for additional land nearer the larger ones: A liberal provision being made both for their present & future wants & due regard shewn to secure their interests & meet their wishes. (M3:94-95){FNREF|0-86472-060-2|8.8.9|156}

Although not entirely clear, it appears from this passage that Mantell was being required to make provision for the additional reserves as well as appropriate provision for their kainga and cultivations. In any event Mantell had the deed with him and was well aware of its provisions as to reserves.

8.8.10 In addition to the directions as to reserves, Mantell received further instructions:

(a) He was to have another deed executed before the second instalment of purchase money was paid. This was to substitute the Crown for the New Zealand Company as purchaser (M3:96).{FNREF|0-86472-060-2|8.8.10|157} Eyre, on instructions from Grey, later countermanded this direction.

(b) He was to note the names of all the Ngai Tahu settlements within the block purchased, take a census of the number of Ngai Tahu of all ages and record the hapu to which they belonged and the principal chief acknowledged by them. Also the names of the principal or most influential men in each settlement were to be noted.

(c) He was to find out how the œ500 paid by Kemp had been distributed. When he paid the second instalment at Akaroa he was not to hand over the sum to any one or two individuals as was done by Kemp. Instead, he was to divide the money into as many portions as there were hapu or kainga. The principal men of each community were to be responsible for further subdivisions.

(d) He was to mark out the lands to which the French company and John Jones of Waikouaiti were entitled. Before doing so he was to ensure that suitable and sufficient reserves were set apart for Ngai Tahu; the boundaries distinctly marked and the plans given to them. Eyre referred Mantell to the deed map and other documents for information concerning the Nanto-Bordelaise situation, and he outlined the way Jones was to be dealt with as follows:

after you have set apart such Reserves as you may deem suitable & sufficient for the Natives, that Gentleman [J Jones] is to be allowed to select the quantity of land to which he is entitled wherever he may choose in the vicinity & in as many separate Blocks as he may please, NOT EXCEEDING THREE, the aggregate number of acres of which shall not be greater than what he is authorised to retain. (M3:100){FNREF|0-86472-060-2|8.8.10|158} (emphasis in original)

At this stage Jones was allocated 2650 acres but, as we have seen, this was later substantially increased.

The allocation of reserves was to be such as Mantell might "deem suitable and sufficient" for Ngai Tahu. Mantell, not Ngai Tahu, was given the power to decide. This of course clearly illustrates the greatly weakened position Ngai Tahu were placed in as a result of Kemp's failure to carry out his instructions to settle reserves with Ngai Tahu first before purchasing the remainder of their land. Had that course been followed they would have been in a very much stronger position to insist that they retained land they did not wish to sell.

Towards the end of his instructions Mantell was told:

One other point the Lieut. Governor would earnestly press upon your attention & that is the great necessity of exercising the most untiring patience and indefatigable perseverance in all inquiries or discussions with the Natives both in ascertaining their respective rights & interests & in winning them to acquiesce in such arrangements as YOU MAY CONSIDER MOST JUST & BEST. (M3:101){FNREF|0-86472-060-2|8.8.10|159} (emphasis added)

The Crown historian, Dr Loveridge, commented that "Any arrangements within the spirit of these instructions would have 'completed' Kemp's purchase in a manner acceptable to both parties" (M2:27). In our view this is very questionable. Mantell's mandate was to persuade Ngai Tahu to "acquiesce in such arrangements as [Mantell] may consider most just & best". Mr Evison in commenting on this instruction rightly said that, "Eyre thus deliberately left the initial decision as to reserves to Mantell" (O46:31).

Mantell journeys south

8.8.11 Mantell was accompanied on the voyage to Akaroa by Eyre and the surveyor Alfred Wills. The Fly left Wellington on 6 August (M2:28).{FNREF|0-86472-060-2|8.8.11|160} At Akaroa on 22 August Eyre gave Mantell additional instructions:

(a) Until further advice Mantell was not to set aside reserves for Ngai Tahu on Banks Peninsula but in all other parts between "Kaiapoe and the Otakou Purchase you are to

mark off all the Reserves which YOU MAY CONSIDER NECESSARY, in accordance with the general tenor and spirit of the instructions referred to."{FNREF|0-86472-060-2|8.8.11|161}(emphasis added)

(b) Secondly, "Kaiapoe" being the southern boundary of the "Ngatitoa Purchase", Mantell was not to set apart any reserves to the north of that point, but as there was reason to believe that a considerable number of Maori wished for their reserves in that immediate neighbourhood, Eyre wanted Mantell "to endeavour to meet their wishes and requirements by appropriating as reserves, for their benefit, such land as they may desire, and AS YOU MAY CONSIDER IT EQUITABLE FOR THEM TO POSSESS SOUTH OF KAIAPOE". (M3:112-114){FNREF|0-86472-060-2|8.8.11|162} (emphasis added)

Here again it was for Mantell to judge what reserves he considered it equitable for Ngai Tahu to possess south of Kaiapoi. The spelling of "Kaiapoe" closely resembles the "Kaipoe" on the Nelson Crown grant (L:19) which suggests Eyre may have had it with him.

8.8.12 The following instructions were given by the New Zealand Company to their surveyor, Wills:

Should any block of land proposed to be reserved for them [Ngai Tahu] exceed in size, or be shaped in such a manner as in your opinion would be likely to cause inconvenience, by scattering the land to be offered for choice to the Company, or in any other way oppose the concentration of the [European] purchasers in districts, hereafter to be surveyed, and increase the outlay necessary for the making of roads of communication, I wish you to represent to the Commissioner the evils that might result from such a mode of proceeding. (M2:32, n1){FNREF|0-86472-060-2|8.8.12|163}

It is apparent that the New Zealand Company hoped that the convenience of the future settlers would have precedence over the rights of Ngai Tahu.

Grievances as to reserves (nos 2 and 3)

8.8.13 The following grievances of the claimants are central to this claim. We state them now before we discuss the provision made by Mantell for reserves. They are:

- That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemp's purchase, in particular -

(a) Ample reserves for their present and future benefit were not provided, and

(b) Their numerous mahinga kai were not reserved and protected for their use.

- That the Crown declined the Ngai Tahu request to exempt from the sale the area between the Waimakariri and Kowhai rivers, or to reserve it for their future exclusive use, to which they were entitled under article 2 of the Treaty.

The request for a reserve between the Waimakariri and Kawari

8.8.14 While Eyre and Mantell were at Akaroa they held preliminary discussions with Ngai Tahu belonging principally to the Ngai Tuahuriri hapu. It was during these discussions that a request for an extensive reserve was made. We have already briefly discussed Mantell's mistaken reference to the Kowai as the northern boundary of this reserve in his testimony to a parliamentary select committee in 1888 (8.5.27). In his testimony to the Smith-Nairn commission, Mantell readily acknowledged that his memory of details was somewhat faulty:

they demanded a reserve beginning, I think, at the Heithcote [sic] and extending north to the Kowai, but I have no doubt there are natives present who will remember that better than myself. (L9:111-112){FNREF|0-86472-060-2|8.8.14|164}

This confusion about the northern boundary has continued to the present day. In their grievance the claimants themselves have listed the request for the reserve as being "between the Waimakariri and Kowhai Rivers".

Yet contemporary evidence bears out the fact that the reserve demanded was indeed bounded on the north by the Kawari which Mantell describes in his Outline Journal as "a small brook-and at a distance of 5 or 6 miles from our camp [at Tuahiwi]" (M3:136).{FNREF|0-86472-060-2|8.8.14|165} The Kowai is a much larger river and lies further north. In his sketchbook, Mantell noted that a block "from the Kawari to the Domett right across" was demanded (X12(b):141).{FNREF|0-86472-060-2|8.8.14|166} We take the Domett to be the Waimakariri as his report of 21 September 1848 related "their demand was for a tract of country bounded by the Kawari and Waimakariri Rivers, to extend thence, of the same width, across the Island to the West Coast" (L9:20).{FNREF|0-86472-060-2|8.8.14|167}

Although this makes a substantial difference to the area of the requested reserve, as the Kowai lies approximately 15 kilometres north of the Kawari, the issues involved in the above grievance are unchanged. Bearing the alteration of the boundary in mind, we continue to consider the grievance.

8.8.15 Although the claimants do not specify the western boundary of this reserve in their grievance, maps produced by Mr Evison suggest that in their view this request was only to extend to the foothills. Given Mantell's repeated assertions that Ngai Tahu asked for a coast to coast reserve, it would appear that Ngai Tahu wanted to reserve a very substantial strip of land right across the island. We are unable now to determine just how this reserve would have stretched across the island. We think it likely that it would have followed Ngai Tahu's traditional trails to their mahinga kai in the interior and to the pounamu resources of Arahura.

Mantell refused to agree to set aside a reserve of these dimensions. The following testimony to the Smith-Nairn commission outlines Mantell's justification for not acceding to Ngai Tahu's request:

I submitted to the Lieut-Governor that if that reserve were made, it would be necessary to reserve similar belts at every kainga I came to down the coast, and inasmuch as the Government pledged itself to make ample provision for the future

wants of the natives, it would be better to allow me to try what was the limit, the extent, within which I could induce them to take reserves in the first instance, than at once to concede a point of that sort, which might really be of more harm than good to them. (L9:112){FNREF|0-86472-060-2|8.8.15|168}

Mantell here appears to be proposing to Eyre that he should be left to try to get Ngai Tahu to agree to as small an area as he could persuade them to accept.

We will let Mantell describe for himself (as recorded in his Outline Journal) the course of events. In his entry for 2 September 1848, after noting the above request for a reserve from Waimakariri to Kaiapoi (pa) across the island, he continued:

...Having combatted this notion I set out with them for the sandhills to shew what I would consent to give them arrived at the sandhills I led them on till the N. point of the bush bore N.W. from me and pointed out the limits of the reserve almost as it was eventually settled.

A great consultation followed ending in their declaring themselves content. On this I called several times on any dissentient and none appearing requested Mr. Wills to commence the survey. I remained with the natives till they returned to the camp.

3 Sept. Sunday. Camp.
In camp.

4 Sept. Monday. Surveying towards Waitueri.
The Survey proceeds. Two or three old men not understanding the erection of a pole at their huts at Waitueri threw it away with the others which the man carried. I went down lectured them explained the use of the pole and remained there.
Very excited speeches all night.

5 Sept. Tuesday. Surveying towds. Kawari.
Stopped by Hau.
Surveying on the North Boundary towards the Kawari. Fixed the remaining boundaries and returned with natives to the Camp. Metehau set fire to the men's hut attempted to pull the tent down and was about to attack me with a tomahawk but was prevented by the other natives. In the course of the Night's talk he succeeded in winning many to his side. Midnight. Wrote to the Private Secretary.

6 Sept. Wednesday. Port Levy natives left.
Survey completed.
Most of the Port Levy natives left. Metehau went early in the morning leaving an anonymous letter demanding ten thousand pounds for the land and a promise that unless I extended the limits of the Reserve to some point on the Kawai [sic] he would return and throw down all the poles.

The Survey completed-I told the natives this morning that Kaiapoi [pa] should be a Govt. reserve as I could not wait to survey it. They were perfectly satisfied. (M3:137-138){FNREF|0-86472-060-2|8.8.15|169}

In his sketchbook of the same time, Mantell noted their demand for a tract of land to run right across the island:

About 1/2 past 10 set out for the sand hills. The natives demanded a block from K. North to the Domett S. to run right across the island and stated themselves [resolved] to take nothing less. [Arrived] on the sand hills they demanded from the Kawari to the Domett right across.

I took the party on until we reached a point S.E. from the point of the bush I then proposed to them to give from this point A by the sand hills to the Kaik [] thence by the N bank of the river to a point NW of the pa thence N.W. From A again down NW a distance of 2 or 3 or so miles to the point where I should direct the surveyor to turn to meet the other boundary. Of the 3 bushes on the S bank of the river the first koau for a [sic?]

the second te Wera for them the S. Pa-Kiaka[sic] contains Maras-these for the maoris the [rest] of the bush for [him].

Great disputes on this point. At last when I had called several times for noncontents to state their objections, I requested Wills to set to work which he did.

K. to be also reserved.(X12(b):141){FNREF|0-86472-060-2|8.8.15|170}

8.8.16 It is apparent from Mantell's own record that the area surveyed off as a reserve at Kaiapoi met strong opposition from the Ngai Tahu people concerned. Their request for a very extensive reserve was summarily dismissed. Instead they were allocated a reserve of 2640 acres for a population, estimated by Mantell, of 229, averaging 11.53 acres per person. Ironically it was a similar area as that awarded and later set aside by Mantell in three separate blocks for one man, John Jones, at Waikouaiti. The Kaiapoi reserve was to be the largest set aside by Mantell under Kemp's deed.

As Mr Temm submitted, Mantell's refusal to grant the reserves Ngai Tahu were asking for was a major cause of their protests at the time. Evidence before us showed that the land between the Waimakariri and Ashley Rivers back as far as the source of the Ashley in the foothills, contained some 220,000 acres. This land, much of it being that requested by Ngai Tahu as a reserve, was later initially divided among just 13 European runholders. Mr Evison summarised the holdings from information in L G D Acland, The Early Canterbury Runs, (4th ed 1975) as follows:

View Hill (1851) 20,000 acres, Burnt Hill (1851) 7,400 acres, Ashley Gorge (2 runs, 1852 and 1859) 15,000 acres, Carleton (1851) 8,000 acres, The Warren (1852) 12,000 acres, Dagnam (1854) 9,000 acres, Worlingham (2 runs 1852 & 1853) 16,000 acres, Murphy's (1851) 14,000 acres, Eyrewell (1853, 2 runs) approximately 15,000 acres; and in addition, adjoining the 2,560-acres Tuahiwi Maori reserve, were the Wai-iti Run of 11,000 acres with two runholders (Acland p 65), Springbank of 23,000 acres (Acland p 75-6), and Fernside of 20,000 acres (Acland p 77-8), Torlesse's station. (S24:3)

Finding on grievance no 3

8.8.17 When, in pursuance of the Kemp deed, Mantell came to set aside reserves, Ngai Tahu made it very clear that they wished to retain a block of land between the Waimakariri and the Kawari. Kemp had promised them that they would be able to retain ample reserves for their present and future needs. Mantell was instructed by Eyre to make a "liberal provision...both for their present & future wants & due regard shewn to secure their interests & meet their wishes" (M3:95).{FNREF|0-86472-060-2|8.8.17|171} In our view Mantell was obliged to respect and give effect to the Ngai Tahu wish to retain the block of land indicated. It was in no way an unreasonable request. Mantell failed to do so. Instead he arbitrarily allocated them a mere 2640 acres for the Tuahiwi reserve at Kaiapoi. Article 2 of the Maori version of the Treaty preserved to Ngai Tahu tino rangatiratanga over their land. The English version of the same article confirmed and guaranteed to Ngai Tahu the full exclusive and undisturbed possession of their land so long as they wished to retain it. Ngai Tahu made it abundantly clear to Mantell that they wished to maintain rangatiratanga over this land; they wished to retain it. Mantell, as the Crown's agent, was obliged to respect Ngai Tahu's wishes. But he failed to act in accordance with the Crown's obligations under the Treaty and his superiors Eyre and Grey, who endorsed his actions, failed likewise.

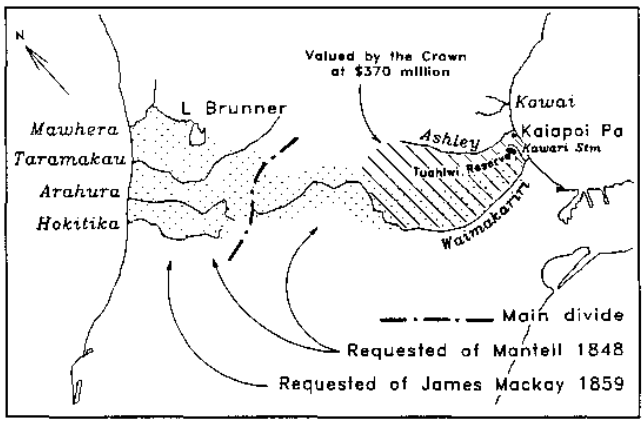

Figure 8.6: The possible area of the land Ngai Tuahuriri wished to exclude from the Kemp purchase. The boundaries are now impossible to determine, but the area appears to have crossed from coast to coast to preserve Ngai Tahu access to mahinga kai and pounamu. The reserve could have swung further south to include other important mahinga kai, such as that at Lake Coleridge.

Finding on breach of Treaty principle

8.8.18 The tribunal upholds the claimants' grievance no 3, that a larger reserve was denied Ngai Tahu, to be a breach of article 2 of the Treaty. However, the width of this reserve was determined by the Waimakariri and the Kawari, north of Tuahiwi, not the Kowhai as identified by the claimants. Although the exact boundaries of this reserve cannot be identified, it clearly was intended to run from coast to coast. It was likely that this strip was to be reserved to preserve Ngai Tahu's access to mahinga kai in the interior and to pounamu on the west coast. It is also possible that the request by Poutini Ngai Tahu to reserve some 220,000 acres between the Grey, Kotukuwakaoka and Hokitika Rivers in 1859 was related to this request. Clearly Ngai Tahu have been detrimentally affected by the Crown's breach.

8.8.19 The Crown called evidence from Mr D J Armstrong, a registered valuer. Mr Armstrong was asked by the Crown to value an area of land between the Waimakariri and Ashley Rivers, the western boundary being defined as a line running from the

downstream end of the Waimakariri gorge to a similar point on the Ashley gorge. Although the area of land requested by Ngai Tahu was a great deal larger than this, it included a good part of this block. The area valued was stated by Mr Armstrong to encompass some 220,000 acres. It was valued by him at œ205,000 as at 1848 (Q14:23-26). In answer to a question by Mr Temm, Mr Armstrong expressed the opinion that the present value of the 220,000 acres is $370 million. This calculation is based on "prairie" value, that is the value of the land in its natural state without improvements of any kind, such as clearing, grazing, fencing, sudivision and roading or community provided assets.

Mantell's reserves

8.8.20 Following the laying out of the Tuahiwi reserve at Kaiapoi Mantell and the surveyor Alfred Wills travelled southwards. Between 1 September and 9 December 1848 they set out 15 reserves or sets of reserves along the eastern coast within Kemp's block. The table on the following page is derived from Mantell's own "Table of Population, Reserves, Payment, &c., Ngaitahu Block August, 1848 to January, 1849".

8.8.21 In addition to the large reserve between the Waimakariri and Kawari sought by Ngai Tahu and declined by Mantell, other requests for reserves were declined. Thus in a sketchbook Mantell referred to:

Their wanting grounds reserved for Kauru & forests for cooking it-other forests for weka hunting-whole districts for pig runs,

Kaiapoi, 2 of Greenwoods sheep [ ] lambs Natives wanted a run of some thousand acres for them. (X12(a); sheet 25){FNREF|0-86472-060-2|8.8.21|172}

These various examples are a clear indication that Ngai Tahu were seeking extensive reserves for foraging and hunting (mahinga kai) almost certainly in the interior. In addition "some thousand acres" were wanted for grazing sheep. All this was denied them by Mantell.

Mantell's Reserves

Reserve Reserve Pop. Acres ac. per
No(s). Name(s) Res. person

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1 Kaiapoi-Tuahiwi 229* 2640 11.53

2 Kaikainui 10 5 0.50

3&4 Te Taumutu 16 80 5.00

5,6,7&8 Arowhenua 86 600 6.98

9&10 Waitaki 31 389 12.55

11 Kakanui 12 75 6.25

12 Moeraki 87 500 5.75

13 Waikouaiti 121 1800 14.88

14&15 Purakaunui 45 270 6.00

Totals 637 6359 9.98

(* Estimated belonging to district) (M3:68-69){FNREF|0-86472-060-2|8.8.21|173}

8.8.22 In the end Ngai Tahu were left with a mere 6359 acres or 9.98 acres per head out of the 20 million acres involved in the Kemp purchase. What was the reason for such a disastrous outcome? The primary responsibility was that of Mantell. Let him explain how it happened in his own words:

(a) In evidence to the Native Land Court Mantell commented on various reserves:

As to reserves generally (27 April 1868)

I consulted their wishes as to an arrangement as to locality. In quantity, I contended with them. I was instructed to abandon outstanding cultivations, and consolidate them. (A9: 9:34){FNREF|0-86472-060-2|8.8.22|174}

Arowhenua reserve (6 May 1868)

133. [By the Court] What do you mean by "sufficient"? -At that time my estimate was Colonel McCleverty's, whom I consulted. THE IDEA WAS ENOUGH TO FURNISH A BARE SUBSISTENCE BY THEIR OWN LABOUR.

134. When a man became old and could not work? -I am not prepared to justify McCleverty's estimate or defend it.

135. On what ground do you think the reserve made by you sufficient (under second clause) to satisfy the honour of the Crown? -I have not said that I thought the reserve sufficient to satisfy the honour of the Crown, but, according to McCleverty's opinion, sufficient to live upon. Colonel McCleverty held a high official position. (A9: 9:36){FNREF|0-86472-060-2|8.8.22|175}(emphasis added)

Purakaunui reserve (15 May 1868)

I found a certain number of Natives resident at Purakaunui, and then fixed the reserve at the smallest number I could induce the Natives to accept. There were 45 Natives, men, women, and children, just 6 acres a head ...

The reserve at Purakaunui was sufficient for their immediate wants; I left their future wants to be provided for. I was not then able to make an estimate, and I took McCleverty's opinion. He said 10 acres, and I gladly embraced that standard. The reserve was made, not so much as fulfilling either clause of the deed, as the smallest quantity I could get the Natives to agree to. (A9: 9:37){FNREF|0-86472-060-2|8.8.22|176}

Mantell then referred to his promise that the government would make schools, build hospitals, and appoint officers to communicate between them and the government. "I found these promises of great weight in inducing the Natives to come in-but these promises have not yet been fulfilled."{FNREF|0-86472-060-2|8.8.22|177} A little later Mantell said:

The reserves may be looked upon as the result of a struggle, in which I got the land reduced as much as possible. I used to tell the people that if they were dissatisfied they must appeal to the Governor, and in one case (Waikouaiti) this was done, and they got an immediate increase. (A9: 9:37){FNREF|0-86472-060-2|8.8.22|178}

(b) In evidence before the Smith-Nairn commission on 15 May 1879 Mantell was asked if he had some principle on which he made the selection of reserves, to which he replied:

At that time it was what I considered a principle-that was to get them to accept as little as they possibly could, to leave a considerable area for the benevolence of the Government hereafter. (L9:120){FNREF|0-86472-060-2|8.8.22|179}

In later evidence given to the Smith-Nairn commission on 19 January 1880, Mantell confirmed his reliance on McCleverty's notion of 10 acres per person and that he "had commenced by giving them as little as they were contented with for the moment"(L9:367).{FNREF|0-86472-060-2|8.8.22|180} Another reason he gave for such a minimal allocation was that it would place as few obstacles as possible on the surveying and laying out of the remainder of the land for settlement by Europeans. He also pointed out that while he persuaded Ngai Tahu to give up outside cultivations after they got their crops in, Ngai Tahu "complained of the reserves as being too circumscribed"(L9:365-368).{FNREF|0-86472-060-2|8.8.22|181} This is inconsistent with the earlier suggestions that he obtained their agreement to his reserve allocations. Agreement in Mantell's terms appears to have been no more than Ngai Tahu's restraint in not attacking Wills or himself and preventing the surveys from taking place.

8.8.23 It is labouring the obvious for us to point out that Mantell, throughout his mission, acted in a manner totally inconsistent with good faith and completely at odds with the Crown's duty under the Treaty to ensure that Ngai Tahu retained the land they did not wish to sell, and had reserved to them on a liberal basis sufficient lands for their present and future needs. The Crown must accept responsibility for the actions of its commissioner even though, as we will show, his reports to his superiors may well have been misleading if not false in some material particulars.

Eyre further varies his instructions to Mantell

8.8.24 On 4 October 1848 the lieutenant-governor wrote to Mantell on Grey's instructions. Mantell was told first that the governor no longer wished him to have a new deed signed by Ngai Tahu (substituting the Crown for the New Zealand Company); secondly not to disturb the arrangements made by Kemp for future payments of the purchase money to be made half-yearly and, thirdly:

You are only to mark out Reserves around (and including) Pah's, residences or cultivations, to the extent that may be necessary for the resident Natives, but you may inform them that the Crown will hereafter mark out for them such additional Reserves as may be considered necessary for their future wants.

In reference to the last clause, I need hardly remark that it cannot be applicable to any Reserves you may have already defined, such will of course remain undisturbed & final, but in all Reserves you have yet to make after receiving this communication you should confine the extent to such limits as are comprehended in the terms of the Clause above given. (M3:116-117){FNREF|0-86472-060-2|8.8.24|182}

Mantell did not receive this letter until after he had completed laying out all the reserves and had returned to Akaroa from Otago late in December 1848. In his lengthy report of 30 January 1849 Mantell noted that, on his arrival at Akaroa on 23 December, he had received the lieutenant-governor's letter of 4 October 1848 "altering in some points the instructions on which I had previously been acting" (M3:57).{FNREF|0-86472-060-2|8.8.24|183}

8.8.25 Mantell replied to Eyre's letter of 4 October the day he received it-23 December 1848. After acknowledging receipt of the letter and noting the first and second clauses, he said:

As all the reserves are now defined it is unfortunately out of my power to carry out His Excellency's wishes as expressed in the last clause yet I trust that it will be found that I have in every case given such consideration to the present and prospective necessities of the Natives that the Lieutenant Governor will see little cause to regret that the reserves should have been finally arranged prior to my receipt of His Excellency's letter. (M3:32-33){FNREF|0-86472-060-2|8.8.25|184}

Eyre could only have concluded from this letter that Mantell had set aside not only Ngai Tahu's kainga and associated cultivations, but also ample reserves for their future needs. Yet it is abundantly clear from Mantell's later admissions that this was not what he had done. On the contrary he had allocated the absolute minimum quantity of land he could get away with. He fended off complaints from Ngai Tahu with promises of further provision of land and of schools and hospitals by the governor. It was simply not true, as he led Lieutenant-Governor Eyre to believe, that he had provided for their "present and prospective necessities". Had Mantell been frank, he would have informed Eyre that he had not in fact made any provision for additional land, but confined the reserves to less than 10 acres per person in most cases.

On 30 January 1849 Mantell submitted a lengthy report to Eyre detailing his travel and laying off the various reserves (A8:I:216-220). With his report he enclosed a table of population and reserves and other details. He also enclosed plans of the reserves.

He noted the total population at 637 and the total area of reserves at 6359 acres. At this point Eyre should have realised that, in fact, Mantell had provided no more than nominal reserves. Whether Eyre was deceived by Mantell's earlier assurances that he had laid off sufficient reserves for the "present and prospective" needs of Ngai Tahu, and that these were acceptable to them, we do not know. Had Eyre, or subsequently Grey, given any real consideration to Mantell's report of 30 January 1849 it would have been obvious that Mantell had not in fact complied with his instructions.

Eyre reports to Governor Grey

8.8.26 On 10 March 1849 Eyre reported to the governor that Mantell had accomplished his southern mission. He enclosed copies of Mantell's reports and correspondence:

From those reports your Excellency will gather that Mr. Mantell met with considerable difficulty in consequence of the incomplete manner in which Mr. Kemp's arrangements relative to the purchase were made, and with some opposition from the two chiefs who under those arrangements had been the recipients of the whole of the first instalment, but who, under the more equitable plan adopted by Mr. Mantell, would only receive such amounts as they were respectively entitled to from a consideration of their rank and claims, the number of Natives within the block purchased whom they represented, and other similar points bearing upon the equity of the case. (A8:I:213){FNREF|0-86472-060-2|8.8.26|185}

Eyre found it unnecessary to make any comment on the reserves allocated by Mantell to Ngai Tahu whether as to location, number or area. Evidently he approved Mantell's actions.

Governor Grey reports to the colonial secretary

8.8.27 On 10 February 1849, anticipating Eyre's report, Grey sent a despatch to Earl Grey in which he advised the colonial secretary in relation to Kemp's purchase that:

although official information has not yet reached me regarding the final adjustment of those details of this purchase which relate to the survey, and defining the reserves kept for the use of the Natives, yet I have received information, which I believe to be authentic, that the whole of these details have now been conclusively and satisfactorily adjusted, so that the land question, in as far as nearly the whole of the Middle Island is concerned, has been set at rest; and with respect to that portion of the Middle Island which is not yet purchased, I will take care that at the earliest possible period arrangements are made for the final settlement of the Native claims in relation to that tract of country, as well as of those which are connected with Stewart's Island. I think it will be a source of great satisfaction to your Lordship to find that so large a tract of country of the most fertile description is thus unrestrictedly open to British enterprise, without any possibility of any of those embarrassing questions arising in relation to it between the European and Native population, in reference to titles to land, which have been a source of such loss and embarrassment to the settlers in the North Island (A8:I:212){FNREF|0-86472-060-2|8.8.27|186}

On receiving Eyre's report of 10 March, he forwarded a copy, with enclosures, to Earl Grey on 26 March 1849 (A8:I:212). In a letter to Eyre, also of 26 March, a copy of which he sent to Earl Grey, he said:

The arrangements made by your Excellency appear to me to have been in every respect judicious, and it is very fortunate that so satisfactory a settlement of this important affair should have been arrived at. I think also that Mr. Mantell appears fully to have merited the encomiums you have bestowed upon the careful and zealous manner in which he has executed the duties intrusted to him. (A8:I:222){FNREF|0-86472-060-2|8.8.27|187}

Clearly Grey approved of Mantell's actions in setting aside just 6359 acres, or 9.98 acres per person, out of the 20 million acres acquired by Kemp.

Ngai Tahu complain about the inadequacy of their reserves

8.8.28 As we have seen from Mantell's evidence given years later, Ngai Tahu complained at the time about Mantell's niggardly approach to their requests for reserves. We recall that Tiramorehu, in his Smith-Nairn evidence, related that after Mantell had marked off the reserves there was a lengthy discussion at Akaroa (which Mantell had reached on 23 December 1848). In the course of these discussions, Tiramorehu said they told him that "the native reserves were not made so large or so numerous as they should have been" (L9:208).{FNREF|0-86472-060-2|8.8.28|188} The point was reiterated a little later in his evidence when he said, again speaking of the meeting at Akaroa:

We reminded Mr. Mantell that Kemp had promised that when the land came to be surveyed a large portion of land would be returned to us. We found after Mr. Mantell had gone down and laid off these reserves that these promises remained unfulfilled.

Did you complain to Mr. Mantell that the land he had laid off was not sufficient? - Yes; I complained to Mantell, and so did others in the course of the remarks they made to him. (L9:217){FNREF|0-86472-060-2|8.8.28|189}

Yet we find Mantell, in his 30 January 1849 report to Eyre, recording that on arriving at Moeraki on 14 November 1848 he received a request from one Raitu that the reserves should "include all the valuable part of the beach & all the Europeans houses and cultivations" (M3:47).{FNREF|0-86472-060-2|8.8.28|190} But, he wrote, because Raitu was "a quiet and rather well disposed native with much of the chief about him", Mantell succeeded in bringing him round to his views. The next day the survey was completed. After observing that most of the inhabitants came from Kaiapoi and the Waipara country he described his contact with Matiaha Tiramorehu:

From one of them, the Wesleyan teacher and principal man of the place, "Matiaha Tiramorehu" I received the greatest support and assistance. Their cultivations are very extensive and very well managed. On my offering them their choice whether to remain or go to the Kaiapoi reserve they preferred to stay as they had buried so many of their relations at Moeraki. (M3:48){FNREF|0-86472-060-2|8.8.28|191}

8.8.29 We have difficulty in reconciling Mantell's account of Tiramorehu's apparently complaisant attitude with Tiramorehu's Smith-Nairn evidence, to which we have referred, and with the letter to Lieutenant-Governor Eyre from Moeraki of 22 October 1849. In this letter Tiramorehu said:

Listen to these my words relative to the part (of land) which was made sacred to yourself and Governor Grey by Mr. Mantell, also to the part which was reserved for the Maoris: The owners of the land are discontented with the portions allotted to them by Mr. Mantell.

You are aware when Mantell first commenced his work in this place, his first mistake was at Kaiapoi, viz., he would not listen to what the owners of the land wished to say to him; they strenuously urged that the part that should be reserved for the Maoris ought to be large, but Mantell paid no attention to their wishes; it was thus he did wrong in the commencement of his work, and continued to do so in all his arrangements in regard to the portions which were reserved for the Maoris. (L9:23){FNREF|0-86472-060-2|8.8.29|192}

Tiramorehu then went on to say that the principal cause of all the disputes in the South Island was that payment for part of their land had gone to Ngati Toa. Next he went on to say:

These are my reasons for writing to request of you that the boundaries of Moeraki may be extended, that we may have plenty of land to cultivate wheat and potatoes, also land where our pigs, cattle, and sheep can run at large; it will not be long before we purchase both cattle and sheep, and what land have we now in the small pieces which are reserved by Mantell for us fit for such a purpose; each allotment which Mantell has set aside for the Maoris is about as large as one white man's residence. We are conjecturing who could have given Mantell his instructions so to act; do you, Governor Eyre, think that I should tell him to reserve for the multitude a piece of land only large enough for one man? No; moreover the Natives will never consent to it. There are many people, and but a small quantity of land for them. (L9:23){FNREF|0-86472-060-2|8.8.29|193}

And later in his letter Tiramorehu returned to the topic:

The white man's transactions are bad, -there are in consequence great disturbances already amongst the Natives of this Island; therefore I earnestly request that some person may be sent here directly to alter all the boundaries, Moeraki included; that there may be a large block reserved for us, is the constant topic of our conversation. Extend the boundaries at Moeraki. (L9:24){FNREF|0-86472-060-2|8.8.29|194}

Tiramorehu's letter was referred to Mantell for his comments. In his reply to the New Zealand colonial secretary he enclosed a table showing the reserves made at Tuahiwi, Moeraki and a timber allotment at Te Kuri. By aggregating these reserves and dividing them between the 200 Ngai Tahu at Tuahiwi and the 87 at Moeraki, Mantell was able to claim an average of "nearly eleven acres to each individual...By this", he wrote, "you will perceive that the wants of the Natives are amply provided for in the reserves which I made" (L9:24).{FNREF|0-86472-060-2|8.8.29|195} Yet he had, on his own admission, been told that the Ngai Tahu people at Moeraki wished to remain

there. The table of reserves showed that at Moeraki he allocated a mere 500 acres for 87 people, or 5.7 acres per individual. This for their present and future needs.

8.8.30 Eyre, nearly six months after Mantell's report of 24 January 1850, instructed Kemp to reply to Tiramorehu:

that the question raised by them was long since settled by Governor Grey, who told them, on their applying to him at Wellington, that he could not disturb or reopen the arrangement made relative to the purchase of Wairau, Kaiapoi, &c., from the Ngatitoas. Neither can I now consent to reopen or alter any arrangement relative to the reserves at Moeraki. I have examined into the matter, and find that the reserve made there contains 500 acres, which is considerable for the very few Natives resident there.

Questions relating to land and arrangements made relative to reserves, &c., cannot be reopened or altered when once they have been settled; otherwise no end of confusion would take place, and the land would be of no value, because there would be no knowing what arrangements were to be the final ones. Therefore I cannot consent to disturb those which have been made relative to Moeraki. (A8:I:229){FNREF|0-86472-060-2|8.8.30|196}

Kemp informed Tiramorehu accordingly. Whether or not Kemp protested to Eyre at the total inadequacy of this reserve we do not know. But Eyre clearly was unconcerned that Ngai Tahu at Moeraki had been left with a purely nominal allocation of 5.7 acres per person. How Eyre could characterise such an allocation as "considerable for the very few [87] natives there" is beyond our comprehension. His refusal to meet Tiramorehu's request clearly constitutes a breach of the Treaty. We are unable to reconcile it with the exercise of good faith required of the lieutenant-governor towards the Crown's Treaty partner.

Ngai Tahu Land Report

08 Kemp's Purchase

8.9 Mahinga Kai

8.9. Mahinga Kai

The meaning of "mahinga kai"

8.9.1 The Maori version of Kemp's deed reserved Ngai Tahu residences and mahinga kai by providing:

Ko o matou kainga nohoanga ko o matou mahinga kai me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou... (appendix 2.2)

We have in our record at least three translations of Kemp's deed. The first part of the above expression in the Maori version has been variously translated as:

- "our places of residence and plantations"
Kemp's own translation of his Maori deed (L9:48){FNREF|0-86472-060-2|8.9.1|197}

- "Our places of residence and our cultivations"
translator not stated (L9:18){FNREF|0-86472-060-2|8.9.1|198}

- "our places of residence and cultivations"
translator not stated (L9:25){FNREF|0-86472-060-2|8.9.1|199}

One of the claimants' grievances is that the Crown failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of the purchase, in particular that "their numerous mahinga kai were not reserved and protected for their use".

The claimants strongly disputed the rendering of "mahinga kai" in the deed as having the limited meaning of plantations or cultivations. Mr Temm stated:

The Ngai Tahu have always asserted that it means "a place where food is gathered". (W1:280)

This would extend for instance to the right to harvest aruhe and ti, and the right to forage for weka and all other birds and animals. It would include the claim for eel-weirs, estuarine fisheries, and other places inland and at sea where kai moana could be gathered.

Before we discuss whether provision was made for mahinga kai under Kemp's deed it is necessary for us to determine the meaning and scope of the term as used in the deed.

8.9.2 Professor Atholl Anderson, an archaeologist called by the claimants, discussed the meaning of 'mahinga kai' (H1:2). He was somewhat equivocal about its meaning, especially in the 1840s. He said he took "mahinga kai" to be a general term for "all places at which food was obtained". This, he said, seemed to be its accepted modern interpretation, although "past opinions have differed". He quoted Chief Judge Fenton in a judgment of 6 May 1868 as stating:

[mahinga] kai does not include Weka preserves, or any hunting rights, but local and fixed works and operations. (A8:II:217){FNREF|0-86472-060-2|8.9.2|200}

We note, however, that in a judgment delivered on the preceding day Fenton said:

the Court will recognise the fisheries (included in the phrase mahinga kai) as the most highly prized and valuable of all their possessions. (A8:II:216){FNREF|0-86472-060-2|8.9.2|201}

Professor Anderson proceeded to say that:

Discrimination amongst food-gathering places is also implied in Te Uki's phrase "...my mahinga kai; also my eel-weirs..." (L9:259){FNREF|0-86472-060-2|8.9.2|202}, and other witnesses at the time used a similar form of words.

The witness continued:

On the other hand, evidence given in 1891 (AJHR, G-7) consistently appears to adopt the view that all traditional food gathering places were mahinga kai: eg. H K Kahu said "all the old kinds of food are lost through the loss of our mahinga kai".

Professor Anderson concluded by saying that Kahu's definition "has at least the virtue that it does not beg the question, which I have nowhere seen answered, of what collective term was used for food-gathering places which were not defined as mahinga kai".

8.9.3 The Crown historian, Tony Walzl, gave lengthy historical evidence from which he came to the conclusion that from 1880 on the term mahinga kai came to mean, as a matter of common usage by both Maori and European, all food-gathering. But he also concluded that at the time of the Kemp purchase the term had a definite limited meaning of "cultivations" to Europeans. And further, that circumstantial evidence shows that the modern meaning could not have been understood by Ngai Tahu in 1848 and, in Walzl's opinion, "it is probable Ngai Tahu understood it to have the same meaning as that given by the Europeans" (P10:92).

8.9.4 By way of rebuttal of Mr Walzl's evidence the claimants put in evidence a paper by Dr Raymond Harlow, senior lecturer in linguistics at the University of Otago (Q21:29-31). The issue discussed by Dr Harlow was whether the expression "mahinga kai" had a narrow meaning as "cultivations" or a broader one as "places where food is produced or procured", at the relevant time-1848. Like Mr Walzl, Dr Harlow was able to find only one occurrence of the expression "mahinga kai" in a document of southern provenance at the period in question, that being the contentious one in Kemp's deed. He suggested the tribunal would need to weigh a variety of types of

indirect evidence to arrive at the most plausible construction. He restricted his comments to purely linguistic evidence of two kinds: etymology, and contemporary and later usage. He then discussed the etymological evidence:

Etymology: mahinga kai is the derived nominal of the verbal expression mahi kai, which is itself composed of the verb mahi 'make, produce', and its incorporated object kai 'food'. Nominals derived by means of the suffix -nga and its cognates typically have as one of their meanings 'the place where...' Accordingly, the etymological meaning of the expression, its 'original' meaning, is the broader one referred to above. (Q21:29)

Dr Harlow went on to point out that Ngai Tahu spoke a southern dialect of Maori which showed considerable divergence from its northern congeners. Thus the specialised meaning "cultivations" learned by Kemp in the north would not necessarily apply in the south. He warned against applying northern construction to the southern dialect. In referring to Mr Walzl's evidence that mahinga kai had by the 1880s acquired the broader meaning, Dr Harlow persuasively argued that it is contrary to normal word development for a word to change from a specialized narrow meaning to a more literal broader meaning. Further, for the word to change its meaning among an older generation in their own lifetime would, Dr Harlow considered, be improbable.

The proposed scenario however postulates two changes of meaning, an earlier restriction from the etymological meaning before 1848, and a subsequent very fast re-extension of meaning, for neither of which direct evidence can be found. (Q21:30)

Dr Harlow concluded that the most plausible view is that for Ngai Tahu "mahinga kai" had, in 1848, the broader meaning of "places where food is produced or procured".

8.9.5 The Crown produced further evidence on the question in the form of a paper by Mr Patrick King, a recognised translator. We record here his main conclusions on how Ngai Tahu understood the term "mahinga kai", as used in Kemp's deed. He suggested that Ngai Tahu would not have been familiar with the words "mahinga kai" as an "unambiguous translation of cultivations":

They would most likely have identified their cultivated plots as "mara" and would therefore have regarded "mahinga kai" as having a broader sense than just plots of land. Their linguistic instinct would probably have suggested to them that the familiar term "mahi kai"was being used here in the sense of the whole range of activities (mahinga) related to obtaining food. (S22:11)

Mr King concluded that:

when the Ngai Tahu were offered the right to their 'Kainga nohoanga' and 'Mahinga kai'...they would logically conclude that they were able to retain their settlements, homes, inhabited areas (Kainga nohoanga) and their right to carry on food production and food gathering (Mahinga kai). (S22:11)

Thus Mr King broadly supported Dr Harlow's conclusion.

8.9.6 That Ngai Tahu in fact interpreted mahinga kai in the broader sense, we believe is indicated by certain requests which they made to Mantell, to which we have earlier referred in our discussion of the boundary question. We recall the following note by Mantell in his sketchbook while at Timaru in 1848:

General. The absence among the natives of any perception in the inevitably appreciable change in their habits of life, foods etc.

Their wanting grounds reserved for Kauru & forests for cooking it-other forests for weka hunting-whole districts for pig runs. (X12(b)){FNREF|0-86472-060-2|8.9.6|203}

Two important points emerge from these somewhat cryptic notes. In his general observation he is noting, no doubt as a consequence of the requests by Ngai Tahu for kauru, for forests for weka hunting and pig-runs, that Ngai Tahu were assuming they would continue in their traditional "habits of life, foods etc". That is, that notwithstanding the purchase by Kemp, they would be able to hunt and forage for food including wildlife as before. This strongly suggests to us that in requesting the various reserves indicated by Mantell, they were doing so in the light of the reservation to them under the deed of their mahinga kai. That reservation reflected their clear understanding at the time of the sale that they were not thereby parting with their traditional rights of food gathering. Mantell, as we have seen, refused their requests.

8.9.7 It was made clear by Ngai Tahu witnesses before the Smith-Nairn commission in 1879 that mahinga kai included at least all land based resources. We cite one example only by way of illustration. Natanahira Waruwarutu was asked what he understood by the expression "mahinga kai" in Kemp's deed:

"Mahinga kai" is not exclusively confined to the cultivation. That is called "Ngakinga kai". "Mahinga kai" is not confined to land cultivated but it refers to places from which we obtain the natural products of the soil without cultivating, you know, the plants that grow without being cultivated by man. (L9:168-9){FNREF|0-86472-060-2|8.9.7|204}

Waruwarutu then amplified this statement by listing cabbage trees, fernroot, weka and berries as being forms of mahinga kai.

We have earlier referred to Kemp's evidence before the Smith-Nairn commission. There he indicated he had promised Ngai Tahu their right to use their eel-weirs and landing places for their sea fishing expeditions. He also included under the rubric of mahinga kai, not only existing lands used for cultivation, but additional lands for cultivation in future years. He made no reference however, to other food sources such as ti, fern root, weka and other birds or animals.

8.9.8 Alexander Mackay in his comprehensive and illuminating royal commission report of 5 May 1887 discussed "mahinga kai" in the context of Kemp's deed. He pointed out that Ngai Tahu contended that the phrase "mahinga kai" used in the deed had a much wider interpretation than the translation into English gave it. He referred to the Native Land Court ruling in 1868 that the phrase included, besides cultivations,

such things as "pipi grounds, eel-weirs and fisheries, excluding merely hunting grounds and similar things which were never made property in the sense of appropriation by labour".(B3:7/1:2){FNREF|0-86472-060-2|8.9.8|205} Mackay said the Maori view of the phrase is that it includes, besides their cultivations, the right of fishing, catching birds and rats, procuring berries and fern-roots, over any portion of the lands within the block. Mackay observed that:

Under this interpretation they would be entitled to roam at will over the whole country-a state of affairs that could not have been contemplated. (B3: 7/1:2){FNREF|0-86472-060-2|8.9.8|206}

Nevertheless Mackay recognised that the traditional food gathering practices of Ngai Tahu should have been provided for. By way of indicating the injustice that Mackay said "was perpetrated on the Ngaitahu owners of Kemp's Block through being deprived of their former mode of subsistence without any equivalent being given them when setting apart their reserves"(B3:7/1:4){FNREF|0-86472-060-2|8.9.8|207}, Mackay cited from a despatch of 7 April 1847 from Governor Grey to Earl Grey. The governor pointed out that Maori:

do not support themselves solely by cultivation, but from fern-root, from fishing, from eel ponds (weirs), from catching birds, from hunting wild pigs, FOR WHICH THEY REQUIRE EXTENSIVE RUNS and by such like pursuits. (B3: 7/1:4){FNREF|0-86472-060-2|8.9.8|208} (emphasis added)

He went on to say that:

To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is, in fact, to cut off from them some of the most important means of subsistence. As they cannot be readily and abruptly forced into becoming a solely agricultural people, such an attempt would be unjust and it must for the present fail (B3: 7/1:4){FNREF|0-86472-060-2|8.9.8|209}

In this passage Governor Grey clearly recognised that extensive provision needed to be made to enable Maori, for a time at least, to continue with their practice of hunting and foraging for food.

Mackay followed the citation from this despatch with a reference to a letter of 13 April 1848 from Earl Grey to the Wesleyan Missionary Committee, in which, after referring to the provisions in the Treaty as to the proprietary rights of the Maori, he observed that it would have been the duty of the governor, as the Crown representative, to take care that Maori were secured in the enjoyment of an ample extent of land to meet all their real wants. Immediately after this passage, Mackay commented as follows:

In taking measures for this purpose their habits would have been considered, and, though it certainly would not have been held that the cultivation and appropriation of tracts of land capable of supporting a large population must be forborne because an inconsiderable number of Natives had been accustomed to derive some part of their subsistence from hunting and fishing on them on the other hand the settlement of such lands would not have been allowed to deprive the Natives even of these resources

without providing for them in some other way, advantages fully equal to those they might lose. (B3: 7/1:4){FNREF|0-86472-060-2|8.9.8|210}

Mackay then observed that, "In acquiring the land from the Natives in the Middle Island the instructions issued by the Imperial Government appear to have been entirely disregarded"(B3:7/1:4).{FNREF|0-86472-060-2|8.9.8|211} He referred in particular to Lord Normanby's instructions to Governor Hobson, including the injunction that the governor would not, for example, "purchase from [Maori] any territory, the retention of which by them would be essential or highly conducive to their own comfort, safety, or subsistence" (B3: 7/1:4).{FNREF|0-86472-060-2|8.9.8|212}

Mackay made several important points in the passages referred to:

(a) He pointed to the Ngai Tahu understanding of "mahinga kai" as having a much broader meaning than simply cultivations.

(b) Only a year before Kemp's purchase Governor Grey had recorded his opinion that the Maori were and would remain, for a time at least, dependent on being able to hunt and gather food in their traditional way.

(c) That the Crown was under a duty to ensure that the Maori "were secured in the enjoyment of an ample extent of land to meet all their real wants".

(d) That the object in purchasing land from the Maori was to facilitate settlement by Europeans. Mackay considered it could not have been contemplated that the Maori would continue to be free to hunt and forage for food over land purchased for settlement. But while he says the settlement of tracts of land capable of supporting a large population should not be lost because a (relatively) small number of Maori were accustomed to derive a part of their subsistence from it, at the same time such settlement should not have been permitted without the Crown first providing Maori "in some other way advantages fully equal to those they might lose".

8.9.9 We return now to Kemp's deed and the provision reserving to Ngai Tahu their "mahinga kai". In the absence of any adequate contemporary record of the discussion between Kemp and Ngai Tahu as to what was intended to be encompassed by the expression "mahinga kai", we must make our findings on the basis of the linguistic evidence presented to us, Mantell's 1848 accounts of what food resources Ngai Tahu considered they were entitled to, and the later evidence from Ngai Tahu and Kemp. We conclude that it is highly likely that the expression meant two very different things to the respective parties to the deed.

Ngai Tahu perspective on mahinga kai

8.9.10 Given the then mode of life of Ngai Tahu and their dependence, on a seasonal basis, on a wide variety of land and water based food resources, we find it inconceivable that in agreeing to sell to Kemp they also agreed to forfeit their future right to important food resources. We believe that the phrase "mahinga kai" would in their minds have encompassed their traditional food resources. We do not accept that Ngai Tahu contemplated that, as a result of this deed, they were agreeing to be

confined and closeted (as subsequently proved to be the case) in minuscule reservations scarcely affording them a bare subsistence. We believe they entered into this deed in good faith and in reliance on Kemp's assurances that ample provision would be made for their needs, which in their minds would have included access to traditional food resources. They may well have recognised that when Europeans arrived and settled amongst them their previously unrestricted access to their former food resources would, over time, be modified. But clearly they did not agree to forfeit, at one stroke, all access to them. We reiterate our earlier findings (8.9.6) that, in signing Kemp's deed, Ngai Tahu were not agreeing to part with their mahinga kai. They did not contemplate the possibility that the Crown, by its agents, would deny them their mahinga kai or would fail to leave them with ample additional land for their wider needs.

Kemp's perspective on mahinga kai

8.9.11 Kemp, on the other hand, almost certainly had a different perspective. He employed the term "mahinga kai" in the Maori version of the deed, which he personally drew up. And he translated it, no doubt in accordance with his own understanding, as "plantations". But many years later he conceded that he had also promised Ngai Tahu at least access to, if not exclusive ownership of, their eel-weirs. He envisaged extended areas of land for future cultivations. But he does not appear, by the use of the expression "mahinga kai", to have intended to preserve to them access to their traditional food resources. However even Kemp must have known Ngai Tahu could not, overnight, be expected to forego all access to such resources. It may well be, although we have no record of him saying so, that in promising that ample additional reserves would be made for Ngai Tahu after survey, their access to traditional food sources would be secured as settlement occurred.

We recall Governor Grey's advice to Earl Grey only the previous year, 1847, that extensive provision needed to be made to enable Maori, for a time at least, to continue with their practice of hunting and foraging for their traditional foods.

The tribunal's conclusion on the meaning of "mahinga kai"

8.9.12 That this tribunal, 142 years after the event, is required, in order to do justice to Ngai Tahu's claim, to hear lengthy testimony and come to a conclusion on a question of such critical importance, is surely a serious indictment of the failure of Kemp, the Crown's agent, to make appropriate provision for Ngai Tahu's very real needs at the time of his negotiations with them. The Crown, in our opinion, cannot now be heard to rely on a narrow or restricted interpretation of a term, the strict application of which would have an effect so contrary to the provisions of article 2 of the Treaty. We find that the expression "mahinga kai" should be interpreted as having the meaning which we are confident was attributed to it by Ngai Tahu at the time, that is, those places where food was produced or procured by them. We further find that Ngai Tahu, who were well aware that the land being sold would be settled by Europeans, would have accepted reasonable provision in the form of ample, that is to say, extensive reserves capable of being used for agricultural or pastoral purposes and as appropriate for maintaining access to food resources such as birding, berries, ti and fern-root, together with those valued sources of inland fish (including eels), such as Waihora, which they wished to retain. The tragedy is that the Crown's agents failed to make such provision

for Ngai Tahu. The Crown derived immense advantage from Kemp's purchase; Ngai Tahu suffered grievous loss.

Mahinga kai: what the Crown did

8.9.13 What provision was made by the Crown for mahinga kai under Kemp's deed? Virtually none. As we have seen, Mantell ensured that the land reserved to Ngai Tahu in the locality of their residences was the irreducible minimum: a mere 10 acres or so per person. As to provision for mahinga kai, in the broader sense of that term Mantell conceded nothing. We have already referred to his arbitrary rejection of requests for kauru (from ti) and forests for cooking it, other forests for weka hunting, and whole districts for pig runs. In another context we have earlier quoted from a letter to Native Under-Secretary Rolleston, of 12 April 1866, in which Mantell frankly described his policy in dealing with the "eel-fishing question" at the time he was laying off reserves. Because it so graphically illustrates Mantell's attitude to making provision for mahinga kai we repeat it here:

Bound as I then felt, pending the execution of the new deed which the Government deemed absolutely necessary, to maintain the validity of that under comment, I treated with the Natives in all matters connected with their reserves with a high hand, and as if I possessed the unquestionable right to do so. At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no case would I give way upon this point, although unfortunately my difficulty was much increased by their knowledge that at a sale then recently made in this Island, a general reservation of this right to the Natives had been conceded.

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it.

All that I promised at any place to the Maoris on this subject was, that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans; and this promise I hope the Government may for a time permit to hold good. (A8:I:242){FNREF|0-86472-060-2|8.9.13|213}

Consistent with this attitude the Crown commissioner for the extinction of native title made no significant provision of mahinga kai for Ngai Tahu under Kemp's deed. As Royal Commissioner Mackay observed in his 1887 report after citing various statements by Mantell as to his policy in setting aside reserves for Ngai Tahu:

Sufficient evidence has been adduced ... to show that the Natives, instead of being consulted in respect of the land they desired to retain, were coerced into accepting as little as they could be induced to receive. (B3:7/1:3){FNREF|0-86472-060-2|8.9.13|214}

It might be thought from Mackay's concluding words that Ngai Tahu, however reluctantly, in fact agreed to the reserves laid down by Mantell. We do not believe this

to be the case. Mantell, acting as he said, with a high hand and as if he possessed the unquestionable right to do so, gave them no option but to accept what little he granted them and, so far as Mantell was concerned, left them to come to terms with the virtual confiscation of their mahinga kai.

Counsel for the claimants, Mr Temm, in his final address, referred us to a passage from Professor Ward's report:

Responsibility lies with other government officers besides Kemp for not clarifying the whole question. Mantell said in 1868 that Kemp's deed was in his instructions but that he was not to be guided by it... For much of the time he was expecting a new deed listing specific reserves. Hence he ignored the wording of the deed, not to consider or clarify its ambiguities, refused to reserve eel weirs, and tried to put limits on the time frame over which food-gathering could be exercised informally. Responsibility lay also with Eyre and, above all, with Grey. Grey, as we have seen, knew full well the importance of a wide range of hunting and gathering areas to the Maori; he knew that a sudden reduction to a cultivating economy alone would involve hardship and loss. Perhaps the terms of the deed, construed liberally, would have reassured him that the Maori right was covered-for the time being. But Eyre had meanwhile instructed Mantell to consolidate reserves, not have them scattered over the country. That, and Mantell's view that the Ngai Tahu could use mahinga kai only until the government required the land, undermined the apparent liberality of the deed. If Eyre or Grey had any anxiety that this unduly circumscribed Ngai Tahu they did not make it known. Grey's general drive to get the Maori to abandon a traditional lifestyle for participation in the new one would probably have led him to favour Mantell's stand anyway. (T1:176-177)

We unreservedly adopt Professor Ward's statement. The Crown cannot rely on Mantell as scapegoat. Responsibility for the Crown's failure to honour the terms of the deed providing for the reservation of mahinga kai must rest ultimately with Governor Grey. We recall his satisfaction with "the careful and zealous manner" in which Mantell "has executed the duties intrusted to him" (8.8.26).

Finding on grievance no 2(b)

8.9.14 We have said enough to justify a clear finding, which we now make, that the Crown, through the bad faith of its accredited agent Mantell, with the subsequent acquiescence of Lieutenant-Governor Eyre and Governor Grey, almost entirely failed to honour the contractual obligation under Kemp's deed to reserve to Ngai Tahu their mahinga kai.

Mahinga kai: what the Crown should have done

8.9.15 What then should the Crown have done consistent with its objective of obtaining land through Kemp's purchase for settlement by Europeans? Before answering this question we refer again to Royal Commissioner Mackay's 1887 findings:

The extent of land ultimately reserved for the Natives in 1848 was 6,359 acres, a quantity that can hardly be considered to come within the meaning of ample reserves

for the present and future wants of a population of 637 individuals, the number of Natives then to be provided for within the block. The Governor was empowered under the terms of the deed of purchase to set apart additional lands for the Natives when the country was surveyed; but even that condition was only partially fulfilled in 1868, a period of twenty years after the date of the engagement. The Natives were under the impression that under the terms of the deed they were entitled to the use of all their "mahinga kai" (food-producing places); but they found, as the country got occupied by the Europeans, they became gradually restricted to narrower limits, until they no longer possessed the freedom adapted to their mode of life. Every year as the settlement of the country progressed the privilege of roaming in any direction they pleased in search of food-supplies became more limited. Their means of obtaining subsistence in this way was also lessened through the settlers destroying, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, draining the swamps, lagoons, and watercourses from which they obtained their supplies of fish. Their ordinary subsistence failing them through these causes, and lacking the energy or ability of supplementing their means of livelihood by labour, they led a life of misery and semi-starvation on the few acres set apart for them. (B3:7/1:4){FNREF|0-86472-060-2|8.9.15|215}

The Crown was obliged under Kemp's deed to reserve to Ngai Tahu their homes, their mahinga kai, and to provide additional ample reserves. In our view these three obligations are inter-related. They should not be viewed in isolation. Crown counsel, Mrs Kenderdine, in her closing address reminded us of Lieutenant-Governor Eyre's instructions to Mantell that Ngai Tahu were "strictly and literally entitled" to reserves encompassing "their places of residence & plantations", as was said to be stated in Kemp's deed (M2:23). Above and beyond this "a liberal provision" was, as Eyre said, to be "made both for their present and future wants & due regard shewn to secure their interests & meet their wishes" (M2:24).{FNREF|0-86472-060-2|8.9.15|216} Mrs Kenderdine agreed that Mantell was under instructions to make provision for three categories of reserves, but she considered, in our view incorrectly, that mahinga kai was defined by Kemp's translation of "plantations".

8.9.16 We record here certain issues put to the claimants and the Crown in relation to Kemp's purchase, and the Crown's answers to those issues:

Issue 8: What reserves were to be made, according to the agreement?
Crown Answer: Those described in the Deed.

Issue 9: Were the reserves actually made in accordance with the agreement?
Crown Answer: No.

Issue 10: Was the agreement made fairly?
Crown Answer: Yes, the agreement with H T Kemp in June of 1848 was made fairly. It was not implemented fairly by Mantell.

Issue 11: Was the outcome in accordance with Ngai Tahu rights under the Treaty?
Crown Answer: No. They received inadequate reserves. (X11)

We have then a frank admission by the Crown that Mantell, in providing for reserves under the deed, failed to act fairly and, further, that the outcome was not in

accordance with Ngai Tahu rights under the Treaty of Waitangi in that they received inadequate reserves. In view of these admissions by the Crown, in our opinion fully justified by the evidence before us, we could perhaps complete our findings without further discussion. We pause however, briefly to refer to the evidence of Mr Walzl and Professor Pool.

8.9.17 Dealing first with reserves made in Otago by Mantell under Kemp's deed, Mr Walzl said that, soon after purchase, Ngai Tahu were keen to take advantage of their proximity to European settlement and develop their market further through increased crop production and pastoralism. But the limited size of their reserves prevented them from developing large-scale agriculture and hence from generating the capital necessary to engage in pastoral activities. By 1861, Mr Walzl said, "their agriculture seems to have hardly developed beyond subsistence" (Q8:46). We recall Matiaha Tiramorehu's plea in 1849 for enlarged reserves at Moeraki, where they had only 5.7 acres per person, so that he and his hapu could run sheep, a request which was summarily rejected by the Crown.

As to the Canterbury reserves, Mr Walzl stated that after a brief boom in the 1850s Canterbury Ngai Tahu, because of the small size of their reserves, were unable to compete with Europeans. Moreover, the size and characteristics of their land rendered it unsuitable for pastoralism, nor were they able to generate the necessary capital to acquire additional land. So Canterbury Ngai Tahu became locked into the same subsistence economy as did the east Otago Ngai Tahu (Q8:47).

Professor Pool's statistics for Canterbury have earlier been referred to in our discussion of the Otakou purchase (6.9.10). In considering "present needs" the crude density figure (number of acres divided by the number of people) for Canterbury in 1848 was 15 acres per person, while the relative density (which has regard to the relative quality of the land wheather good, medium or poor) was only 13 (O15:23-24). As to "future needs", Mackay's 1891 assessment of the sufficiency of land for Canterbury showed 12.9 per cent of Ngai Tahu as having "sufficient", while 49.7 per cent had insufficient, and 37.4 per cent had none. We cite these figures as indicative and repeat our comments made when considering the corresponding data for the Otakou purchase, that in separately discussing "present" and "future" needs there is a very real danger that the outcome is distorted. It is manifestly evident that the reserves set aside by the Crown under Kemp's deed were seriously inadequate for the present and the future needs of Ngai Tahu.

Findings on reserves and mahinga kai provided under Kemp's deed

8.9.18 We uphold the claimants' grievances that:

the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemp's Purchase, in particular-

(a) Ample reserves for their present and future benefit were not provided and

(b) Their numerous mahinga kai were not reserved and protected for their use.

While Mantell did reserve most, if not all, Ngai Tahu places of residence, he refused to include all existing cultivations. In arbitrarily allowing an average 10 acres per person to Ngai Tahu who were parties to the sale, Mantell made insufficient provision for their present needs, viewed on any basis other perhaps than that of bare subsistence. He failed to provide, as envisaged in the deed and as promised by Kemp, additional reserves, so as to ensure that Ngai Tahu had land fully sufficient to maintain access to mahinga kai and to develop alongside the European settlers pastoral farming in addition to agriculture. He entirely failed to honour the obligation under Kemp's deed to reserve to Ngai Tahu their mahinga kai. It is not stating the position too strongly to say that the effect of the Crown's niggardly allocations was to "ghetto-ise" Ngai Tahu on small uneconomic units on which they could do little more than struggle to survive.

We do not believe that it would have been necessary for the Crown to reserve to Ngai Tahu unrestricted access on a permanent basis to all foraging and hunting, to all ti or fernroot, to all birds, to all inland fisheries, in the extensive areas which they sold. But had the Crown first ensured that in addition to their residences and existing cultivations adequate land was provided Ngai Tahu for future cultivations (as envisaged by Kemp); secondly, reserved all eel-weirs and other inland fisheries sought by Ngai Tahu; and thirdly, also reserved extensive areas of good quality land in appropriate locations, which would remain as a plentiful source of mahinga kai and would enable Ngai Tahu to engage fully in both agricultural and pastoral farming pursuits, then we believe the Crown's obligations under Kemp's deed would have been substantially met. More especially would this have been so had the Crown complied, as it should have, with Ngai Tahu's request for a very substantial reserve between the Waimakariri and Kawari and crossing the island.

8.9.19 The tribunal finds that the Crown's failure to fulfil its contractual obligations under Kemp's deed in respect of reserves and mahinga kai, as summarised above was in breach of the Treaty principle which required the Crown to act with the utmost good faith towards Ngai Tahu. The Crown failed to so act.

8.9.20 The tribunal further finds that the Crown failed to preserve and protect Ngai Tahu's rangatiratanga over their land and valued possessions in breach of article 2 of the Treaty. We recall the first Treaty principle, which we have found relevant to the Crown's dealings with Ngai Tahu. This is that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. In our earlier discussion of the Treaty (4.6.6) we reiterated the finding of the Orakei tribunal, that in recognising the tino rangatiratanga over their lands the Crown was acknowledging the right of Maori, for as long as they wished, to hold their lands in accordance with longstanding custom, on a tribal and communal basis. It is clear that Ngai Tahu had no intention of surrendering their pa, their cultivations, their valued mahinga kai and that, in addition, they wished to retain extensive areas of land for their future well-being-all this on a tribal or communal basis. The Crown, through its agents, rode roughshod over Ngai Tahu's rangatiratanga, over their right to retain land they wished to keep, over their authority to maintain access to their mahinga kai. Instead of respecting, indeed protecting, Ngai Tahu's rangatiratanga, the Crown chose largely to ignore it. In so doing it acted in breach of an important Treaty obligation, and has continued to so act down to the present time.

8.9.21 The tribunal further finds that the Crown acted in breach of the Treaty principle which requires that in exercising its right of pre-emption the Crown was obliged to ensure that Ngai Tahu were left with a sufficient endowment for their own needs, both present and future. This the Crown patently failed to do at the time of the purchase. Such failure has continued down to the present time.

As will be shown, Ngai Tahu suffered grievously as a result, while the Crown, for a nominal payment of œ2000 obtained title to 20 million acres of land. The outcome, while obviously highly satisfactory to the Crown's senior officials, was nothing short of disastrous for Ngai Tahu who, when in good faith they negotiated with Kemp and listened to his assurances, could never have contemplated that they would in fact be rendered virtually landless. They would have expected, given the provisions in the deed, that they would be left with their homes, their mahinga kai and ample land on which to develop agricultural and pastoral activities alongside, and on an equal basis with, the new European settlers. We are convinced that had they foreseen an outcome so different they would never have agreed to the sale.

We recall that Lord Normanby instructed Governor Hobson that the land should be bought extremely cheaply from the Maori as this would facilitate development and assist in bringing out more settlers. But the spin-off for Maori would be that the land they retained would, over time, increase greatly in value. As we have indicated, this would occur only if the Crown ensured that it left Maori with ample land. This the Crown failed to do. And so Ngai Tahu suffered severely in two ways. They were paid a mere œ2000 for 20 million acres, a substantial part of the South Island and almost a third of the total area of the country. In no way were they compensated for receiving such a nominal payment, as they were left with totally inadequate land.

8.9.22 As we will relate in a subsequent chapter, some slight relief was granted in the way of additional reserves by the Native Land Court in 1868 and under the Landless Natives Act 1906. In addition some financial relief has been granted under the Ngaitahu Claim Settlement Act 1944. But the tribunal is satisfied that Kemp's purchase is yet to be completed. The Crown, as a matter of honour, is under a compelling duty to act generously and speedily in repairing this longstanding injustice to a gravely disadvantaged people.

Ngai Tahu Land Report

08 Kemp's Purchase

8.10 Post-purchase Challenges to the Western Boundary

8.10. Post-purchase Challenges to the Western Boundary

8.10.1 We indicated in 8.6.8 that before stating our conclusions on the questions of the boundaries of the Kemp purchase, and in particular the question of the "hole in the middle", we would discuss the Crown's actions in the provision of reserves under the deed and, having done this, we would examine how, when, and in what circumstances, the claims in respect of Kemp's purchase came to be brought by Ngai Tahu. This we now proceed to do, in the hope that it will assist us in coming to a conclusion on the disputed western boundary question. In the course of this discussion we will also consider other grievances of Ngai Tahu relating to the Kemp purchase.

New Zealand Company Land Claimants Ordinance 1851

8.10.2 The claimants' fifth grievance was:

That the Crown failed to ensure that a claim was lodged on behalf of Ngai Tahu to protect their interests under the New Zealand Company Land Claimants Ordinance of 2nd August 1851. (W4)

The purpose of this ordinance, as its long title indicated, was to ascertain what contracts and engagements had been entered into by the New Zealand Company for the disposal of certain lands vested in it, and to provide for the completion of those contracts, by the New Zealand government, which had not been completed by the New Zealand Company. This ordinance followed the surrender by the New Zealand Company of its charters and the reversion to and vesting of its lands in the Crown.

The claimants said that Ngai Tahu, by virtue of unfulfilled provisions of Kemp's purchase, had a valid claim to reserve lands and mahinga kai. They asserted that the Crown was under a duty to protect Ngai Tahu by ensuring that a claim on behalf of Ngai Tahu was lodged under the ordinance.

Finding on grievance no 5

8.10.3 The short answer to this grievance is that the ordinance related to land sold or contracted to be sold by the New Zealand Company to which no legal title had been given by the company.{FNREF|0-86472-060-2|8.10.3|217} It did not apply to land purchased by or vested in the New Zealand Company by the Crown or other legislative provision. Ngai Tahu were vendors not purchasers. The ordinance had no application to them. Accordingly, we cannot sustain this grievance.

Canterbury Association Lands Settlement Amendment Act 1851

8.10.4 The claimants' sixth grievance was:

That the Crown on 7th August 1851 passed the Canterbury Association Amendment Act without providing for the protection of Ngai Tahu interests derived from the unfulfilled promises of the Crown under Kemps Purchase. (W4)

The 1851 Act amended the Canterbury Association Lands Settlement Act 1850. Both were enactments of the United Kingdom Parliament. The 1850 Act vested some two and a half million acres of land in Canterbury, which had been included in the Kemp purchase, in the Canterbury Association, following the surrender by the New Zealand Company of its charter. The Canterbury Association had been empowered to sell the land over a period of 10 years, subject to certain conditions laid down in the 1850 Act. The 1851 Amendment, of which complaint is made, enabled the association, throughout that part of Kemp's block over which they had authority, to cut timber, fell forests, construct roads, railroads, canals, drains, and to alter, divert and deepen channels of rivers and streams, and make locks, dams and weirs. These activities, the claimants said, could be exercised to the detriment or destruction of Ngai Tahu mahinga kai and otherwise adversely affect the lands to which Ngai Tahu were still entitled under Kemp's deed. The claimants said that since no provision was made in the Act to protect their interests under Kemp's deed, this was an act of bad faith and was contrary to article 2 of the Treaty of Waitangi.

Finding on grievance no 6

8.10.5 No specific details of detriment which ensued as a result of the exercise of its powers by the Canterbury Association were given in connection with this particular grievance. It was, however, common ground that over a period of years following Kemp's purchase timber was cut, swamps were drained and other development work designed to facilitate settlement was carried out. We have no doubt that certain valued mahinga kai resources were detrimentally affected as a result. This topic is more fully discussed in our later chapter on mahinga kai. The 1850 Act and its 1851 amendment were no doubt passed by the Imperial legislature on the assumption that, following Kemp's purchase and Mantell's provision for reserves, Kemp's purchase had been completed. We have no evidence that the Imperial Parliament acted in bad faith. However, there can be little doubt that the statutes complained of did result in Ngai Tahu's enjoyment of certain of its mahinga kai resources being detrimentally affected. The basic fault was of course that of the Crown's New Zealand officials, in failing to ensure that the provisions of Kemp's agreement were fully and faithfully implemented. Had this been done Ngai Tahu mahinga kai, and other lands which should have been reserved to them, would not have been vested in the Canterbury Association. The British legislation can be viewed as a consequence of this failure by the Crown's New Zealand representatives. In the result its enactment aggravated the pre-existing breaches of the Treaty which we have earlier found. We accordingly find this grievance to be substantiated.

Ngai Tahu reaction to the Kemp purchase

8.10.6 We turn now to Ngai Tahu's reaction to the Kemp purchase over the ensuing three decades during which Te Kerema, the claim, took shape. This topic was the subject of lengthy evidence by Professor Ward. At this point we propose to refer only

to the main points which emerge from this detailed discussion. Ngai Tahu's deep sense of disillusionment, culminating in the formation of its claim, is graphically encapsulated by the introductory comments on the aftermath of the purchases:

During the 1840s Ngai Tahu had embarked upon the complex task of establishing a satisfactory relationship with the British Crown. Ngai Tahu chiefs signed the Treaty of Waitangi, entered into purchase negotiations with the Crown and established personal contacts with officers of the new administration. The adjustment to the new economic order, begun well before 1840, likewise proceeded. Following the government land purchases, this process of adjustment and realignment of traditional patterns of political and economic organisation continued in the expectation, not that it was the first step in the tribe's subjugation to European political and economic realities, but that the promises conveyed by the Treaty, the purchase deeds and the words of government agents would be interpreted in a liberal spirit and provide for the tribe's future welfare. As the passage of time made it clear that Ngai Tahu expectations far exceeded the Crown's willingness to preserve or provide resources, a deep sense of grievance developed. Settlers had over run the country, draining the swamps, burning off the native plants, fencing, stocking and otherwise altering the landscape to the detriment of Ngai Tahu's traditional lifestyle. The tribe had lost its land-but to what purpose? Notions about unfulfilled promises and dissatisfaction with the size of the reserves became the nucleus of a tribal claim against the Crown. In the latter half of the nineteenth century Ngai Tahu vigorously pressed their claim against the Crown, demanding a place in the new world. The Crown responded with a series of investigations into the condition of the tribe and the allegations of unfulfilled promises, none of which served to assuage the sense of grievance or substantially increase the amount of land and resources with which the tribe was endowed. Te Kerema, the claim, became a rallying point for Ngai Tahu and a persistent problem for the Crown. (T1:331)

The period 1848-1868

8.10.7 As we have seen in our consideration of the reserves provided in the Otakou and Kemp blocks, Ngai Tahu failed to prosper following the purchases. The reserves were grossly inadequate, providing no more than a bare subsistence, and not always that. European settlement increasingly impinged on Ngai Tahu's mahinga kai and progressively confined them to their reserves. They had no prospect, following the decline in agriculture, of diversifying into sheep and cattle farming, as the European settlers had done with excellent results.

There were serious communication problems at a local level due to their lack of proficiency in English and the lack of interpreters. Hamilton reported in 1859 that it was almost impossible to find a competent interpreter in the whole of Canterbury province. But as Professor Ward pointed out:

These early problems of communication, however, relate much more to the frustration of Ngai Tahu's forward-looking aspirations and to day to day problems than to the stifling of any complaints arising from the purchase. For there were channels of communication to lay specific complaints. These included the writing of letters to the Governor and other senior officials. Many of these survive from the 1850s. There were also formal meetings with officials visiting the south, such as the meeting of

Ngai Tahu rangatira with Governor Browne in 1856 and with the Premier Stafford, and Native Minister, C. W. Richmond, in 1858. Grievances were then stated publicly.

Professor Ward recorded, for example, that after Governor Browne visited Dunedin, Matiaha Tiramorehu wrote to Mantell, then in England:

I spoke to that Gov. Browne about powder, about guns, about the price fixed by Captain Cargill on the [10 acres at the] Kuri [Hampden], and about the rule of the Customs House [Officer] Logie for the Maori boats.{FNREF|0-86472-060-2|8.10.7|218}

Professor Ward commented on the variety of complaints being made and noted the absence of any reference to tenths:

He also spoke about a block of land for himself at the Bluff and about wanting Mantell as 'Governor' of Otago. But in this, as in all such addresses of the time, there is no mention of 'tenths' or major boundaries or mahinga kai-the main legs of the subsequent claim. (T1(e):337)

And so during these early years there was little evidence, apart from the immediate and persistent protest at the northern boundary of the purchase being fixed at Kaiapoi pa, of a tribal claim against the Crown in the terms articulated before the Smith-Nairn commission in 1879-1880. However, in the mid-1850s Walter Mantell publicly protested at the failure of the Crown to honour the promises which he had made during the Kemp purchase reserve negotiations and the Murihiku purchase. These were that, in compensation for the almost nominal purchase monies paid by the Crown, there would be "valuable recompense in schools, in hospitals for their sick, and in constant solicitude for their welfare and general protection on the part of the Imperial Government" (O21:25).{FNREF|0-86472-060-2|8.10.7|219} This topic is fully discussed in chapter 19. Mantell by this time had undergone a marked change in attitude to Ngai Tahu and undertook a vigorous campaign both in London and New Zealand in support of Ngai Tahu. As will be seen, Ngai Tahu pursued Mantell's claim that the Crown should meet the unfulfilled promises made in its name.

The 1868 Native Land Court sittings

8.10.8 In April 1868 the Native Land Court sat for the first time in the South Island. Chief Judge Fenton presided. The hearing was held in the Christchurch town hall and followed British legal procedures. For most Ngai Tahu participants this was a novel and strange experience. Proceedings were in English with one interpreter present. A variety of claims were heard by the court. Mantell gave evidence about the Rapaki and Kaiapoi reserves. As indicated elsewhere, he told the court that he had tried to restrict their size to an absolute minimum. Of the Port Levy purchase, his instructions had been to carry matters with a "high hand". He was "not prepared to say whether any single step taken by me on the part of the Government, or by them, through anybody else, in respect to these people, was fair" (A8:II:199).{FNREF|0-86472-060-2|8.10.8|220}

As Professor Ward pointed out, after Mantell's testimony there was little the court could do. The Crown's lawyer conceded that Ngai Tahu were entitled to more land

than they had been given. Fenton decided to make a settlement which would release the Crown from the provision in Kemp's deed requiring further reserves and finalise the transaction (A8:II:202).{FNREF|0-86472-060-2|8.10.8|221}

Following the Rapaki judgment the court heard a claim from Heremaia Mautai and others to Kaitorete Spit. This had the unexpected outcome that Kemp's deed was referred to the court as an order of reference under the provisions of section 83 of the Native Lands Act 1865 and section 38 of the 1867 amendment. These provisions enabled the governor to refer to the Native Land Court any agreement made by Maori owners to sell land to the Crown for an investigation into the title and interests in the land. The order was signed by Sir John Hall, a member of the Executive Council, and was produced to the court against the objection of Ngai Tahu's lawyer, Cowlishaw, who claimed the governor had not authorised the reference to the court. Cowlishaw went further and questioned the legality of Kemp's deed, submitting there was no valid European title in Canterbury (A8:II:210).{FNREF|0-86472-060-2|8.10.8|222}

The order of reference gave the court power to determine what reserves should have been made under Kemp's deed. In the result, the chief judge ordered a series of additions to the reserves and also delivered a judgment on the meaning of "mahinga kai". The reserves were increased from an average of 10 acres per person to 14 acres. This resulted in some 5000 acres of new reserves in Canterbury and Otago, including a number of fishing reserves. As Professor Ward commented:

The finality of the 1868 allocations was pressed home to the tribe... Where up to 1868 Ngai Tahu had been able to look forward to and make application for further reserves under the terms of the deed, after 1868 the Crown considered that its obligations had been effectively discharged and the tribe was forced to face the reality of survival on the reserves. By forcing this realisation on the tribe, the events of 1868 became a turning point and materially affected the development of a claim against the Crown.(T1:357)

Professor Ward cited the Reverend J Stack's 1871 warning to Rolleston that poverty was leading to disillusionment and disaffection among his parishioners:

They now find themselves placed in a situation they never contemplated when disposing of their land for the purposes of colonisation and consider themselves the victims of deception and boldly charge the government with having purposely misled them. They are bequeathing to their children a legacy of wrongs for which they charge them to seek redress-this will serve to perpetuate the spirit of discontent which has for some time prevailed. (T1:357){FNREF|0-86472-060-2|8.10.8|223}

Grievance no 7

8.10.9 Included in the claimants' grievances are two matters associated with or arising out of the Native Land Court decisions in 1868. The seventh grievance is:

That the Crown under the Native Land Act 1865 failed to provide for adequate protection for Ngai Tahu in the conduct of the Native Land Court.

The claimants relied on certain statements made in Mr Evison's evidence that:

(a) Alexander Mackay was appointed agent for the Crown at Canterbury. He referred to a memorandum by one T H Hamilton of the Native Secretary's Office. But the document is notice of Mackay's appointment as agent for the Crown at the approaching sittings of the Native Land Court at Otago not Canterbury (B3: 6/2).{FNREF|0-86472-060-2|8.10.9|224} In fact Mackay was appointed to appear at the Native Land Court sitting at Christchurch in April 1868 "on behalf of the Natives" (A8:II:182).

(b) The chief judge admitted Kemp's deed as an order of reference in terms of the Native Lands Acts of 1865 and 1867 and that Ngai Tahu's counsel, Cowlishaw, then withdrew in protest on the ground that Ngai Tahu had no proper forewarning or time to prepare to argue the question, and on the ground that the court's acceptance of the order of reference was improper when the Ngai Tahu case was still pending.

In support of his contention that Cowlishaw withdrew in protest Mr Evison referred to a statement to this effect by one of the commissioners in the Smith-Nairn commission hearing. But this statement is plainly mistaken as the printed record clearly shows. The order of reference in question was admitted in evidence by Fenton during the hearing of a claim by Heremaia Mautai and others to ownership of Kaitorete Spit. Mr Cowlishaw appeared for the claimants, not the whole of Ngai Tahu. At the conclusion of evidence of various witnesses, including Mantell, Cowlishaw sought and obtained an adjournment until the next morning (A8:II:204-205).{FNREF|0-86472-060-2|8.10.9|225} The hearing resumed the following morning, 29 April 1868. Mr Cowlishaw was present. The Crown lawyer sought leave to introduce the order of reference pursuant to section 38 of the Native Lands Act 1867 whereby certain questions as to reserves still outstanding under Kemp's deed could be settled and the agreement for the purchase of the lands concluded. Mr Cowlishaw did object as suggested by Mr Evison, but his objections were not upheld by the court, which admitted the order of reference and the deed.

Far from withdrawing, Cowlishaw called evidence about Maori pa in the vicinity of Kaitorete Spit. He then made submissions as to the illegality of Kemp's deed. After further argument, the chief judge indicated he would take time to consider his decision. On 5 May 1868 the chief judge delivered what the record appropriately described as a very lengthy and elaborate judgment. In it he referred to certain submissions made by Cowlishaw. The court held that, given all the facts, there was sufficient ground to cause a court of equity to compel specific performance of the deed. It would be the duty of the Native Land Court, under the order of reference, to ascertain all the terms of the contract. In the result the court disallowed the claimants' claim to ownership of the spit.

Finding on grievance no 7

8.10.10 It is clear from the record that Cowlishaw was present throughout the whole of the argument on the admissibility of the order of reference. While he had little time to prepare argument, there is nothing in the record to indicate that he sought more time. In any event it was the Native Land Court, not the Crown, which was conducting the proceedings to which the Crown was a party. Any defects in the court proceedings were the responsibility not of the Crown, but the court. Accordingly we

find that the claimants' grievance, that the Crown failed to provide adequate protection for Ngai Tahu in the conduct of the Native Land Court, is not sustained.

Grievance no 8

8.10.11 We turn to the eighth grievance of the claimants:

That the Crown passed the Ngai Tahu Reference Validation Act of 1868 to the detriment of Ngai Tahu.

No submission was made to us on this grievance by counsel for Ngai Tahu. But the grievance referred to our record at B2:37-43, which is a passage from Mr Evison's evidence. Mr Evison stated that Ngai Tahu took a case to the Supreme Court at Christchurch to challenge the proceedings of the Native Land Court and the validity of the order of reference that had been admitted. But, Mr Evison said:

the Ngaitahu Reference Validation Act of 1868 was then promptly enacted. This codified Fenton's erroneous judgment and removed the matter out of the jurisdiction of the Courts for ever. (B2:43)

Mr Evison submitted that the Crown thereby committed an act of fraud, and failed in its duty under article 2 as the ultimate protector of Maori.

Finding on grievance no 8

8.10.12 We would agree at once that the Crown acted reprehensibly in foreclosing by legislative act all access to the courts by Ngai Tahu to test the legality of the Kemp deed. But we have no evidence to suggest that it was a fraudulent act. The principal motivation, we believe, was to cure a possible procedural defect, in that the order of reference was signed by Sir John Hall, a minister of the Crown, it not being shown that this was with the express authority of the governor, as the Native Lands Court Act appears to have required. Mr Evison moreover, begged the question when he characterised Fenton's judgment as "erroneous". He gave no reasons. Nor did we hear any argument on the point from the claimants' counsel. We are accordingly unable to find it proved that Ngai Tahu have been prejudicially affected by the passing of the Validation Act. We should record that the Validation Act expressly provided that nothing in the Native Land Court orders or in the Act should be deemed to extinguish the claims of any Ngai Tahu in respect of promises made to them by any officer of the government of schools, hospitals and other advantages to induce Ngai Tahu to consent to the sale of Kemp's block.

The development of Te Kerema: 1868 onwards

8.10.13 We now resume our narrative of the development of Te Kerema, the claim, following the Native Land Court hearings in 1868 and the passage of the Ngaitahu Reference Validation Act. While the passage of the Act precluded further legal challenges to the Crown's title to the block, at the same time the well publicised proceedings raised the consciousness of Ngai Tahu. Professor Ward commented on the situation in the early 1870s:

As Stack observed in 1873, the claim was passing to a new generation. Several of the kaumatua who had signed the deeds, notably Matiaha Tiramorehu and John Topi Patuki, would remain active in the battles of the 1870s, but much of the work would be undertaken by younger men. Part of the process which was shaping the claim in the 1860s and early seventies was an attempt by the older generation to explain the loss of the land to their heirs and justify their actions. (T1:360)

One of the most dramatic instances of this was Matenga Taiaroa's statement to his people which begins:

To all my Tribe, to my Hapu, and to my Son.
Let me bring these word to your remembrance, that they may be impressed upon your memory in the future, after I am dead and gone, that you may understand and judge for yourselves respecting the lands I sold to the Europeans.(C2:21:9){FNREF|0-86472-060-2|8.10.13|226}

In this document Taiaroa, after referring to his journey to Sydney and covenant with the governor of New South Wales, the Treaty of Waitangi, the Otakou purchase and the tenths, next referred to Kemp's deed:

After that was Mr Kemp's deed of purchase with Ngaitahu, on the 12th of June, 1848. We asked a large price of Mr Kemp, to which he did not agree. Mr Kemp said to us that we should give up all the land, and that he would take charge of it; this œ2,000 was an advance on the land. Mr Kemp said after that Government would make payment and return some land to us. We said to Mr Kemp, "What about our settlements, cultivations, sacred places, fishing grounds, and so forth?" Mr Kemp's answer was, "The Government will agree to all those requests; your cultivations will not be taken from you." Besides which, there were many statements made by the land purchasers. Mr Kemp also said to us, "If you do not agree to give up your land, soldiers will be sent to take possession of it", and on that we gave our final consent to the sale; and on account of all these words we concluded that sale; and it was left for the Government to protect the Natives of this island. But there were other words referring to schools, hospitals, and other words on account of which the land was given. (C2: 21:9){FNREF|0-86472-060-2|8.10.13|229}

We note that Taiaroa, a leading Ngai Tahu chief, here makes no reference to any differences over the boundaries of the purchase. The reference to the promises of schools and hospitals which, as we later show, were long unfulfilled, was significant. The theme of unfulfilled promises came to be increasingly emphasised by Ngai Tahu.

It seems clear that the Native Land Court sittings in 1868 forced Ngai Tahu to take stock, or as Professor Ward said, "to confront the totality of what had been done" (T1:365). They were now faced with an apparently binding decision that, with the addition of a mere four acres per person and a few fishery reserves, they had now received all the Crown was prepared to concede. The vast difference between their expectations of the extent of land they would retain after the Kemp purchase, and the depressing and confining reality, impelled them to rethink the whole transaction. As the Ward report said:

One of the products of this process was a realisation that the boundaries defined in the deeds did not always correspond with the Maori understanding of the sum total of what had been sold. (T1:365)

For Ngai Tahu had been promised ample reserves, their kainga and cultivations and their mahinga kai, yet they had been left with so little. They had sought a very substantial area running from coast to coast and this had been denied them. The older generation were, as Professor Ward indicated, called on to explain the loss of their land and to justify their actions. Whatever the legal niceties, they had not agreed to part with all but a few thousand acres of land as the Crown now insisted they had.

8.10.14 It is not unlikely that, in reflecting on their discussions with the governor and his officials some 20 or more years earlier, those Ngai Tahu who were involved may have revived memories which seemed to indicate the sale of a smaller area of land. We recall our earlier discussion of Governor Grey's negotiations with Ngai Tahu chiefs at Akaroa and Otakou early in 1848 before Kemp went south. We concluded from the limited contemporary evidence that although Colonel Wakefield, who accompanied Grey, was under the impression that Ngai Tahu had indicated a willingness to sell "the level country back to the central mountains", Grey very probably thought he had a broad agreement with the Ngai Tahu people to sell their land between the Wairau and Otakou blocks. But, we also concluded that the contemporary evidence was such that no firm conclusion could be drawn as to the Ngai Tahu state of mind at the time.

We also recall our earlier reference to Commissioner Nairn's questioning of Mantell about his decision to set the north-eastern boundary of Kemp's purchase at Kaiapoi pa. Mantell told the commission that, on arriving at the pa, he pointed out to Ngai Tahu a line in a north-westerly direction by compass "as being 'te rohe a Ngatitoa' and as being the boundary to the northwest...". Mr Commissioner Nairn then asked:

I cannot see how the Maoris should recognise the line by your merely pointing out a line in a north-west direction, unless there was some particular point or feature to which their attention was drawn? -I think the line went near to Maungatere (Mount Grey).

Was that mentioned at the time as being on the boundary do you think?... -No; it certainly was not mentioned as being on the boundary. Nothing was mentioned. We all saw the direction. The Natives came to my standpoint, and looked in that direction.

Mr Smith -That was done when you were at Kaiapoi? -Yes at Kaiapoi. (L9:359){FNREF|0-86472-060-2|8.10.13|230}

We commented then that we thought this passage might offer a clue as to how Ngai Tahu came to regard the north-western boundary as commencing at Maungatere.

If Ngai Tahu's recollection of boundary discussions focused more on these incidents and less on those with Kemp, then we can see how, in an effort to formulate their claim in terms Europeans would understand, they came to claim an inland boundary running from Maungatere to Maungaatua. This, if recognised, would provide them with plenty of land and access to mahinga kai, now being denied them. This and

associated claims they now advanced, greatly aided by the parliamentary efforts of H K Taiaroa, who finally secured the appointment of the Smith-Nairn commission in 1879. These events we discuss later in our report.

Ngai Tahu Land Report

08 Kemp's Purchase

8.11 The Western Boundary

8.11. The Western Boundary

8.11.1 We have related how in the 1870s Ngai Tahu came to publicly dispute the western boundary. This followed the apparent finality of the Native Land Court's 1868 restrictive decision over reserves. It became clear to Ngai Tahu that the basis on which they had agreed to sell to Kemp-that they would retain their kainga, their mahinga kai and ample lands for future development had only been honoured by the Crown in respect of their kainga. Now, following the court's decision, it appeared the Crown considered it had fulfilled its obligations under the deed. It must have seemed to Ngai Tahu that the Crown had redrawn the terms of the sale, for clearly the outcome was radically different from the terms of the deed and from all that Kemp had orally assured them would be done following further discussions and consequential surveys.

We have earlier discussed Ngai Tahu's perception of Kemp's purchase (8.6). In agreeing to the sale they would have been greatly influenced by Kemp's promises about what they would retain, namely:

- their kainga;

- additional land beyond that presently cultivated, for future cultivation;

- eel-weirs and certain landing-places "in a more or less fair proportion"; and

- additional land constituting "an endowment of very large proportions and dimensions".

No doubt on the basis of these assurances, which would have been given, in part at least, at the insistence of Ngai Tahu, the tribe was willing to sign the deed. Ngai Tahu would have had no reason to believe the assurances would not be honoured. They were, after all, dealing with the governor's representative, and the assurances were the outcome of various discussions, including a lengthy negotiation on 10 June 1848. It is clear from the deed and deed map and contemporary records, that both Kemp and Kettle understood Ngai Tahu were willing to part with their land and interests in land from coast to coast-that is to say, the land which remained after Ngai Tahu's requirements had been fully met.

8.11.2 We have earlier indicated our view, particularly in our discussion of mahinga kai, that it is inconceivable that Ngai Tahu, in agreeing to sell to Kemp, agreed to forfeit their future access to important food resources. We are convinced they entered into this deed in good faith and in reliance on Kemp's assurances that ample provision

would be made for their needs, including access to traditional food resources. It was not in their minds that they would be confined to reservations so small as to be barely capable of sustaining them at subsistence level. They fully expected to retain extensive areas of land, which would provide them with continued access to mahinga kai and enable them to engage in the same farming practices as the European settlers, some of whom already were engaged in extensive pastoral activities to the north. In these circumstances, and given their lack of familiarity with English legal conveyancing practice, we accept they would not have placed the same reliance on the precise terms of the deed of purchase itself, as on the totality of the arrangement, oral and written, which they had come to with Kemp after prolonged discussion.

We do not believe that Ngai Tahu in 1848, given the vast area involved in the sale, would have focused as sharply on the boundaries referred to in the deed and deed map as on the verbal promises from Kemp as to what they would retain. On the assumption that all they sought and needed for their immediate needs and their future involvement in the new economy would be left in their possession and control, we believe they were prepared to part with the remainder, including such interests as at least some of them had on the west coast. That they expected to retain extensive areas of land is proved by their well documented request, made only two months after the deed was signed, for a reserve of several hundred thousand acres between the Waimakariri and Kawari Rivers, and running from the east coast to the west coast. Other requests, almost certainly involving substantial areas of land in the interior, were also made to, but rejected by, Mantell in 1848.

8.11.3 As settlement progressed Ngai Tahu saw pastoral runs, each of thousands of acres, occupied by settler families while they were forced to subsist on a few acres. Steadily their access to mahinga kai was curtailed. They fretted at their inability either to maintain their earlier mode of living, free to forage and hunt at will, or to emulate the new settlers by grazing sheep and cattle on the extensive lands they had expected to retain. They came to realise by 1868, if not earlier, that the Crown did not intend to honour its obligations under Kemp's deed. By the early 1870s they were forced to reassess the parlous situation in which, through no fault of their own, they now found themselves. Those who had participated in the sale were called on to justify and explain how Ngai Tahu, in so short a time, had been reduced to circumstances of poverty and virtual landlessness. In the knowledge that they had not agreed to part with almost all their land, and reflecting on the discussions with Grey and his officials in 1848, they concluded the western boundary was not that contended for by the Crown but should be redefined as running from Maungatere to Maungaatua. In this way substantial areas of land would be restored to them. And so Te Kerema evolved.

8.11.4 Kemp was seriously at fault for asking Ngai Tahu to sign a deed which in itself did not fully describe the boundaries of the land and interests in land being sold. Nor was the deficiency fully rectified in the deed map, prepared by the surveyor Kettle and attached to the deed. Only Wakatipu-Waitai or Milford Haven was marked on the west coast. While the north-western boundary on the map came out at Cape Foulwind by the Kawatiri, it was not named. Regrettably we lack any detailed contemporary record of the discussions between the Ngai Tahu chiefs and Kemp on the boundaries agreed on. We know, however, that the deed and accompanying map were drawn up on the morning of 12 June at the conclusion of discussions with the chiefs, this being the day the deed was signed. We have no reason to believe that Kemp and Kettle

conspired to misrepresent the outcome of the discussions with Ngai Tahu as to boundaries by preparing a deed and associated map which falsely described the extent of the sale. But nor do we accept as justified the interpretation subsequently placed on the deed by the Crown's representatives which resulted in the expropriation of extensive areas of land and valuable food resources with which Ngai Tahu had no intention of parting. It must have seemed to Ngai Tahu by the late 1860s, if not earlier, that they had been deliberately tricked and deceived by the Crown's agents, who had arbitrarily confiscated much of the land they wished to retain.

Finding in respect of grievance no 4(a)

8.11.5 And so the tribunal finds that while Ngai Tahu agreed with Kemp to give up a substantial part of the land they owned, or in which they had an interest, from coast to coast, they did not agree to part with their kainga, their mahinga kai, or the extensive areas required to enable them to adapt and prosper in the new settler society. Ngai Tahu hoped and expected by this arrangement with Kemp to fully participate in, and share with the new settlers, the benefits accruing from the new economy which the sale to Kemp would make possible. Instead, 58 years later, while the settlers prospered, after decades of procrastination by the Crown, a half-hearted effort was made to alleviate the poverty and distress of many Ngai Tahu by the passing of the South Island Landless Natives Act 1906. The title of the Act says it all.

The claim of Ngai Tahu regarding the western boundary was not dismissed lightly. However after a full, frank and lengthy discussion the tribunal finds that it does not uphold the claimants' grievance no 4(a), that on the matter of boundaries the Crown enforced an interpretation which had not been agreed to by Ngai Tahu in respect of the western boundary.

The Remaining Grievances

8.11.6 There remain three grievances relating to Kemp's purchase which we have yet to consider. Grievance no 9 is discussed in chapter 21 and grievance no 11 in chapter 20. We reach the same conclusion on grievance no 10 as on similar grievances in relation to the Banks Peninsula, North Canterbury and Kaikoura purchases. We refer to these at 9.7.6, 11.5.10 and 12.5.14.

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{FNTXT|0-86472-060-2|8.5.22|81}81 see n 28, p 112

{FNTXT|0-86472-060-2|8.5.23|82}82 see n 49, p 679

{FNTXT|0-86472-060-2|8.5.23|83}83 see n 49, pp 707-709

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{FNTXT|0-86472-060-2|8.5.27|90}90 see n 51, pp 4-5

{FNTXT|0-86472-060-2|8.5.27|91}91 W Mantell Sketchbook No. 8, 1848-1849, p 141

{FNTXT|0-86472-060-2|8.5.27|92}92 see n 85, no 15

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{FNTXT|0-86472-060-2|8.5.28|95}95 see n 91, p 91

{FNTXT|0-86472-060-2|8.5.29|96}96 see n 98, pp 194-195

{FNTXT|0-86472-060-2|8.5.29|97}97 see n 73

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{FNTXT|0-86472-060-2|8.5.29|101}101 ibid, p 244

{FNTXT|0-86472-060-2|8.5.30|102}102 ibid, pp 247-248

{FNTXT|0-86472-060-2|8.5.30|103}103 ibid, p 249

{FNTXT|0-86472-060-2|8.5.30|104}104 ibid, p 252

{FNTXT|0-86472-060-2|8.5.30|105}105 ibid, p 261. This is followed by an English translation of the letter.

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{FNTXT|0-86472-060-2|8.7.6|121}121 see n 51, entry for 23 September 1848

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{FNTXT|0-86472-060-2|8.7.6|123}123 Mantell to Rolleston, 12 April 1866, Compendium, vol 1, pp 241-242

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{FNTXT|0-86472-060-2|8.7.6|126}126 Mantell, plan attached to purchase of Port Cooper, 10 August 1849, Compendium, vol 1, p 257

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{FNTXT|0-86472-060-2|8.8.2|136}136 Kemp to Gisborne (for Eyre), 22 June 1848, G7/1, NA, Wellington

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{FNTXT|0-86472-060-2|8.8.4|141}141 Grey to Earl Grey, 25 August 1848, Compendium, vol 1, p 208

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{FNTXT|0-86472-060-2|8.8.14|166}166 see n 91, p 141

{FNTXT|0-86472-060-2|8.8.14|167}167 see n 85

{FNTXT|0-86472-060-2|8.8.15|168}168 see n 164, p 152

{FNTXT|0-86472-060-2|8.8.15|169}169 see n 51, entries for 2-6 September 1848

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{FNTXT|0-86472-060-2|8.8.17|171}171 see n 151, p 5

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{FNTXT|0-86472-060-2|8.8.29|195}195 Mantell to colonial secretary, 24 January 1850, Compendium, vol 1, p 228

{FNTXT|0-86472-060-2|8.8.30|196}196 Eyre to Kemp, 13 June 1850, Compendium, vol 1, p 229

{FNTXT|0-86472-060-2|8.9.1|197}197 see n 41

{FNTXT|0-86472-060-2|8.9.1|198}198 Translation of Kemp's deed, Compendium, vol 1, p 211

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{FNTXT|0-86472-060-2|8.9.6|203}203 see n 91, p 91

{FNTXT|0-86472-060-2|8.9.7|204}204 see n 43, pp 169-170

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{FNTXT|0-86472-060-2|8.9.13|213}213 Mantell to Rolleston, 12 April 1866, Compendium, vol 1, pp 241-242

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{FNTXT|0-86472-060-2|8.10.3|217}217 See preamble, section 3 and the prescribed form of grant in schedule A, NZ Company Land Claimants Ordinance, 2 August 1851, Ordinances of the Legislative Council of New Zealand 1841-1853, vol 1, p 360

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{FNTXT|0-86472-060-2|8.10.9|224}224 Hamilton to Mantell, 8 May 1868, ms papers 83 (Mantell) folder 163, ATL, Wellington

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{FNTXT|0-86472-060-2|8.10.13|226}226 M Taiaroa's statement (translation) 13 February 1863, presented by H K Taiaroa to Committee on Middle Island Native Affairs 1872, H-no 9, pp 8-9. M Taiaroa's statement in Maori held MA 67/9, NA, Wellington

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228

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Ngai Tahu Land Report

09 Banks Peninsula

9.1 Introduction

9.1. Introduction

This claim involves a consideration of:

(a) French claims to have purchased land at Banks Peninsula between 1838 and 1845; and

(b) subsequent purchases by the Crown of the peninsula in three parts. The first of these was the Port Cooper block, purchased by W Mantell on 10 August 1849, closely followed by the Port Levy block on 25 September 1849. The final purchase was the Akaroa block bought by W J W Hamilton on 10 December 1856.

The French purchases related to efforts by the French government to establish a colony on the peninsula and eventually in much of the remainder of the South Island. Because some important documentation is to be found only in France, it did not prove easy for the claimants to establish the full facts from New Zealand based records. The tribunal learned that Dr Peter J Tremewan, a senior lecturer in French at the University of Canterbury, has over the last five or more years been engaged on a major study of the French attempt to annex and colonise the South Island. His research has included a lengthy period on study leave in France where he had access to the official French naval and colonial ministry records. While in England he inspected the relevant British Colonial Office and Foreign Office records. Dr Tremewan is recognised as the leading authority on the French involvement in Banks Peninsula. Accordingly, the tribunal decided to commission him as an independent consultant to furnish a full report on matters relevant to our inquiries. Dr Tremewan presented a detailed 126 page report on Ngai Tahu land sales to Captain Langlois and the French Nanto-Bordelaise Company on Banks Peninsula (T3). As part of Professor Ward's overview evidence, Dr Tremewan prepared a condensed version of his full report (T1:61-72). Apart from some matters of detail there appears to be general agreement among the parties on the correctness of Dr Tremewan's account. In view of this, and his obvious grasp on the whole complex series of events, we have decided to adopt Dr Tremewan's condensed version and reproduce it as an authoritative and independent statement of the facts. We will of course be commenting on it and elaborating some aspects in the light of other evidence and counsel's submissions.

Ngai Tahu Land Report

09 Banks Peninsula

9.2 Statement of Grievances

9.2. Statement of Grievances

The claimants have set out their grievances in respect of Banks Peninsula as follows:

1. That Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu.

2. That Ngai Tahu were not compensated for Lord Stanley's award.

3. That no reserves were provided for Ngai Tahu out of Lord Stanley's award.

4. That the Crown failed to protect Ngai Tahu against the land-purchasing pretensions of the French: that although Belligny's 1845 "deeds" were illegal and were not proved to be supported by the customary owners of the land, the Crown allowed these transactions to be used against Ngai Tahu by Commissioner Mantell in 1849 and subsequently by the Canterbury Association in denying Ngai Tahu their continued rights of occupation on Banks Peninsula.

5. That the Crown sent Commissioner Mantell in 1849 to falsely assert that Banks Peninsula was already the property of the Crown, and to "carry matters with a high hand": or alternatively that Mantell having done these things the Crown did nothing to rectify them.

6. That at Port Cooper and Port Levy in 1849 Commissioner Mantell conducted his proceedings as an award under which the matters of payment and Maori reserves were not negotiable; and that consequently Ngai Tahu were denied a fair price and an adequate provision of land and other economic resources (including kai moana and fisheries) for their continued sustenance and prosperity.

7. That consequently Ngai Tahu had to abandon the Port Levy and Port Cooper blocks with the exception of the Port Levy, Purau and Rapaki reserves which were quite inadequate for their needs.

8. That at the Port Levy proceedings with Mantell Ngai Tahu expressed their unwillingness to sell Okains Bay, Kaituna Valley, and part of Pigeon Bay, and expressed a wish for a larger reserve at Port Levy; but these were denied to them.

9. That although Mantell's Port Levy deed was signed by only a minority of the chiefs present at the proceedings, and Mantell did not visit all the settlements in the block to ascertain the residents' wishes, the Crown enforced the deed as a legal conveyance of the block.

10. That the Crown under the Canterbury Association Lands Settlement Act of 14 August 1850 assigned the whole peninsula to the Canterbury Association, although it had been clearly excluded from Kemp's purchase and had not been otherwise properly purchased from Ngai Tahu.

11. That consequently Ngai Tahu had to suffer European settlers moving on to their lands, for which they have never received adequate compensation.

12. That at Mantell's 1849 Akaroa block proceedings Ngai Tahu asked to retain for their own use a substantial part of the block comprising some 30,000 acres or more, including the southern part of the peninsula and the whole Wairewa (Little River) basin, and in 1856 made a similar request to Hamilton, to which under Article 3 of the Treaty they were entitled; but this was wrongfully denied to them.

13. That under the terms of Hamilton's 1856 deed only the "places (or areas) in dispute at Akaroa" were sold; but the Crown nevertheless with the exception of 1200 acres reserves enforced the forfeiture of the whole block.

14. That Hamilton's 1200 acres reserves and œ150 payment were manifestly inadequate as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa Block together with the absentees, and that Ngai Tahu suffered as a result.

15. That the Crown under the terms of Hamilton's Akaroa deed unreasonably required the Ngai Tahu residents of the block to provide for returning absentees as well as themselves from the œ150 and 1200 acres Hamilton had provided, and that both residents and returning absentees suffered privation as a result.

16. That under the Land for Settlements Acts the Crown at Wairewa (Little River) resumed the Morice Estate of 912 hectares on 16 December 1905 at a cost of œ40,633 for the settlement of 29 landless Europeans, and on Banks Peninsula resumed the Kinloch Estate of 5275 hectares on 19th February 1906 at a cost of œ116,382 for the settlement of 30 landless Europeans, which land could instead have been provided for the relief of landless Ngai Tahu; instead of which the Crown offered landless Ngai Tahu only the very inferior and remote land provided under the South Island Landless Natives Act of 1906, none of which was on Banks Peninsula.

17. That as the result of these acts of the Crown most Ngai Tahu of Banks Peninsula were driven off the land and lost their turangawaewae.

18. That the Crown has failed to ensure the adequate protection of the natural resources of Banks Peninsula; that it has allowed the wholesale destruction of the forests and other natural vegetation to the detriment of native fauna, water quality and soil conservation, and that the resulting siltation of stream beds and tidal waters has been to the detriment of fish and birdlife; that the Crown has allowed excessive pollution of Wairewa (Lake Forsyth) so that this great inland fishery and eel resource is now almost extinguished; and that it has allowed the depletion of kaimoana in the bays, harbours and coasts through pollution and excessive exploitation. (W3)

Ngai Tahu Land Report

09 Banks Peninsula

9.3 The French Purchases

9.3. The French Purchases

We now set out Dr Tremewan's condensed version in the form in which he presented it (T1:61-72).{FNREF|0-86472-060-2|9.3|1}

Langlois' 1838 "land purchase"

9.3.1 At the end of the 1830s and the beginning of the 1840s, the French whaling fleet of some sixty ships was spending long periods in New Zealand waters. One of these ships, the Cachalot, under Captain Jean Francois Langlois, was whaling out of Whakaraupo/Port Cooper (now known as Lyttelton Harbour) from 13 May to 16 August 1838. The importance of New Zealand to the French whaling fleet is shown by the amount of time spent in New Zealand waters by the French man-of-war, the Heroine, Captain J B Cecille, as part of its task of maintaining order and providing logistic support for the French whaling fleet. The Heroine was present in Port Cooper from 10 July to 4 August 1838. A number of other French, American and Australian whaling ships also spent some of the winter operating out of the same port. During the bay whaling season, the presence of the whaling ships attracted a number of Maori to Port Cooper from Port Levy and from further afield. Even so, the Maori population of Banks Peninsula was probably well under 200 at this time, largely as a result of the deaths, captivity and migration that resulted from Te Rauparaha's attacks of 1830-1832. The European population of the peninsula in 1838 was even smaller, being limited to a few dozen men engaged in the whaling trade. They were established mainly at Peraki, on the south coast, where George Hempelman ran the peninsula's only shore station. There were no European families, missionaries, farmers or traders in the area in 1838. Meaningful land sales to Europeans were confined to a sequence of negotiations made in connection with Hempelman's shore station.

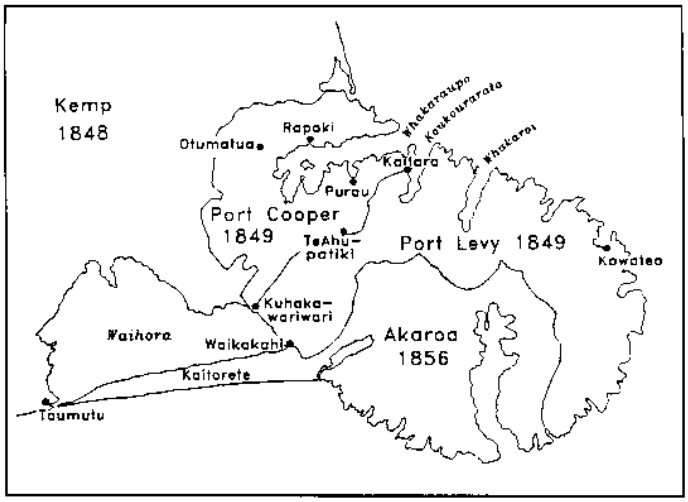

Figure 9.1 The Banks Peninsula purchases 1849-1856.

The transaction of 2 August 1838

9.3.2 Just before leaving Port Cooper, Captain Langlois of the Cachalot entered into some sort of negotiations with local Maori. According to a deed dated 2 August 1838 and written in French, Langlois bought all of Banks Peninsula except tapu land or cemeteries from the leading Maori chiefs he found at Port Cooper. The original of this deed seems no longer to be extant, but copies were made.{FNREF|0-86472-060-2|9.3.2|2}

The deed states that Langlois paid a deposit of 150 francs (œ6) in goods and promised to pay the remainder of the total price of 1000 francs (œ40) on taking up possession. The signatories of the deed are hard to identify, as their names were not recorded very accurately. "Ch,gary", described in the deed and elsewhere as the king of the district, was known to British whalers as Jacky Lynx. He is described as one of the two principal men of Port Cooper in 1838 in Hempelman's Piraki Log, along with Tommy, who was probably the person who is recorded on the deed as "Repouin,i called Thomy". Because of the difficulties in identifying the Maori signatories, it is not possible to assert that they were the Maori who, in 1838, had the right to sell Banks Peninsula. Certainly, the whaling activities at Port Cooper attracted people from a wide area. However, those living in Akaroa in 1840 said that they had not been a party to the deed. And it seems very unlikely that the senior Ngai Tahu chiefs-Tuhawaiki, Patuki, Karetai and Taiaroa, for example-who lived further to the south, but who had rights to at least parts of Banks Peninsula, were consulted.

European versions of what took place when the deed was signed are dependent on Langlois' own testimony. There were no independent witnesses. The deed itself can be taken as representing Langlois' point of view. The Maori participants would not have been able to read a deed written in French and they never subsequently acknowledged this "sale". Iwikau, a leading chief and a refugee from Kaiapoi who was living on the peninsula after returning from captivity, stated categorically before a land commissioner in 1843 that he remembered Langlois being at Port Cooper in 1838 and that there had been no talk with Langlois of selling land at that time. In 1840, the Port Cooper chiefs also denied any such sale. At most, statements by Akaroa Maori can be interpreted as indicating that they thought the Port Cooper Maori had sold a small amount of land within Port Cooper to Langlois in 1838.{FNREF|0-86472-060-2|9.3.2|3} Some intelligent and responsible Frenchmen who were present on Banks Peninsula in 1840 were more sceptical: they felt that Langlois' "purchase" was very dubious indeed.{FNREF|0-86472-060-2|9.3.2|4} The deed existed, but whether it was a true record of an oral negotiation is unproved. Moreover, the deed indicated that the conveyance was not completed until payment of the balance of the price was made on taking up possession of the land.

French authority to buy: Maori authority to sell

9.3.3 When Langlois returned to France in May 1839, he sold his Banks Peninsula land rights to a group of French businessmen from the cities of Nantes and Bordeaux who formed a company known variously as the Nanto-Bordelaise Company or the French New Zealand Company. Langlois retained a substantial shareholding in the company. It was the company's aim to colonise the South Island of New Zealand and to undertake commercial activities there. The company had the active support of the

French government, which undertook to add the supervision of the new colony to the duties of the new man-of-war that was being sent out to New Zealand to oversee the French whaling fleet. Langlois was to return to New Zealand with the first settlers to complete his earlier sale and to buy up the rest of the South Island. The Nanto-Bordelaise Company, which found weaknesses in the 1838 deed, supplied Langlois with model deeds for the purchases he was to make on their behalf. The French businessmen and politicians hoped that these sales would lead to French sovereignty over the South Island.

9.3.4 By the time Langlois had obtained this financial and political backing in France, the Maori population of Banks Peninsula had increased, largely as the result of the return of Ngai Tahu captives from the North Island. By 1842, when the first detailed census took place, there were 339 Maori living on Banks Peninsula, including 212 at Port Levy, 72 at Akaroa, 40 at Port Cooper and 15 at Pigeon Bay. A number of these, particularly those at Port Levy, were members of Ngai Tuahuriri hapu from the abandoned settlement of Kaiapoi on the North Canterbury plains. On the peninsula itself, Whakaraupo was the traditional territory of Ngati Te Rakiwhakaputa and its sub-hapu, Ngati Wheke. Koukourarata was the home of Ngati Huikai and its sub-hapu, Ngai Tutehuarewa. Ngati Mako were centred on Wairewa, while Ngati Te Ruahikihiki territory extended from Taumutu across the southern part of the peninsula to the western side of Akaroa Harbour. The descendants of Te Raki Taurewa, Te Ake and Tutakahikura were to be found on Akaroa Harbour's northern and eastern shores.

Among the principal inhabitants of Banks Peninsula whose names one would expect to find on a valid land conveyance in 1840 were Hoani Papita Akaroa, Hakopa Te Ataotu, Pita Te Hori, Te Ikawera, Iwikau, Katata, Te Kauamo, Apetera Kautuanui, Arapata Koti, Moihi Manunuiakarae, Maopo, Heremaia Mautai, Tiemi Nohomutu, Parure, Piripi Te Puehu, Apera Pukenui, Hone Wetere Te Ruaparae, Werahiko Tamakeke, Hoani Timaru Tiakikai, Hone Tikao, Paora Taki, Paora Tau, Tuauau and Hoani Tukutuku. Of these chiefs, Iwikau was acknowledged to be the most influential, even though he was from Kaiapoi and not from Banks Peninsula itself. Important Ngai Tahu chiefs who lived further to the south also had claims to at least parts of Banks Peninsula. These included Tuhawaiki, Te Matenga Taiaroa, Karetai, Patuki, Kahupatiti, Matiaha Te Morehu [Tiramorehu] and Te Rehe.

The August 1840 land deals

9.3.5 Langlois left the French port of Rochefort in March 1840 and sailed for New Zealand in the Comte de Paris, a new French naval ship which was specially fitted out and leased to the Nanto-Bordelaise Company. On board were some 57 prospective colonists. The Comte de Paris reached Banks Peninsula in August 1840, coming to anchor in Pigeon Bay on 9 August. He was unaware that British sovereignty had been proclaimed over the South Island, that leading Ngai Tahu chiefs had signed the Treaty of Waitangi and that the British administration had declared that new European land purchases from the Maori were invalid. Langlois invited a number of Maori on board his ship, the Comte de Paris, to negotiate the sale of land. Both the French and the Maori later agreed that a land sale had been negotiated and that the Maori had signed a deed and received payment. Langlois explained his terms in English. A Nga Puhi named Tommy, who understood a little English, acted as interpreter.

Subsequent French and Maori interpretations of the amount of land paid for and sold as a result of these negotiations differed considerably. The Maori view-expressed by Iwikau, Tikao, Parure and Nga Mana-was that small areas of land had been paid for and sold in the northern bays of the peninsula: Te Pohue (Camp Bay) in Port Cooper, Kaihope in Port Levy, and Kokakongutungutu (Holmes Bay) in Pigeon Bay. Further land around these same harbours was also promised to the French on receipt of further payment. In addition, some land around the north-east shoreline of Akaroa Harbour was acknowledged by the Maori to have been sold by Iwikau. This land extended from Te Wharekakaho (Piper's Stream) to Takapuneke (Red House Bay). However, this was done without the participation of the leading inhabitants of this southern part of the peninsula who were angry at the deal reached by the chiefs who had assembled at Pigeon Bay. This part of the sale, then, was not conducted by the chiefs who had primary rights to the land in question.{FNREF|0-86472-060-2|9.3.5|5}

Deeds dated 11 and 12 August 1840

9.3.6 One French view of the negotiations is represented by two deeds which were signed by a wide range of leading Banks Peninsula chiefs from both the north (eg Nohomutu, Pukenui, Iwikau, Te Puehu, Te Kauamo, Te Hori, Te Ao, Jacky Lynx) and the south (eg Tuauau, Tikao, Parure, Mautai, Tamakeke) of the peninsula. These deeds were dated 11 and 12 August at Pigeon Bay.{FNREF|0-86472-060-2|9.3.6|6} The first of these documents conveyed the whole of Banks Peninsula to the French in return for a payment in goods. These goods are not listed, nor is their value specified, although it was acknowledged to be greater than the 850 francs (œ34) required for completion of the 1838 deal. The western boundary of the area sold was said to be from Double Corner (the mouth of the Waipara River) southwards to Sandy Corner. The 160 Maori (men, women and children) with land rights to Banks Peninsula are each guaranteed 10 acres of land near a French settlement and 20 square metres within a settlement. The second document conveyed a much greater area of land, extending from the latitude of Kaikoura in the north (given as 42" 20' S) to that of Te Waiteruati (present-day Temuka, 44" 45' S.), and from the east coast to the west coast. The price was given as 120,000 francs (œ4800), payable in five instalments. The first instalment of 8000 francs (œ320), in specified goods, is to be paid at Akaroa. The balance is to be paid, in specified goods, at two-year intervals and in equal amounts over a period of 10 years (ie five payments of 22,400 francs or œ896 each). A receipt for the payment of the first instalment is dated 24 August 1840 at Akaroa. Reserves in perpetuity for the Maori are to be not less than six acres per person and must be within one league of the French settlements.

These two deeds were witnessed by members of the crew of Langlois' ship, the Comte de Paris. However, it is certain that the Maori signed blank sheets of paper, leaving it to Langlois to write down what was agreed upon.{FNREF|0-86472-060-2|9.3.6|7} Langlois wrote the deeds up at Akaroa some days later, but back-dated them to the time and place when he was still unaware of the declaration of British sovereignty and of the invalidity, in British eyes, of new land purchases from the Maori. At least one of the witnesses, Aimable Langlois, signed at a much later date than the one that features on the deed, for he was not at Pigeon Bay at that time. The same applies to at least one of the Maori signatories, Tuauau. It is not only Maori statements about the extent of the land which they acknowledged as paid for and sold that throw serious doubt on the faithfulness with which Langlois recorded the oral agreements. The two

deeds provide for Maori reserves in the immediate vicinity of, or even within, French settlements. On this point of detail, Iwikau was quite adamant: Langlois proposed such an arrangement, but it was rejected by the Maori negotiators.

9.3.7 Meanwhile, the naval ship which the French government had sent out to oversee the establishment of a colony and to supervise the French whaling fleet had reached New Zealand. The Aube, under Captain C F Lavaud, called first at the Bay of Islands, where it was discovered that the South Island had been placed under British sovereignty, that new European land purchases were not recognised by the British colonial authorities and earlier purchases were subject to confirmation by land commissioners. Lavaud sailed on to Banks Peninsula, preceded by a British warship, the Britomart, under Captain O Stanley. When Langlois received news that Lavaud and the Aube were at Akaroa, he left Pigeon Bay and sailed round to join him. Now that he was on the spot, Lavaud saw the original 1838 deed as deficient, in that it was not signed by any of the Akaroa Maori, whom he saw as belonging to a different tribe from those at Port Cooper. He was also aware of rival European land claims. Knowing that land deeds signed in August 1840 would not be seen as valid by the British authorities, Lavaud advised Langlois to draw up a new deed, back-dated to 1838.{FNREF|0-86472-060-2|9.3.7|8} Land negotiations were now being conducted to satisfy the British authorities rather than the Maori landowners. Lavaud and the Nanto-Bordelaise Company's representative, P J Belligny, in consultation with Lieutenant-Governor Hobson's representative, Captain Stanley, and two British magistrates, selected 3000 acres in Paka Ariki Bay and Takamatua, where the 57 colonists would live.

The 1838 deed renegotiated and back-dated

9.3.8 Langlois followed Lavaud's advice and obtained Maori signatures on a renegotiated back-dated 1838 deed of conveyance.{FNREF|0-86472-060-2|9.3.8|9} The signatories included leading chiefs from both the northern part of the peninsula (Te Kauamo, Te Puehu, Pukenui, Iwikau, Jacky Lynx, Pita Te Hori) and from Akaroa (Tikao, Tuauau, Mautai, Akaroa, Tamakeke, Parure). The senior members of the tribe from Otakou and Murihiku (eg Tuhawaiki, Taiaroa, Karetai) were not present and did not sign. During the negotiations at Akaroa, Father Comte, a French Catholic missionary, acted as interpreter. Witnesses included three officers from Lavaud's ship, the Aube. This back-dated deed purports to convey all of Banks Peninsula to Langlois, without specifying any boundary on the western side. Probably as a result of Maori objections to living next to French settlements, an area of land was set aside as a Maori reserve. The reserve was to lie between the two shore whaling stations of Peraki and Oyshore (Goashore) on the southern coast of the peninsula, extending three miles inland. This was Ngati Te Ruahikihiki territory. The original purchase price of 1000 francs (œ40) has now became 6000 francs (œ240), and the goods to be paid over to the northern and southern peninsula Maori are itemised.

Despite the wording of the deed, other Frenchmen indicated that the negotiations which led to the back-dated deed involved the conveyance of rather less than the whole of Banks Peninsula. In addition to the land sold or promised to the French in Ports Cooper and Levy and Pigeon Bay, the Akaroa Maori now agreed to sell some land around Akaroa Harbour. According to Belligny, this meant "all the harbour apart from the tapu lands in which the properties owned by British people are

included".{FNREF|0-86472-060-2|9.3.8|10} The Akaroa Maori view was that they had sold "the land at Akaroa, situated between Point Te Kau and a stream called Kaitangatu [Kaitangata], and extending back to the tops of the mountains at Akaroa".{FNREF|0-86472-060-2|9.3.8|11} Kaitangata is the mouth of Pakaiariki (Aylmer's Stream). Point Te Kau is now unknown, but was perhaps a point between Takamatua and Kakakaiau (Robinson's Bay). This was the land initially occupied by the French colonists. The difference between this Maori view and Belligny's can be accounted for in terms of the French pattern of occupation. While more land around the harbour might be seen as promised to the French, occupation as well as payment would be needed, in Maori eyes, for the sale to be complete. And further occupation of land might well require further payment.

Akaroa, 1841-1845

9.3.9 When the Nanto-Bordelaise Company discovered that British sovereignty had been declared over the South Island, it sent out no more settlers. Its agent and its colonists at Akaroa were virtually abandoned. Belligny's bills of exchange were not honoured by the company back in France, where one of its main shareholders, Balguerie and Company, went into liquidation. Through the protection of the French naval officer at Akaroa and good relations with the British colonial administration, Belligny was nevertheless able to promote the Nanto-Bordelaise Company's interests on Banks Peninsula at the expense of those of rival European land claimants, notably Hempelman. At some point, the Nanto-Bordelaise Company came to terms with E Cafler and J Rateau, two Frenchmen who had also "bought" Banks Peninsula.{FNREF|0-86472-060-2|9.3.9|12} Cafler and Rateau bought the title of Captain G T Clayton, who had made his purchases from the leading Onuku (Akaroa) chief, Tuauau, in 1837. Rateau was given a one-tenth share in the Nanto-Bordelaise Company's land, while Cafler's interest seems to have been bought out, at least in part, through a land deal in the Bay of Islands. Although claims based on Clayton's purchases were not allowed by the land commissioners, the combination of Langlois' 1838 "purchase" from the Port Cooper Maori and of Clayton's 1837 "purchases" from the principal chief of Onuku presented a stronger case that was never tested in court: the combined Maori sellers were more representative of those with land rights to Banks Peninsula at that time.

In September 1841, Governor Hobson visited Akaroa and held discussions with Lavaud and Belligny. He then wrote to London, to Lord Stanley, secretary of state for the colonies, suggesting that the French be given the same privileges as the New Zealand Company. After consulting widely, Lord Stanley agreed to this proposal in July 1842.{FNREF|0-86472-060-2|9.3.9|13} This meant that, provided its land claims were substantiated, the Nanto-Bordelaise Company would be awarded a Crown grant of four acres of land for every pound sterling spent, not only on land purchases from the Maori, but also on sending out its settlers, erecting public buildings, surveying and other tasks required by a colonising venture.{FNREF|0-86472-060-2|9.3.9|14} Belligny was invited to substantiate the Nanto-Bordelaise Company's land claim.

Belligny presented the company's case before Land Commissioner E L Godfrey at a hearing at Akaroa in August 1843.{FNREF|0-86472-060-2|9.3.9|15} Depositions were taken at Akaroa from Tikao, Parure, Nga Mana, Tuauau and Iwikau, as well as from two French settlers, J C,bert and G Fleuret. Godfrey then went on to Otakou

where Tuhawaiki told him that he had not been a party to the sale of Banks Peninsula to the French and would not give his consent until he received payment. The land commission report concluded from all the evidence that no sale had been proved in 1838. The Maori had admitted the sale to Langlois in August 1840 of specific areas of land (Te Pohue at Port Cooper, Kokaihope at Port Levy, Kokakongutungutu at Pigeon Bay and about 400 acres at Akaroa between Te Kau Point and Kaitangata Stream) and had promised more land around these four harbours on receipt of further payment. Because this deal was undertaken after Governor Gipps' proclamation of 14 January 1840, the commissioners would have dismissed the case if it had been made by a private individual. But, because it was a company claim, they made no recommendation but simply recapitulated the evidence.

Like Godfrey, Belligny seems to have accepted on pragmatic grounds the Maori view of what had been effectively sold to the French. Captain A B,rard, who had replaced Lavaud at Akaroa as the commander of the French naval station, asked Edward Shortland to draw up a model deed of purchase in Maori and to provide him with a list of Maori with land rights on Banks Peninsula. Belligny asked Iwikau to provide him with a list of goods to be purchased by the French at Sydney and to be paid over to the Maori. The goods were bought in Sydney by Captain B,rard for 6000 francs (œ240) at the end of 1843. Payment was delayed by Belligny in the hope that the governor would come and give his official sanction to it. When there seemed to be no chance of this, Belligny decided to go ahead independently. Maori demands for more payments and threats to pillage Akaroa showed the weakness of the French colonists' position on the peninsula. Belligny hoped to make it more secure before his own departure and before that of B,rard's warship, the Rhin.

9.3.10 Some 400 Maori assembled at Akaroa in March in 1845. Two separate deeds were signed, in Maori, with accompanying maps, between Belligny and the Maori from the northern half of the peninsula and those from the southern half.{FNREF|0-86472-060-2|9.3.10|16} There is evidence that a show of force by the Rhin contributed to Maori acquiescence.{FNREF|0-86472-060-2|9.3.10|17} According to B,rard, the goods given in payment for the peninsula were substantial: those paid across for the northern half of the peninsula had a value of 15,000 francs (œ600), while those given for the southern half were valued at 23,000 francs (œ920), which roughly matches Belligny's total valuation of œ1485. In addition to the articles which B,rard had bought in Sydney, the remaining exchange items brought out by Langlois in 1840 were also distributed. Payment for the southern half of the peninsula included an 11 ton schooner built at Pigeon Bay. Cattle, a horse, agricultural tools, saws, guns and pistols were included among the items paid. In addition to the payments made in March 1845, Belligny promised further payments of œ100 per year for two years and œ50 per year for five years, making a total of œ450 promised but not paid.

Three very important Akaroa Maori declined to sign Belligny's deed on the grounds that it did not exclude from the sale the land being farmed by Rhodes, with whom they were associated. Because Belligny's deeds do not seem to have survived, it is difficult to be sure about some details of these negotiations. Nevertheless, it is clear that agreement was reached that the Maori would continue to live in the villages which they then occupied and that reserves of some sort were set aside. Belligny told Ngai Tahu that adjustments would be made if an official government investigation decided that the price or the reserves were insufficient. Belligny left Akaroa in April

1845 to return to France. According to the agreement he had just reached with Ngai Tahu, œ450 remained to be paid to them by the Nanto-Bordelaise Company.

British government intervention 1841-1849

9.3.11 As soon as it heard of the declaration of British sovereignty over New Zealand and of the consequent plight of its own nationals, the French government asked the British government to protect the rights of French landowners in New Zealand and received a reassuring reply early in 1841. Preliminary inquiries were made by the Nanto-Bordelaise Company to see if it could sell its land rights to the British New Zealand Company. But firstly it had to have those rights recognised by the British government. It was not, however, until 1844 that the Nanto-Bordelaise Company sent an official representative, G N MaillŠres, to London to establish its rights to Banks Peninsula (mistakenly believed to have an area of 30,000 acres) on the basis of total company expenditure on its colonisation project. At the Colonial Office, Lord Stanley proved sympathetic to the French company's claim.

The various documents produced by MaillŠres were examined by the Land and Emigration Office and by Lieutenant-Colonel Godfrey, the man who had examined the French claim as a land commissioner in New Zealand and who was now back in London. Godfrey reported that Ngai Tahu agreed that small quantities of land were already sold to the French and paid for, and that they would be very willing to sell most of Banks Peninsula (excluding their villages and cultivation grounds) for a small sum. Godfrey, of course, was unaware that Belligny had conducted further negotiations with Ngai Tahu in March 1845. The Land and Emigration Office was satisfied that the French company had spent œ11,685 (L3:II:93-108, 121-123).{FNREF|0-86472-060-2|9.3.11|18} At five shillings per acre, this would entitle the company to a maximum of 46,740 acres, but only 30,000 had been requested. On receiving these reports, Lord Stanley wrote to the incoming governor of New Zealand, Grey, instructing him to confirm any valid land purchases which the French had already made and to waive the Crown's right of pre-emption over any land on Banks Peninsula that was needed to bring the French company's validly purchased land up to 30,000 acres.{FNREF|0-86472-060-2|9.3.11|19} The Maori, who were seen as willing sellers, were, of course, to be paid compensation for any extra land which the French acquired through negotiation with them.

Grey, who was by no means a francophile, may well have deliberately prevaricated when he received these instructions, but he certainly encountered a real problem when he eventually went to Akaroa in 1848 and found that there was no longer a representative of the Nanto-Bordelaise Company there to negotiate with. In the meantime, and even though a Crown grant had not been issued, the Nanto-Bordelaise Company succeeded in selling its interests in Banks Peninsula land to the New Zealand Company. The final conveyance was made in London on 30 June 1849 for œ4500.{FNREF|0-86472-060-2|9.3.11|20} Land already sold or given by the Nanto-Bordelaise Company to individual settlers was excluded from the sale. Any further payments that needed to be made to the Maori became, according to the deed of conveyance, the responsibility of the New Zealand Company, as did any fees or expenses incurred in acquiring a Crown grant. The deed left open the possibility that the French company had a valid claim to more than 30,000 acres, for the French

negotiators had discovered their error concerning the area of Banks Peninsula. The British colonial secretary had declined to go beyond this figure, however.

Ngai Tahu's record of signing deeds with the French and accepting payment undoubtedly contributed to the impression formed among British officials that Ngai Tahu had gone quite some way towards relinquishing their rights over much of the peninsula. Just how far they had done so, and over what area, was not known.

Principal issues which emerge from the French purchases

9.3.12 That concludes Dr Tremewan's condensed version of the 1838, 1840 and 1845 French purchases. We now discuss the principal points which emerge, together with comments on them by the claimants and the Crown.

The 1838 and 1840 deeds

9.3.13 In our view these "agreements" were all fatally flawed.

(a) The original 2 August 1838 deed, prepared by Langlois in French, purported to purchase the whole of Banks Peninsula, except tapu land or urupa, from the leading chiefs he found at Port Cooper. How much, if any, of a deed in French the Ngai Tahu signatories understood must be very questionable. The principal chiefs at Akaroa in 1840 denied they were parties to the deed. Nor, it appears, were other leading chiefs such as Tuhawaiki, Patuki, Karetai and Taiaroa, who lived elsewhere but who claimed rights to parts of the peninsula, consulted. Belligny in 1840 accepted that it was defective.

(b) The first 1840 deed, dated 11 August, purported to sell the whole of Banks Peninsula and the second, of 12 August, a much greater area from Kaikoura in the north to present-day Temuka in the south, and from east to west coast. In fact Langlois obtained Ngai Tahu signatures to blank sheets of paper. He apparently undertook to later record what had been agreed. This he did several days later but back-dated the agreements. No reliance can be placed on documents so prepared and executed.

(c) The third document prepared by Langlois at Lavaud's instigation was a renegotiated version of the original 1838 agreement. It was negotiated with the Maori at Akaroa at the end of August or the beginning of September 1840, and back-dated 2 August 1838. As Dr Tremewan related:

Undertaken by Langlois on Lavaud's initiative and not his own, it was meant to bring the Akaroa Maori into the land purchase agreement and to convince the British authorities of the validity of the French claim to have bought Banks Peninsula in 1838. (T3:34)

That Lavaud felt uncomfortable about his initiative is evident from his letter of 3 September 1840 to the Nanto-Bordelaise Company, in which he said:

I confess to my shame, for it is dishonest, that it was necessary in order that in the eyes of the British authorities we have at least a semblance of right to the ownership

of the land at Akaroa, for me to make Mr Langlois understand that it was absolutely necessary to draw up a contract with the native chiefs of this area and to date it 2 August 1838. (T3:33){FNREF|0-86472-060-2|9.3.13|21}

Crown counsel submitted that the back-dating of the document, though deceptive, was not in breach of any law, citing in support an ancient 1584 English decision in Goddard's Case (1584) 2 Co Rep 4b: 76 ER 396, in which it was said:

A date is not of the substance of the deed. For although it want a date, or have a false date, or an impossible date such as the 30th of February, yet the deed is good.

Crown counsel, on the strength of this statement, submitted that if the deed were otherwise regular this factor would not vitiate it; but the rights of the French company would depend upon the application of the doctrine of pre-emption. As the back-dated deed was executed after the acquisition of British sovereignty over New Zealand it might not be recognised by the Crown, but Crown counsel claimed it was not an illegal transaction or nullity. It could therefore transfer title away from Ngai Tahu.

Mr Temm, for the claimants, submitted that the Crown had already conceded the making of the false date was for the purpose of deceiving the British authorities. As we have seen, Lavaud conceded to his superiors in France that his action was dishonest and intended to deceive the British authorities. Mr Temm characterised the document as a forgery, which he rightly defined as a false document known to the maker of the document to be false in any material particular and for the purpose that it shall be acted upon as genuine. As Mr Temm pointed out, in the deed in question the date was material because if the transaction took place before the proclamation of sovereignty the consequences would be very different from those that would flow if it had been made after that proclamation.

9.3.14 We agree with Mr Temm that the alteration was made for the purposes of deceiving the British authorities and it was made also with the intention that it be acted upon as genuine. The fact that a forgery fails in its purpose does not make it any less a forgery. While, as Mr Temm agreed, a deed which lacks a date can be effective, or a deed which has a mistaken date wrongly recorded without any intention to deceive can also be effective, a forgery is a nullity and any transaction that is based upon a forgery is invalid. Nothing that was said in Goddard's Case would suggest otherwise. In that case it appears that by mistake a deed was dated later than it was executed and delivered. It was not a case of deliberate falsification of the document for ulterior purposes. We have a clear view that the back-dated French deed was a legal nullity. It was procured and back-dated for the express purpose of deceiving the Crown officials, who it was hoped would accept and act on the document as genuine and correct on its face. In our opinion it cannot be invoked or relied on, as the Crown contended, as in some way passing title away from Ngai Tahu.

The Godfrey commission, 1843

9.3.15 At a hearing in Akaroa before Land Commissioner Colonel Godfrey in August 1843, Belligny presented the Nanto-Bordelaise case for its claim to all of Banks Peninsula with the "exception of the Bay of Hikuraki. Oihoa on the South and Sandy Beach, north of Port Cooper on the north" (L3:I:86){FNREF|0-86472-060-

2|9.3.15|22}, the "supposed contents" being 30,000 acres. In support of the company's claim Belligny submitted a copy of the back-dated 1838 deed. A copy of the deed is annexed to the commissioner's report (A31:5/A). As Dr Tremewan pointed out, the land commission report concluded from all the evidence, both Ngai Tahu and French, that no sale had been proved in 1838. But the commissioner found that various Ngai Tahu chiefs, whom he named, had admitted the sale to Captain Langlois in August 1840 of certain specific areas of land, being "about 400 acres" from "Point Tikau to a stream called Kaitangata and extending backwards to the top of the adjacent mountains" (L3:I:87){FNREF|0-86472-060-2|9.3.15|23}, and in addition land (area unknown) at Te Pohue at Port Cooper, Kokaihope at Port Levy and Kokakongutungutu at Pigeon Bay, and, that they had received goods worth œ234 in exchange. Despite these admissions by the Ngai Tahu chiefs who gave evidence, the commissioner would have found the transaction null and void because the purchase was made after the proclamation of 14 January 1840 forbidding such direct purchases. But because the British government had decided that the claim should be dealt with on the same basis as a British company claim, the commissioner made no recommendation but simply recapitulated the evidence (L3:I:87).{FNREF|0-86472-060-2|9.3.15|24}

The claimants' historian, Mr Evison, estimated that 150 acres, or perhaps more, was "sold" to the French at Pigeon Bay; an undefined area, perhaps 400 acres, at Port Levy, and at Port Cooper at most 600 acres-these being in addition to the 400 acres referred to by the Godfrey commission as being sold at Akaroa. Later, after considering Dr Tremewan's evidence (T3:44-46) of the probable location of "Point Tikau" (or "Te Kau") referred to in the commission report, Mr Evison agreed that a small prominence near the junction of French Bay and Children's Bay, referred to as Te Keo on an Akaroa museum map, was the likely location of Point Tikao. This location, he said, would give a foreshore length to the French block of some 1200 metres, and not about 500 metres as he had earlier suggested. This would mean, Mr Evison agreed, that Godfrey, in assessing the probable area at 400 acres, had underestimated the area (U10(d):1-9). We agree with this conclusion and have estimated on the basis of a plan included by Mr Evison (U10(d):4), that the more likely area was in the vicinity of 1700 acres. If this is added to the estimated areas for the three other locations at Pigeon Bay, and Ports Levy and Cooper of 1150 acres, we have a total estimate of some 2850 acres, say 3000 acres in round figures. We doubt if a more precise estimate can be made so long after the event.

We note that Commissioner Godfrey, while in London in 1845, had referred to him a variety of papers. These included the deeds of 11 and 12 August 1840, submitted to Lord Stanley by the Nanto-Bordelaise Company. After examining the dossier, Godfrey still came to the same conclusion he had in 1843, that the only authentic sale had occurred in August 1840, when specific pieces were sold and paid for. Godfrey was at the time unaware of the 1845 transactions which had taken place between Belligny and Ngai Tahu (T3:66).

The 1845 French "purchases"

9.3.16 These have been described by Dr Tremewan (9.3.10). It appears the French handed over goods worth about œ1485 in exchange for some Ngai Tahu signing two separate deeds, one for the northern half of the peninsula and the other for the

southern half. As Dr Tremewan noted, Belligny was perfectly aware that the payments might not satisfy the British authorities (T3:60). It is apparent that Belligny's 1845 purchases were made from mixed motives. In a letter dated 23 April 1845 from the Akaroa police magistrate, Robinson, to the superintendent at Wellington, Robinson wrote:

In reference to the land purchases of the Nanto Bordelaise Company, I am happy to inform you, that I have anticipated your wishes, both with respect to taking no official notice of the payment made by M. Belligny to the Natives, and also by cautioning him, that it would very probably prove a useless expenditure but that M. Belligny informed me, his only object was to redeem the promise, that he had made the natives, & to ensure the tranquillity of the French Settlers, after his departure, and that he was probably aware that it was not a final payment, but subject to the approval of the Governor. (T3:116){FNREF|0-86472-060-2|9.3.16|25}

In another letter to the superintendent on the same day Robinson stated:

M. Belligny admitted to me, as did the Commandant [B,rard], that the purchase was not according to the terms of the Proclamation, but said their only object was to ensure the safety and Tranquillity of the settlers, after the Departure of the Corvette, and M. Belligny-that the goods had been purchased & might as well be given to the natives, & that they had promised it and wished to keep their word. (T3:118){FNREF|0-86472-060-2|9.3.16|26}

The Crown submitted that Belligny's purchases in 1845 could reasonably be regarded by the Crown as valid in that it was effective to divest title from Ngai Tahu in respect of the lands to which they related. Under the doctrine of pre-emption, it was argued, title passed not to the French but to the Crown. But the Crown went on to say that the critical question-and one almost impossible to answer at the time-is how much land Ngai Tahu really agreed to sell in 1845 (X2:36). In view of this admission, it is difficult to see how the transaction could have the effect contended for by the Crown. But there are other compelling reasons for us finding, as we do, that the deeds cannot be relied on as having divested Ngai Tahu of ownership of Banks Peninsula:

- the deeds do not appear to have survived. No copy was produced to us and no one can say with any certainty what they contained;

- they lacked legal effect because they were made without any waiver by the Crown of its right of pre-emption;

- the sum of œ450 was to be paid by annual instalments over five years. These payments were never made; and

- at least three very important chiefs-Te Ruaparae and Akaroa of Ngati Irakehu and Mautai of Ngati Mako-refused to be parties to the transaction. (T3:55)

Despite these major impediments the Crown still felt able to submit to us that by 1845, the French had surely done enough to justify a substantial grant-perhaps more than 30,000 acres. The difficulty with this argument is that the 1838 and 1840 dealings in themselves did not confer any title or rights in the French, while the 1845

transactions are not evidenced by the deeds and, as we have indicated, were seriously, indeed fatally, flawed. We are left with the very limited sales of August 1840 which the Godfrey commission found to have been admitted by Ngai Tahu. Godfrey's estimate of 400 acres for the land at Akaroa sold to the French should be revised, as we have indicated, to some 1700 acres.

Lord Stanley awards 30,000 acres to the French

9.3.17 As Dr Tremewan explained, when France accepted the fact of British sovereignty over New Zealand it sought to obtain an assurance from London that the rights of the French settlers in New Zealand would be protected. It received a reassuring reply in 1841. Lord Stanley agreed in 1842 that, provided its claims were substantiated, the Nanto-Bordelaise Company would be awarded a Crown grant of four acres of land for every pound sterling spent, not only on land purchases from the Maori, but on sending out settlers and colonising expenditure incurred in New Zealand.

The Nanto-Bordelaise Company offered to sell its South Island interests to the New Zealand Company. It also appealed to the British government in 1844 to have its claims to Banks Peninsula recognised, erroneously estimating the size of the peninsula at 30,000 acres, when the real figure was more like 250,000 acres.

The Land and Emigration Office in London reported on 12 December 1844 that it was satisfied the French company had spent œ11,685 on its Banks Peninsula venture (L3:II:121-123).{FNREF|0-86472-060-2|9.3.17|27} At five shillings an acre this would entitle the company to a maximum of 46,740 acres, but only 30,000 had been requested. Colonel Godfrey's report came to hand on 2 July 1845. Five days later, 7 July 1845, Lord Stanley wrote to the incoming governor of New Zealand, George Grey, instructing him:

- to send Edward Shortland or another officer to Akaroa to confirm any valid land purchases made by the French;

- to waive the right of pre-emption over such additional land required to make up 30,000 acres after allowing for the land already purchased; and

- although not expressly stated, it is to be implied from Lord Stanley's instructions that Ngai Tahu were to be paid for any additional land required to be purchased to make up the 30,000 acres (L3:II:1-14).{FNREF|0-86472-060-2|9.3.17|28} This is accepted by Crown counsel, who added that the French could complete a purchase of up to 30,000 acres, but the British government did not assume that it had already occurred (X2:20).

Governor Grey did not act on these instructions. When he went to Akaroa three years later, in 1848, he found there was no longer a representative of the Nanto-Bordelaise Company with whom he could negotiate.

In 1849, although no Crown grant had been issued, the Nanto-Bordelaise Company succeeded in selling its interests in its now recognised claim to 30,000 acres at Banks Peninsula to the New Zealand Company. The colonial secretary, Earl Grey, had

previously denied an application to extend the award when the company realised that the peninsula consisted of more than 250,000 acres (L3:III:16).{FNREF|0-86472-060-2|9.3.17|29} Under the deed of conveyance of 30 June 1849, land already sold or given by the French company to individual settlers was excluded from the sale (T3:123-126).{FNREF|0-86472-060-2|9.3.17|30} The deed also provided that any further payment that needed to be made to Maori in respect of the land being sold became the responsibility of the New Zealand Company. With the signing of this deed the interest of the French company in Banks Peninsula was extinguished.

Findings on grievances nos 1, 2 and 3

9.3.18 We now consider the claimants' first three grievances which related to Lord Stanley's award of 30,000 acres to the French company. The grievances are:

1. That Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu.

2. That Ngai Tahu were not compensated for Lord Stanley's award.

3. That no reserves were provided for Ngai Tahu out of Lord Stanley's award. (W3)

The first grievance is clearly made out. There is no evidence before us that the Crown consulted Ngai Tahu before deciding to award 30,000 acres at Banks Peninsula to the French company. The British colonial secretary, Lord Stanley, did, however, instruct Governor Grey to send Shortland or another officer without delay to Akaroa to identify the land already purchased by the French and to facilitate the purchase of the balance required to make up the 30,000 acres. Grey failed to comply with these instructions. No representative was sent until Mantell unsuccessfully sought to purchase the Akaroa block in 1849. We have earlier estimated that the land the Godfrey commission found to have been purchased by the French company at Akaroa in August 1840 was probably of the order of 1700 acres, not 400 as estimated by Godfrey. Assuming this to be a reasonable estimate, some 28,300 acres remained to be purchased.

The tribunal is disposed to agree with the Crown historian Mr Armstrong's comment that Lord Stanley's award should be viewed as a solution to the political problems associated with the French presence on Banks Peninsula (R8:6/30:42).

As to the second grievance, there is no evidence that Ngai Tahu were ever paid for the 28,300 acres. We agree with Mr Armstrong that Belligny's payments in goods in 1845 cannot be viewed as having any relation to the "compensation" alluded to by Lord Stanley in his instructions to Grey. It had no relationship to the arrangement agreed upon in London (R8:42). Nor is there any evidence that any reserves were provided for Ngai Tahu out of Lord Stanley's award. The second and third grievances are accordingly also made out. We discuss the purchase of the Akaroa block later in this chapter (9.6) and will defer our formal findings until then.

Ngai Tahu Land Report

09 Banks Peninsula

9.4 The Crown Purchases

9.4. The Crown Purchases

9.4.1 As we have seen (8.4.7), on 10 June 1848 around 500 Ngai Tahu gathered at Akaroa to negotiate a purchase with Kemp. Charles Kettle, Kemp's surveyor, noted that:

Tikao, a native who lives on the western side of Akaroa and who appears to be an influential person from his superior intelligence ... (was interrogated by Kemp) with regard to the claim of the French company, and he very clearly stated that they (the natives) had sold the whole of the Peninsula to them and among all the natives present there was not a dissentient. (L3:I:77-78){FNREF|0-86472-060-2|9.4.1|31}

Kemp subsequently reported to Eyre that:

The Natives clearly admit to have sold the whole of Bank's Peninsula to the French company... I did not think it advisable on this account to enter into any arrangements with regard to the Reserves &tc, knowing also that the question was one at present pending between the English and French Govts. My impression is that no definite Reserves were made for them by the French Agent at the time of Sale, & that they continue to occupy the Cultivation Grounds they formerly did. (L9:II:424){FNREF|0-86472-060-2|9.4.1|32}

As we have seen, Kemp's deed map showed Banks Peninsula coloured green and bore the legend "The land coloured green is that acknowledged by the natives to have been

sold to the French Co". See fig 8.3

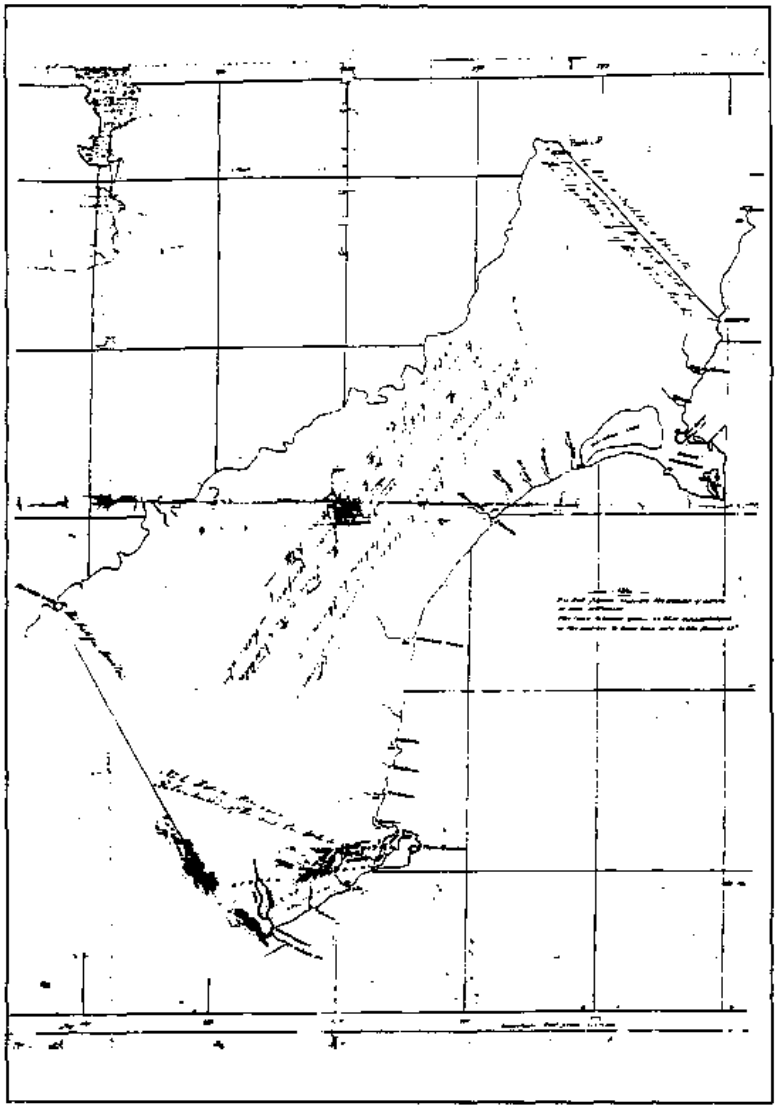

Figure 8.3: The Kemp deed map. On the original there is a blue border around the coast line, Banks Peninsula is coloured green and the Otakou purchase is coloured yellow. Courtesy of DOSLI, Wellington.

Mantell appeared to gather the same impression when he went south to lay out reserves for Ngai Tahu following the Kemp purchase.

Other evidence suggests that Kemp and Kettle may have gained the wrong impression from their discussions with Ngai Tahu. For instance William Fox, in a letter to Grey of 9 April 1849, said:

The Natives though they admit some sales, deny having received the stipulated payments, and profess to be in expectation of still receiving a large sum of money (œ5000) from the French Company. (L3:III:23){FNREF|0-86472-060-2|9.4.1|33}

Mantell reported on 28 November 1849 that Ngai Tahu were:

actuated partly by prejudice against the English ...and partly by a confident hope that M. de Belligny will still return and make them some enormous payment. (L3:III:29){FNREF|0-86472-060-2|9.4.1|34}

Certainly in 1843, as Commissioner Godfrey found, Ngai Tahu admitted to having sold no more than 3000 acres. In evidence before the Godfrey commission, Iwikau said that Ngai Tahu:

considered that the lands about Port Levy, Port Cooper and Akaroa and Pigeon Bay were Wakatapu'd, made sacred, to Captain Langlois, who promised to complete the purchase by payment of property and cattle to us upon his return, but we have not since received any payment. (L3:I:89){FNREF|0-86472-060-2|9.4.1|35}

We have no doubt that Kemp and Kettle genuinely believed they were being told by Ngai Tahu that they had sold the peninsula to the French. It is more likely Ngai Tahu were intending to convey the notion that some land had been provisionally sold and was set apart pending payment in full by the French.

Plans for a Canterbury settlement

9.4.2 In a letter of 9 April 1849 the New Zealand Company agent William Fox told Governor Grey of the Canterbury Association's plans to found a settlement around Port Cooper and the adjacent country. Some concern was expressed over the uncertainty surrounding the allocation of the 30,000 acres to the French. To facilitate the aspirations of the Canterbury Association, Fox requested the governor to issue a Crown grant for a block including the harbours of Port Cooper and Port Levy. He suggested that there was some doubt as to whether Banks Peninsula had been excluded from Kemp's purchase, and that Ngai Tahu now claimed that the peninsula had not been sold and that Port Cooper and Port Levy did not belong to the government. Fox advised the governor that there would be no great difficulty in providing a small additional payment for the peninsula, but he hoped Grey would:

be able to feel satisfied that Port Cooper and Port Levy, as well as the rest of Banks Peninsula, are comprised in the late purchase from the Natives. If your Excellency should think otherwise, I have then to request that the necessary steps may be taken to extinguish the Native title to the district in question. (L3:III:24){FNREF|0-86472-060-2|9.4.2|36}

On 27 April 1849 the civil secretary, Dillon, advised Fox that Governor Grey would facilitate the Canterbury Association by directing Lieutenant-Governor Eyre to procure such land as the association required at Port Cooper and Port Levy. As to whether Banks Peninsula was included in Kemp's purchase, Grey's:

own intention was that all the Native claims to land, with the exception of the reserves made to them, should be extinguished by the payment of œ2000; but if the lieutenant-governor should think that some small payment should, upon account of any misunderstanding, be still made to the Natives for the land now required at Port Cooper and Port Levy, I will direct him to consider the land so required as having been a reserve made upon behalf of the Natives, which they dispose of to the

Government for the use of the new settlement about to be established. (L3:III:25){FNREF|0-86472-060-2|9.4.2|37}

Grey was here saying that his INTENTION was that Banks Peninsula should have been included in the purchase, but if there was thought to be some misunderstanding then the land required should be treated as being a Maori reserve and a small payment made for it. Grey was refusing to recognise that Ngai Tahu had not sold the land. By some fiction the Ngai Tahu land was to be treated as a Maori reserve which Ngai Tahu were to agree to dispose of to the government.

Eyre instructs Mantell to purchase the peninsula

9.4.3 On 9 June 1849 Eyre instructed Domett to write to Mantell about his going down to Akaroa to decide on the reserves required for the Maori on Banks Peninsula and to extinguish their claims to the residue of the peninsula:

So far as they may not have been extinguished by the late purchase in the Middle Island. (L3:III:25).{FNREF|0-86472-060-2|9.4.3|38}

On 12 June Eyre gave Domett more detailed instructions to be conveyed to Mantell. Domett duly wrote to Mantell the following day, 13 June 1849. In this letter Mantell was told that:

You are aware that throughout the negotiations for the Tract of Country recently acquired in the Middle Island, that portion of Banks' Peninsula sold to the French was intentionally left out of consideration, because the Natives admitted that they had made a Sale to the French, and because the extent and position of the land thus sold was not defined for the same reasons no Reserves were set apart for the Natives on the occasion of your last visit within the limits of the Peninsula.

At the same time, however, the late Purchase included the whole of the Native right and title between the Ngatitoa Boundary and the Otago block excepting as regarded their own Reserves and the Block sold to the French. Now therefore that the Government are sending down a Surveyor to mark off the 30,000 acres which have been awarded to the French Company it will be necessary to set apart under your directions such Reserves within the limits of the Peninsula as may be necessary for the present or future wants of the Natives.

In making these Reserves you will be guided by the Instructions which were given to you when sent down to set apart the Reserves required for the Natives in the late purchase in the Middle Island. (G2:316){FNREF|0-86472-060-2|9.4.3|39}

Against the middle paragraph above Mantell noted:

The whole peninsula marked green on map accompanying Kemps deed was excepted. (G2:317){FNREF|0-86472-060-2|9.4.3|40}

Domett went on to say that as a result of the 30,000 acre block being assigned to the French and Mantell setting aside reserves for Ngai Tahu, there would then be three classes of land on the peninsula:

The Block assigned to the French-the Native Reserves, and the residue of the Peninsula which would come under the terms and conditions of the [Kemp] Deed of Sale. (G2:319){FNREF|0-86472-060-2|9.4.3|41}

Domett then went on to justify the payment of "some additional payment" to Ngai Tahu:

as it is possible that the Natives may have supposed that they had disposed of a larger block of land to the French than is awarded to them, and that on their arriving to take possession of it some additional payments might be made to them. His Excellency considers it will be only right to consider the extra quantity of land which will be acquired in the Peninsula by the limitation of the of the French Claim in the light of a Native Reserve which not being required by the natives themselves may be given up for the purposes of colonization upon a moderate compensation being given to the Native owners. (G2:318){FNREF|0-86472-060-2|9.4.3|42}

Mantell made the following marginal note against this passage:

Believe they consider the whole Peninsula to have been disposed of to the French & sold on rect. [receipt] of further payment. (G2:318){FNREF|0-86472-060-2|9.4.3|43}

As to the "moderate compensation" that was to be given to Ngai Tahu, Mantell was told:

it will be your duty to determine and award upon a full enquiry into the merits of the case upon the spot, and you will be furnished with funds by the New Zealand Company's principal agent for this purpose. (G2:319){FNREF|0-86472-060-2|9.4.3|44}

We have certain marginal notes which Mantell made on his copy of his instructions which we believe record verbal advice he received from Eyre. It is of interest that Mantell notes the belief that Ngai Tahu considered the whole peninsula to have been disposed of to the French and sold, subject to the receipt of further payment.

At the foot of page 4 of the letter Mantell recorded cryptic notes of queries addressed to Eyre and Eyre's replies:

Query:

In case of disturbance -Mr Watson (i.e. Police Magistrate at Akaroa)

In event of suspension of Negotiations shall I return? -By no means.

Godfrey's report -Given me for perusal

Lord Stanley's paper -ditto

What deeds or receipts for money? -As giving up lands reserved for them . . as completing purchase. (G2:319){FNREF|0-86472-060-2|9.4.3|45}

It is apparent that Mantell was well-briefed. He saw Commissioner Godfrey's report from which he would have learned that Godfrey had recognised very limited sales to the French in 1840. Indeed he had full notes of Godfrey's report in his notebook (G2:398).{FNREF|0-86472-060-2|9.4.3|46} He also saw Lord Stanley's 1845 instructions to Grey concerning the 30,000 acre award to the French. An extract is recorded in his notebook (G2:400).{FNREF|0-86472-060-2|9.4.3|47}

In addition to making notes on Domett's letter of instructions, Mantell made further notes summarising certain instructions from Eyre in his private memorandum book:

Verbal Inst:

Memorandum of Verbal Instructions from H E L G IN ANSWER TO ENQUIRIES RELATIVE TO WRITTEN INST. of June 13, 49. (G2:321){FNREF|0-86472-060-2|9.4.3|48} (emphasis in original)

Included are the following entries:

I believe they (the Natives) consider the whole Peninsula to have been disposed of to the French, and sold ON RECEIPT of further payment ... On this view compensation is equally due everywhere. (G2:321){FNREF|0-86472-060-2|9.4.3|49} (emphasis in original)

It appears from this passage that it is being recognised that "compensation" should be paid for all land acquired, that is, land sold to the French but for which Ngai Tahu had not been fully paid:

Have I [Mantell] anything to do with marking off the French claim.

'No'.

Survey of French Block? To commence when my business is done. (G2:322){FNREF|0-86472-060-2|9.4.3|50}

It seems clear from these notes that the surveying of the 30,000 acre block for the French was to be done by the surveyor independently of Mantell, and after he had finished his business. The surveyor's instructions were not produced in evidence. Nor, so far as we are aware, was the survey of the 30,000 acre block ever completed.

When I have fixed on a reserve the natives are not unlikely to prevent Survey &c? Perhaps when I have fixed the amt to be paid they thinking it too small may refuse to take it-? (G2:322){FNREF|0-86472-060-2|9.4.3|51}

Immediately following this passage is his note of the lieutenant-governor's instructions, written by Mantell in the Greek script:

Let them leave it. I must carry matters with a high hand. (G2:322-323){FNREF|0-86472-060-2|9.4.3|52}

This perhaps speaks for itself.

9.4.4 Mantell could be forgiven if he found difficulty with his instructions. Eyre, reflecting Grey's attitude, was reluctant to concede that Ngai Tahu had not sold all their land on the peninsula. Like Grey he resorted to the fiction that after provision was made for the 30,000 acres for the French, and reserves were set aside for Ngai Tahu, the balance (being most of the 260,000 acres) was to be treated as a fictional Maori reserve which "not being required by the natives themselves, may be given up for the purposes of colonization upon a moderate compensation being given to the Native owners". Eyre is at pains to avoid any suggestion that Mantell is to actually engage in the purchase from Ngai Tahu of their unsold lands on the peninsula.

Mantell was to say much later, in evidence before Chief Judge Fenton in 1868, that:

An inchoate title existed in a French Company and I was instructed to press this upon the Natives, and show them that the whole of their land was in peril. (A9:9:32){FNREF|0-86472-060-2|9.4.4|53}

And a little later he told the court of his instructions "to carry matters with a high hand", which he did, and to use:

the previous purchase of the Nanto-Bordelaise Company...to carry out my duty-that is, to get the land. The effect of this was the Natives were willing to sell, but the price to be paid was reduced. I succeeded in bringing them down towards the price fixed by the Government. (A9:9:33){FNREF|0-86472-060-2|9.4.4|54}

The Port Cooper block is purchased

9.4.5 Mantell, accompanied by the surveyor Thomas, arrived at Port Cooper on 2 July 1848. More than five weeks elapsed before Mantell succeeded in obtaining "signatures" to the Port Cooper deed. The only contemporary records of what took place during his negotiations are those of Mantell, principally his diary entries.

Mantell held a korero with Ngai Tahu at Port Cooper on 7 July. He noted in his diary that:

Old Jim & Co & Tukaha & Company from Rapaki came. Went on the hill by the tent with Thomas & an umbrella & held a korero. Jacky Leek Chigary & Tiakikai present. Old Jim demanded two millions in money & large reserves. Mr Tukaha 3 ships 3 small vessels 10 longboats 30 whaleboats 100 horses &c. I told them that I had no intention of discussing amount of payment, that when I had set apart reserves for them I should allot & distribute to them what additional payment to that already received I thought just. Of course after much more of this sort the froth of such negotiations nothing was done on this occasion. (G2:329){FNREF|0-86472-060-2|9.4.5|55}

We note that Mantell here refers to his payment being "additional" to that already received. This can only be a reference to earlier payments by the French and strongly suggests he was invoking earlier transactions between Ngai Tahu and the French as a bargaining factor.

On the following Monday, 9 July, Mantell met Ngai Tahu at Rapaki, where there was "the usual talk about two millions & so on and the usual answer"

(G2:331).{FNREF|0-86472-060-2|9.4.5|56} At a meeting at Purau on 11 July there was again "the usual talk and answer". The next day, 12 July, he was present at a further meeting at Rapaki:

At their urgent request told them that giving a small reserve at Purau and a large one at Rapaki I would give œ160 as final payment: of course this was rejected. Gave them time to consider. (G2:332){FNREF|0-86472-060-2|9.4.5|57}

Nohumutu indicated his intention of going round the peninsula to consult all the Maori.

Few, if any, discussions were held by Mantell with any Ngai Tahu over the next 12 days. Then on 25 July 1849 Mantell's diary records:

Natives Nohumutu &c came. After a little talk set out with Thomas & Carrington for Purau. After some disagreeable difficulties resolved to cut the knot so set Carrington to survey the reserve which he finished by sundown. reached Cav. bay shortly after dark. All gardens beyond reserve to be abandoned after harvesting the present crop. (G2:335-336){FNREF|0-86472-060-2|9.4.5|58}

We infer from this entry that Mantell failed to resolve the difficulties and went ahead without reaching agreement on the Purau reserve. Not even all gardens were reserved. The following day Mantell agreed to a firewood reserve-a detached bush called Motuhikarehu.

On 27 July Mantell was at Rapaki "with all the natives". There he marked out a reserve. He does not record whether this was done with the agreement of Ngai Tahu. Bad weather, including snow and hail, was experienced over the next few days. Carrington surveyed the reserve at Rapaki on 2 and 3 August 1849. Mantell arranged with Ngai Tahu for a visit to settle the day for payment of the purchase price and to see the boundaries the following Monday. On Saturday 4 August Mantell noted that his writing was "interrupted by Te Uki & Co who camped near the men's house & wasted my whole day" (G2:337-338).{FNREF|0-86472-060-2|9.4.5|59}

On 6 August Mantell returned to Rapaki where a reserve was marked off. Three days later, on 9 August, the local Ngai Tahu held a korero at which recipients were appointed for the five divisions of the block as the purchase money of œ200 was to be paid over the next day.

9.4.6 On 10 August 1849 the deed of purchase for Port Cooper was signed, but not before some opposition was encountered. The previous evening "Old Pokene" endeavoured to discuss his claims with Mantell, but Mantell told him he would hear him the next day in the presence of the assembled Ngai Tahu. Accordingly he called on Pokene to speak at the meeting on Friday. Pokene "tried to establish a claim to many places but failing began to threaten". (G2:339-340){FNREF|0-86472-060-2|9.4.6|60} At this point "Jim and the rest" went to Mantell and suggested that he:

Keep your money the land is yours but we cannot take the money now or a disturbance will ensue-Send for Mr Watson said one For a man of war said another

Wait till the Governor comes said a third till December said another. (G2:340){FNREF|0-86472-060-2|9.4.6|61}

Purporting to take up the December suggestion Mantell records that he wrote a codicil to the deed, which he had previously read twice to Ngai Tahu, to the effect that the money should be distributed in December. This, he noted, they did not like at all. At this point he left them, promising to return after lunch. On his return from lunch:

Old Jim soon came up & seemed rather fidgetty; presently he said When are you going to begin its getting late; Presently when Ive done my pipe; have you done quarrelling? Yes make haste the sun will be down soon: after a few whiffs lounged in & brought out the deed-assembled the natives-Read the deed Got the signatures and those of the witnesses took the deed in...Called in the elected receivers...and handed over the money... Everyone was satisfied & before night Every man woman & child claimant or not had got some portion of the spoil. (G2:341){FNREF|0-86472-060-2|9.4.6|62}

The terms of the deed of sale

9.4.7 Mantell had finally succeeded, after what he described as "long and tedious negotiations", in obtaining signatures to a deed of sale of Port Cooper and adjoining territory amounting to some 59,000 acres (appendix 2.3). The purchase price was œ200. In a report of 11 August 1849 to the colonial secretary he noted:

I have reserved for the Natives two portions of land; the first, 10 acres, more or less, at Purau, Acheron Bay; the second, 856 acres, more or less, at Rapaki and Taukahara. As this would at first sight, appear excessive, I may state that Mr. Carrington estimates the extent of arable land in it at less then sixty acres. I have further reserved for them the right of firewood in an isolated wood inland of the Purau Reserve, called Motuhikarehu. (L3:III:26){FNREF|0-86472-060-2|9.4.7|63}

In a further letter to the colonial secretary, also written on 11 August, Mantell again referred to the negotiations as being most protracted and tedious and went on to say:

I proceed next week to Port Levy.

It will be necessary to extinguish the Native title over the whole peninsula in the same manner as this place before the survey of the proposed grant to the Nanto-Bordelaise Company can be commenced; the balance, therefore, of the sum originally placed at my disposal will be far from adequate, and I would suggest that the Principal Agent of the New Zealand Company be requested to remit an additional amount of about œ300. (L3:III:27){FNREF|0-86472-060-2|9.4.7|64}

It is apparent from this passage that Mantell, in the light of his experience in the field, acknowledged that the Maori title was still in existence and that he would require additional funds to extinguish their title.

It is also apparent from Mantell's correspondence with his father that he had found the assignment a difficult one. Writing from Banks Peninsula on 16 August 1849, he told his father:

I have encountered great difficulties in my negotiations there [Port Cooper] partly from the difficulty of making the natives comprehend what I could not understand myself. (T2:24){FNREF|0-86472-060-2|9.4.7|65}

This is an illuminating observation. It suggests to us that Mantell experienced difficulty with the instructions he received from Eyre that he was to regard the interest of Ngai Tahu as being one in "reserves" only, which were to be handed over in exchange for modest "compensation". It is apparent that at his first meeting on 7 July he took a rigid stand, indicating he did not intend to discuss the amount of payment and that he would be taking into account their payments from the French. He appears, by his own account, to have acted arbitrarily and unreasonably in marking off a mere nine or ten acres at Purau and requiring all gardens beyond the reserve to be abandoned after the crop was harvested. But by the end of his lengthy discussions with Ngai Tahu he had come to accept that they still had title to the land and it would have to be purchased, for which additional funds would be required. While he was delayed by unusually severe wintry conditions, nevertheless it took some five weeks to obtain Ngai Tahu signatures to the deed. It appears they bargained vigorously and at length, but finally agreed to accept what Mantell proposed.

9.4.8 On 5 September 1849 Domett wrote to Mantell on instructions from Lieutenant-Governor Eyre (G2:396).{FNREF|0-86472-060-2|9.4.8|66} Mantell was told:

- that the New Zealand Company was prepared to advance a further œ300 as requested by Mantell;

- that Governor Grey's "intention" had been that all the Maori claims to the land except their reserves and the land sold to the French should be extinguished by the payment of œ2000 for Kemp's purchase;

- that it was only because the Ngai Tahu reserves and the land sold to the French was not at the time (of Kemp's purchase) decided, that the government entertained the question of additional compensation at all;

- the French company after the last (1845) payment made by the French captain, disavowed and endeavoured to impress on Ngai Tahu that no future payment could be expected from them;

(We would comment here that this is contrary to the evidence that an additional œ450 would be paid to Ngai Tahu over a five year period.)

- that the English government did not appear to have contemplated that any such further payment would be required on account of their award of 30,000 acres;

(We note that this is also incorrect. It is clear from Lord Stanley's memorandum of 7 July 1845 that the French company was expected to purchase any additional land required to make up the 30,000 acres.)

- that Carrington the surveyor was not to be kept unemployed but should proceed to mark out the 30,000 acres according to the instructions he had received and which, it was said, had no reference to Ngai Tahu or to their reserves; and

- that he was to act upon his instructions and:

discard altogether any statement or application of the Natives, having reference to the Governor-in-Chief or causing delay in the adjustment, as Sir George Grey has given full directions on the subject. (G2:396){FNREF|0-86472-060-2|9.4.8|67}

It appears from this final directive that Mantell was being required to ignore any representation which Ngai Tahu might wish to make to the governor or which might delay the "adjustment". Grey, it appears, had given his final word.

Domett wrote a further letter to Mantell on behalf of Eyre on 19 September 1849. He stressed the lieutenant- governor's concern that Mantell should procure the necessary cession from Ngai Tahu as economically as possible as:

the Natives have already been so well compensated for their claims generally that they could only anticipate the additional payments now making as a matter of grace, arising out of the unsettled state in which the French claim was, at the time the purchase was made by Mr Kemp, and in satisfaction of any equitable claims, upon their resigning those portions of the Peninsula required by the Company, but not included in Mr Kemp's purchase or in the French Claim. (A31:6/c:3){FNREF|0-86472-060-2|9.4.8|68}

We would observe that, apart from some of these instructions from Eyre being plainly wrong, they were designed to reinforce Eyre's earlier instructions setting up the fiction that the lands on Banks Peninsula not sold to the French were in some way to be regarded as Maori "reserves".

Moreover, it was said that because Ngai Tahu had already been so well compensated, the additional payments were being made as a matter of grace only. In short, Ngai Tahu had no right to be paid for their land not sold to the French. Perhaps the most disturbing feature was Eyre's injunction to Mantell that he disregard entirely any representations which Ngai Tahu might wish to make to Governor Grey, or indeed which might delay Mantell in completing his acquisition of the land.

The Port Levy block is purchased

9.4.9 As a result of these further instructions from Eyre, Mantell was acting under even tighter constraints (and certain false premises) than he had been at Port Cooper. These were reflected in the dictatorial stance which he assumed in his dealings with Ngai Tahu. As a consequence, as the Ward report noted, the "proceedings were at least as acrimonious and even more devisive than at Port Cooper" (T1:187).

Mantell moved to Koukourarata (Port Levy) on 15 August 1849. That evening a party of Ngai Tahu, including Apera Pukenui who claimed to be the principal chief there, had a long talk with Mantell about the land from Kaituna to Flea Bay. They demanded:

Reserves at P. Levi, Pigeon Bay & Kawatea, commonly called Okain's bay & œ500 for Eastern & œ500 for Western part of block. (G2:348){FNREF|0-86472-060-2|9.4.9|69}

On 21 August the party set out in the rain to see where a reserve was wanted at Pigeon Bay:

Reaching the grave of Tikao's child Puke. [Apera Pukenui] said a piece there might be resd of according to what he pointed out about 80 acres the other cultivations & kaikas to be abandoned in 2 or 4 years time-He then requested to know what wd be the amount of final payment, from Kaituna to Fly Bay-I said œ300. Of course he was dissatisfied having demanded œ1000. (G2:351-352){FNREF|0-86472-060-2|9.4.9|70}

At Apera's request Mantell went to his kaika on 25 August to hear from Tamakeke. According to Mantell, Tamakeke spoke for some two hours:

mostly in abuse of my award of œ300. praising the French & abusing the English. (G2:356){FNREF|0-86472-060-2|9.4.9|71}

Mantell noted Tamakeke as also saying:

About the boundaries. because formerly sold to French now you take all.

I intend to keep some for the French, if they do return (?) for myself & my children-

This side for you that for the French or me.

Because you are here you say that you have the tikaka of the ground

Not so-

œ1000 or none.

Explained again French payment. (G1:394){FNREF|0-86472-060-2|9.4.9|72}

It is clear from these passages that Mantell had been relying heavily on the French purchases in his bargaining with Ngai Tahu.

That evening Apera Pukenui and Pohata saw Mantell and tried to induce him to "accede to their terms 1000" (G2:358).{FNREF|0-86472-060-2|9.4.9|73}

Four days later, on 29 August, further discussions took place. Mantell was told that:

the people generally are anxious to close the business lest Topi and Taiaroa should come & seize all. (G2:361){FNREF|0-86472-060-2|9.4.9|74}

In the evening Mantell talked further with Pukenui, who said he wished to see Sir George Grey to bind him to his promises of February 1848. To which Mantell responded:

The money is an after consideration-you imagine it will be increased, I can assure you that I expect no such result. As to the land that is already the property of the Govt. owing to my having made an award. If you like to return the money the Govr. will

praise your conscientiousness &c. He seemed rather astonished & wished to call the rest in to hear me-this I deferred. (G2:362){FNREF|0-86472-060-2|9.4.9|75}

Mantell's reference to his having "made an award" is presumably a reference to his earlier advice to Ngai Tahu that œ300 only would be paid for the Port Levy block. His statement that the land was "already the property of the Govt." was false. Even if it was officially regarded as a fictional "reserve" it was nonetheless Ngai Tahu property. It is difficult to construe these comments of Mantell as other than intimidatory.

The next day the discussion continued and Mantell repeated his reliance on the French purchases and stressed the non-negotiability of his "award":

Abel [Apera Pukenui] then spoke & next Tamakeke who again said that unless the sum demanded were given he would keep his land & so forth. After he had done I asked if anyone else had anything to say. Replied that they all agreed with Tamakeke. I then told them to listen to me. You talk about pupuri te wenua how can such language apply to land for which payment has already been given. When I came here my first care was to set apart & have surveyed reserves for you that you might not be driven out of the land. As to the money which I have awarded, I shall not increase it because it is what I think just so I see no reason for exceeding the amount of œ300 on which I have decided. This money you can take or not the title to the land will none the less belong to the Governor. Never mind the money let me take care of you. If tomorrow is a fine day I shall direct Mr Carrington to begin the survey of your reserve. You have said the survey shall not proceed until I have assented to your terms. This is foolish, if you really prevent the survey the boundaries of your land will be vague & undefined and will most probably be narrowed. (G2:362-363){FNREF|0-86472-060-2|9.4.9|76}

Mantell's blustering and threatening conduct must have made it clear to Ngai Tahu that he was not willing to negotiate an agreement.

Shortly thereafter Tamakeke, Maopo and Pohau of Ngati Irakehu and Ngati Moki hapu left. They had an interest in the southern part of the Port Levy block, south of the main line of the hills. Ngai Tuahuriri, from Kaiapoi, had already withdrawn from the proceedings (T1:189).

By now, however, Pukenui was worn down and prepared to accede to Mantell's terms. His dispirited remarks to Mantell are revealing of his state of mind:

he said this is my tikaka-if you will consent let the survey commence tomorrow morning. I accede to your terms. I wanted the other 200 to distribute to those people to enable them to pay their debts but now I trouble myself no more about them. They say they will stop the survey. If they do theirs is the sin it can be surveyed at any time. We now care for no reserve at Pigeon Bay the grave can be combined with the churchyard or the bodies removed there when there is one there. I have no children to inherit from me nor have most of us. (G2:356){FNREF|0-86472-060-2|9.4.9|77}

The terms of the deed of sale

9.4.10 A deed was signed on 25 September 1849 and the purchase price of œ300 paid over. The Port Levy block thus acquired by the Crown was extensive. It went around the coast from Koukourata (Port Levy) to Pohatupa (Flea Bay) and then in an arc following the hill tops behind Akaroa Harbour to Waihora (Lake Ellesmere). Out of the 104,700 acres acquired by the Crown (as determined by DOSLI) one reserve only, containing 1361 acres at Port Levy, was agreed to by Mantell (appendix 2.4). In 1880, 300 acres was described as good arable land, the rest being rocky hillsides (M15:23).{FNREF|0-86472-060-2|9.4.10|78} In a brief letter of 27 September 1849, reporting the conclusion of his Port Levy negotiations, Mantell advised the colonial secretary he had guaranteed that a small grave at the head of Pigeon Bay, where an infant child of John Tikao was buried, should be undisturbed until a cemetery was consecrated there (L3:III:29).{FNREF|0-86472-060-2|9.4.10|79} We understand this was not subsequently respected (T1:190).

Some 21 chiefs signed the deed. In addition there were four proxy signatures, including known opponents such as Tamakeke. A significant number of those who participated in the earlier discussions and who had interests in the Port Levy block were not parties to the deed, having earlier withdrawn from the negotiations. Indeed, of the 28 chiefs named by Mantell in his journal in the course of his operations in Port Levy, only eight signed the deed (M26:39). But those eight included seven out of the nine principal claimants acknowledged by Mantell. The two principal chiefs who did not sign were Pohata Motunau and Tamakeke. (Mantell had Pukenui sign as proxy for them.) So the total of twenty one who signed the deed included seven out of the nine principal claimants, the balance of fourteen being signatures of those Mantell presumably considered minor claimants. Included among those who withdrew from the discussions were a number of legitimate claimants having interests in the Port Levy block (M26:53).

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9.5 Grievances Concerning the Purchase of the Port Cooper and Port Levy Blocks

9.5. Grievances Concerning the Purchase of the Port Cooper and Port Levy Blocks

Grievance no 4

9.5.1 We now consider the claimants' grievance no 4 which is:

That the Crown failed to protect Ngai Tahu against the land-purchasing pretensions of the French: that although Belligny's 1845 "deeds" were illegal and were not proved to be supported by the customary owners of the land, the Crown allowed these transactions to be used against Ngai Tahu by Commissioner Mantell in 1849 and subsequently by the Canterbury Association in denying Ngai Tahu their continued rights of occupation on Banks Peninsula. (W3)

We deal first with the complaint that the Crown failed to protect Ngai Tahu against the land purchasing pretensions of the French. Clearly the Crown could have done nothing about Captain Langlois' 1838 purchase as it took place before the Crown obtained sovereignty over New Zealand. Nor, in the circumstances surrounding the arrival of the French in July 1840, could it realistically have been expected to prevent the further transactions which took place that year. But it had taken action in January 1840, through Governor Gipps' proclamation, proscribing purchases direct from the Maori. Moreover, it appointed commissioners to investigate pre-1840 purchases and Commissioner Godfrey duly carried out an investigation in 1843 into the 1838 and 1840 transactions. It is apparent then that the Crown did in fact take steps to protect Ngai Tahu in respect of the early French transactions.

As to the 1845 French purchases, we have seen (9.3.16) that Robinson, the police magistrate, cautioned Belligny that his payments would "very probably prove a useless expenditure", and Belligny accepted that the purchase was not according to the proclamation but was done to secure the safety and tranquillity of the French settlers after the departure of the French corvette.

It is, however, correct, as the claimants alleged, that the Crown subsequently allowed these transactions to be used against Ngai Tahu by Mantell in 1849, and subsequently by the Canterbury Association, in denying Ngai Tahu their continued rights of occupation on Banks Peninsula.

Grievance no 5

9.5.2 In their fifth grievance the claimants said:

That the Crown sent Commissioner Mantell in 1849 to falsely assert that Banks Peninsula was already the property of the Crown, and to "carry matters with a high hand": or alternatively that Mantell having done these things the Crown did nothing to rectify them. (W3)

We have seen that Grey and Eyre, reflecting Grey's instructions, created a fiction that Ngai Tahu, following the Kemp purchase, held such land on the peninsula as had not been sold to the French or purchased by Kemp as Maori reserves. This device was resorted to because Governor Grey was unwilling to admit that Ngai Tahu still retained unextinguished customary title to land on Banks Peninsula. Mantell was placed in a difficult position by his instructions. He came to realise that Ngai Tahu still retained ownership of much of the peninsula. While Ngai Tahu may have agreed to sell much, if not all, of it to the French in 1845, Mantell was told they had yet to be paid fully for it. It is clear from the note he made at the time of his interview with Eyre that Mantell was told to "carry matters with a high hand". Mantell was later to confirm what his contemporaneous journal entries had already made clear, that he acted high-handedly, as if ownership had already passed to the Crown. At the same time he was to report after the Port Cooper transaction was completed that it would be necessary to extinguish Maori title over the whole peninsula, thereby conceding that Ngai Tahu still held customary title to part at least.

Finding on grievance no 5

9.5.3 The tribunal sustains the claimants' grievance no 5 that the Crown, in 1849, sent Mantell to Banks Peninsula to falsely assert that the peninsula was already the property of the Crown and to "carry matters with a high hand".

Grievances nos 6, 7 and 8

9.5.4 These are inter-related. The complaint in grievance no 6 is that at Port Cooper and Port Levy in 1849, Mantell conducted his proceedings as an award, under which matters of payment and Maori reserves were not negotiable. As a consequence, it is said that Ngai Tahu were denied a fair price and an adequate provision of land and other economic resources (including kai moana and fisheries) for their continued sustenance and prosperity.

As to the payment for Port Cooper

9.5.5 Mantell, as we have seen (9.4.5), made it clear early in his discussions that he had "no intention of discussing amount of payment" and when he had set aside reserves he would "allot and distribute to them what additional payment to that already received" (from the French) he "thought just". On 12 July he told Ngai Tahu he would give œ160 as a final payment; this he later increased to œ200. It is difficult to find that the purchase price was freely negotiated. Crown counsel conceded in his closing address that Mantell's negotiating stance on Banks Peninsula was to dictate terms to Ngai Tahu, and that he tried to use previous Ngai Tahu dealings with the French and the cloud on their title, as a means of reducing their asking price. But Mr Blanchard went on to suggest that whether this plan actually had that effect was debatable-at least in respect of Port Cooper (X2:24-25).

The tribunal has no doubt that, as the Crown conceded, Mantell adopted a dictatorial stance in his negotiations. This is apparent from his comments early in the discussions on 7 July. We do not believe the purchase price for the 59,000 acres was freely negotiated. For that reason it bore more the character of an award.

As to reserves at Port Cooper

9.5.6 It is clear from Mantell's diary record of 25 July 1849 (9.4.5) that Mantell fixed the reserve at Purau, "after some disagreeable difficulties", by arbitrarily instructing Carrington to lay off a mere nine acres, and to insist that all gardens beyond the reserve were to be abandoned. We infer that the disagreeable difficulties experienced by Mantell arose from the fact that Ngai Tahu sought a more extensive reserve than Mantell was prepared to concede.

On 27 July Mantell was present at Rapaki "with all the natives" and there marked out a reserve of 856 acres. But, as he later explained in case this should seem excessive, the surveyor Carrington estimated the extent of arable land at less than 60 acres. In addition he reserved a right to firewood in an isolated wood inland of the Purau reserve.

We do not have accurate information of how many Ngai Tahu were living in the Port Cooper block in 1849. In 1857 a full census of the Canterbury Maori reserves was taken. This showed a population of 72 at Rapaki, with 120 acres out of the 856 acres under cultivation-an area of less than two acres per person (Q8:35).{FNREF|0-86472-060-2|9.5.6|80} On a notional basis, if the steep rocky hillside country is taken into account, there were 11.8 acres available for the 72 Ngai Tahu. This was grossly inadequate, especially given the poor quality of most of the land.

As to payment for Port Levy

9.5.7 Apera Pukenui, the principal Port Levy chief, saw Mantell along with other Ngai Tahu on the evening of Mantell's arrival at Port Levy on 15 August. They requested reserves at Port Levy, Pigeon Bay and Kawatea (Okains Bay). They sought œ500 for each of the eastern and western parts of the Port Levy block (9.4.9).

Six days later, at Pigeon Bay, Mantell told Pukenui that the final payment for the block would be œ300. Pukenui was disappointed, having sought œ1000.

On 25 August Tamakeke spoke at length, mostly in criticism of Mantell's "award of œ300". Mantell justified his price on the basis of earlier French payments to Ngai Tahu. The same evening Pukenui and Pohata again tried without success to persuade Mantell to pay œ1000 (9.4.9).

When on 29 August Pukenui again raised the question of the purchase price and said he wanted to see Sir George Grey, Mantell told him he did not expect this to get them any increase. He claimed the land was already government property "owing to my having made an award [of œ300]" (G2:362).{FNREF|0-86472-060-2|9.5.7|81}

The following day, 30 August, Mantell, in response to Tamakeke's protests at Mantell's failure to agree to œ1000, again referred to the block as land for which payment had already been given (presumably by the French). He continued:

As to the money which I have awarded, I shall not increase...the amount of œ300 on which I have decided. (G2:363){FNREF|0-86472-060-2|9.5.7|82}

In the light of Mantell's totally uncompromising attitude, his reliance on previous payments, his characterisation of his payment as being no more than an award, it is not surprising the Crown has conceded that Mantell's stance was to dictate terms to Ngai Tahu. Indeed Crown counsel freely conceded that to the extent that Mantell succeeded in beating Ngai Tahu down in respect of price by unfair means, his actions were not consistent with the Crown's Treaty obligations (X2:25). This was clearly the case. Despite repeated efforts by Ngai Tahu, Mantell refused to move from the figure of œ300, which he and he alone had decided was all that should be paid. The purchase price was not freely negotiated. As he was later to tell Fenton's Native Land Court in 1868, "an inchoate title existed in a French Company, and I was instructed to press this upon the Natives, and show them that the whole of their land was in peril" (A9:9:32).{FNREF|0-86472-060-2|9.5.7|83} We are in no doubt that Mantell succeeded in beating Ngai Tahu down in respect of price by unfair means, to the extent that they were given no real choice as to the price.

As to reserves at Port Levy

9.5.8 The claimants said in their grievance no 7 that as a further consequence of the way in which Mantell conducted his proceedings as an award, Ngai Tahu had to abandon the Port Levy and Port Cooper blocks with the exception of the Port Levy, Purau and Rapaki reserves, which were quite inadequate for their needs. And in grievance no 8, that at the Port Levy proceedings Ngai Tahu expressed their unwillingness to sell Okains Bay, Kaituna Valley and part of Pigeon Bay, and expressed a wish for a larger reserve at Port Levy, but these were denied them by Mantell.

There is no dispute that Mantell unjustifiably declined the request of Ngai Tahu for reserves at Okains Bay and Pigeon Bay. While Pukenui purported to relinquish the claim for the Pigeon Bay reserve, it had in fact been made by Tikao who certainly did not withdraw it. Indeed, he was subsequently to complain direct to Grey on the matter. As to whether Mantell agreed to all that Ngai Tahu requested at Port Levy, the evidence is unclear. But he did admit in the Native Land Court in 1868 that:

This reserve (Port Levy) was lived upon at this time, and I marked off the smallest piece possible. (A9:9:32){FNREF|0-86472-060-2|9.5.8|84}

Nor is it disputed that the single reserve of 1361 acres granted out of the 120,000 acres acquired by the Crown was grossly inadequate. The 1857 census accorded a population of 97 at Port Levy, with 160 out of the 1361 acres under cultivation. An 1880 survey described the 1361 acres as having 300 acres of good arable land, "the rest being rocky hillside" (M15:23).{FNREF|0-86472-060-2|9.5.8|85} Thus there was a mere three acres of cultivatable land available per person, while the whole, if apportioned among 97, amounted to 14 acres per person. Having regard to the largely

poor nature of the land this reserve would be unlikely to provide even subsistence living.

In the light of the foregoing discussion we find that the claimants' grievances numbered 6, 7 and 8 are made out.

Grievance no 9

9.5.9 The complaint is that although Mantell's Port Levy deed was signed by only a minority of the chiefs present at the proceedings, and Mantell did not visit all the settlements in the block to ascertain the residents' wishes, the Crown enforced the deed as a legal conveyance of the whole block.

As we have seen, seven out of the nine principal chiefs on the Port Levy block signed the deed of purchase. In addition to the two leading chiefs who did not sign were a significant number of other chiefs of Ngai Tuahuriri, principally based at Kaiapoi, who withdrew from the discussions at a relatively early stage, and three (including Tamakeke) from the southern part of the Port Levy block. It is apparent that the leading chief, Pukenui, played a dominant role in the protracted discussions with Mantell. It was he who finally acceded to Mantell's terms. Clearly the Ngai Tahu people with interests in the block were divided among themselves as to whether they should accept Mantell's virtually non-negotiable conditions. However, all but two of the leading Port Levy chiefs chose to sign. That there was this divergence of opinion is a reflection of the fact that some interested Ngai Tahu were not prepared to bow to Mantell's unbending and dictatorial stance, while Pukenui and his fellow principal chiefs felt sufficiently under duress as to agree to sign. The basic flaw in the Port Levy deed was that there was no true agreement between the Crown and Ngai Tahu. There is, accordingly, much force in the claimants' grievance that the Crown enforced the deed as a legal conveyance against the residents' wishes.

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9.6 The Akaroa Purchase

9.6. The Akaroa Purchase

Mantell attempts to purchase the Akaroa block

9.6.1 On 27 September 1849 Mantell went to Akaroa to open discussions for the purchase of the Akaroa block. He had copies of reports by both Colonel Godfrey and Edward Shortland which indicated the limited nature of the French purchases. He also had copies of Robinson's letter reporting on the unofficial payments by the French. But in addition he had been told, as we have seen, in a letter from Domett of 5 September 1849, that it was understood that since the last payment made by the captain of the French man-of-war (in 1845), the French company had disavowed and attempted to persuade Ngai Tahu that no future payment could be expected from them. Nor, the letter went on to say, did the English government appear to have contemplated any further payments would be required in respect of Lord Stanley's award of 30,000 acres (9.4.8). Both these assertions were plainly wrong. The French had agreed (but failed) to pay a further œ450. And Lord Stanley clearly envisaged that the French would have to purchase and pay for such part of the 30,000 acres not already acquired by them from Ngai Tahu.

Mantell also had a further letter from Domett of 19 September, which we have earlier cited, in which he stressed that Ngai Tahu had already been "so well compensated for their claims generally" that they could only expect the additional payments now being made "as a matter of grace" arising out of the unsettled state of the French claim at the time of Kemp's purchase.

We have no contemporary account of Mantell's negotiations apart from his report of 28 November 1849 to the colonial secretary, Domett (L3:III:29).{FNREF|0-86472-060-2|9.6.1|86} This report made the following points:

- he had felt obliged to discontinue his negotiations for the extinction of Ngai Tahu's claims in the Akaroa and Wairewa district of Banks Peninsula;

- throughout the negotiations Ngai Tahu had "conducted themselves, as usual, in the most insolent and turbulent manner". (We note that he seemed unaware of his own dictatorial stance);

- Ngai Tahu were unwilling to sell an area on the south of the block which he identified in an accompanying sketch as comprising at least 15,000 acres (L3:III:28).{FNREF|0-86472-060-2|9.6.1|87} This land, they asserted, had always been excluded from previous purchases. But Mantell, after a careful review, felt

impelled to deny their claims to such a block, as the only exceptions from former sales he considered to have been were their residences and gardens;

- the award he made and communicated to Ngai Tahu was as follows:

RESERVES

1. At Akaroa, at Onuku, say 350 acres

2. At Wainui and Ohae, say 1200 acres

3. At Wairewa, at the Kaika, say 30 acres

4. At Wairewa, in one or two blocks around their gardens 300 acres

Making a total of, say 1880 acres

PAYMENT.

A sum of œ150. (L3:III:29){FNREF|0-86472-060-2|9.6.1|88}

- on Ngai Tahu's rejection of his award he decided the prudent course was to return to Wellington. Had he attempted a survey it would have been stopped by Ngai Tahu, and Carrington, who was engaged on the eastern boundary of the French company grant, would have been stopped had he tried to resume his survey; and

- the principal instigators were said to be Tikao, Tapu and Tamakeke who were actuated by a confident hope that Belligny would still return and make them some "enormous payment".

No further action was taken by the Crown to purchase Ngai Tahu's interest in the Akaroa block for some years. The immediate needs of the New Zealand Company, and in particular the Canterbury Association, had been met by the Port Cooper and Port Levy block purchases. Moreover, it transpired that the New Zealand Company in England had acquired all the rights and interests of the French company. It was now liable for any compensation to Ngai Tahu.

Canterbury Association activities on Banks Peninsula 1850-1856

9.6.2 The claimants had two grievances concerning the Canterbury Association. Their grievance no 10 was:

That the Crown under the Canterbury Association Lands Settlement Act 1850 assigned the whole of the peninsula to the Canterbury Association, although it had been clearly excluded from Kemp's purchase and had not been otherwise properly purchased from Ngai Tahu.

As a consequence, the claimants said in their grievance no 11:

That Ngai Tahu had to suffer European settlers moving on to their lands, for which they have never received adequate compensation. (W3)

9.6.3 In the course of our chapter on Kemp's purchase we have discussed the Canterbury Association Lands Settlement Act 1850 and its 1851 amendment (8.10.4). Under the 1850 Act the Canterbury Association was empowered, over a period of 10 years, to sell an area of some two and a half million acres of land in Canterbury, including the whole of Banks Peninsula with certain limited exceptions. By 1850 the Crown, albeit by dubious methods, had acquired the Port Cooper and Port Levy blocks, but not the Akaroa block. The 1850 Act therefore most seriously affected the Akaroa block, most of which remained vested in Ngai Tahu. But it also extended to the Port Cooper and Port Levy blocks in that it affected land which should have been, but was not, reserved to Ngai Tahu either because the reserves granted were insufficient, or because certain reserves requested had been wrongly refused by Mantell.

In 1851 Godley, the agent for the Canterbury Association, expressed surprise in a letter of 8 January, when told by the resident magistrate at Akaroa that a block of land at Akaroa and Wairewa was claimed by Ngai Tahu. He said it had always been understood that the Crown was in possession of the whole peninsula and the Canterbury Settlement Act was founded on that assumption (L3:III:55).{FNREF|0-86472-060-2|9.6.3|89}

In a further letter, Godley relied on the two deeds of purchase which the French obtained in 1845, the originals of which in 1851 he held. On the basis of these alleged sales he asserted that "the natives have no moral claim to what they have already disposed of for tolerable consideration" (T2:44).{FNREF|0-86472-060-2|9.6.3|90} He appeared unaware that these deeds were of no legal effect, nor that the balance of the purchase money was unpaid. He asserted his company's right to sell or let the land under the terms of the 1850 Imperial Act.

That others were equally ignorant is graphically demonstrated by a comment of Henry Sewell in his journal of 7 July 1853:

That the Native Policy (if policy it can be called) is contemptible I can bear witness from the little I see of it here...Simeon as Resident Magistrate is a sort of Native Protector, and all bargains with them should pass through his hands. When we were at Wellington together the other day Simeon asked for some instructions how to proceed. 'Oh', said the Civil Secretary, 'you can do whatever you like'-a pleasant responsibility.{FNREF|0-86472-060-2|9.6.3|91}

Earlier in the year Simeon had written to the colonial secretary stating that Ngai Tahu were in the habit of visiting him about money owing to them. Simeon confessed he could never understand what their enquiries were about (T2:47).{FNREF|0-86472-060-2|9.6.3|92}

In the meantime the Canterbury Association went ahead and granted licences over some of the land for stock-runs. Part of the land was sold. As we will see, W J W Hamilton found when he went to effect the purchase of the Akaroa block in 1856, the whole of the land he acquired from Ngai Tahu had:

long been let by the Crown, and occupied by cattle and sheep runs, and part of it positively sold as freehold. (L3:III:64){FNREF|0-86472-060-2|9.6.3|93}

9.6.4 We find then that the claimants' grievances regarding the effect of the Canterbury Lands Settlement Act 1850 are clearly made out in respect to the Akaroa block and to a much lesser extent in respect of the Port Cooper and Port Levy blocks. Their complaint that Ngai Tahu had to suffer Europeans moving on to such lands without any compensation to Ngai Tahu is also well founded.

9.6.5 When provincial government was established, W G Brittan became the commissioner of Crown land for the Canterbury province. He wrote to Mantell on 18 January 1854 saying that two parties of Maori, one living near Wainui, opposite the town of Akaroa, and the other near the head of Little River, had been to see him. They claimed the areas where they were living had never been bought from them and they refused to leave. They had a copy of the plan which Mantell prepared in 1849 which showed the land they wished to retain. Brittan sought Mantell's assistance (T2:53).{FNREF|0-86472-060-2|9.6.5|94} In his reply Mantell said that Ngai Tahu had no right to any land in the Akaroa and Wairewa block beyond that "awarded" by him (and marked on maps and reported at the time) but they had a right to the "awarded" sum of œ150 (T2:56).{FNREF|0-86472-060-2|9.6.5|95} It is clear that Mantell considered he had, subject to the payment of œ150, extinguished Ngai Tahu's title to the Akaroa block.

But a year later Mantell underwent a complete change of heart. Writing to Symonds on 21 August 1855 he referred to his having written to Symonds concerning "the yet unpurchased Block of Land at Akaroa & Wairewa" for which some five years earlier he had "made an offer... which the natives refused". After referring to the promises he made to Ngai Tahu, that schools and hospitals would be provided for them, he went on to say that "Of course the Akaroa natives are not bound by my award". He then proceeded to denounce the "sham of paternalism" and to suggest that Ngai Tahu were the victims of a government whose policy was one of selective morality based on the relative strength of the tribe rather than on justice (G2:408-413){FNREF|0-86472-060-2|9.6.5|96} Mantell also referred to news that, within the boundaries unsold, Ngai Tahu at Wainui and Wairewa had been turned off by people who had bought the land from the commissioner of Crown lands.

Commissioner Johnson's 1856 investigation

9.6.6 In 1856 the new governor, Browne, visited Akaroa as part of a tour of the southern settlements. There he met the local Maori. Some months after the governor's visit local Ngai Tahu reported to Commissioner J G Johnson that they had been threatened by the governor that they would, if necessary, be dispossessed by force. Johnson, deputy native commissioner in the Whangarei district, was fluent in Maori having lived for many years in Maori regions in the North Island. On 25 April 1856 he was instructed by Donald McLean, the chief land commissioner, to proceed to Port Cooper to implement Mantell's award for Akaroa. He was to "use the utmost firmness with the Natives in carrying out this award" (L3:III:56){FNREF|0-86472-060-2|9.6.6|97} The extent and nature of Mantell's award he was to obtain from the provincial land commissioner, Brittan. But Brittan was not well informed, as he appears to have told Johnson that Ngai Tahu should, in terms of the "award",

relinquish all their lands in Akaroa, receiving one reserve only of 500 acres at Onuku and œ150. This fell considerably short of Mantell's 1849 proposal to reserve 1880 acres at several locations. Not surprisingly Ngai Tahu at Akaroa rejected such a limited offer. This caused Johnson to more thoroughly research the background. As a result of his investigations and discussions with Ngai Tahu, he advised McLean on 7 June 1856:

The instructions which you furnished me with, are based upon the supposition that the Natives are in the occupation of land which they have ceded to the Crown, whereas upon a careful investigation of the case, it does not appear clear that the Crown has acquired any title to the land which it is sought to dispossess the Natives of, and their statements are so clear and satisfactory that they have never with their knowledge and consent sold all their possessions, that I am unable to adopt the course which I would under other circumstances feel it my duty to pursue, of compelling them to quit those lands, or in the event of their not doing so, abide the alternative which has been intimated to them. [forcible eviction] (L3:III:58){FNREF|0-86472-060-2|9.6.6|98}

9.6.7 McLean was impressed by Johnson's report. In a memorandum of 13 August 1856 he accepted that the question "had never been fairly settled " and that Ngai Tahu were "only demanding their just rights" (L3:III:61){FNREF|0-86472-060-2|9.6.7|99} At last a senior Crown official had come to recognise that Ngai Tahu retained "unquestionable rights...to the land over which their claims have not been extinguished" (L3:III:61).{FNREF|0-86472-060-2|9.6.7|100} He considered that an appropriate settlement would provide for reserves of 400 acres each at Onuku and between Tekau Bay and Wainui on the opposite side of the harbour together with a payment of œ150 to be paid to those Maori who did not participate in the "first" sale.

It will be noted that McLean was suggesting two reserves only amounting to 800 acres whereas Mantell had proposed 1880 acres in 1849.

Hamilton is instructed to purchase the Akaroa block

9.6.8 On 16 August 1856 McLean wrote to Hamilton, the collector of customs at Lyttelton (L3:III:62).{FNREF|0-86472-060-2|9.6.8|101} It is not entirely clear what instructions and information Hamilton received. He was requested to settle certain unextinguished claims at Akaroa and Kaiapoi. He appears to have been given a copy of McLean's memorandum of 13 August. A memorandum by Johnson of 14 August was also supplied. Unfortunately this has not so far been found. It undoubtedly contained views which influenced Hamilton when he came to negotiate the purchase. But we do know that Hamilton had Johnson's map with him (L3:III:59).{FNREF|0-86472-060-2|9.6.8|102}

Johnson's map is especially important as Hamilton failed either to describe in the deed of purchase the boundaries of the land sold by Ngai Tahu or to attach a map showing the boundaries. Mantell's Port Cooper and Port Levy purchases were marked off leaving three categories of land within the remaining block. These are described in the

Ward report as follows:

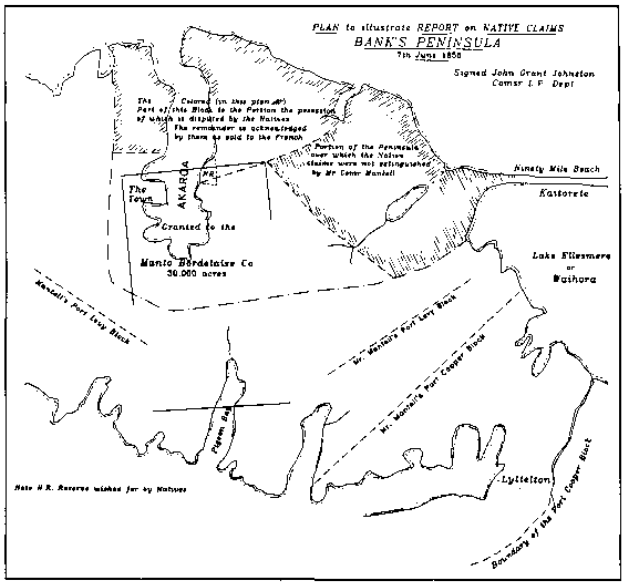

Figure 9.2: A copy of Johnson's map showing Ngai Tahu's understanding of the lands which Mantell had not purchased in 1849.

(I)The former French claim. There is an incomplete rectangle indicating its earlier intended location running back in a long block from the top of Akaroa Harbour to take in part of Pigeon Bay. On Johnson's map, it has been conveniently reshaped to take up more land around Akaroa Harbour. This portion is labelled "Granted to the Nanto Bordelaise Co. 30,000 acres". It is referred to elsewhere on the map as "acknowledged by them [i.e. Ngai Tahu] as sold to the French".

(II)Both sides of the harbour at the heads were included in a portion "the possession of which is disputed by the Natives".

(III)The land beyond the hills to the south west, and out to the coast, though away from Akaroa Harbour itself, had clearly been within the block that Mantell had unsuccessfully tried to acquire in 1849. This was now labelled "Portion of the Peninsula over which the native claims were not extinguished by Mr. Commr. Mantell".

Though the native reserve which Johnson proposed should be recognised on the south side was drawn in, the less contentious one on the north was not (L3:III:59). This map is of critical importance because the Deed that was subsequently drawn up for the transfer of the Akaroa Block to the Crown makes sense only if read in conjunction with the information the map contains. (T1:199)

We will be referring to this map (figure 9.2

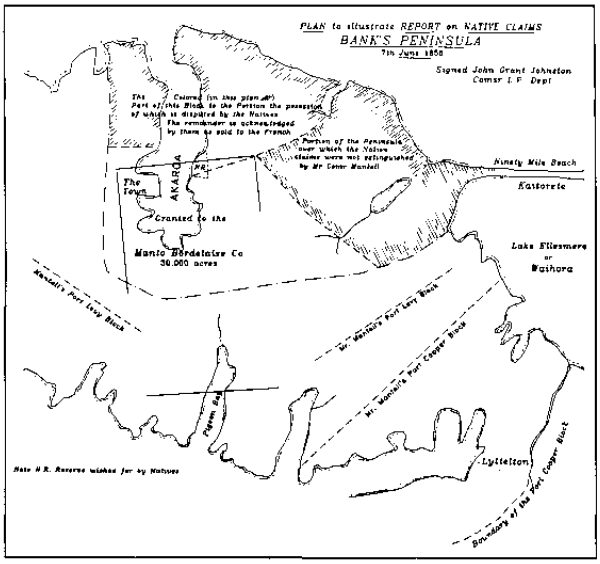

Figure 9.2: A copy of Johnson's map showing Ngai Tahu's understanding of the lands which Mantell had not purchased in 1849.

) when we discuss the boundaries of Hamilton's purchase.

9.6.9 Hamilton was examined at some length on his purchase of the Akaroa block 23 years after the event. The following account is drawn from his evidence to the Smith-Nairn commission on 20 May 1879 (A31:7A).{FNREF|0-86472-060-2|9.6.9|103} Hamilton arrived at Akaroa on 8 December 1856 accompanied by the Reverend Aldred as interpreter, as Hamilton had only a limited familiarity with the Maori language. On Tuesday some Ngai Tahu from Kaiapoi had not arrived so the korero was deferred until the next day. Early on at the meeting that day Ngai Tahu requested an additional reserve at Wairewa equal in size to the two reserves at Onuku and Wainui already agreed. Hamilton agreed to that immediately. Asked whether there was any discussion or bargaining about the price he responded:

No; there was no discussion. From the moment I said I would agree to the Little River Reserve there was no discussion. (A31:7A:62-63){FNREF|0-86472-060-2|9.6.9|104}

It appears the deed which he had signed was based on a draft supplied with his instructions from Auckland.

Asked whether the Europeans were occupying much, if not the whole, of the land before the government had bought it, he agreed they were there "before the final extinction of the claims had been made" (A31:7A:45).{FNREF|0-86472-060-2|9.6.9|105}

9.6.10 Hamilton was also examined in detail about the boundaries of his purchase. It was put to him that earlier in the day a Ngai Tahu witness Paurini:

has been telling us that Akaroa mentioned the boundaries to you, and that on that occasion, following the dotted line to the left side of the harbour & nearly parallel to the coast, he pointed out that what was on the north of that line was Europeans' land, and what was on the South belonged to natives. Have you any recollection of that? - None whatever.

All the Maoris, I may say, state that was mentioned by Akaroa. Are you prepared to say, as a matter of fact, that their recollection is wrong? -I have no recollection of any discussion whatever at Akaroa from the moment I conceded at once to their demand, that there should be a reserve at Little River. (A31:7A:50-51){FNREF|0-86472-060-2|9.6.10|106}

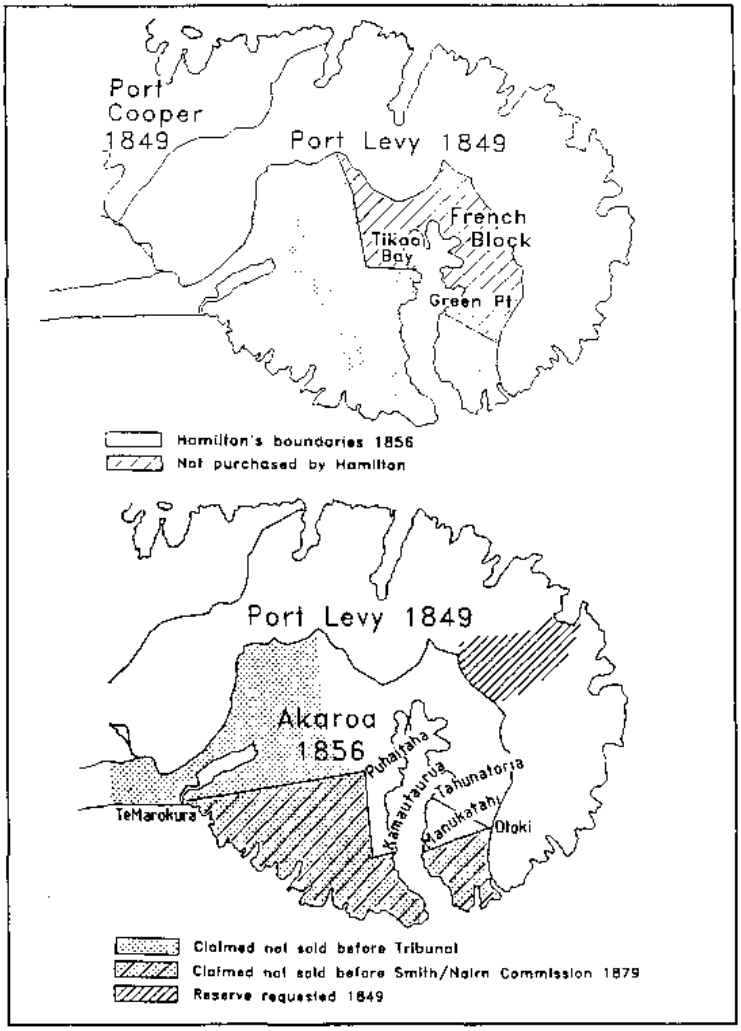

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

It is, however, clear that before the question of the Wairewa reserve was raised by Ngai Tahu that boundaries were discussed with Hamilton. On the very day the deed was signed (10 December 1856) Hamilton wrote a letter to the Canterbury Provincial Association secretary. He described a number of points on a boundary which he evidently understood divided the French block from the land he had purchased:

The Block extends from Waikakahi Stream (where Mr. Mantells Port Levy purchase ends) running up to and along the main ridge on the S.W. side of Akaroa Harbour to Tikao Bay, thence by the coast line round to the commencement of the ninety mile beach. It also includes on the East side of Akaroa Harbour a tract running up from near Mr. Carrington's survey pole somewhere about Green Point to and along the Main ridges Southwards to the Coast. (T1:203){FNREF|0-86472-060-2|9.6.10|107}

Hamilton's understanding of his purchase as reflected by this description is shown on

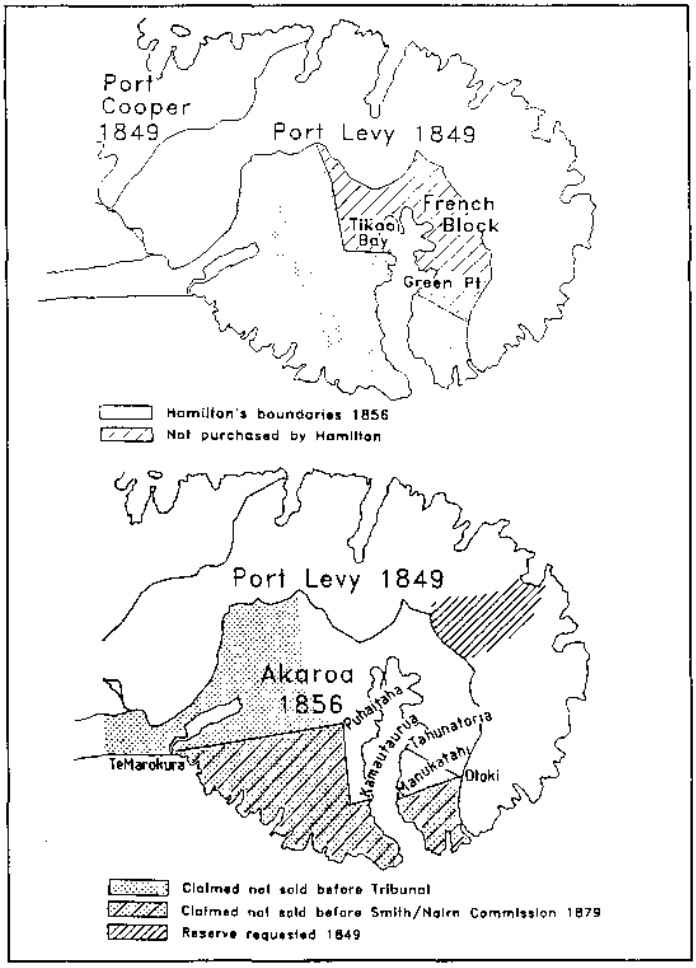

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figure 9.3.

It is clear from Hamilton's evidence before the Smith-Nairn commission that these boundaries were given to him by Ngai Tahu in the course of negotiations on the day of the sale. The following account is taken from Hamilton's evidence:

With reference to what Akaroa has stated, I feel confident that there was no discussion between him and me about boundaries from a letter I wrote to the Provincial Secretary the day the purchase was completed (Letter from witness to the Provincial Secretary, dated Akaroa, Wednesday, Decr. 10, 1856, produced.) I take this description of the boundaries, which I could only have had from the natives on the spot on the very day the deed was signed, and then the reservation of these three only pieces of their land being made to them, I take that as showing what the meaning of the rest of the deed is: that they have transferred all their lands; and at the time I would have been perfectly willing to have made any other reserves they named. (A31:7A:56-58){FNREF|0-86472-060-2|9.6.10|108}

By way of amplification Hamilton went on to say that the moment after the deed was signed they asked him to apply to the Wastelands Board for 400 acres of pasture at Wairewa in addition to the reserve he had set aside. He expressed his regret that they

had not made that demand to him at the time, because if they had made it before the deed was signed he would have been willing to agree to that also, but the moment they signed the deed the power was taken out of his hands (A31:7A:58).{FNREF|0-86472-060-2|9.6.10|109}

But, as there was no plan put into the deed and Maori were not shown any map or tracing, it is not surprising that there was misunderstanding. Several witnesses before the Smith-Nairn commission made reference to the boundaries. Some believed that extensive lands to the south of the line running from the ridge above Kamautaurua (Cape Three Points) down to the coast between Wairewa and the sea at Otukakou before joining Mantell's Port Levy boundary, remained unsold. It was said by some that this land was excluded from the sale to make provision for the numerous hapu members absent at the time.

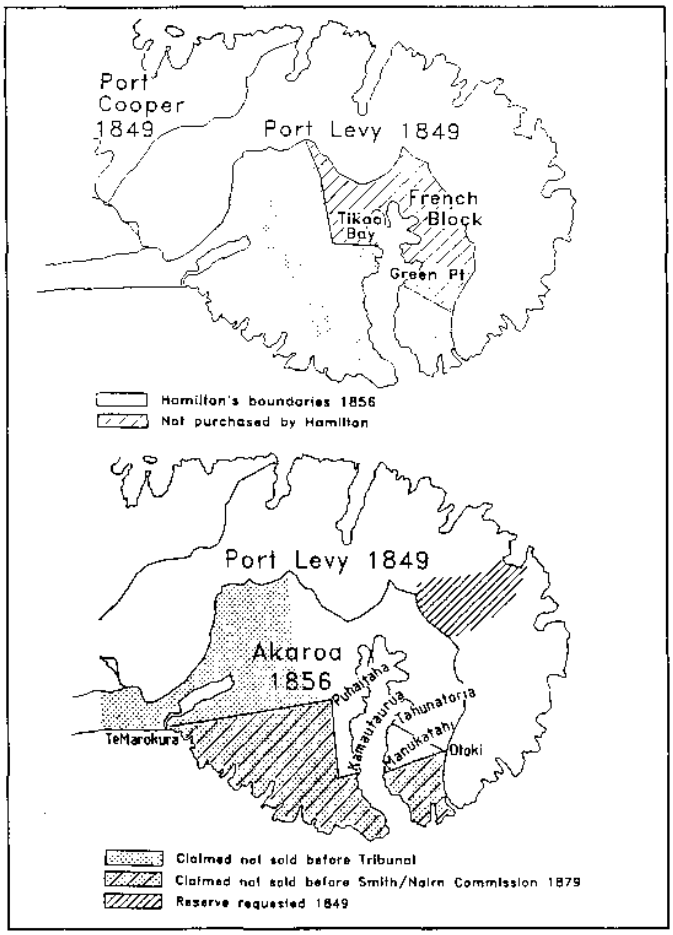

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

Figure 9.3 also shows Hoani Papita Akaroa's understanding of the Hamilton purchase. As Dr Tremewan, who prepared this map, observed, the three reserves provided by Hamilton (Onuku, Opukutahi and Wairewa) lie within the area understood to be sold. Hone Taupoki gave Manukatahi; while Henere Te Paro gave Tahunatoria as a boundary point. Dr Tremewan's source for these boundaries was the Smith-Nairn commission evidence 21, 63, 65 and 73.{FNREF|0-86472-060-2|9.6.10|110}

9.6.11 There is another important feature of the two maps prepared by Dr Tremewan. The first, showing Hamilton's understanding of his purchase, shows the area approximating to that in Johnson's map (figure 9.2

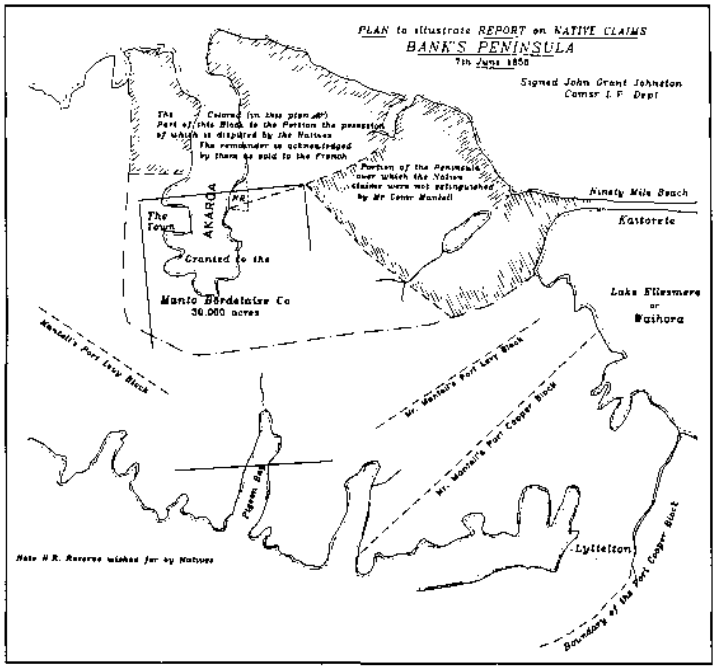

Figure 9.2: A copy of Johnson's map showing Ngai Tahu's understanding of the lands which Mantell had not purchased in 1849.

) as being the 30,000 acres granted to the French.

According to Johnson's notation, the imprecise rectangular block shown on his map was the portion "granted to the [Nanto] Bordelaise Co., 30,000 acres". And that it was "acknowledged by them (Ngai Tahu) as sold to the French".

This raises many questions.

- Who defined (in so far as it is defined) the 30,000 acres? Johnson? Ngai Tahu? Carrington? We simply do not know.

- How did it come about that Ngai Tahu acknowledged, if in fact they did, that they had sold so great an area to the French? When did they sell it? For years they had been waiting for Belligny to return to complete his purchase. Did Ngai Tahu have any comprehension that they were said to have admitted the sale of as much as 30,000 acres to the French?

We are unaware of any satisfactory answers to these questions.

When Hamilton went to Akaroa he seemed to think his mission was simply to implement the arrangement entered into by Johnson. He agreed to an additional reserve of 400 acres at Wairewa. Otherwise he appears, as figure 9.3

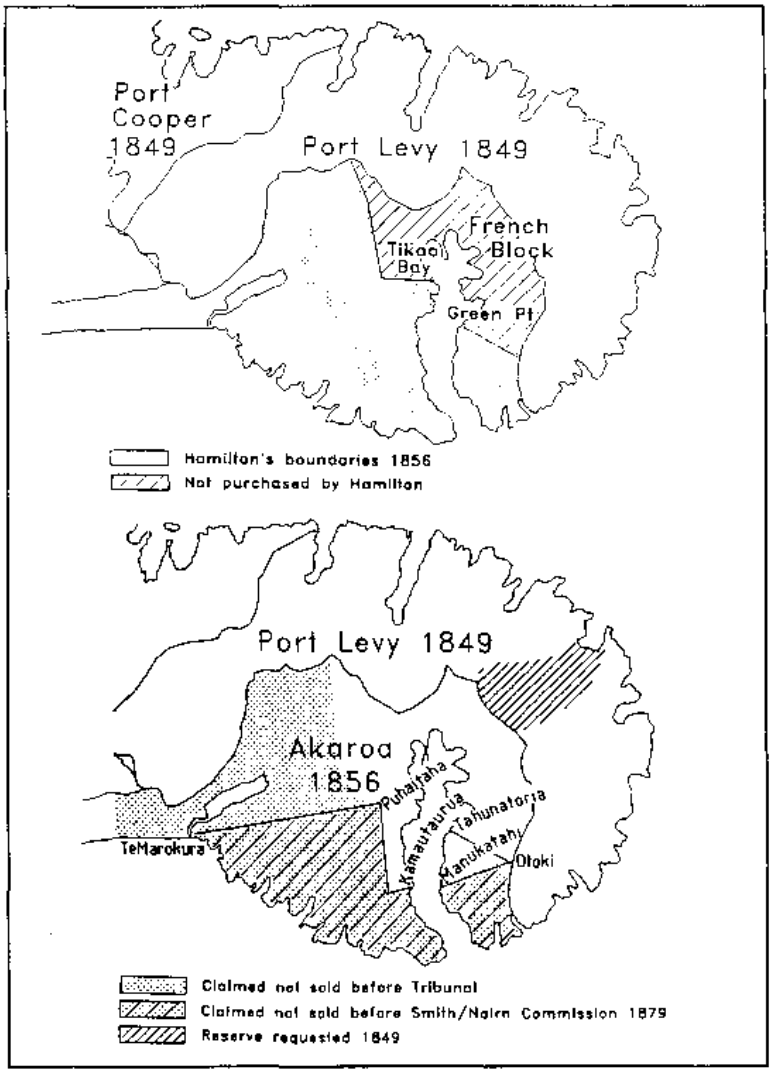

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

demonstrates, to have understood he was purchasing all the land Ngai Tahu then owned at Akaroa. This did not include the so-called French block, which he assumed, in the light of Johnson's map, was acknowledged by Ngai Tahu to have been sold to the French.

We have earlier discussed Ngai Tahu's grievances as to Lord Stanley's award of 30,000 acres to the French company and found (9.3.18) that the award was made without consulting Ngai Tahu and that, except as to some 1700 acres, it was not paid for.

9.6.12 Before considering the claimants' grievances concerning Hamilton's 1856 deed of purchase we should advert to certain allegations made to the Smith-Nairn commission concerning Hamilton's conduct of his negotiations. While these are not the subject of a formal grievance they were referred to by the claimants' historian Mr Evison.

Several witnesses before the Smith-Nairn commission testified that Hamilton had threatened to bring soldiers and that he put pressure on Ngai Tahu to accept settlement

by saying he would take the money to Murihiku. So far as we can ascertain no allegation was put to Hamilton by the Smith-Nairn commissioners that he was alleged to have threatened to bring soldiers (although, as we have noted, some such allegations were made in respect to an earlier visit by Governor Browne). But Hamilton was recalled on 16 March 1880 by the commission and the Maori charges were put to him. Hamilton repeatedly and strenuously denied this allegation saying, among other things, that he "never threatened to take the money to Murihiku, for I never knew where it was until a few months ago" (G2:624).{FNREF|0-86472-060-2|9.6.12|111} Whatever may be the truth of the matter, the allegations cannot, in our opinion, be regarded as proved.

Ngai Tahu Land Report

09 Banks Peninsula

9.7 Grievances Concerning the Akaroa Purchase

9.7. Grievances Concerning the Akaroa Purchase

9.7.1 These are as follows

12. That at Mantell's 1849 Akaroa Block proceedings Ngai Tahu asked to retain for their own use a substantial part of the Block comprising some 30,000 acres or more, including the southern part of the Peninsula and the whole Wairewa (Little River) basin, and in 1856 made a similar request to Hamilton, to which under Article 3 of the Treaty they were entitled; but this was wrongfully denied to them.

13. That under the terms of Hamilton's 1856 Deed only the "places (or areas) in dispute at Akaroa" were sold; but the Crown nevertheless with the exception of 1200 acres reserves enforced the forfeiture of the whole block.

14. That Hamilton's 1200 acres reserves and œ150 payment were manifestly inadequate as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa Block together with the absentees, and that Ngai Tahu suffered as a result.

15. That the Crown under the terms of Hamilton's Akaroa Deed unreasonably required the Ngai Tahu residents of the Block to provide for returning absentees as well as themselves from the œ150 and 1200 acres Hamilton had provided, and that both residents and returning absentees suffered privation as a result. (W3)

Grievance no 12

9.7.2 It is clear that in 1849 Ngai Tahu were unwilling to sell to Mantell a substantial part of the block comprising some 30,000 acres or more. This is evident from Mantell's report of his failure to reach agreement, and his accompanying map (9.6.1). There was also Ngai Tahu evidence before the Smith-Nairn commission 26 years after the event that they had excepted from the sale an area of some 30,000 acres, as shown

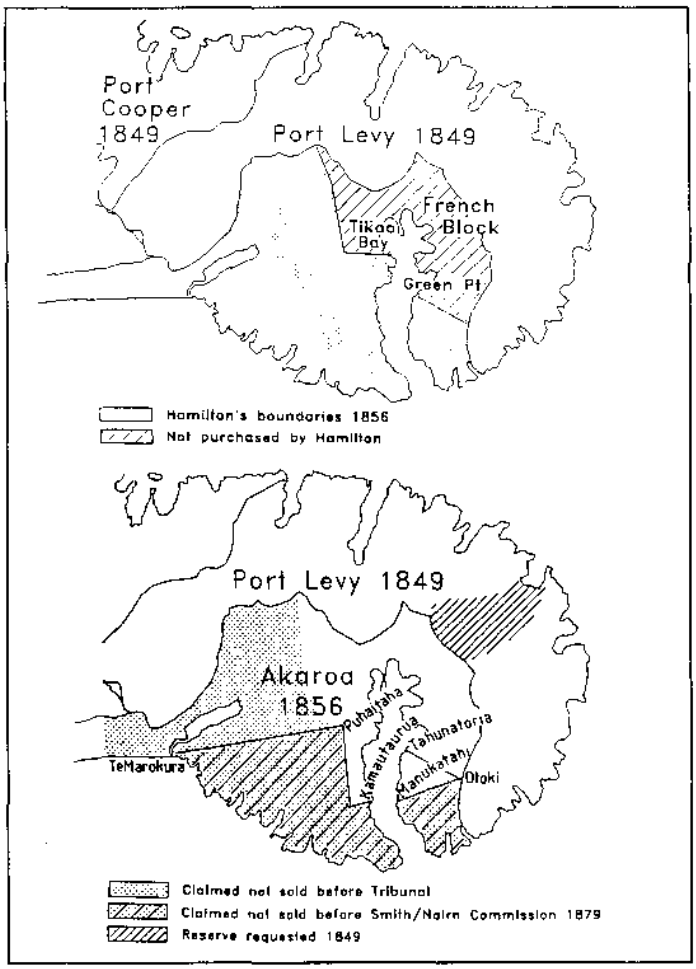

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

in figure 9.3. This evidence must, however, be weighed against the record made by Hamilton on the day of the sale, 10 December 1856, that he had purchased the land shown in the same figure, which clearly includes the land claimed by Ngai Tahu not to have been sold. Given the considerable lapse in time we consider it likely that the Ngai Tahu witnesses in 1879 were confusing what they had told Mantell with their discussions with Hamilton. We find that the Hamilton 1856 purchase did include the southern part of the peninsula and the whole Wairewa (Little River) basin. We are reinforced in this view by the fact that both Ngai Tahu witnesses and Hamilton are agreed that Ngai Tahu requested an additional reserve of 400 acres at Wairewa, to which Hamilton agreed. If the land at Wairewa was not included in the purchase why was a reserve requested there? We have no reason to doubt that the record made on the day of the purchase by Hamilton does other than correctly record the agreement as to the outer boundaries of the purchase.

Grievance no 13

9.7.3 It is true that Hamilton's deed is sadly lacking in precision. It recites the consent "to surrender the pieces (of land) now disputed at Akaroa" to the Queen. It then states that "these only are the places reserved for us", and refers to the three reserves of 400 acres each at Onuku, Wainui and Wairewa. Had it been agreed that in addition an

extensive area of up to 30,000 acres had been excepted from the sale it is difficult to believe that Hamilton would not have made express reference to this, as he did to the three reserves. The deed refers to pieces of land now disputed at Akaroa. The dispute was as to whether land, other than that bought by the French, had been sold to the Crown. It was that land which Hamilton described in his letter of the day of the purchase and which is shown in figure 9.3.

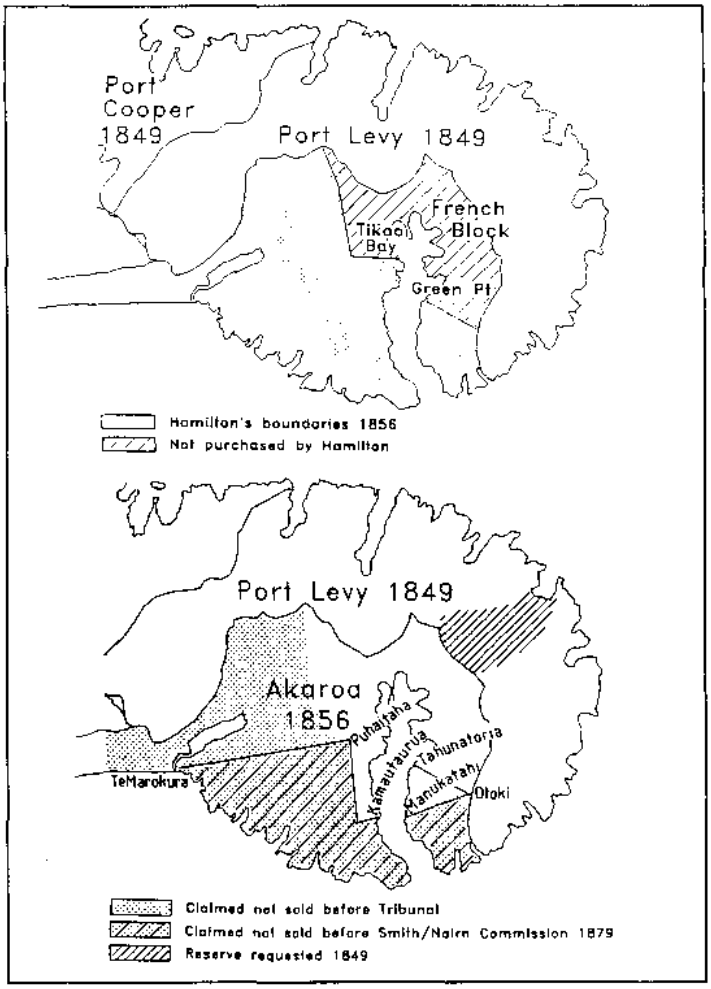

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

For the reasons given earlier we believe this correctly records the land sold by Ngai Tahu to the Crown in Hamilton's deed of purchase.

But, having found that, the question remains as to whether the 30,000 acres approximately awarded by Lord Stanley had in fact been purchased from Ngai Tahu. We believe it had not except in respect of some 1700 acres purchased by the French. Hamilton, by his own account in his letter of 10 December, did not buy the land which Johnson understood Ngai Tahu to have agreed had been sold to the French. What Hamilton purchased (by his own account rather than the deed) was all the remaining land on Banks Peninsula, with the exception of the reserves. We accordingly find that at least 27,300 acres in the area shown as not sold to Hamilton

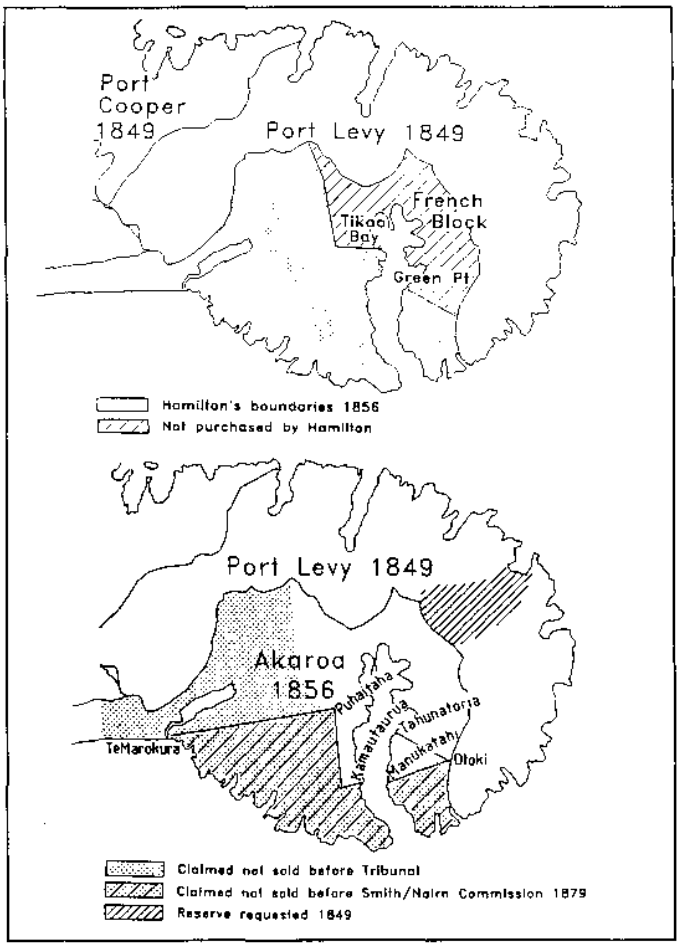

Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

on figure 9.3 was not acquired by the Crown and to this day Ngai Tahu have not been paid for it.

Grievances nos 14 and 15

9.7.4 It was not disputed by the Crown, nor in our view can it be, that Hamilton's reserves of 1200 acres and œ150 purchase price were insufficient as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa block together with the absentees at the time of Hamilton's purchase. No sooner was the sale to Hamilton completed by the signing of the deed than Ngai Tahu were requesting that an additional 400 acres be leased to them by the Waste Lands Board. Hamilton told the Smith-Nairn commission that, had Ngai Tahu requested the additional acreage before the deed was signed, he would willingly have agreed to it (9.6.10). Hamilton himself considered the 1200 acres "barely sufficient", even for the 90 people resident, as he reported to Chief Commissioner McLean on 8 January 1857 (L3:III:66).{FNREF|0-86472-060-2|9.7.4|112} We were not given any precise evidence as to how many Ngai Tahu having an interest in land purchased by Hamilton were absent in 1856 but there seems little doubt that some were. This aggravated the shortage of land remaining to Ngai Tahu in and around Akaroa following Hamilton's purchase. We find the claimants' grievances nos 14 and 15 to be made out.

Grievances nos 16 and 17

9.7.5 The claimants gave evidence that under the Land for Settlements Acts the Crown at Wairewa (Little River) resumed the Morice estate of 912 hectares on 16 December 1905 at a cost of œ40,633 for the settlement of 29 landless Europeans, and on Banks Peninsula resumed the Kinloch estate of 5275 hectares on 19 February 1906, at a cost of œ116,382, for the settlement of 30 landless Europeans.{FNREF|0-86472-060-2|9.7.5|113} The complaint is that this land could have been provided for the relief of landless Ngai Tahu. Instead the Crown offered landless Ngai Tahu only very inferior and remote land under the South Island Landless Natives Act 1906, none of which was on Banks Peninsula. This is the burden of grievance no 16. The following grievance, no 17, claims that as a result of these acts of the Crown most Ngai Tahu of Banks Peninsula were driven off the land and lost their turangawaewae.

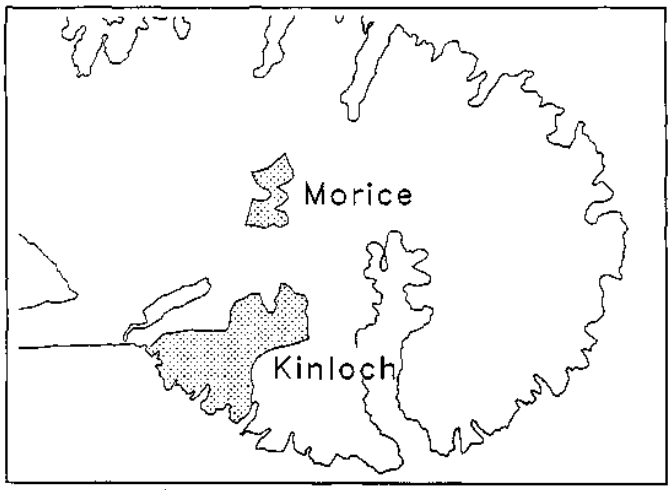

Figure 9.4: The Morice and Kinloch estates show how extensively the Crown was prepared to re-acquire land for settlement on Banks Peninsula, while making no specific provision for Ngai Tahu needs.

As will be seen in chapter 20, the Mackay Smith commission made a final report to government on 28 September 1905 on setting apart land for landless Maori in the South Island (E2:497).{FNREF|0-86472-060-2|9.7.5|114} This report was preceded by a number of interim reports made in 1897 and later years. The commissioners pointed out that their work had been exceedingly onerous and performed at slight cost to government owing to the work having been done in the commissioners' own time quite outside official duties. The principal reason for the delay was said to be due to the absence of suitable blocks of land. The commission noted:

In the end, lands have actually been found to meet all requirements as to area, but much of the land is of such a nature that it is doubtful if the people can profitably occupy it as homes. (E2:497){FNREF|0-86472-060-2|9.7.5|115}

The contrast between the Crown's willingness to expend substantial sums to place settlers on Banks Peninsula and its dilatory and minimal efforts to relieve those Ngai Tahu from Banks Peninsula made landless by the paucity of the reserves left them after the various purchases is striking. Not only were Ngai Tahu to be banished from their turangawaewae but they were to be given modest areas in remote locations, in some cases inaccessible other than by sea and of such a nature that it is doubtful, in the words of the Mackay-Smith commission, that they could profitably be occupied as homes. While generous provision was to be made for Europeans on Banks Peninsula, Ngai Tahu were to be offered inadequate land in remote places with which they had no association.

9.7.6 In our later chapter on the North Canterbury purchase we have examined a similar grievance based on the Land for Settlement Acts (11.5.9). For reasons which we there discuss in some detail we conclude that as a matter of law the Maori enjoyed the same rights under the Land For Settlement Acts as Europeans and that accordingly we are unable to uphold the grievance (11.5.10). For the same reason we cannot uphold that part of grievance no 16 which relates to the Land for Settlement Acts. But in chapter 20 on the Landless Native Grants the tribunal has found that the South Island Landless Natives Act 1906 and its implementation cannot be reconciled with the honour of the Crown (20.7.3). It has further found the Crown's policy and legislative implementation of that policy in relation to landless Ngai Tahu to be a serious breach of the Treaty. It follows that we uphold that part of the claimants' grievance no 16 relating to the Landless Natives Act of 1906.

As to grievance no 17, we do not believe the claimants exaggerated when they complained that as a result of Crown acts many Ngai Tahu were driven off their land and lost their turangawaewae. This grievance is accordingly sustained.

Grievance no 18

9.7.7 The last of the claimants' grievances concerned environmental and natural resource degradation impacting on fish and birdlife on the peninsula. These will be dealt with in chapter 17 in our consideration of mahinga kai and related matters.

Ngai Tahu Land Report

09 Banks Peninsula

9.8 The Crown's Position as to the Banks Peninsula Purchases

9.8. The Crown's Position as to the Banks Peninsula Purchases

9.8.1 In his closing address, counsel for the Crown among other matters made the following points.

- Mantell did try to pressure Ngai Tahu into selling and unreasonably cut back on their requests for reserves. That conduct was conceded to have been improper and in breach of the Treaty.

- The prices paid for each block should have been higher, although they were already out of proportion with the Kemp purchase at œ2000.

But the Crown did not suggest, as surely it could not, that œ2000 was a remotely reasonable price for the Crown to have paid even in 1848 for some 20 million acres. The prices paid for the various Banks Peninsula blocks in 1849 and 1856, although inadequate, serve to highlight the total inadequacy of the œ2000 paid for the vast Kemp purchase.

- The prices in themselves were not the real problem, which was the question of what land Ngai Tahu were left with.

We do not accept that the inadequacy of the prices paid can be dismissed in this way. Admittedly, had generous and completely adequate reserves been left with Ngai Tahu the meagreness of the purchase prices would have been less serious. But this did not happen, and the fact that the purchase prices were no more than nominal is correspondingly more serious. Ngai Tahu were severely maltreated both as to price and as to the land left to them. Crown counsel submitted that Ngai Tahu appeared to have received in goods and cash approximately œ1750 from the French and œ650 from the Crown for the peninsula.

It is very questionable whether Ngai Tahu received from the French cash or goods to the value of œ1750. Much of the 1845 payment in goods was old stock of little value. It was paid as much to secure peace of mind for the French settlers being abandoned by the French company and government. We remain of the opinion that Ngai Tahu were significantly underpaid for the land, the more so as they were left with so little land of their own.

- A fair approach, Crown counsel submitted, would have been the offer of modest sums for the various blocks on the peninsula coupled with the making of adequate reserves, which should have taken into account the possibility that some Ngai Tahu would return to the peninsula in later times. Crown counsel, in discussing Hamilton's

purchase in particular, stressed that there the real problem, which even Hamilton conceded, was the inadequacy of the reserves.

This overlooks the fact that Ngai Tahu were never paid for most of the 30,000 acres awarded to the French.

The reserves retained by Ngai Tahu were approximately 900 acres in Port Cooper; 1340 acres in the Port Levy block; and 1200 acres in the Akaroa block-to which a further 100 acres timber reserve at Little River was added by the Native Land Court in 1868. This totals 3540 acres out of some 230,000 acres purchased by the Crown. As we have seen, upwards of 30,000 acres has never been purchased. We agree with the Crown that the Ngai Tahu population on the peninsula at the time is difficult to estimate. Some had yet to return. The Crown suggested a figure of about 300. This is probably reasonably accurate. On that assumption the reserves amounted to some 11.8 acres per person, which is grossly inadequate even if all the reserves were of good quality land which they certainly were not. Substantial areas were largely unproductive steep rock hillsides.

Ngai Tahu Land Report

09 Banks Peninsula

9.9 Breaches of Treaty Principles

9.9. Breaches of Treaty Principles

9.9.1 In the course of our narrative of the events leading to the acquisition of Banks Peninsula by the Crown we have discussed, and for the most part upheld, 17 grievances of Ngai Tahu. These grievances fall under four main heads:

- relating to Lord Stanley's award of 30,000 acres to the French Nanto-Bordelaise Company;

- relating to Mantell's conduct in acquiring the Port Cooper and Port Levy blocks. In particular his actions in using the earlier French purchases to intimidate Ngai Tahu; his denial of ownership by Ngai Tahu; his overbearing "high-handed" actions which resulted in a failure freely to negotiate over reserves or the purchase price; and his failure to grant reserves requested by Ngai Tahu;

- relating to the Canterbury Association Lands Settlement Act 1850; and

- relating to the failure to set aside reserves requested by Ngai Tahu and to the inadequacy of the reserves made by the Crown.

We will consider each of these broad groups in the light of relevant Treaty principles.

Stanley's award of 30,000 acres to the French

9.9.2 We have found that Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu and that Ngai Tahu were not compensated for the award either then or down to the present day. Responsibility for the failure to arrange for the necessary land to be purchased and paid for by the French must, however, rest not with Lord Stanley in London, but with the Crown's representatives in New Zealand. They took no action at the time, and later simply assumed that no such action was necessary.

In short the 30,000 acres were, in effect, confiscated by the Crown. This is in clear breach of article 2 of the Treaty, the English version of which "confirms and guarantees" to the Maori "the full exclusive and undisturbed possession of their Lands and Estates..." so long as they wished to retain them. The Crown's action was equally in breach of the Maori version of article 2 of the Treaty which protects "te tino rangatiratanga" of Maori over their land and other property. We have earlier said that the Maori text conveyed an intention that Maori would retain full authority over their land, homes and other taonga. The Crown's unilateral act in arbitrarily depriving Ngai Tahu of their rangatiratanga over the 30,000 acres, and in confiscating it without

consultation and without ensuring that it was paid for, constitutes a grave breach of the Treaty. Despite repeated efforts by Ngai Tahu no relief or remedy has ever been granted to them.

Mantell's conduct in the acquisition of the Port Cooper and Port Levy blocks

9.9.3 While we have largely focused on Mantell's conduct it must not be overlooked that he was acting under instructions from Governor Grey and Lieutenant-Governor Eyre, neither of whom was prepared to recognise that, following the French "purchases" and Kemp's purchase (which clearly excluded Banks Peninsula), Ngai Tahu had an interest any greater than that of a "reserve" in land unpurchased from them. Mantell's instructions were infected by bad faith on the part of his superiors, who required him to treat with Ngai Tahu on transparently false premises. Even Mantell confessed in private correspondence with his father that he did not truly understand the situation. Nevertheless he was not deterred from obeying his instructions from Eyre, to carry matters with a high hand. As we have seen he granted minimal reserves; he refused to grant requests for reserves at Okains Bay and Pigeon Bay; he failed to obtain the signatures of a significant number of Ngai Tahu having an interest in the Port Levy block; he was inflexible over the purchase price; he threatened Ngai Tahu that their earlier transactions with the French had imperilled their title to the land; and he acted as if his function was simply to make an award, rather than freely negotiate a purchase.

All such conduct was in complete disregard of Ngai Tahu's rangatiratanga over their land and was in clear breach of article 2 of the Treaty. The breach was the graver because it resulted from a lack of good faith on the part of the governor and lieutenant-governor in the instructions given to and carried out by Mantell.

It is plain that Ngai Tahu did not wish to sell land at Okains Bay and at Pigeon Bay. But they were overborne by Mantell, in clear breach of article 2 which required the consent of Ngai Tahu to the sale of their land.

It is equally plain in relation to the Port Levy block that they sought a substantially higher price-œ1000-for the block, but Mantell, using threats and an overbearing manner, refused to negotiate and awarded œ300 only. Again he acted in breach of article 2 by acting without their consent and in the knowledge that a significant number of Ngai Tahu having an interest in the land had withdrawn from the negotiations prior to the completion of the deed.

The effect of the Canterbury Association Lands Settlement Act 1850

9.9.4 This Act purported to vest in the Canterbury Association all the land on Banks Peninsula save a few hundred acres, notwithstanding it had not been included in the Kemp purchase and despite the methods employed to acquire the Port Cooper and Port Levy blocks, and the failure by the Crown in 1849 to acquire the Akaroa block. The Act was passed by the British Parliament without reference to the New Zealand authorities or, needless to say, Ngai Tahu.

Once again we have a failure by the Crown in breach of article 2 to respect Ngai Tahu rangatiratanga over their land, especially the Akaroa block. The effect of the Act was

to vest legal ownership of the land which the Crown had not acquired from Ngai Tahu in the Canterbury Association in breach of article 2, which required the consent of Ngai Tahu. Only the previous year Ngai Tahu had made clear their refusal to sell the Akaroa block to the Crown. Moreover, we have recounted the dubious methods employed by the Crown to acquire the Port Cooper and Port Levy blocks. We have also seen that as a result of this Act land was leased or even sold by the association and the Crown before it had been lawfully acquired from Ngai Tahu. This was in total disregard of te tino rangatiratanga of Ngai Tahu over the Akaroa block in particular, and in breach of article 2 of the Treaty.

Failure of the Crown to set aside adequate reserves

9.9.5 The Crown does not now dispute that, in setting aside 3540 acres out of 230,000 acquired from Ngai Tahu, it failed to provide adequate reserves. At around 11.8 acres per person this was insufficient for bare subsistence. It fell far short of providing for the long-term future needs of the Ngai Tahu people whose traditional home was on Banks Peninsula and for those other Ngai Tahu who had interests in land there. No provision was made for the mahinga kai requirements of Ngai Tahu. The possibility of Ngai Tahu developing pastoral farming was effectively foreclosed by the minimal size and the poor quality of much of the reserve land. No allowance was made for Ngai Tahu who were expected to return. As a consequence we find that the Treaty principle requiring the Crown to ensure that an adequate endowment of land for the present and future needs of Ngai Tahu on Banks Peninsula was plainly breached and that Ngai Tahu were very detrimentally affected. Equally significant was the failure of the Crown, in reducing Ngai Tahu to a near state of landlessness, to respect as article 2 required, Ngai Tahu rangatiratanga in and over Banks Peninsula. This failure is a common thread to all major Crown dealings with Ngai Tahu on the peninsula and resulted in many having to abandon their turangawaewae. Instead of recognising this in subsequent years and taking action to make good the serious lack of land available to Ngai Tahu, the Crown chose to expend considerable sums on settling even more Europeans on the land. If those Ngai Tahu now made landless wished to have a portion of land it would be hundreds of miles away, often of poor quality, difficult of access and uneconomic.

9.9.6 We conclude our discussion of the Crown acquisition of Banks Peninsula by recording what must by now be obvious-that the Crown's actions brought no credit on those involved. Governor Grey and Lieutenant-Governor Eyre must bear much of the responsibility for Mantell's conduct. A clear duty now rests on the Crown to repair, so far as is now possible, the grave harm done to Ngai Tahu by the serious and numerous breaches of the Treaty and its principles. Good faith and the spirit of partnership require no less.

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{FNTXT|0-86472-060-2|9.3|1}1 This is a condensed version of (T3), which is more fully documented. To facilitate ease of reference we have added some headings and substituted our own numbers to topic headings. Endnotes have been altered to conform with the format used in this report.

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{FNTXT|0-86472-060-2|9.3.10|16}16 The map has survived (NM 8 1845/183, NA, Wellington) but for the content of the deeds we are mainly reliant on contemporary European correspondence; C B Robinson's reports, 13 March-23 April 1845; Berard to the Minister of the Navy, 4 April 1845, BB4 1011, Archives Nationales, Paris

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{FNTXT|0-86472-060-2|9.3.15|23}23 see n 3, p 434

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{FNTXT|0-86472-060-2|9.5.8|84}84 see n 53

{FNTXT|0-86472-060-2|9.5.8|85}85 see n 78

{FNTXT|0-86472-060-2|9.6.1|86}86 see n 34

{FNTXT|0-86472-060-2|9.6.1|87}87 see n 34, Plan of Native Claims, Banks Peninsula

{FNTXT|0-86472-060-2|9.6.1|88}88 see n 34

{FNTXT|0-86472-060-2|9.6.3|89}89 Godley to colonial secretary, 8 January 1851, Compendium, vol 2, p 7

{FNTXT|0-86472-060-2|9.6.3|90}90 Godley to Fox, 16 January 1851, Canterbury Association Correspondence 3/2, Canterbury Museum Archives, Christchurch

{FNTXT|0-86472-060-2|9.6.3|91}91 W D McIntyre (ed) The Journal of Henry Sewell, 1853-7 (Whitcoulls, Christchurch, 1980) vol 1, p 341

{FNTXT|0-86472-060-2|9.6.3|92}92 Simeon to colonial secretary, 28 January 1853, CS 53/81, NA, Wellington

{FNTXT|0-86472-060-2|9.6.3|93}93 Hamilton to chief commissioner of Land Purchase Department, 11 December 1856, Compendium, vol 1, p 15

{FNTXT|0-86472-060-2|9.6.5|94}94 Brittan to Mantell, 18 January 1854, 8/1 Letterbook of CCL, July 1853, Canterbury Museum Archives

{FNTXT|0-86472-060-2|9.6.5|95}95 Mantell's statement, quoted in Brittan, memorandum, 4 January 1856, IA I 56/367, NA, Wellington

{FNTXT|0-86472-060-2|9.6.5|96}96 Mantell to Symonds, 21 August 1855, ms papers 32 (McLean) folder 446, ATL, Wellington

{FNTXT|0-86472-060-2|9.6.6|97}97 McLean to Johnson, 25 April 1856, Compendium, vol 2, p 6

{FNTXT|0-86472-060-2|9.6.6|98}98 Johnson to McLean, 7 June 1856, Compendium, vol 2, p 10

{FNTXT|0-86472-060-2|9.6.7|99}99 McLean, 13 August 1856, Compendium, vol 2, p 12

{FNTXT|0-86472-060-2|9.6.7|100}100 ibid

{FNTXT|0-86472-060-2|9.6.8|101}101 McLean to Hamilton, 16 August 1856, Compendium, vol 2, p 13

{FNTXT|0-86472-060-2|9.6.8|102}102 see n 98, p 11

{FNTXT|0-86472-060-2|9.6.9|103}103 Smith-Nairn commission testimony, no 22, Hamilton, 20 May 1879, MA 67, NA, Wellington

{FNTXT|0-86472-060-2|9.6.9|104}104 ibid, pp 62-63

{FNTXT|0-86472-060-2|9.6.9|105}105 ibid, p 45

{FNTXT|0-86472-060-2|9.6.10|106}106 ibid, pp 50-51

{FNTXT|0-86472-060-2|9.6.10|107}107 Hamilton to provincial secretary, 10 December 1856, Canterbury Provincial Council Records 1856/706, Canterbury Museum Archives

{FNTXT|0-86472-060-2|9.6.10|108}108 see n 103, pp 56-58

{FNTXT|0-86472-060-2|9.6.10|109}109 see n 103, p 58

{FNTXT|0-86472-060-2|9.6.10|110}110 Smith-Nairn commission testimony, no 21, Hirawea, 20 May 1879, pp 27-28; no 63, Tikao, 12 March 1880, p 129; no 65, Taupoki, 13 March 1880, p 48; no 73, Te Paro, 16 March 1880, pp 196-197, MA 67, NA, Wellington

{FNTXT|0-86472-060-2|9.6.12|111}111 Smith-Nairn commission testimony, no 77, Hamilton, 16 March 1880, p 230, MA 67, NA, Wellington

{FNTXT|0-86472-060-2|9.7.4|112}112 Hamilton to McLean, 8 January 1857, Compendium, vol 2, p 17

{FNTXT|0-86472-060-2|9.7.5|113}113 AJHR 1906 C-1, appendix 2, p 57; 8*, p 56*

{FNTXT|0-86472-060-2|9.7.5|114}114 Report Relative to Setting Apart Land for Landless Natives in Middle Island, 28 September 1905, AJHR 1905, G-2

{FNTXT|0-86472-060-2|9.7.5|115}115 ibid, p 1

Ngai Tahu Land Report

10 The Murihiku Purchase

10.1 Introduction

10.1. Introduction

Late in 1851 Walter Mantell was commissioned to purchase from Ngai Tahu the portion of the South Island which lay to the south of the Otakou block. Mantell understood from these instructions that he was to negotiate for all the land from coast to coast. He duly arrived in Dunedin on 16 November 1851.

Two days later he held a meeting at Port Chalmers with Topi Patuki, Te Au, Karetai, Taiaroa and many other rangatira. During or following this meeting Mantell prepared a map showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast and thence back around the coastline from Piopiotahi to the Nuggets. The names of various chiefs having an interest in various parts of the block are shown. On the west coast below Piopiotahi the names of Taiaroa, Potiki, Ariaha Taheke, Whaikai and Karipa appear. The names of Maui, Tikini and Poka appear on the coastline west of the Waiau River. The names of other well-known Ngai Tahu chiefs are shown at various places east of the Waiau almost back to the Nuggets. This map appears to indicate the extent of the land which the Ngai Tahu chiefs were prepared to sell.

Mantell left Dunedin on foot early in December, accompanied by the paramount Murihiku chief Topi Patuki and some other Ngai Tahu. On the way the party was delayed by heavy rain. While so detained Mantell, presumably with Patuki's assistance, prepared a list of some 84 claimants, together with a further plan having the same boundaries. Various areas nominated SE, S, W, N, NW are indicated. Between them they cover the whole area from coast to coast. The names of chiefs having an interest in particular areas are shown. In particular the names of Taiaroa, Potiki, Ariaha Taheke, Whaikai, Karipa, Pohau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. The names of other Ngai Tahu appear on the coastline west of the Waiau River.

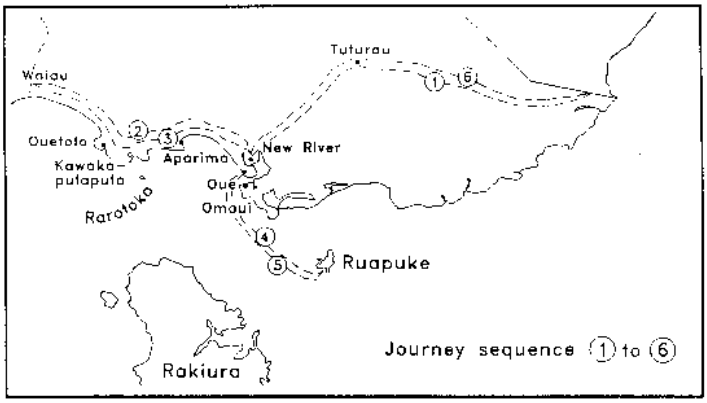

Figure 10.1: Mantell's journey to Murihiku from December 1851 to February 1852 showing his route and the main settlements he visited.

The party then proceeded to Tuturau, on the Mataura River, where Mantell agreed on a reserve. From there he went south to Oue, on the coast of Foveaux Strait a little to the west of the Bluff. There a large meeting was held on 22 December 1851 with Ngai Tahu from Rakiura (Stewart Island), Ruapuke Island, Aparima, Oraka, and Kawakaputaputa to the west. It seems the Ngai Tahu chiefs present agreed to sell their land, but made it clear they wanted a good price. Mantell was not willing at that time to say how much the Crown would be prepared to pay.

Following this meeting, Mantell arranged for reserves to be provided at Omaui on the New River, Oue, Aparima, Oraka, Kawakaputaputa and Ouetoto. These reserves were surveyed in March-April 1852 by Charles Kettle-unfortunately at a time when many Ngai Tahu were on the annual excursion to the Titi Islands. The claimants say that in some cases Mantell declined to make the reserves as large as Ngai Tahu requested, and in other cases he refused altogether to reserve areas which they wished to keep. Among these was Rarotoka Island in Foveaux Strait. In all, the seven reserves made by Mantell totalled some 4875 acres.

Mantell returned to Dunedin early in 1852 where he was employed as commissioner of Crown lands, having scheduled a meeting with Ngai Tahu for May to finalise the purchase. Although he planned to pay over the purchase price in June, these arrangements fell through as the government failed to make the necessary funds available to him. Meanwhile, Topi Patuki and Taiaroa visited Wellington and there confirmed their willingness to finalise the sale. As a result the officials in Wellington felt no need to complete the purchase quickly. Moreover, government was short of funds at the time. And so the matter dragged on until, in August 1853, Mantell decided to act on his own initiative. By this time he had begun to fear, given the apparent indifference on the part of government to completing the sale, that Ngai Tahu might be tempted to sell or lease direct to Europeans who were moving into the district. He took advantage of the presence of a substantial number of Otakou and Murihiku Ngai Tahu in the vicinity of Dunedin at the time and convened a meeting to discuss the sale. After a "long and anxious debate" the deed of purchase was signed on 17 August 1853.

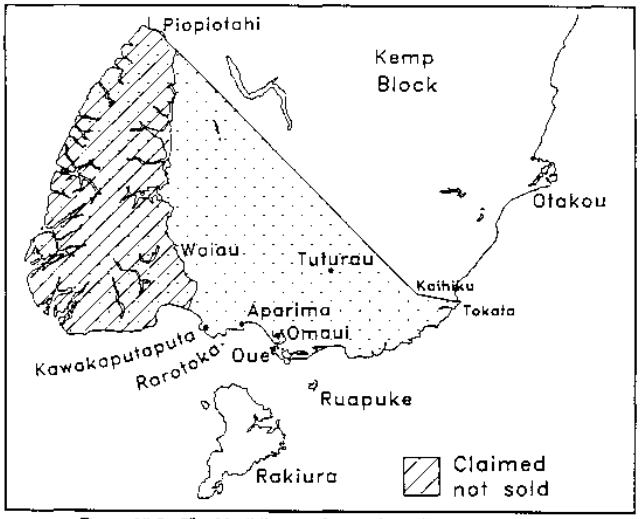

Figure 10.2: The Murihiku purchase, 1853, showing the land west of the Waiau River which the claimants alleged had not been included in the sale to Mantell.

The English translation of the deed makes it clear that the boundary extended from Piopiotahi (Milford Sound) east to Kaihiku and Tokata on the east coast, and right around the west coast from Piopiotahi to Tokata again on the east. That is, the whole of the land south of a line from Milford Sound to Tokata or Nugget Point (the southern point of the Otakou purchase). The claimants, relying on a very recent translation of the Maori version of the deed of purchase, contended that the deed is ambiguous. A map attached to the deed clearly shows the coast line etched in blue extending from Milford Sound all the way round to Tokata (the Nuggets).

The purchase price provided for in the deed was œ2000, but Mantell orally agreed to seek an increase to œ2600 and government agreed to pay the extra œ600.

The claimants have a variety of grievances about the Crown purchase. These fall under three main heads:

1 The failure of the Crown to ensure that Ngai Tahu retained sufficient land for an economic base. Associated with this are complaints that the Crown failed to set aside either additional land or specific areas of land requested as reserves by Ngai Tahu.

2 Failure of the Crown to provide schools and hospitals at each Ngai Tahu village as promised by Mantell.

3 The wrongful inclusion by the Crown of land west of the Waiau in the sale. Associated with this is an alleged failure by the Crown to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.2 Statement of Grievances

10.2. Statement of Grievances

The grievances as filed were:

1. The Crown failed to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.

2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.

3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale.

4. The Crown failed to set aside the following lands for the use of Ngai Tahu after the sale:

-additional land at Aparima to that which Mantell allowed;

-additional land at Kawakaputaputa to that which Mantell allowed;

-additional land at Omaui to that which Mantell allowed;

-a block at Oue;

-a block of 200 acres at Waimatuku;

-Rarotoka Island;

-300 acres on the Waiau River, which may be at Oetota as a reserve there;

-a block at Opuaki;

-the waterfall at Te Aunui on the Mataura River.

5. The Crown failed to provide schools and hospitals at each Ngai Tahu village which provision was part of the price agreed upon by the Crown.

6. The land west of the Waiau was wrongfully included in the sale.

7. The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.

9. The Half-Caste Grants Acts, the Landless Natives Act and other legislation were inadequate to remedy the landlessness caused by the sale to the Crown.

10. The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

We will consider these various grievances at the appropriate points in our narrative of events which follows.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.3 Background to the Purchase

10.3. Background to the Purchase

10.3.1 As we have seen, the Otakou purchase was effected in 1844. But it was not until the late 1840s that the Otago settlers began to arrive and settle over the 530,000 acres of land purchased some years earlier. In 1848 the Kemp purchase had been negotiated and in 1849 a substantial part of Banks Peninsula had been acquired by Mantell for the Crown. The land to the south and south-west of Otago remained unpurchased, but the Crown was in no hurry to complete its purchase down to Foveaux Strait and across Fiordland to the west coast. As Professor Ward pointed out, for some years after the Otakou purchase there was no settler pressure. There was also a persistent belief that Ngai Tahu were not only willing, but anxious, to sell to the Crown their lands to the south of the Otakou and Kemp purchases. For instance, Governor Grey in November 1853, after receiving a copy of the Murihiku purchase deed, commented to Domett that about six years previously some of the principal chiefs of the Murihiku district had agreed, while the governor was there, to dispose of the land on terms "nearly the same as those to which they have since adhered" (E2:37(c)).{FNREF|0-86472-060-2|10.3.1|1}

10.3.2 On 12 February 1849 the paramount Murihiku chief, Topi Patuki, wrote to Grey inviting him to come to Parewha on Ruapuke Island to discuss the purchase of land south of the Otakou and Kemp purchase boundaries, but making it clear that "the larger area however must remain with us, the Maori people" (Q3:4-5).{FNREF|0-86472-060-2|10.3.2|2}

A year later, however, attitudes appear to have changed. Captain Stokes of HMS Acheron reported to Lieutenant-Governor Eyre on the then disposition of Ngai Tahu, "to sell all that remains to them of the Middle Island" (A8:I:270).{FNREF|0-86472-060-2|10.3.2|3} Many Ngai Tahu visited the Acheron hoping that it was part of Captain Stokes' mission to effect a purchase. Stokes was persuaded by Ngai Tahu to make out on a chart the reserves they wished to retain. W J W Hamilton prepared a list now in the Canterbury Museum (O13:4-6).{FNREF|0-86472-060-2|10.3.2|4} It records 19 locations, all east of the Waiau River. Stokes further reported that:

after making out on the charts the reserves they were desirous of retaining, the Maoris, both in Foveaux Strait and at Otago, expressed their desire to sell all the land from Otago to the Western Coast. (A8:I:270){FNREF|0-86472-060-2|10.3.2|5}

While we have no clear indication of the size of the various reserves charted by Stokes, or of the precise location of all of them, it is evident that Stokes met their wishes and that in consequence Ngai Tahu were willing to sell the remainder of their land from Otago right across to the western coast. Stokes also indicated in his report

that Ngai Tahu would probably accept œ2000 as purchase money, which he suggested should be distributed by paying œ1000 at Otago and the other œ1000 at Awarua (Bluff) (A8:I:270).{FNREF|0-86472-060-2|10.3.2|6}

Mantell receives his instructions

10.3.3 It is against this background that Mantell received instructions from Governor Grey in October 1851. Earlier in the year Grey had evidently discussed with Mantell the possibility of his going south to purchase the southern portion of the South Island. Mantell followed up his conversation with the governor by writing to Domett, the colonial secretary, on 13 March 1851. He made various proposals for submission to the governor. On the question of reserves he said that:

In carrying out the spirit of my instructions on the block purchased by Mr. Kemp, I allotted on an average ten acres to each individual, in the belief that the ownership of such an amount of land, though ample for their support, would not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain. (E2:2){FNREF|0-86472-060-2|10.3.3|7}

This hardly augured well for Ngai Tahu.

As to the equipment necessary he commented:

it must be borne in mind that in parts, especially toward the West Coast, overland communication is reported to be impracticable; I would therefore recommend the chartering of a serviceable coaster, sufficiently large to carry a useful boat: the vessel, if such a course were sanctioned by Government, might be useful in payment for the territory to be acquired; in such a craft, too, the Natives resident on the western portion of the block purchased by Mr. Kemp might be visited, and some idea obtained of the nature and value of that country. (E2:2){FNREF|0-86472-060-2|10.3.3|8}

It is clear from this proposal that Mantell had in mind a purchase which extended over to the west coast.

On 14 April 1851 Domett advised Mantell that, as he had executed the duties in purchasing a large portion of the South Island "in a very satisfactory manner", the governor wanted to engage him to purchase "the remaining portion of that Island". If arrangements could not be made for sending Mantell on the government brig, the governor would endeavour to charter a whaling schooner at present attached to the Acheron (E2:2).{FNREF|0-86472-060-2|10.3.3|9}

10.3.4 Subsequently, Mantell was appointed commissioner of Crown lands based at Dunedin. On 17 October 1851 he received firm instructions from Domett, at the behest of Governor Grey, to purchase for the Crown the portion of the South Island which lay to the south of the Otago block. As to the price, Mantell was told that, as the Ngai Tahu had never expressed any expectation of receiving more than œ2000 for this land, he should regard that sum as the "extreme limit". He was to carefully ascertain who were the leading chiefs and the proportionate amount to be paid to each of them (E2:7-10).{FNREF|0-86472-060-2|10.3.4|10}

On the question of reserves Mantell was told that:

His Excellency further directs me to authorise you retaining for the use of the natives out of the lands purchased, such reserves as you think proper; and to acquaint you with reference to such exceptions, that you will be responsible for taking care that ample reserves are kept both for their present and future wants, and that in selecting such reserves, you will, in as far as is consistent with the public interests, consult the wishes and feeling of the Natives both with respect to their position and shape. (E2:10-11){FNREF|0-86472-060-2|10.3.4|11}

Mantell was therefore required to ensure that ample reserves were kept for both the present and future wants of Ngai Tahu, although this would be determined by Mantell himself. Moreover, Mantell was to consult with Ngai Tahu regarding the location and size of such reserves "in as far as it is consistent with the public interests". It appears that Mantell, not Ngai Tahu, was to be the ultimate arbiter.

In commenting on these instructions and Mantell's earlier intimation to Domett in March that he envisaged reserves of 10 acres per person to be appropriate, Professor Ward said:

It must be assumed that Domett saw no conflict between such instructions and Mantell's clearly stated intention of restricting reserves to ten acres per head. In commissioning Mantell, Domett assured him that his actions in completing the Kemp purchase had Grey's complete confidence. In this exchange there is clear evidence that Grey and Domett were quite content with a policy which combined a stated intention of providing for Ngai Tahu's present and future needs, with the practice of confining the tribe on tiny subsistence reserves without any further land being made available for their future endowment. Grey's statement to the Smith-Nairn Commission that he would not knowingly have allowed such a miserly provision to have occurred is shown to be no more than self-serving rhetoric. (T1:216)

The tribunal has no reason to disagree with these conclusions.

Mantell also received instructions to employ a surveyor to lay out the reserves, to provide Ngai Tahu with a copy of the plans, to keep a daily journal of his travels and to make a population census of Maori in the country being purchased.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.4 The Negotiations

10.4. The Negotiations

Mantell meets Ngai Tahu chiefs at Port Chalmers

10.4.1 Mantell arrived in Dunedin on 16 November 1851. He lost no time in arranging a meeting with leading Ngai Tahu chiefs having an interest in Murihiku. In a letter of 20 November 1851 to the colonial secretary, he reported on the meeting which took place on 18 November. We reproduce his letter in full:

I have the honor to report to you for the information of H.E the Governor in Chief my arrival at this port on the 16th inst.

On Tuesday the 18th inst. I held at Port Chalmers a preliminary conference with the natives relative to the purchase which I am instructed to effect. Patuki, te Hau, Karetai, Taiaroa and many other Chiefs interested were present and expressed their wish to cede the land to the Government. I have arranged to proceed to the Native Settlement at the Heads in a few days to discuss the matter more fully and to hear any other claimants in this neighbourhood to attend and take part in the proceedings after which I propose to depart at once for the South accompanied by John Topi. (O13:20){FNREF|0-86472-060-2|10.4.1|12}

Although Mantell referred to the Ngai Tahu chiefs wishing to cede the land he did not define the area discussed. It appears, however, that during or following the discussions on 18 November Mantell prepared a map (figure 10.3) showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast, and from there back around the coast. On the west coast below Piopiotahi are the names Taiaroa, Potiki, Ariaha Taheke, Whaikai, and Karipa. The names G Maui, Tikini and Poka appear on the coastline west of the Waiau River. The names of other well-known Ngai Tahu chiefs appear at various places east of the Waiau almost back to the Nuggets. Mantell, it seems, obtained this information during his discussions with Ngai Tahu chiefs on 16 November. The map bears the hand-written legend "Korero chart, Nov. 1851 No.1". The map appears to indicate the extent of the land which the Ngai Tahu chiefs were

prepared to cede and the names of chiefs having an interest in various locations.

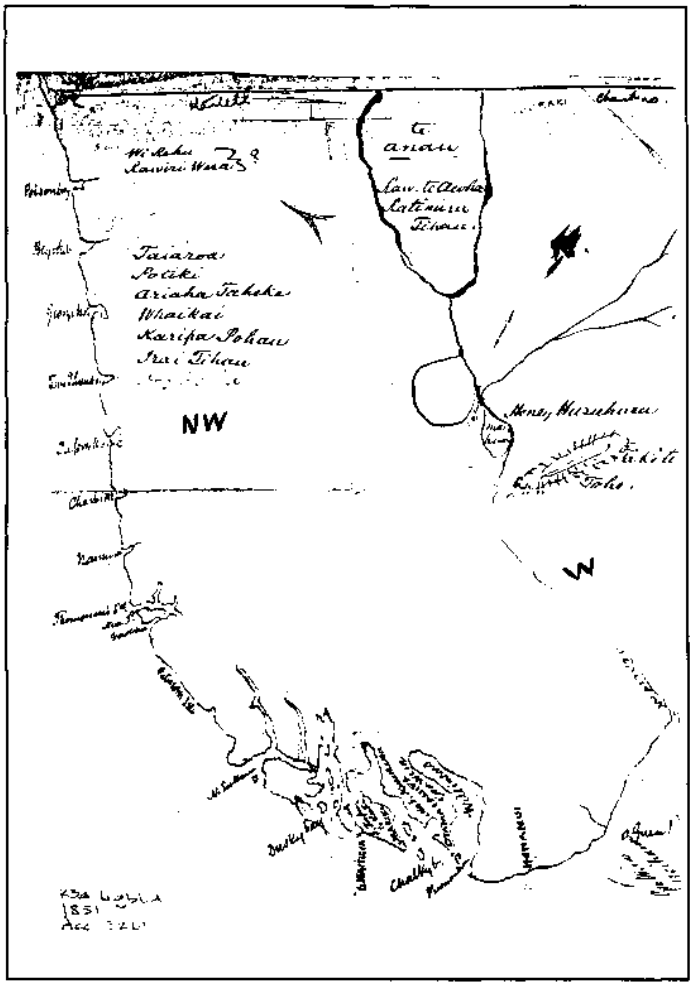

Figure 10.3: One of the "korero charts" prepared by Walter Mantell in November and December 1851 to determine who had rights to the land he was intending to purchase, from Mantell papers, Alexander Turnbull Library,

We have no evidence as to what transpired at any further discussions Mantell may have had at the heads on the Otago peninsula. We do know, however, that he duly left Dunedin on foot on 3 December 1851 accompanied by Topi Patuki and several other Ngai Tahu.{FNREF|0-86472-060-2|10.4.1|13}

10.4.2 On the way to the Mataura River the party was delayed by heavy rain on 10 December 1851 (E2:20).{FNREF|0-86472-060-2|10.4.2|14} The Ward report recorded how Mantell made use of his time:

Forced to stay in the tent, Mantell prepared his list of claimants. (O13:83-85) The list consists of 84 individuals, grouped around their places of residence. Those noted as living in Moeraki, Waikouaiti, and Purakaunui are included in the Otakou list. Each claimant has a hapu name; an indication of where the claim lies (W, SE, NE, NW, N, and S); the name of the person under whom the claim is grouped. There is a three level ranking of importance. The first rank of claimants consists of Taiaroa, Karetai, Te Au, Topi Patuki and Paitu. While most claimants of the second and third rank fall in behind the above, a small number have claims in their own right. These include Huruhuru, Tutauira, Haereroa, and Rawiri Tauira. The table suggests a sophisticated

attempt to determine just who had rights throughout the whole block. For instance, Rawiri te Awha, later identified as a 'native of Te Anau', was marked as having rights to the North. (E2:26) Being compiled before Mantell had visited the Foveaux Strait settlements, the schedule is likely to have been created with information provided by Topi Patuki. Although prepared early in the course of events there is clear evidence that Mantell continued to use this table throughout the purchase negotiations: the subsequent deaths of several individuals including Tuhawaiki's son, Kihau, are recorded. (T1:217-218)

A map bearing the legend "10 Dec. 1851, Korero chart No.2 (Mantell)" prepared by Mantell presumably the same day, shows how he subdivided the whole block below a line running from Tokata (the Nuggets) in the east to Milford Sound in the west and showing also the complete coastline. The areas nominated SE, S, W, N and NW are all indicated (figure 10.3) and the names of various chiefs having an interest in particular areas are shown. The names of Taiaroa, Potiki, Ariaha Taheke, Whaikai, Karipa Pohau, Irai Tihau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. As the Ward report indicated, the information in Mantell's list of claimants and in his chart no 2 is likely to have come from Patuki, the chief of Murihiku, who was with him at the time. It is obvious that Mantell and Patuki were concerned to identify who held interests in the whole of the block running from coast to coast which Mantell was subsequently to purchase.

Tuturau reserve (no 1)

10.4.3 No doubt satisfied by his earlier discussions at Dunedin, Mantell began the task of negotiating the terms of the sale with Ngai Tahu and determining reserves in various locations. He intended that all reserves should be settled prior to any deed being signed or money being paid. On reaching Tuturau on the Mataura River on 15 December Mantell laid out a reserve for the local people there. Mantell's journal entry for that day notes:

Reko demands a reserve of about fifty square miles. Fine day very warm. Gave reserve as at p.7. Reko quite satisfied. (E2:21){FNREF|0-86472-060-2|10.4.3|15}

The reserve was surveyed by Kettle in Reko's presence three months later. The area amounted to 287 acres (O13:37-39).{FNREF|0-86472-060-2|10.4.3|16} No complaint was made of this reserve by the claimants.

On leaving Tuturau the party crossed the Mataura and on 20 December reached Oue.

The sale discussed

10.4.4 Two days later, on 22 December 1851, a hui was held at Huruhuru's boathouse at Oue. At least 60 Ngai Tahu were present (E2:22).{FNREF|0-86472-060-2|10.4.4|17} Hoani Takurua described to the Smith-Nairn commission how Paitu was brought from Stewart Island. Patuki was present, along with the Ruapuke people; and others from Aparima, Oraka and Kawakaputaputa (E2:324-325).{FNREF|0-86472-060-2|10.4.4|18} Patuki, in his Smith-Nairn testimony, said that in addition to himself, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs were present. In the

morning some individual claims were discussed for a time. Mantell then produced his chart of claims. This too was discussed. It is not clear whether the "chart" was the "korero sheet" prepared on 10 December or the list of claimants, also prepared at that time, or both. Following the arrival of Paitu at noon, discussion of the purchase resumed. Mantell noted that Ngai Tahu wished to have the money distributed there and that the "Final korero" was to be at Otago (E2:22-23).{FNREF|0-86472-060-2|10.4.4|19}

Takurua said that at the meeting at Oue:

Mantell explained about the land. [He] asked them to cede the land to him and to the Queen. They asked him what was the price, and Mantell said he did not know then, that he would tell them at some future time. It was then and there that the land passed into Mantell's possession. The Maoris thought that there would be a large price given. Mantell concealed the price that would be given. By saying the land passed into Mantell's possession I mean that the people agreed to sell it. He obtained our consent to sell the land, and we went away with the impression that he was to pay us a large sum of money. When Mantell came back [in 1853] he told us it was a thousand pounds, and then we complained of the smallness of the money. Then came the promise of schools and hospitals. (E2:324-325){FNREF|0-86472-060-2|10.4.4|20}

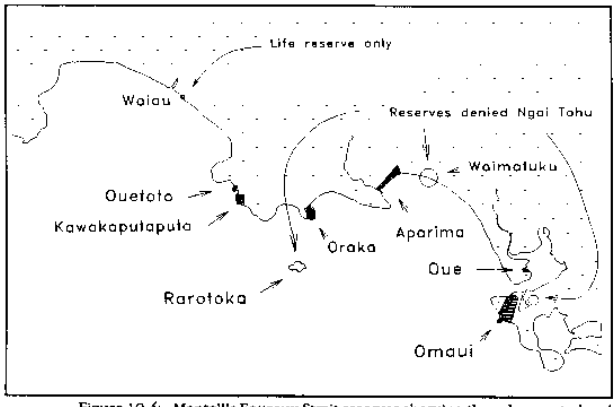

Figure 10.4: Mantell's Foveaux Strait reserves showing those he granted and those such as Rarotoka, Waimatuku and an additional reserve at Omaui which he denied. There was an additional reserve at Tuturau.

Unfortunately Takurua did not say what land he understood was being bought by Mantell.

While arguing that Rarotoka (Centre Island) was excluded by Ngai Tahu from the sale, he made no such qualification about the land west of the Waiau. Nor did he make any suggestion that such land was not included in the sale which he regarded as having taken place at Oue. On the other hand, as we will see, both Patuki and Horomona Patu were to tell the Smith-Nairn commission that Mantell was told at Oue that the western boundary of the land to be sold was to be the Waiau River.

Additional reserves

10.4.5 In addition to the reserve at Tuturau, Mantell made provision for six more reserves, plus a life reserve, following his discussions at Oue. The claimants, in their grievance no 4, complained that Mantell failed to set aside certain lands in addition to those provided by him. We will now discuss each of the reserves in the light of the

claimants' grievance. The number following the name of each reserve is that appearing on the map which accompanied the deed of purchase.

Omaui reserve (no 2)

10.4.6 This reserve of 1686 acres was at the mouth of the New River. Horomona Patu was questioned about the reserves at Omaui and Oue:

The natives pointed out where the boundaries were to be.

They (including Patu) walked round where the boundary was to be? -Yes, and then they put down a peg. (E2:94){FNREF|0-86472-060-2|10.4.6|21}

Patu went on to say that the people were not "exactly satisfied" and were not clear as to what was meant by the marking off of reserves (E2:94-95).{FNREF|0-86472-060-2|10.4.6|22}

According to Mantell, on 22 December Patuki demanded a reserve at Omaui which included the whole headland:

from the head of the inlet across to the sea. Went along the sandhills but could not get a good view. I demanded from the houses outward for Europeans. Very dissatisfied. (E2:23){FNREF|0-86472-060-2|10.4.6|23}

The reserve was not settled by Mantell until 26 December when Mantell noted that, "After the reserve was fixed Patuki set out in his boat for Ruapuke". Mantell did not say whether or not this reserve met with Patuki's approval. On balance we think this unlikely and find that there was some shortfall in the provision made by Mantell. We are unable to quantify it. But, as Professor Ward pointed out, Mantell later arranged for Patuki to be compensated with two sections at Aparima totalling 221 acres which Patuki accepted (T1: 224-225). The grievance is therefore not sustained.

Oue reserve (no 3)

10.4.7 A reserve of 176 acres was made on the western side of the New River estuary. Mantell commented that he:

Sent for Huruhuru, Heneri Huruhuru, Poharama & Tutauira about their wish for a reserve here. Set out with them-3 miles N. over wooded sand hills to a point whence they point out the Kotika [detached portion] they desired at the neck of sand between the river and the beach...Defined [sic] consideration of demand till I can converse on it with nat[ive]s at Omaui. (E2:23){FNREF|0-86472-060-2|10.4.7|24}

There is no evidence to suggest that Mantell failed to meet the wishes of Ngai Tahu in making this reserve. The claimants' grievance cannot be sustained.

Aparima reserve (no 4)

10.4.8 This was a reserve of 527 acres at the mouth of Jacob's River at Riverton. The following account is taken substantially from the evidence of a Crown witness, Mr D A Armstrong.

In his evidence to the Smith-Nairn commission Hoani Paororo stated that the site of the present town of Riverton was included in the reserve which the people originally asked for:

Mantell said -"I must have a portion of that land for a town". The Maoris objected. Mantell said -"It will be better for you to give a portion of this land to have a town here which will be a benefit to you". Then the Maoris consented. My father was one who agreed to it. Mantell then said -"Where shall the boundary be fixed". We fixed upon the line of that back street which passes the Marine Hotel... If the Maoris had persisted in what they originally asked for, there would be no town where it now stands. (E2:346-347){FNREF|0-86472-060-2|10.4.8|25}

According to Horomona Patu, Ngai Tahu:

told Mantell where they wanted the boundaries, from Reretai to Otaetae, and from Otaetae to Aparima. (E2:100){FNREF|0-86472-060-2|10.4.8|26}

But Mantell did not lay it out as the people wanted it, because, according to Patu:

...Mantell was not willing to have it owing to the entrance of the river. The natives would claim it.

Then did the natives want to get on both sides of the river? -No, only on one side.

Then how was it settled? -Mantell told them they had better go across the river to one side of the river, & leave the pakehas the other side. The natives did not want both sides of the river, but Mantell advised them to go on one side of the river, and let him have the other.

What was finally done? -We said," We shall not go across to the other side of the river (the South side); We will remain on this side where we are"...

Was it finally arranged that they should remain where they were? -Yes. Mantell replied, "Well, if you actually want this place, I will mark it off for you".

Mr Smith -and it was marked off? -Yes, he marked off a similar reserve to that which we wanted, or would have liked to have got. (E2:100-101){FNREF|0-86472-060-2|10.4.8|27}

On 1 January 1852 Mantell noted in his journal:

Shewed the natives the boundary of 500 acres which Hor. Pukeite and the rest will not agree to as it includes no part of Otaitai wood and the E. boundary does not extend to Aparima. (E2:24){FNREF|0-86472-060-2|10.4.8|28}

On 3 January he noted:

Went to see the hapuas [lagoons] in the wood. Evg. offered to exchange that part for an equal quantity at Otaitai. (E2:125){FNREF|0-86472-060-2|10.4.8|29}

On the same day Mantell wrote to the colonial secretary, remarking:

I reached this place on the 27th ultimo, and have not yet succeeded in reducing the demands of the Natives for a reserve of extravagant dimensions sufficiently to justify me in assenting to them. (E2:2){FNREF|0-86472-060-2|10.4.8|30}

Mantell and his party then proceeded to Oraka on 5 January 1852. The Aparima reserve was left to be settled on his return.

On 23 January Mantell recorded:

Arranged the reserve...after great annoyance from those stupid dolts Paroro and Solomon. (E2:30){FNREF|0-86472-060-2|10.4.8|31}

It appears that Ngai Tahu succeeded in obtaining their reserve in the preferred location, despite Mantell's fear that this could interfere with further European settlement. But Mantell did succeed, against the wishes of Ngai Tahu, in confining the reserve to just over 500 acres, providing a mere 10 acres per head by Mantell's own census figures. The tribunal finds the claimants' grievance that Mantell refused to reserve additional land at Aparima is made out. We are, however, unable to quantify the deficiency.

Oraka reserve (no 5)

10.4.9 This was a reserve of 1132 acres at Colac Bay. Although Mantell at first appeared surprised at the extent of the reserve requested, on 13 January 1852 he noted in his journal that Hau [Te Au] and Matewai agreed with him on the boundaries of the reserve (E2:25).{FNREF|0-86472-060-2|10.4.9|32} This was confirmed by Hoani Paororo, who told the Smith-Nairn commission that their reserve was agreed to as requested:

There was no difference between Mantell and Te Au about Oraka. The reserve there was marked off as Te Au wished it. It was Te Au who asked for a reserve and Mantell at once assented. (E2:347){FNREF|0-86472-060-2|10.4.9|33}

No complaint was made about this reserve by Ngai Tahu.

Kawakaputaputa reserve (no 6)

10.4.10 This was a coastal reserve of 977 acres bordering on Foveaux Strait between Colac Bay and Te Waewae Bay.

On 9 January 1852 Mantell noted a discussion with George Maui, who sought a reserve at Te Awaroa rather than Kawakaputaputa. On 12 January when Te Au arrived, Mantell had a further discussion about reserves with Te Au and George Maui (E2:26). On 13 January Mantell recorded that:

After dinner spoke with George about Wakaputaputa reserve. He wishes it to extend to te Awaroa, about 6 miles off, which I tell him it is useless to demand, begging him to consider the matter till my return from Waiau. (E2:26){FNREF|0-86472-060-2|10.4.10|34}

On the following day Mantell recorded in his journal:

George came in to say that as I objected to it he had given up Awaroa, which he had wanted as a run for his 36 goats now there. He pointed out where he wished the lines to begin. (E2:27){FNREF|0-86472-060-2|10.4.10|35}

The claimants in their grievance no 4 complained that Mantell failed to set aside additional land requested at Kawakaputaputa. It is clear that George Maui did seek a more extensive area than Mantell provided. But Maui appears to have accepted Mantell's objection to the large area sought. He pointed out a lesser area of nearly 1000 acres which was duly reserved. This resulted in 32 acres being available to each of the 31 Ngai Tahu named in Mantell's census. This was insufficient for the future needs of the people. We uphold the claimants' grievance and find that Mantell should have acceded to George Maui's original request. Again, we have no evidence on which to quantify the shortfall.

Ouetoto reserve (no 7)

10.4.11 This reserve of 90 acres lies a little to the west of the Kawakaputaputa reserve. We have little information about it. Mantell simply recorded that on 14 January 1852 he "Set out reserve no. 7" (E2:27).{FNREF|0-86472-060-2|10.4.11|36} The claimants made no grievance as to this reserve.

Reserves allegedly requested and not awarded

10.4.12 We now discuss the remaining claims in the claimants' grievance no 4 concerning land not set aside at Waimatuku, Rarotoka Island, 300 acres on the Waiau River and the waterfall at Te Aunui on the Mataura River.

Waimatuku

10.4.13 This grievance concerns an area of some 200 acres. According to Horomona Patu, in evidence to the Smith-Nairn commission, Ngai Tahu requested a reserve at Waimatuku on the coast near Aparima. Patu told the commission:

The natives pointed out the boundaries they wanted [from Okuera to Otemakirikiri]. Mr Mantell took a note of it in his book, but he did not mark it off.

Did he agree to make the reserve there? -Yes.

Did he go round the boundaries? -No. (E2:98){FNREF|0-86472-060-2|10.4.13|37}

Patu went on to note that Mantell had promised to mark off this reserve of approximately 200 acres on his return from Waiau, but he "did not keep his promise" (E2:99).{FNREF|0-86472-060-2|10.4.13|38}

In later evidence by Patu the topic was again raised:

Did you see Mr Mantell when he came back? -Yes, I saw him when he returned from Waiau. Mr Mantell asked -"Where is Matiaha?...I thought that Matiaha was here, so that we might all go and mark off the boundaries."...

You are quite sure he meant the reserve at Waimatuku? -Yes, I am quite sure it was Waimatuku he was referring to. We have been speaking about that land ever since. (E2:121-122){FNREF|0-86472-060-2|10.4.13|39}

Although Mantell waited several hours for Matiaha Tiramorehu he did not come and Mantell resumed his journey (E2:123).{FNREF|0-86472-060-2|10.4.13|40} It appears that Tiramorehu later returned from his eel fishing and he set off after Mantell. He failed to catch him as Mantell had crossed the river on a ferry boat (E2:124).{FNREF|0-86472-060-2|10.4.13|41} Waimatuku was a Ngai Tahu kaika at the time the reserve there was requested. Patu said that when Kettle came to survey the reserves they "were all away mutton-birding" (E2:124).{FNREF|0-86472-060-2|10.4.13|42}

Mantell made no reference in his journal to a request for a reserve at Waimatuku. However, Horomona Patu's evidence has a convincing ring about it and we accept that, for whatever reason, Mantell failed to provide for a 200 acre reserve at Waimatuku as requested by the people there. The claimants' grievance is accordingly upheld.

Rarotoka Island

10.4.14 This island is situated some seven kilometres off Oraka Point. It is specifically named in the deed of purchase as being ceded by the owners and is shown on the deed map.

The principal evidence before the Smith-Nairn commission suggesting that Mantell was told Ngai Tahu did not wish to sell this island is that of Horomona Patu. According to Patu, Mantell, while at Oraka, looked over to Rarotoka and said:

"I must have that island." We replied to Mantell -"we will not let you have that island, and we shall not let you have that island." ... Mantell said "Let me have that island to place a powder magazine there, & to have a place for a prison." The natives said -"We will not let you have that island, Mantell, leave that for ourselves." (E2:102){FNREF|0-86472-060-2|10.4.14|43}

Evidence was also given to the Smith-Nairn commission by Thomas Pratt Haereroa as to:

the reason why the natives did not care letting the Island of Rarotonga go during the time Mantell was here. Several Maoris lived there for years before Mantell's time, and several of my ancestors, male and female, are buried there. Their bodies have never been removed. This shews to the Court that this was one reason why the natives did not care to let the island go. (E2:292){FNREF|0-86472-060-2|10.4.14|44}

Asked whether he had heard what was said to Mantell about it, the witness admitted that he had not. His statement was in the nature of opinion or hearsay evidence. But he was immediately followed by Horomona Patu who was recalled by the commission. Patu said Mantell was told:

"You shall not have that island; that island shall be kept by us; we cannot sell our graves or burial places." That is the reason why we claim this island up to the present time. The Govt. say that they bought this island off Te Au. I say that the island was never bought. Neither Mantell nor Te Au ever made any proclamation that the island had been bought. (E2:296){FNREF|0-86472-060-2|10.4.14|45}

Curiously, although Te Au gave evidence before the Smith-Nairn commission he made no reference to any refusal on the part of Ngai Tahu to sell Rarotoka and was not questioned on the matter.

The only other Ngai Tahu witness to advert to Rarotoka before the Smith-Nairn commission was Hoani Takurua. He told the commission that:

While there [at Kawakaputaputa] Mantell looked at Rarotonga. Mantell pointed to the island and said "That island must be given to me". Te Au and others replied -"That land will not be given to you; we shall keep it". Mantell said -"You must give it to me for a magazine or a store for powder and guns, and a place for prisoners to be kept". The Chiefs refused again and said they wished to keep the land for themselves and their children. Neither ceded the point. Mantell held to his, & the Maoris held to theirs. For this reason we say that the island of Rarotonga is still ours and that it is not gone. This took place at Ngawhakaputaputa. (E2:326-327){FNREF|0-86472-060-2|10.4.14|46}

In the Mantell papers held at the Alexander Turnball Library is a memorandum by Mantell dated 1860 concerning the island:

Te Au, Oraka, Aug 5 1860 offers Rarotoka for œ500 rec'd Oct 9. Rarotoka was included in the lands ceded by the Murihiku Deed but contrary to the repeated protest of Te Au-the understanding courteously arrived at being that during his lifetime it should be only subject to military occupation if required-he having for that period all civil use of it. (J2:34){FNREF|0-86472-060-2|10.4.14|47}

If Mantell recorded this arrangement it has not been found. Mantell here acknowledged that Rarotoka was included in the deed of purchase despite repeated protest by Te Au. He appears to have suggested that Te Au eventually accepted a right of occupancy for his life only, subject to any military requirements of the government.

10.4.15 Rarotoka was an island of considerable strategic importance to Ngai Tahu. Not too many years previously it had been a populous refuge. Moreover, as Horomona Patu made clear in his evidence, Ngai Tahu were anxious to reclaim it because it was wahi tapu: there were many graves of Ngai Tahu on the island. The fact that Te Au in 1860 offered Rarotoka for sale indicates that he considered it was still in Ngai Tahu ownership. On the other hand Rarotoka is expressly named in the deed of purchase as passing to the Crown. While the tribunal accepts that it did pass to the Crown in this way we consider this was against Ngai Tahu's wishes and that it

should have been set aside as a reserve for Ngai Tahu. It is clear they sought to retain ownership and Mantell's note makes it clear that Te Au made repeated requests for the retention of the island. Accordingly the grievance is sustained.

Three hundred acres on the Waiau River

10.4.16 After laying out the Ouetoto reserve (no 7) on 13 January 1852, Mantell proceeded westwards to the Waiau River. The following afternoon he embarked in a small moki accompanied by John Matewai, leaving behind Te Au and Irai. Mantell remarked that no one crossed the Waiau except on business. Because of the fragility of the moki and the presence of innumerable snags the crossing was a risky one. On reaching the western side they found a group of grass huts with no inhabitants. After an hour's search Matewai returned to the kaika with two elderly women, "Heko and Popokore and a fine little boy - the entire native population of Waiau" (E2:29).{FNREF|0-86472-060-2|10.4.16|48} Heko was the mother of Te Au and Matewai. Mantell recorded:

These poor old women will not be induced to leave the valley, but today they consented at the urgent request of their relations to move to the east side of the river. I have therefore promised them about five acres at Tumutu for their huts and garden during their lives for their occupation only. (E2:29){FNREF|0-86472-060-2|10.4.16|49}

Mantell noted in his journal for the following day, 16 January, making a four acre life reserve opposite Tumutu for Heko and Popokore. Perhaps because it was a reserve for life only he did not record it on the deed of purchase or the deed map.

In evidence to the Smith-Nairn commission Horomona Patu claimed that Ngai Tahu asked for 300 acres at Waiau, although he admitted he was not present and other people told him there was a reserve there (E2:111).{FNREF|0-86472-060-2|10.4.16|50} However, also in evidence before the commission, Hoani Paororo substantially confirmed Mantell's account:

When Mantell went to Tumutu he found two old women there. Mantell pointed out ten acres which these old women were to occupy during their lives, and after their death it was to return to the Government. The Maoris say that the land was permanently reserved, but what I heard Mantell say was what I have told you. (E2:348){FNREF|0-86472-060-2|10.4.16|51}

We find that there is no reliable evidence to substantiate the claimants' grievance that a reserve of 300 acres at Waiau was either requested or refused. The grievance is not sustained.

A block at Opuaki

10.4.17 Horomona Patu told the Smith-Nairn commission that after Mantell set aside the reserve at Aparima they told him:

"that this piece of ground is small, you have [not] taken where we wished the boundary to be, our cattle cannot live on that reserve that you have reserved for us".

Mr Mantell said "If your cattle increase, if I am away apply to Mr Strode for a piece of land to run your cattle on... The natives said this -"let the land that is to be given to us be at Opuaki in the event of our cattle increasing."... Mantell said, -"It is all right your desiring that, but Opuaki is in my hands; I shall hold it in my hands." We agreed. (E2:125-126){FNREF|0-86472-060-2|10.4.17|52}

Although the cattle numbers at Aparima did increase the people sold the extra animals rather than make application to Chetham-Strode. According to Patu, this was because Mantell's promises were not believed (E2:127). {FNREF|0-86472-060-2|10.4.17|53}

It is clear that Mantell declined to grant the land requested at Opuaki, which Patu said was about six miles inland from Aparima. The claimants' grievance is sustained.

A waterfall at Te Aunui on the Mataura River

10.4.18 This grievance appears to rest on the following evidence of Matiaha Tiramorehu before the Smith-Nairn commission:

I want to speak with reference to the waterfall at Mataura. I want the Govt to give it back.

Why? What is your reason for wanting the Govt to return it? Do you mean as a gift, or have you any special reason why the Govt should give it back? -Because I think the œ10 was not sufficient for my claims. The fall is called Te Aunui; it is on the Mataura. The reason why I did not mention Te Aunui was because somebody else held it then. The Ngaitahu killed the people who first held it, and that was the reason I did not put in my claim. It had passed by right of conquest. (E2:192-193){FNREF|0-86472-060-2|10.4.18|54}

Tiramorehu appears to be making his claim for the return of Te Aunui waterfall for the first time 28 years after the purchase. It is apparent he made no claim at the time. The Crown cannot be held to have failed to set it aside at the time of the purchase as alleged by the claimants. This grievance is accordingly not substantiated.

Summary of findings on grievance no 4

10.4.19 The claims that the Crown failed to set aside the following lands for the use of Ngai Tahu after the sale are sustained:

- additional land at Aparima to that which Mantell allowed (10.4.8);

- additional land at Kawakaputaputa to that which Mantell allowed (10.4.10);

- a block of 200 acres at Waimatuku (10.4.13);

- Rarotoka Island (10.4.14); and

- a block at Opuaki (10.4.17).

The remaining claims in grievance no 4 are not sustained.

Our findings in relation to the Treaty of Waitangi on the grievances upheld are deferred until we have considered grievance no 8, to which they are closely related.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.5 The Purchase

10.5. The Purchase

The purchase is delayed

10.5.1 After laying out the reserves and making a trip to Ruapuke, Mantell returned to Dunedin. As Professor Ward put it, Mantell clearly regarded the various meetings in the summer of 1851 and 1852 as settling the issue-certainly as it applied to the major concerns of the sale-although he was yet to reveal the price (T1:224-225).

On 19 February 1852 Mantell formally reported to the colonial secretary, Domett, the completion of his overland journey and the setting aside of eight reserves (including the Tumutu life reserve). He asked for the surveyor Kettle to be made available urgently as he wished to have maps of the reserves available for delivery to the chiefs by 24 May 1852, "the day fixed for a final general meeting at Otago to settle all disputes prior to the distribution of the final instalment" (A8:I:273){FNREF|0-86472-060-2|10.5.1|55} He indicated that after the 24 May meeting he intended to go south to distribute the first instalment of œ1000. He wished to travel there by sea, taking with him those chiefs living at Dunedin who should be there. Domett authorised Kettle's engagement but made no arrangements about the purchase money. The May meeting, which was fixed to coincide with the closure of the titi season, took place, but with no response from the government, the Murihiku people returned south still hoping Mantell would bring the payment to them. Eventually they dispersed (T1:225). On 21 June Mantell wrote to Domett suggesting further arrangements for completing the purchase in August:

As indicated in my letter of the 19th February I have awarded the sum of œ2000 to be paid for the district: this I have deferred communicating to the natives in order that I might do so in full assembly. The land in the meantime is regarded by them as ceded, the price to be fixed by me. (O13:66){FNREF|0-86472-060-2|10.5.1|56}

10.5.2 For more than a year there was no action on the part of the government in providing the funds to enable Mantell to complete the purchase. Domett did not explain the reasons for the delay until after the sale was effected. In a letter of 7 November 1853 he advised Mantell that:

- about six years previously some of the principal chiefs of the district had agreed with the governor to sell the land now sold on certain terms when it might be required;

- those terms were nearly the same as they had since agreed on in the deed of purchase;

- within the last 12 months Patuki and Taiaroa, on a visit to Wellington, had confirmed the earlier agreement; and

- given the agreement, there appeared to Grey no need to hurry the completion of the purchase, especially as at the time the government found it very difficult to find funds for more urgent purchases of land elsewhere. (A8:I:283){FNREF|0-86472-060-2|10.5.2|57}

10.5.3 Mantell heard nothing further from the government for over a year. By August 1853 he had become seriously concerned that Ngai Tahu would withdraw from their agreement to cede the land. Tired of waiting for government initiatives, 30 or 40 European families were placing increasing pressure on Ngai Tahu to sell them land directly, despite the Native Land Purchase Ordinance which was intended to prevent such purchases. In particular, Mantell began to fear he would be unable to settle for œ2000 (E2:37a){FNREF|0-86472-060-2|10.5.3|58}

The deed of purchase is signed

10.5.4 In August 1853 Mantell decided to act on his own initiative. He was still without funds from the government. Although lacking authority from Wellington he drew œ500 from the land fund, (which held profits from the sale of Crown lands within the Kemp and Otakou blocks), for which he was responsible, and he borrowed œ500 on the security of his own property. Finding that many of the principal claimants to the block from both Otakou and Murihiku were in or near Otago, Mantell arranged for them to assemble on 17 August 1853 to settle the sale. After what he described as "a long and anxious debate" some 58 Ngai Tahu chiefs signed or had their names recorded on the deed of purchase that day. These included a substantial number from the Foveaux Strait area to the south and south-west. Of the five chiefs identified by Mantell as representing those with the major rights to the block, Taiaroa, Karetai, and Paitu signed the deed. The remaining two, Te Au and Topi Patuki, were present and had their names recorded on the deed. Of these, all but Taiaroa and Karetai were from the south and south-west, while according to Mantell's map prepared in consultation with Patuki, Taiaroa had interests in Fiordland on the west coast as well as in the east. Other chiefs having an interest in Fiordland, namely Potiki, Akaripa Pohau and Irai Tihau also signed or were named on the deed.

10.5.5 Although the purchase price nominated in the deed was œ2000, Mantell explained to Domett in a letter of 18 August 1853, that the Ngai Tahu chiefs only agreed to this on the basis that he would urge the governor, particularly having regard to the long delay, to pay an additional œ600, one half of this would be distributed at Otago and the other half at the Bluff (E2:37(b) & (c)).{FNREF|0-86472-060-2|10.5.5|59} The governor agreed to this. The deed itself provided for the œ2000 to be paid in two equal instalments at Otakou and Awarua (the Bluff). The first instalment was paid at Koputai (Port Chalmers) on 3 October 1853, but it was not until 15 February 1854 that the remaining œ1000 was available and distributed at Awarua. The additional payments of œ300 each were not made until 4 and 25 November of the same year (E2:37(f)-(h)).{FNREF|0-86472-060-2|10.5.5|60} Mantell went to considerable pains to ensure that each claimant received a share of the payment. In some cases this was no more than a few pounds, or even less, and there were later complaints that others were not paid at all.

The deed and map

10.5.6 The deed states that the chiefs and people of all the lands within the boundaries described in the deed, and more particularly in the accompanying map, entirely give up those lands to the Crown forever. In return, they were to be paid œ2000 by two instalments of œ1000, as we have earlier indicated. The boundaries of the deed were described as:

Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotahi,) haere atu i reira ki Kaihiku, a i, reira, haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe, me nga Turanga me nga Turanga. me nga awa me nga roto, me nga ngahere, me nga Pakihi, me nga aha noa katoa kiroto ki aua wahi me aua mea katoa e takoto ana; Otira kei te pukapuka ruri kua oti te whakapiri, ki tenei pukapuka te tino tikanga me te tino ahua...(see appendix 2.5)

Which was later translated by Alexander Mackay as:

The boundary commences at Milford Haven (the name given to that place in Mr. Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the land within these boundaries, with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. A more accurate description and representation of the land is given in the plan hereunto annexed. (E2:37(g)){FNREF|0-86472-060-2|10.5.6|61}

The claimants, in support of their claim that the deed lacked clarity in its description of the boundaries, tendered in evidence a new translation of the Murihiku deed, in which the boundaries of the land alienated are described as follows:

The boundary commences at Piopiotahi (the name given to that place in Kemp's deed of sale is Whakatipu Waitai however the Maori name is Piopiotahi) from there it goes on to Kaihiku then from there to Tokata closely following the old boundaries of Kemp and Symonds to the sea of Piopiotahi then on to Tokata yonder to Tauraka, Rarotoka and Motupiu and all the islands which lie close to shore (but not the Ruapuke group)... (R39:3-4)

We note that the Mackay translation has stood unchallenged for over one hundred years until 1989. The essential difference between the two translations of the description of the boundaries is that the earlier translation, after reference to "Kemp and Symonds", says "and by the coast from Milford Haven round to Tokata..." where as the new translation says "to the sea of Piopiotahi then on to Tokata yonder..."

10.5.7 Those members of the tribunal qualified to do so have considered the two translations and have no hesitation in finding that the older Mackay translation of the disputed passage is correct. The words "ma te moana" mean "by the sea", and while "coast" is, in the context, an acceptable substitute for "sea", the most accurate translation would read "and by the sea from Milford Haven round to Tokata". The tribunal considers that the deed provided a clear, if concise, description of the boundaries which would have made it plain to all Ngai Tahu who heard the deed read out that the land extended from Piopiotahi (Milford Haven) on the west coast, across to Kaihiku and on to Tokata (the Nuggets) on the east coast; and the whole way around the coastline from Piopiotahi to Tokata, including Tauraka, Rarotoka, Motupiu and all the islands lying adjacent to the shore, except the Ruapuke group.

10.5.8 The deed map was also criticised by the claimants on the ground that there is no Green Island in the place indicated on the map. This is a valid criticism. As we have seen, the deed itself refers to "...Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (except the Ruapuke group)". But it makes no reference to Green Island. The map correctly identifies Rarotoka and Motupiu islands, but does not show Tauraka. Presumably the Green Island shown on the map was intended to be Tauraka. In Mantell's 1852 sketch map Tauraka is shown at the mouth of the Waitutu River, which drains Lake Poteriteri about 60 kilometres west of the Waiau river mouth (J4:76).{FNREF|0-86472-060-2|10.5.8|62}

Further enquiries made from the literature reveal references to both Green Island (or Islets) and Tauraka:

- Herries Beattie, The Maoris of Fiordland, (Dunedin, 1949), has in chapter IV a list of place names between Waiau and Preservation Inlet. The Green Islets are described as being between Cavendish and Wilson Rivers (p 20).

- W H Sherwood Roberts, Place Names and Early History of Otago and Southland, (Invercargill 1913), says "Windsor Point was Tauraka" (p 99). No source for this statement is given.

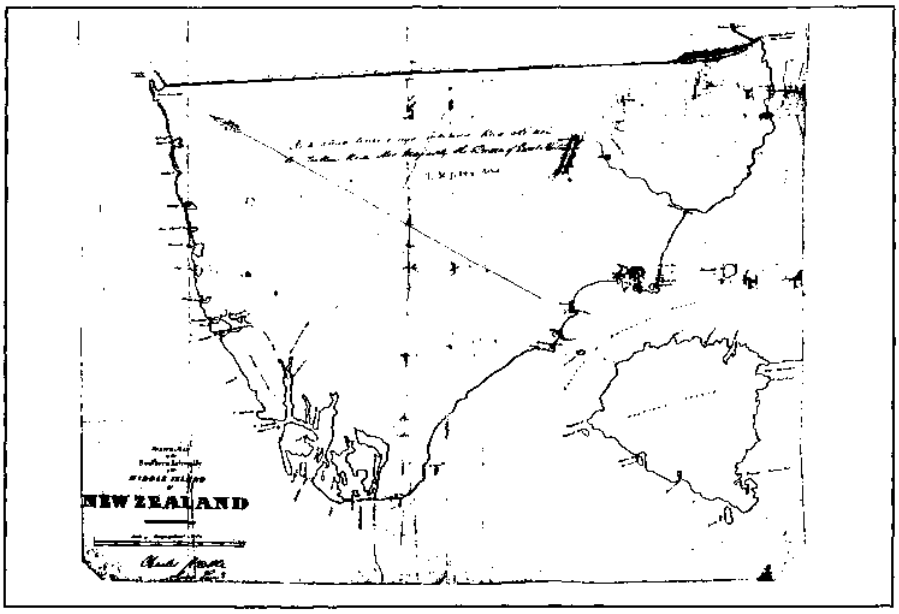

Figure 10.5: The Murihiku purchase deed map as drawn up by Charles Kettle. The coast line is heavily coloured blue in the original and the reserves are marked in yellow. The Waiau River is not marked and the place mentioned in the deed as Tauraka is on the map as Green Island. Courtesy of DOSLI, Wellington.

Windsor Point (previously Tauraka) was shown on a large map, in evidence before us (O40), as being near the south-west corner of the South Island, not far removed from the Green Island shown on the deed map. It seems highly likely, therefore, that the island described as Green Island was intended by Kettle, the map draughtsman, to be Tauraka. If so, he appears to have erred in describing it as an island, if in fact it was a point or headland. While to modern readers and viewers the reference to Tauraka may serve only to confuse, it is very likely from Mantell's identification of Tauraka on his 1852 sketch map that to Ngai Tahu, in 1853, the reference would have been perfectly familiar. It comes in the correct sequential order, preceding, as it should, the reference to Rarotoka, which is to its east, and Motupiu, which is further east. Even more convincing is the information recorded on a map made by Edward Halswell and dated 1842. The map was prepared from information provided by Ngai Tahu informants, and has already been reproduced as part of this report (figure 3.2

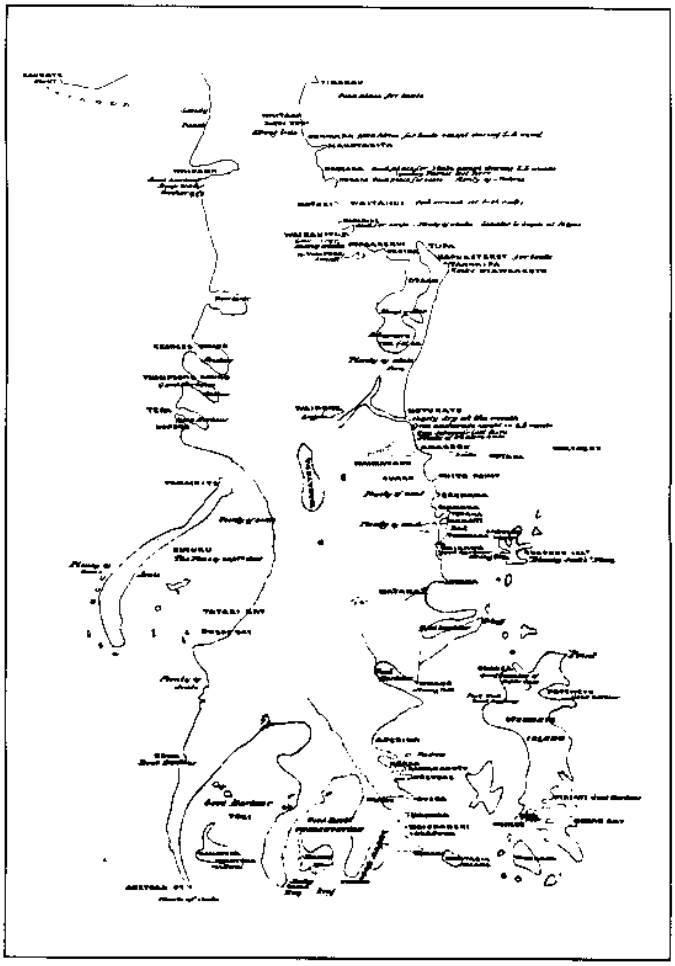

Figure 3.2: Southern portion of a Maori map of the South Island made for Edward Halswell in the early 1840s, courtesy of the Alexander Turnbull Library, Wellington, New Zealand.

). It shows a place labelled "Toraki" on the coast between the Waiau river mouth and Preservation Inlet. We think it unlikely therefore that the absence of Tauraka on the map and the presence of "Green Island" in the approximate position of Tauraka would have significantly affected Ngai Tahu's appreciation that the boundaries extended the whole way around the coast from Piopiotahi to Tokata.

10.5.9 The claimants, through their historian, Mr McAloon, were strongly critical of the absence of any reference to the Waiau River in the deed map. Indeed, Mr McAloon went so far as to allege that it was drawn to deceive (J2:65). It was suggested that the coastline shown on the map might have been confused by Ngai Tahu for the Waiau River. A perusal of the map shows the whole of the block, as delineated in the deed, to be outlined in pink, with a thick blue border clearly indicating the sea coast and various bays and inlets. We see no possibility of any part being confused with the Waiau River.

Mr McAloon conceded that the deed map was present at the time of signing (J2:66). The map is large, judging by the copy produced in evidence (T9) which we understand to be of approximately the same size as the original. It should have been clearly visible to the signatories.

While Milford Haven, not Piopiotahi, is marked on the deed map, the deed itself expressly refers to Piopiotahi. This should have clearly indicated to Ngai Tahu signatories that the purchase extended right across to the west coast. Topi Patuki, while unclear about a number of matters, stated that he signed the deed at Port Chalmers (E2:73){FNREF|0-86472-060-2|10.5.9|63} and, asked whether it was read over before he signed it, replied -"Yes, it was read over before I signed it" (E2:75).{FNREF|0-86472-060-2|10.5.9|64} We will return to Patuki's evidence shortly.

It should also be noted that the deed map shows the seven reserves marked off by Mantell, except for number 3 at Oue, which either flaked off the original at an early or was not recorded and hence is not now shown on photocopies. (See P18:appendix A).

Who signed the deed?

10.5.10 Mr Temm, echoing in part at least observations by Mr McAloon, said in paragraphs 4-8 of his reply (Y1:92-94):

4. The Deed was signed once only-at Port Chalmers. It was sent off to Domett on the same day (E.2; p.1). Money was paid over at Port Chalmers in October 1853, at Awarua in February 1854 and in Dunedin on 2 occasions-on 4 November 1854 and 3 weeks later on 25 November. At none of these places was the Deed read out. It had been sent off to Domett on the very day it was signed at Port Chalmers.

5. The main point made by the claimants has not been adequately dealt with by the Crown. That is that the people living near Waiau, in the western part of Southland did not participate in the signing of the Deed and therefore did not hear it read out. The Crown's response to this point is as follows:

"..It has been suggested that the Deed was read out near Port Chalmers and no where else and that Mantell spoke one way at that time and a different way at Awarua. But it is for the claimants to prove this allegation; they have produced only unsupported speculations."

Again this is not correct.

6 Horomona Patu was the paramount chief in the western part of Murihiku and he certainly did not sign the Deed, nor did any of his people. The Smith-Nairn Commission received a letter from 17 of the chiefs of Ngai Tahu at Aparima written on 8 March 1880 urging the Commission to come down to Riverton so that their evidence could be taken (J.4; p.115). The writers of the letter point out that there were 80 or more in their community and that they were not at all clear about the sale "of this side of Murihiku".

7. On 25 March 1880 Horomona Patu gave evidence and said:

"...The people here south knew nothing of the sale of Wakefield, and as regards the selling of Murihiku Block it was not the people of Murihiku who sold it but the people of Otago..." (J.4:p.145)

It is clear from reading his evidence that when Mantell went down to Aparima the year before the sale as part of his negotiations he was obviously concerned only with identifying what reserves should be laid off. At that stage he did [not] disclose what he was prepared to pay and no price was discussed with Horomona Patu or his people near the Waiau River.

8. The fact that the Deed was signed at [Port] Chalmers and thereafter sent off to Domett is clear evidence that it was not taken about and read out to any of the others when the money was paid out in October 1853 and during 1854. It seems an inevitable conclusion to draw from the evidence that Mantell went to Aparima to lay off reserves but never returned there. It is clear that he did not disclose what price he would pay until the final discussions at Port Chalmers in October 1853 and the point made by the claimants is that he failed to get the agreement of all the principal chiefs of Murihiku. In particular he failed to get the agreement of those who were most affected by the sale of Fiordland, viz. those who were living near the Waiau River, at Colac Bay and at Aparima-those who had "the biggest interest" of whom Tiramorehu had spoken when he was asked about the boundaries of Murihiku during Mantell's first round of negotiations.

10.5.11 After these submissions had been made, Mr Evison, one of the claimants' historians, had the opportunity of closely examining the original deed. From this he concluded that the vast majority, 41 out of 58, of those named on the deed, did not actually sign the deed itself, but had their names recorded (Z41). The receipt for the first payment made at Koputai, on 3 October 1853, was written on the back of the deed and was signed by 39 Maori. The Awarua receipt of 15 February 1854 was also signed by all those named. However, Mr Evison suggested that Paitu was the only chief from Murihiku who signed the deed. Since Mantell had this receipt signed on a separate sheet, rather than continue using the back of the deed, Mr Evison argued it was likely that the deed was not taken to Awarua. From all this, Mr Evison concluded that, apart from Paitu, none of the signatories from Murihiku actually signed a document specifying what land, if any, was being conveyed to the Crown. As a result it is possible, he suggested, to argue that the Murihiku people were confused about the sale, and any doubt they may have had about the area of the block would not have been resolved.

Mr Temm erred in claiming that the deed was sent off to Domett on the day it was signed, as Mr Evison's later comments demonstrated. In fact Mantell sent a copy only to Domett that day (E2:37(b)).{FNREF|0-86472-060-2|10.5.11|65} The following year, by letter dated 12 May 1854, he enclosed "the ORIGINAL DEED OF PURCHASE of the Murihiku Block, with the receipts for the first two instalments of œ1,000"(E2:37(d)){FNREF|0-86472-060-2|10.5.11|66} (emphasis added). The second instalment was paid at Awarua on 15 February 1854 (E2:37(g)).{FNREF|0-86472-060-2|10.5.11|67} Thus Mr Temm's claim that on no occasion after its signing on 17 August 1853 was the deed read out, cannot be sustained. Since the deed was used for the first receipt, it is likely that it was read out when the first payment was made. While Mr Evison suggested that it was not taken to Awarua in February 1854, because a separate receipt was on that occasion drawn up, this is not conclusive.

Mr Temm's main point was that the people living near Waiau in the western part of Southland did not participate in the signing of the deed and therefore did not hear it

read out. He said that Horomona Patu, whom he claimed to have been a paramount chief in the western part of Murihiku, did not sign the deed nor did any of his people. It is true that Patu did not sign the deed, but whether he was the "paramount chief in the western part of Murihiku" has not been established. The claimants' historian, Mr McAloon, claimed that Patuki had the paramount mana in Murihiku. It is certainly not correct that none from this part of Murihiku (referred to in his paragraph 8 as those living near the Waiau River at Colac Bay (Oraka) and at Aparima) signed the deed. The only chief named by the claimants as not having signed is Horomona Patu. No reference was made to the list of claimants in evidence prepared by Mantell in association with, and no doubt at the direction of, Patuki (O13:84-85).{FNREF|0-86472-060-2|10.5.11|68} Out of 59 names on the deed, 41 have been identified. Of the 41, 15 were from Otakou and the remainder-26 in number-were from Murihiku. In his list Mantell names the claimants from various localities. The numbers shown are as follows, with the number from each locality whose names appear on the deed shown in brackets.

Oue 3 (1-Huruhuru)

Aparima 13 (5-Paororo, Matiaha Kukeke, Haimona Pakipaki, Makaia, Akaripa Pohau.
Note: Horomona Pukuheti [Patu] is included in Mantell's list of claimants, but he was not a signatory and is therefore not one of the 5)

Oraka 8 (4-Tiare Te Au, Takurua, Pirihira and Ratamira Te Hau)

Ruapuke 19 (10-John Patuki, John Karako, Ihaia Whaitiri, Tiare Hape, Horomona Mauhe, Wiremu Rehua, Matene Manaia, Teoti Rauparaha, Wi Rehu and Maraitaia)

Rakiura 8 (1-Paitu)

Kawakaputaputa 7 (none)

Including one from Rakiura, there are 21 chiefs from west and south of Otakou. To this number must be added a further five whose names appear on the census compiled by Mantell (O13:22-24), as follows:

Oue 1 (Te Marama)

Aparima 1 (Paororo)

Ruapuke 3 (Manihera Tutaki, Tipene Pepe and Riwai Piharo)

This brings the total of identified participants to the deed from Murihiku to twenty-six. Horomona Patu was not listed as a principal chief by Mantell. The principal men

according to Mantell's list were Huruhuru, Te Au, Topi Patuki and Paitu, all of whom are named on the deed.

10.5.12 Although, as Mr Evison pointed out, the deed was only signed by a minority of those involved, it has never been suggested that the chiefs named did not give their consent. The question remains, since they did not sign the deed, did they understand the boundaries mentioned in the deed and on the deed map? Given the circumstances, it can only be concluded that they did understand these. Topi Patuki commented to the Smith-Nairn commission that, "The document was read out and then my name was written"(J4:2).{FNREF|0-86472-060-2|10.5.12|69} If the deed was read out then the boundaries would have been clear to all those present. Although, as Mr Evison also pointed out, the receipts did not specify the nature of the land sold, the payments were the subject of much debate and the amounts made over determined on the basis of rights openly discussed and recorded by Mantell in his charts and rights table.

In the light of what actually happened, it appears difficult to sustain the claimants' allegation for which they cite Horomona Patu that:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it, but the people of Otago... (J4:145){FNREF|0-86472-060-2|10.5.12|70}

In fact, the evidence clearly shows, that all the leading Murihiku chiefs consented, as did an appreciable number of lesser rank from Murihiku. It is not correct to say that it was only the people of Otago who sold the land. They appear to have been a minority of those involved.

According to Mantell's charts and rights table, the area of the west coast owned by those from Foveaux Strait only extended to Dusky Sound. The area from Dusky Sound to Milford was owned by chiefs from Otakou. To this extent it would seem the Otakou chiefs did sell a large portion of Fiordland and since no significant evidence was given to the tribunal to suggest otherwise we can only conclude that it was theirs to sell.

Grievances nos 7 and 10

10.5.13 It is appropriate at this point to consider two further grievances of the claimants, grievance no 7, that:

The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

and grievance no 10, that:

The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

In considering these grievances the following circumstances are relevant:

- Soon after arriving in Otakou Mantell, on 18 November 1851, had a preliminary conference with Patuki, Te Au, Karetai, Taiaroa and "many other chiefs". Those present expressed their wish to cede the land to the government. The map prepared by Mantell during or following the discussions demonstrates that the names of chiefs having an interest in various parts of the block, including Fiordland and the west coast, were identified. This map appears to indicate the extent of the land the Ngai Tahu chiefs were prepared to cede.

- On 22 December 1851 at least 60 Ngai Tahu were present at a hui held at Huruhuru's boathouse at Oue to discuss the purchase with Mantell. Among those present were Patuki, Te Au, Paitu, Huruhuru and Horomona Patu. According to Takurua in 1880, the chiefs agreed to sell, but he did not say what land he understood was being bought by Mantell. Others, as we will soon relate, told the Smith-Nairn commission that Mantell was informed at Oue that the western boundary would be the Waiau River. It is clear that Mantell declined at that time to name the price the Crown was prepared to pay. This was not disclosed until much later. Following this hui Mantell spent the next six weeks visiting various kaika and laying off the reserves. Again we have no contemporary evidence of what he discussed. It is, however, difficult to believe that the purchase was not the subject of discussion and debate.

- Mantell arranged for a final meeting at Otago on 24 May 1852 to, as he put it, "settle all disputes prior to distribution of the first instalment". Although the meeting took place, nothing was concluded as Mantell had received no advice that the purchase money would be made available. We have no information as to what discussions took place during this meeting. It appears that Mantell again refrained from naming a price. On 21 June he wrote to Domett, advising that he had awarded œ2000 for the district, but had deferred informing Ngai Tahu of this so that he might do so "in full assembly". But, he added, "the land in the meantime is regarded by them as ceded, the price to be fixed by me".

- On 17 August 1853 Mantell met with many of the principal owners from both Otakou and Murihiku at Port Chalmers. After "a long and anxious debate" some 58 Ngai Tahu chiefs accepted Mantell's terms. We know from Patuki that the deed was read out before his name was written out. Among those also named, as we have seen, were a substantial number, including all the principal chiefs, from the Foveaux Strait area to the south and south-west. It is apparent there was a debate over the purchase price which led to an understanding that, while œ2000 would be named in the deed, Mantell would strongly urge the governor to agree to pay an additional œ600. This the governor agreed to, and œ2600 was duly paid.

- We have no contempory record of what was said when the first instalment of œ1000 was paid out at Port Chalmers on 3 October 1853, or when the second œ1000 instalment was paid over at Awarua on 15 February 1854. While Mantell still had the original deed of purchase in his possession, we do not know whether it was read out or again referred to at either of these meetings. No doubt news had travelled fast from the August 1853 meeting when the deed was signed, as to what had been done.

Finding as to grievance nos 7 and 10

10.5.14 While it is apparent that not every chief was present at the signing of the deed, it is evident that all the leading chiefs were, along with many others, including a substantial number from or having interest in the south and south-west, including areas west of the Waiau. Many were at Port Chalmers when the terms of the purchase, including the price, were debated at length before the deed was signed. As a result of these discussions, Mantell was obliged to endeavour to obtain the agreement of the governor to pay œ2600. In this he was successful. In all the circumstances we are not able to sustain the claimants' grievances no 7 and no 10.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.6 Land West of the Waiau River

10.6. Land West of the Waiau River

10.6.1 The claimants, in their grievance no 6, said that the land west of the Waiau was wrongfully included in the sale. This area covers the largely mountainous region familiarly known as southern Fiordland, and includes Lakes Manapouri and Te Anau. As this grievance was a central issue in the claim we propose to deal with the evidence in some detail. Before doing so, however, we record a submission by the Crown on the relative infrequency with which this grievance has been raised with the Crown over the past 136 years.

Silence as to the western boundaries

10.6.2 The Crown, in closing, claimed that prior to the Smith-Nairn commission, the Fiordland question was not raised with the Crown and from that time until now-over 100 years-it again seems not to have been raised in any approach to the Crown. That fact, the Crown claimed, speaks for itself (X2:64). The Ward report put the matter more fully and perhaps in better perspective, as follows:

Whereas in the Kemp purchase a continuous line of protest, and the survival of more contemporary material has allowed us to establish firm links between the Maori view of the transaction in 1879-80 and the events of 1848, for Murihiku we are forced to rely almost entirely on the records of the Smith-Nairn Commission. Many of the concerns about reserves and the provision of schools and hospitals had been raised prior to 1879, however the suggestion that the Maori understanding of the boundaries of the Murihiku block differed greatly from that in the deed is recorded almost exclusively in the evidence of that Commission. An 1863 letter from the Superintendent of Southland, J.A.R. Menzies, shows that Ngai Tahu were concerned about the boundaries of the purchase, but is unspecific about the nature of their complaint (Q3:6). There are also the much later statements of two Ngai Tahu kaumatua, Poko Cameron and Thomas Spencer, that Fiordland was to be reserved, or that it had not been included in the sale (J2:54-8; J4:22, 23a). Only Spencer provided a specific boundary, 'Te Wae Wae to Milford Sound'. (T1:231)

It is apparent from the claimants' evidence that the Smith-Nairn testimony was the principal basis for their claim that Ngai Tahu did not intend to sell the land beyond the Waiau.

Smith-Nairn evidence 1879-1880

10.6.3 Mr McAloon presented evidence which he believed showed that the Murihiku purchase was understood by Ngai Tahu to extend only so far west as the Waiau River.

He based this belief particularly on the evidence of Topi Patuki, Horomona Patu, Horomona Pohio, Matiaha Tiramorehu and Wiremu Potiki. Mr McAloon claimed that these five Ngai Tahu stated that the Waiau was the boundary (E1 and E22). In later evidence Mr McAloon indicated that whereas Patuki, Patu and Pohio all explicitly gave the boundaries of the land that was offered to the Crown as "Kaihiku to Hokanui and then to Waiau", Tiramorehu and Potiki did not. He stressed however, that the importance of Tiramorehu's evidence is that the traditional boundary of Murihiku was the Waiau River (J2:48). Mr McAloon had certain parts of their evidence retranslated and submitted these in evidence (J4:1-6).

In fact, neither Potiki nor Tiramorehu were definite about the boundaries-see Potiki:

I was not clear about the boundary of the land which was bought by Mantell. (J4:5)

And see Tiramorehu:

I do not know about the boundaries. It is for other men to speak of the boundaries, the people with a big interest. I did not think about the boundaries. (J4:4)

Initially Mr McAloon claimed that five Ngai Tahu said the boundary was at the Waiau. Of nine others, six who were eye-witnesses made no comment, and three who were not also made no comment. These three are said to have included Karetai, who was a signatory to the deed. Following Mr McAloon's later evidence we are left with three only out of eleven claiming the boundary went only to the Waiau. The others were either vague or silent on the western boundary. We think it surprising that so few appeared to be aware of such an important matter if it was indeed the fact that the boundary did not, as the deed and deed map show, extend right across to the west coast.

We would observe that a careful reading of the Ngai Tahu evidence to the Smith-Nairn commission reveals a considerable number of contradictions or inconsistencies. These are no doubt the result of the witnesses attempting to recall events which occurred up to 29 years earlier. We find it difficult to know what evidence can be regarded as reliable when significant parts appear not to be.

It must also be remembered that whereas the Smith-Nairn commission heard from some Ngai Tahu witnesses, they did not hear from Mantell on the Murihiku purchase. The evidence accordingly lacks any statement from one of the principal protagonists. It must, we suggest, for this reason also be viewed with some caution.

Topi Patuki

10.6.4 The following points are from Patuki's evidence to the commission (E2:60-67).{FNREF|0-86472-060-2|10.6.4|71}

- He recollected Mantell coming down to the south in 1852 and accompanying Mantell on his journey west. In fact this occurred in 1851.

- He could not recollect whether Mantell met with any people at Dunedin and talked about the sale of the land before travelling across towards Murihiku with Patuki. We

note that this was the preliminary conference at which Mantell recorded Patuki and many other chiefs being present and agreeing to cede the land.

- Patuki described a meeting at Oue at which he, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs, and the majority of the people living there, were present. Mantell told them he came to buy their land and the Ngai Tahu asked about the price. Mantell spoke about schools and hospitals.

- Patuki said that "He [Mantell] described the boundaries as extending from Kaihiku, Hokanui & Waiau". This was retranslated (J4:1) to read that "the land which was mentioned by Mantell began from Kaihiku to Hokanui and extended from there to Waiau". The difference between these two versions does not appear to us to be material. In both versions Patuki, shortly after, said it was Ngai Tahu who mentioned the boundaries. In both versions Mantell was described as saying the land was too little and he would be satisfied if all the land were given to him. That was all that was said by Patuki to have passed on the question.

- Patuki recollected Mantell coming to Awarua in 1853.

We now set out an extensive quotation from Patuki's evidence concerning this visit by Mantell to Awarua:

Was there any conversation then about the land? -The natives asked Mantell questions.

What questions did they ask him? -They asked Mantell "How much money have you brought to pay for the land; what money have you brought wherewith to pay for the land?" Mantell said "I have brought one thousand pounds." The natives assented to Mr. Mantell's terms, because he mentioned hospitals & schools. They yielded to Mr. Mantell because he spoke of hospitals and schools.

Do you mean to say that one thousand pounds was all the money Mantell paid for the land? -We thought that this thousand pounds was for the boundary from Kaihiku to the river Waiau.

Did you know nothing about Mantell paying more than one thousand pounds? -No; I did not. I did not know of anything more than one thousand pounds. I have no knowledge of any other payment.

Do you know of any other payment than that œ1000 at the Bluff? -No; I do not.

[Murihiku deed produced.]

Did you sign the Deed? -I signed the Deed, but not at Awarua. It was at Port Chalmers I signed the Deed.

Did you get any payment at Awarua? -Yes. (E2:71-73){FNREF|0-86472-060-2|10.6.4|72}

Patuki was confused here.

- He had been a party to the deed at Port Chalmers on 17 August 1853.

- The deed, which he heard read out, clearly stated that the purchase price was œ2000.

- Mantell did not go south to Awarua to pay out the œ1000 to the Murihiku people until 15 February 1854.

- Mantell had some months previously (3 October 1853) paid out the first œ1000 to the Otakou people at Koputai (Port Chalmers).

Here follows further evidence:

Then you [Patuki] went to Port Chalmers, and signed the Deed? Did any other natives go up there from your part to sign it? -I don't know of anyone else. I know of myself. (E2:74){FNREF|0-86472-060-2|10.6.4|73}

In fact the deed was signed in August 1853, some six months before the money was paid out at Awarua. As we have seen, 25 other people from the south and west were present at Port Chalmers in August 1853, when Patuki agreed with them to the purchase. It seems surprising that he could not remember the presence of any of them there.

Later he acknowledged that his name had been placed on the deed which was shown to him. His evidence continued:

Was it [the deed] read over before you signed it, or not? -Yes; it was read over before I signed it.

You have told us that you had spoken to Mantell about the land from Kaihiku to the River Waiau. Did you notice that in that Deed much more land is included? -We thought it was on our boundary, but we did not know there was anything else taking place about the boundaries at Otakou. I supposed that the boundaries of the land we were selling were the boundaries that we mentioned to Mantell.

Did you understand what was read to you at the time? -I was not quite clear that the boundary was going beyond the boundary mentioned.

You heard it read, and did not understand that it included land beyond Waiau? -Yes. It was written clear enough, but the thing had been done at Otakou, and they could not help themselves.

Was the Deed signed by all the people together at the same time? -Yes, they were all there. Still they did not understand that the other portion of the land was sold. (E2:75-76){FNREF|0-86472-060-2|10.6.4|74}

It is interesting to compare the retranslation of this passage, which reads as follows:

The document was read out and then my name was written.

To our knowledge that sale was on our boundary. We did not know that a large land sale had been spoken of at Otakou. To my knowledge the land which was sold was the area described by us to Mantell.

When the deed was read out I was not very clear whether the boundaries were being extended.

I certainly heard it read out, however I do not know whether the lands beyond Waiau were being acquired.

The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed.

All the people were there. There was just one recording of their names. However they did not know that other land had been taken. (J4:2)

We note that Patuki was "not very clear" whether the boundaries were being extended. He certainly heard the deed read out but did not know whether the lands beyond Waiau were being acquired. But he then said, "The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed" (J4:2). Patuki seemed to be implying that the Murihiku people were not at Otakou. But 26 or so, including himself, were in fact there, and no doubt were party to the discussions in the "long and anxious debate" before the deed was read out and signed on 17 August 1853. He admitted the deed was "clear enough" (E2:76), or "quite clear" (J4:2). We recall that Topi Patuki was a major Murihiku chief. It is difficult to believe that he did not play a leading role in the lengthy discussions with Mantell. That he was interested in the sale taking place was evidenced by the special trip which he and Taiaroa had made to Wellington the previous year in the hope of expediting the sale (E2:37(c)).{FNREF|0-86472-060-2|10.6.4|75} It appears, however, that the passage of nearly 30 years before giving this evidence has substantially impaired his recollection of events.

Horomona Patu

10.6.5 According to Patu, Mantell, when asked by the people at Oue in 1852 on his first visit, what land he had come to buy replied, "The Murihiku Block; the southern end". Ngai Tahu gave the boundaries as, "From Kaihiku to Hokanui and to the Waiau River". Mantell replied, "It is too little". The Ngai Tahu then asked how much he would give for it (E2:92-93).{FNREF|0-86472-060-2|10.6.5|76} The new translation (J4:2-3) is not materially different.

Much of Patu's evidence was directed to the marking off of reserves by Mantell. Patu said he did not know the words of the deed nor did he sign the deed, although he later received part of the payment at Awarua (E2:106-107).{FNREF|0-86472-060-2|10.6.5|77} He was asked:

Was anything said on the second visit about the land that Mr Mantell was to acquire? -The natives, on the second visit of Mantell to Awarua asked "What sum of money have you got?" (E2:107){FNREF|0-86472-060-2|10.6.5|78}

As we know, Mantell had œ1000, being the instalment due under the deed signed some six months earlier.

It appears from Patu's evidence that the only mention he heard of the land to be bought by Mantell was at Oue in December 1851, that he was not present at the lengthy discussions on 17 August 1853 when the deed was signed, and that when Mantell arrived in February 1854 to pay over the instalment of œ1000, the area of the land being purchased was not discussed. Many of those present had of course been in Port Chalmers when the deed was signed. Given Patu's very limited involvement in the purchase negotiations we consider his evidence cannot be regarded as definitive or conclusive.

Later on 25 March 1880, Patu made a statement to the Smith-Nairn commission at Riverton which included the following:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it BUT THE PEOPLE OF OTAGO. The inquiry was held at Otago, and Mantell came here only to mark off the reserves here. He went back to Otago, and there a thousand pounds was paid, and Mantell then came South and brought a thousand pounds, which may be said to be money which passed through the hands of the Otago people, and handed to us. This money was brought and paid down as the price of Murihiku; but in my thought, what is this money? (J4:145){FNREF|0-86472-060-2|10.6.5|79} (emphasis added)

He continued by saying he looked on the money as merely clinching a bargain and did not challenge the boundaries in the deed. Nor did any other Ngai Tahu witness at that hearing.

The statement of Patu that it was not the people of Murihiku who sold it but the people of Otago does not square with the evidence of the deed. He appears to have overlooked or forgotten, or indeed not known, that many of the southern and western Murihiku people including the principal chiefs were named in the deed in August 1853. We believe his evidence suffers from a hazy memory or lack of knowledge or both.

Horomona Pohio

10.6.6 Pohio said he was at Port Chalmers when Mantell went there in 1852. The people from Waikouaiti, Moeraki, and Port Chalmers assembled there. Mantell stood in the midst of the people and said:

that he came to buy the land.

Did he say what land he wanted to buy? -No, people asked him what land, and he replied Murihiku Hokanui and on to Waiau River. And then the Maoris said -"You will have to give us a good price -"Mr. Mantell said "I shall give you a good price." I did not go to Murihiku with Mr. Mantell.

Was that all that Mr. Mantell said at that time about the land? -The words of Mantell were -"Do not consider what I am giving you now as the large payment, but hereafter I shall establish you schools and hospitals." (E2:134-135){FNREF|0-86472-060-2|10.6.6|80}

In later evidence Pohio said:

Was anything said about reserves at this first time in 1852? -Yes, there was.

What was it? -Mantell said -"I shall set apart reserves for the natives."

Did he tell them anything about the quantity-the size of the land? -No, I could not say.

Did he say where he would set it apart? -At Murihiku, out of the land that he was buying from Kaihiku to Waiau River.

Do you recollect seeing Mr. Mantell again in the following year, or about the land? -Yes, I did see him.

Did Mr. Mantell speak to pretty nearly the same people the following year as he spoke to in 1852? -Yes, pretty nearly the same people. He repeated the same words that he first told them in 1852. I and Matiaha Tiramorehu were present listening. Mantell talked to the same people on this second occasion, and I was present, and also Matiaha Tiramorehu.

What did he say to the people about the land on the second occasion? -He spoke of Kaihiku and down to Waiau, taking in the sea coast.

.....You told us that he spoke to them about the land. Was anything further said about the benefits to the natives? -Yes. He spoke again of hospitals and schools.

Do you mean to say that he spoke to you on the second occasion to the same effect as on the first occasion? -Yes.

As to schools & hospitals? -Yes. This was the time that they were going to get the money. He spoke of hospitals and schools, and gave them the money.

How many times did Mr. Mantell ask the natives to meet him about Murihiku? -Twice.

Then it was at the second time that you got the money? -Yes. (E2:136-139){FNREF|0-86472-060-2|10.6.6|81}

Again, given the passage of 28 or so years, Pohio's recollection was shaky. He described a first meeting, between Mantell and the Otakou people only. This meeting took place before Mantell set aside the reserves. It was evidently a reference to the preliminary conference between Mantell and many chiefs at Port Chalmers not in 1852 but on 18 November 1851. Pohio's memory was faulty in suggesting only Otakou chiefs were present. We know that at least Topi Patuki and Te Au, two leading Murihiku chiefs, were present and possibly others. It is also difficult to

reconcile Pohio's recollection that at that preliminary meeting Mantell suggested he wanted to buy only to the Waiau River when, as we have seen, he obtained quite detailed information of who held rights in the whole of the area across to the west coast and prepared a plan based on this information.

Pohio also referred to a second meeting at which, as he recalled, Mantell again spoke of the land he wished to buy as being from Kaihiku and down to Waiau, taking in the sea coast. It was on this occasion, Pohio said, that he got the money. Horomona Pohio's name is on the deed and he also signed the first receipt at Awarua in October. The second meeting to which he referred must have been that held not in 1852 but when he received payment at Port Chalmers on 3 October 1853. Pohio appears to have confused the signing of the deed with the signing of the first receipt and the distribution of the first œ1000. He was present on both occassions. While it is true that only Otakou people were present when the payment was made, many from Murihiku were present three weeks earlier when the deed was signed.

10.6.7 As Mr McAloon conceded, these three witnesses were the only ones to claim the land sold extended no further than the Waiau. Only Pohio suggested that Mantell mentioned the Waiau as the boundary on the day the deed was signed in August 1853. Patuki and Patu both suggested this was said by Mantell in December 1851 at Oue. Their recollections, as we have seen, were clearly faulty on a variety of points. It is surprising, if the Murihiku people really believed they were not selling beyond the Waiau, that more witnesses were not available to give persuasive evidence to that effect. Perhaps that is why, as the Ward report noted, Izard, the claimants' counsel did not push the boundary issue. Counsel made brief reference to the Ngai Tahu understanding at the time that Mantell wanted to buy the land from Waikanui (sic) on to the Waiau River, but when summarising the complaints over the purchase at the end of his address no mention was made of boundaries at all (T1:231-232).

The claimants placed some reliance on the evidence of two other Ngai Tahu witnesses before the Smith-Nairn commission. These were Matiaha Tiramorehu and Wiremu Potiki. Tiramorehu's evidence was invoked principally because of his reputation of being steeped in the history and traditions of his people.

Matiaha Tiramorehu

10.6.8 At the outset of his evidence Tiramorehu was asked:

Where does Murihiku begin? -At Waitaki, and goes on to Waiau.

What is the other side of Waiau? -Te-Whakatakanga-o-te-Karehu-a-Tamatea.

Then how far did this go north? -Up to between Piopiotahi and Whakatipu.

Where is Whakatipu Waitai as compared with Piopiotahi? -Piopiotahi is south of Whakatipu-Waitai.

Mr Izard -Is it far south of it? -I cannot tell you; I was not there. (E2:178-179){FNREF|0-86472-060-2|10.6.8|82}

It is of interest to note that Tiramorehu had apparently not been to Piopiotahi. Shortly after Tiramorehu was asked:

Were you present when Mr. Mantell met the people at Port Chalmers? -Yes, I was.

Did you hear what Mr. Mantell said to the people? -Yes, I heard Mantell ask Taiaroa and Karetai, on behalf of the natives of Murihiku, to let him have the land on the other side of the boundary of Captain Symonds' purchase.

Did Mr Mantell ask for the land by any name? -The other side of Kaihiku, round by Tokata.

Did he ask for it by any name? -No, he did not mention, but he said "The whole of Murihiku".(E2:179){FNREF|0-86472-060-2|10.6.8|83}

Later Tiramorehu was asked about the deed:

Mr Izard -Was the Deed read over to you before you signed anything? -I forget.

Mr Nairn -Did they speak of the boundaries? -I do not know. I could not tell you. It lays with the people who had a greater interest in it. I did not look to the boundaries. (E2:186){FNREF|0-86472-060-2|10.6.8|84}

Mr Nairn questioned Tiramorehu further about the deed later in his evidence:

When the natives assembled at Port Chalmers was the Deed brought before them and read out before them? -I was not there.

Did you never hear the Deed read? -No, I never heard it read.

Then you do not know the boundaries of the land that was sold? -I understood, but yet I did not understand. I heard it, but did not understand it.

Mr Smith -You had part of the money? -Yes.

But you did not sign the deed? -I signed the receipt, but not the deed, when I received a portion of the money. (E2:191-192){FNREF|0-86472-060-2|10.6.8|85}

It is not clear from Tiramorehu's evidence whether he was present at the meeting when the deed was signed on 17 August 1853 or only at the later meeting in October 1853 at Port Chalmers when œ1000 was dispersed. He signed the receipt in October but neither his name nor his signature are on the deed. As Mr McAloon conceded, Tiramorehu did not know what was agreed about the boundaries. It was not apparently of any great concern to him.

Wiremu Potiki

10.6.9 The following quotation comes from Wiremu Potiki's evidence. He is here giving his recollection of a meeting at Port Chalmers when Mantell first came there. That was in November 1851.

Do you live now at Port Chalmers? -I live at the Otago Heads, upon the large reserve there.

Were you at Port Chalmers when Mr. Mantell came there first? -Yes, I was.

Were you present when Mr. Mantell met the chiefs and the people? -Yes, I was.

Were Taiaroa, Karetai, Te Au and others present? -When Mr. Mantell met the natives first Taiaroa and Karetai were there, but Te Au and the Murihiku natives were not present.

These were Otago natives who were present? -Natives of Otago and the neighbourhood of Otago and Waikouaiti.

It would include the Moeraki natives? -Very likely Moeraki.

But it would not include the Murihiku natives? -No. (E2:220-221){FNREF|0-86472-060-2|10.6.9|86}

We pause here to observe that Potiki's recollection was clearly faulty. Both Topi Patuki and Te Au from Murihiku were present at this first meeting with Mantell. Potiki's evidence continues:

Did you hear the conversation between Mr Mantell and the people? -I did.

What did Mr. Mantell say to the people? -Mr. Mantell said to the people -"I come to buy land".

Where? -The land adjoining Wakefield's purchase, up to Kaihiku.

Did he mention the boundaries of the land he wanted to buy? -No, I don't know; I cannot say that Mantell mentioned any boundaries.

Do I understand that Mr. Mantell told them he wanted to buy the land south of Kaihiku? -Adjoining Kaihiku, and towards Murihiku.

Mr Smith -Do you mean by this "rohe" of Wakefield's, the boundary of Mr Symonds' Block? What "rohe" do you mean? Do you mean the "rohe" of the land bought by Mr. Symonds? -Yes, I mean the boundary of the Block bought by Mr. Symonds.

Then when you said he wanted to buy Murihiku, what land did the natives then understand by Murihiku? -The lands from Mataura down to Oue and adjoining the boundary of Wakefield's Block.

Did it not extend as far as the Waiau? -Patuki and Te Au extended it to Waiau.

Do I understand you to say that the northern natives claimed no interest in the land beyond Oue, and that Patuki and the others claimed it beyond? -Yes, the Otago people claimed as far as Oue, at the mouth of the Mataura, but myself and Taiaroa went on

further south. We went across the River Mataura, and claimed with the Murihiku people.

How far south did you claim? -Right to the far end.

How far did the claim of Taiaroa and yourself and the Murihiku people go beyond Oue? -I am unable to tell you.

Can you tell me what the natives called the land between the Waiau and up to Piopiotahi? -I do not know. (E2:221-223){FNREF|0-86472-060-2|10.6.9|87}

Mr Nairn, later in Potiki's evidence, made a further inquiry about the boundaries:

Did Mr. Mantell explain to the maoris the boundaries of the land he had purchased? -I am not clear. (E2:233){FNREF|0-86472-060-2|10.6.9|88}

Perhaps Potiki's evidence is best summed up by the last answer cited-he was not clear about the boundaries. We recall that during or immediately after the preliminary conference held by Mantell at Port Chalmers on 18 November he drew what he called a "Korero chart" (10.4.1). This extended right across to Milford Haven on the west coast. Among the names of those listed by Mantell as having an interest in Fiordland below Milford Haven are Potiki and Taiaroa. This may explain why Wiremu Potiki, when asked how far south he claimed, answered "Right to the far end". But when further questioned he said he was unable to say how far the claim of Taiaroa and himself and the Murihiku people went beyond Oue. If, as the claimants now contend, it stopped at the Waiau we would have expected him to say so.

10.6.10 Essentially then, the evidence that Murihiku Ngai Tahu did not intend to sell the land west of the Waiau rests on the faulty recollection of three only of their number, the rest of those who gave evidence either not knowing or not recalling.

Evidence to the contrary

10.6.11 Unfortunately Mantell himself did not give evidence on the question, presumably because of the premature winding up of the commission's proceedings. We therefore lack any response by the Crown agent to a claim first made public nearly 30 years after the purchase. In weighing the claimants' evidence on this question we must also consider the evidence to the contrary. This we now proceed to do.

Mantell's "korero charts" of November and 10 December 1851

10.6.12 In the korero chart no 1, prepared by Mantell during or soon after his discussions on 18 November 1851 with Otakou and Murihiku chiefs, the interests of various Ngai Tahu rangatira are shown in all parts of the block south of a line from Tokata (the Nuggets), on the east coast, to Milford Haven on the west. The Waiau River is depicted and the names of various chiefs having an interest on or near the coast to the west of the Waiau are noted. Also noted are those interests of other chiefs, including Taiaroa and Potiki, on the west coast south of the boundary line terminating at Milford Haven. The second chart, dated 10 December 1851, is more elaborate and

contains more detailed information as to the location of the various interests of a substantial number of Otakou and Murihiku chiefs around the coastline from Tokata to Milford Haven and at various locations inland. In preparing this, Mantell would appear to have built upon the information he obtained at Port Chalmers when he prepared his November chart, with additional information presumably from Patuki who was with him on 10 December 1851. In considering the significance of these charts we here had regard to comments by the Crown historian, Mr Armstrong

10.6.13 (Z11(a)), and Mr McAloon for the claimants (Z13(C)).

We believe the preparation of these charts is a clear indication that Mantell, from his very first contact with Otakou and Murihiku rangatira, was discussing with them the purchase of their interests in the land across to the west coast, including Fiordland. The fact that he was able to obtain from them advice as to their interests in the whole of the block suggests they were cooperating with him. When, on 20 November 1851, he reported to Domett on the outcome of his discussions with Topi Patuki, Te Au, Karetai, Taiaroa and the other chiefs present regarding their willingness to cede the land to the government, we believe he was referring to the land illustrated in his "korero chart" no 1.

The deed and deed map

10.6.14 These have already been discussed. In our view they clearly demonstrate that the land being sold by Ngai Tahu and purchased by the Crown included all the land west of the Waiau (known as Fiordland) up to Piopiotahi on the west coast. The deed in Maori, after being read out by Mantell, was assented to by all the principal Murihiku chiefs, and many others from Murihiku, as well as Otakou.

The request for reserves at Piopiotahi

10.6.15 Several Ngai Tahu gave evidence to the Smith-Nairn commission on requests for reserves on the west coast. This raises the question of why, if the land west of the Waiau was not being sold, reserves should have been requested on the west coast. We now consider the evidence of three witnesses, Hoani Paororo, Horomona Patu and H K Taiaroa.

Hoani Paororo

10.6.16 After discussing the marking off of certain reserves by Mantell during his 1851-52 visit, Paororo proceeds:

Mantell, Te Au and Poko then went to Waiau. It was then that the reserve at Oetota was made, and at Tumutu. I heard this from Mantell and Poko on their return. That completed the reserves that Mantell made. It was, as it were, the sort of thing that was spoken of in the clouds. Mantell spoke also of a reserve to be made at Piopiotahi, but he did not go there. It was Te Au who asked Mantell for a reserve there. Mantell did not promise to give this reserve at Piopiotahi, nor did he refuse, but Te Au asked for it, and it was left. It was asked for. Mantell neither refused nor consented. (E2:348){FNREF|0-86472-060-2|10.6.16|89}

Mr McAloon, in attempting to explain this incident, claimed Mantell himself raised the possibility of a reserve with Te Au. Paororo's evidence is, however, quite clear. It was Te Au who raised the matter with Mantell. In later evidence Mr McAloon said he did not believe that Te Au, in asking to have his rights at Piopiotahi recognised, necessarily implied that he was consenting to the sale of the rest of Fiordland. Mr McAloon argued that it is entirely possible that he was merely asking to have the Crown confirm his rights at Piopiotahi as distinct from the more general rights of the southern people to Fiordland. While this is an interesting speculation, it does not really answer the question why Te Au should specifically seek a reservation at Piopiotahi if the sale did not extend beyond the Waiau.

Horomona Patu

10.6.17 Horomona Patu gave hearsay evidence about Te Au's request for a reserve at Piopiotahi. He was questioned by H K Taiaroa as to whether anything was said to Mantell concerning ground at Waiau, to which he replied that they asked for 300 acres.

Did Mr. Mantell agree to it? -I was not present, but other people told me that there was a reserve there, and that there was another at Milford Haven (Piopiotahi). Te Au asked Mr. Mantell to make the reserve there. (E2:111){FNREF|0-86472-060-2|10.6.17|90}

H K Taiaroa

10.6.18 The Member of Parliament for Southern Maori gave evidence, a significant part of which related to a reserve at Piopiotahi which he claimed Mantell promised his father, Matenga Taiaroa, would be set aside between Piopiotahi and Te Horo. Pounamu was said to be available there. Matenga Taiaroa was present at the Port Chalmers meeting with Mantell and was a signatory to the deed.

We record the following passage from the record of H K Taiaroa's evidence:

Taiaroa questioned Horomona Patu whether there were any reserves made at Piopiotahi. Horomona said there were. Mr Mantell wrote in 1874 or 1875 to Mr. McLean to say that a reserve had been made at Piopiotahi, but he did not mention it in the face of the deed of sale. The reason why this came out about this reserve was, that when I spoke to Mackay about the reserve at Aparima Mantell said, "That reserve is not for you, but for the natives at Aparima." Mantell said "Your reserve is at Piopiotahi". A memorandum was made at once by Mantell, and forwarded to the Govt, and the Govt wanted me to go with Mackay to see this reserve. There was no steamer available at the time. I asked Mantell why it did not appear on the face of the deed, and Mantell merely shuffled out of it, and said "Oh, I did not bother about it". He said -"I may, perhaps, have a copy of that memorandum, but the original is in the office." (E2:267-269){FNREF|0-86472-060-2|10.6.18|91}

It appears the memorandum was to Donald McLean, native minister, and asked that the reserve at Piopiotahi be confirmed. According to Taiaroa, "This land is land adjoining Murphy's, an old whaler" (E1:44).{FNREF|0-86472-060-2|10.6.18|92}

Shortly after Taiaroa said:

That reserve was made at Piopiotahi at the time the land was purchased, though there is no mention made of it in the deed. I have got more to say yet. (E2:271){FNREF|0-86472-060-2|10.6.18|93}

Taiaroa's evidence continued the next day:

I must explain about Piopiotahi. The reserve which the natives understand to have been made for them extends from Piopiotahi to a place called Te Horo. The reason why they wanted to have Piopiotahi reserved was on account of the greenstone. Why they called it Te Horo is, that is a land slip, where the greenstone is found. That is all I understand about Piopiotahi.

Mr Smith -Who gave you this information about the reserve extending from Piopiotahi to Te Horo? -Taiaroa, my father. Piopiotahi is the name of the inlet. I am not clear where Te Horo is; it is where they get greenstone from. It is adjoining the land of the person called Murphy. (E2:279-280){FNREF|0-86472-060-2|10.6.18|94}

In his later evidence Mr McAloon cited what he described as the strongest evidence of the Taiaroa claim as being a letter written by Mantell to H K Taiaroa on 14 July 1874:

But I can at once reply to your other enquiry as to the provision in fulfilment of the terms of the Deed made in favour of your father, Taiaroa, as one of the signatories.

Taiaroa excluded, or at least not included as one having an interest in the other reserves in the Block, stipulated for a reserve of 100 (one hundred) acres at Milford Haven, and to this I, on the part of the Government, acceded. But, as there was known to exist a Grant (in satisfaction of an old Land Claim) of 612 acres at Milford Haven to one Murphy & another, this reserve could not be selected before the claimant's land; and it was understood that the survey of the reserve could be made at the same time as that of the claim. (J2:59-60){FNREF|0-86472-060-2|10.6.18|95}

Mr McAloon later referred to the evidence of a Royal commission in 1907 which inquired into the Taiaroa claim that H K Taiaroa's father had been promised a reserve at Piopiotahi by Mantell during the Murihiku purchase arrangements. This commission found that:

the late Hon. H.K. Taiaroa had no legal or valid claim and that any rights that his Father might at any time have had were barred by the deed and the lapse of time between the date of the conveyance and the date the claim was first made on the Government. No doubt some such arrangement was made between Mr Taiaroa and Mr Mantell; but we think it probable that it was abandoned either before or after the completion of the deed of purchase and that Mr Mantell has, after twenty years, forgotten that such was the case. (J2:63){FNREF|0-86472-060-2|10.6.18|96}

Mr McAloon correctly commented that the Royal commission did not address the issues raised before the Smith-Nairn commission of whether Fiordland was included in the deed with the agreement of the vendors or not. He argued that even if an agreement was made between Taiaroa and Mantell as suggested by the

commissioners, there is no possible way in which that could have bound other vendors to dispose of Fiordland if they did not wish to do so (J2:63). But this comment of Mr McAloon seems to have missed the point. Why would Taiaroa Sr have requested a reserve at Piopiotahi if Mantell was not in fact purchasing the land over to the west coast and up to Piopiotahi?

Finding on grievance no 6

10.6.19 We find that the grievance that the land west of the Waiau was wrongfully included in the sale cannot be sustained. In coming to this conclusion we have carefully weighed the evidence of the three Ngai Tahu chiefs who nearly 30 years after the event testified to this effect. Not surprisingly after so great a lapse in time their recollection of events is defective, seriously so, in a number of material respects. Nor are they supported by any other Ngai Tahu witness before the commission. The claims that the southern Murihiku people were not consulted or parties to the deed has not been established. It was not, as was suggested, something done only by Otakou people but included principal Murihiku rangatira as well as many others. The deed in Maori was read out before it was agreed to and after protracted debate. It clearly included all the land west of the Waiau up to the northern border referred to in the deed, and clearly shown on the deed map. It seems apparent that from the outset of discussions between Mantell and the leading Ngai Tahu chiefs, a sale across to the west coast was contemplated. Although not definitive, the fact that Te Au and Taiaroa each made requests for reserves on the west coast is consistent with, and serves to reinforce the view, that Ngai Tahu were intending to sell across to the west coast. We recall the Crown's criticism that this claim was not publicly raised until the Smith-Nairn commission hearings some 27 years after the event, and since then has not again been raised until this tribunal began sitting. For the reasons indicated, we find that the land west of the Waiau was not wrongfully included in the sale.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.7 The Adequacy of Reserves

10.7. The Adequacy of Reserves

10.7.1 In our consideration of grievance no 4 we have found that the Crown failed to set aside additional land at Aparima and Kawakaputaputa requested by Ngai Tahu. Mantell also failed to reserve a block of 200 acres at Waimatuku and a block at Opuaki and Rarotoka (10.4.19). This grievance was only one of several relating to the setting aside of lands for Ngai Tahu in Murihiku. The principal grievance was:

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.

Other related grievances are:

1. The failure of the Crown to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.

2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.

3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale. (W6)

Grievance no 1: The failure to appoint a protector

10.7.2 As we have indicated in chapter 4 on the Treaty and Treaty principles, the Crown representatives at the time of the signing of the Treaty emphasised that Maori would be protected against land sales and that the Crown would ensure they kept such land as they needed or wished to retain. The third of the Treaty principles articulated by this tribunal concerns the Crown obligation actively to protect Maori Treaty rights. As we have said, the duty of protection imposed on the Crown extends not merely to the use of their lands and waters but to the exercise by the Crown of its Treaty right of pre-emption. Lord Normanby, in his instructions to Captain Hobson, contemplated the appointment of an official protector.

As we have shown in our earlier discussion of protectors of aborigines (5.5), the first protector was appointed by Hobson in April 1840. George Clarke's role as the first protector was, however, somewhat compromised by his dual position as land purchaser for the Crown. At his own request Clarke was relieved of this latter duty in 1842. From that time the protectors were not directly responsible for buying land and therefore provided a measure of protection of Maori interests. Grey, however, soon after his arrival in 1845 chose to abolish the Protectorate Department. At the same

time he embarked on a massive land purchase programme. The role of land purchase officer was recombined with that of protection of Maori interests. In all the Ngai Tahu purchases after that of Otakou, Ngai Tahu had no official to advise them other than the purchasing officer. The Murihiku purchase was no exception.

In his reply to the Crown's closing address Mr Temm referred to the failure of the Crown to protect the tribal estate of Ngai Tahu (Y1:1-2). The cause of this breach, he claimed, was not hard to identify: "In each transaction there was no Protector of Aborigines".

10.7.3 The Crown, through Mr Blanchard, appeared to minimise the need for a protector. In his closing address on the Murihiku claim, he said:

It is alleged against the Crown that it should have appointed a Protector to supervise the transaction and to ensure that Ngai Tahu were made aware of their rights. But that would not have been necessary if the instructions had been carried out. (X2:49)

The problem with Crown counsel's submission is that it assumes that the various commissioners appointed to purchase land for the Crown were capable of serving two masters. Events surely disproved this.

As will be seen, Mantell saw his primary duty as being to effect a purchase on behalf of the Crown while conceding to Ngai Tahu no more than seemed necessary by way of reserves. He did obtain a modest œ600 increase in the purchase price he had been authorised by the Crown to pay for some seven million acres of Ngai Tahu land. We do not consider that Ngai Tahu was in a position to bargain on equal terms with Mantell as the Crown's representative, or that he had sufficient regard for their legitimate interests, particularly in relation to the reservation of adequate lands for their own use. Moreover, the Crown was well aware of Mantell's approach to the provision of reserves in both the Kemp and Banks Peninsula transactions.

Finding on grievance no 1 as to breach of Treaty principles

10.7.4 The tribunal finds that the failure of the Crown to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights was a breach of the principle of the Treaty which requires the Crown actively to protect Maori Treaty rights. As a result of such failure Ngai Tahu were denied the right to retain certain land they wished to retain, and were left with insufficient land for their present and future needs.

Grievance nos 2 and 3: Mantell's instructions regarding reserves

10.7.5 Grievances nos 2 and 3 are closely inter-related.

Mantell, as we have seen (10.3.3), gave an early indication to the colonial secretary that he thought an allocation of 10 acres to each individual to be ample for their support. Despite this, Mantell, on the authority of Governor Grey, was given power to set aside such reserves as he might think proper, while taking care that ample provision was made for both Ngai Tahu's present and future wants. Clearly Mantell, not Ngai Tahu, was to be the judge of what constituted "ample provision". As we

earlier indicated Mantell was also to be the ultimate arbiter of Ngai Tahu's needs. We accordingly find these grievances are sustained.

Finding on grievances nos 2, 3 and 4 as to breach of Treaty principles

10.7.6 Mantell was instructed to limit the land set aside for Ngai Tahu by reserving such land as he (not Ngai Tahu) thought proper. It follows that he, not Ngai Tahu, would ultimately decide what land would be so set aside. As we have found in considering grievance no 4, he refused to reserve to Ngai Tahu certain land they wished to retain (10.4.19). Article 2 of the Maori version of the Treaty preserved to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to Ngai Tahu the full, exclusive and undisturbed possession of their land so long as they wished to retain it. We have earlier found that Ngai Tahu wished to retain rangatiratanga over certain land: they wished to retain it. But Mantell, no doubt conscious of his instructions, failed to respect Ngai Tahu's wishes. In so doing, we find that he failed to act in accordance with the Crown's obligations under article 2 of the Treaty. Clearly Ngai Tahu were detrimentally affected by the loss of the land they wished to retain.

The foregoing group of grievances are, however, in a sense ancillary to the more general grievance no 8, that the Crown failed to ensure Ngai Tahu were left with an adequate endowment of land. We now proceed to consider this claim.

Grievance no 8: The Crown failure to provide Ngai Tahu with an economic base

10.7.7 Apart perhaps from the western boundary question this is the claimants' principal grievance. The land which was purchased by the Crown encompassed some seven million acres. It included a mix of potentially rich farming land and heavily forested mountainous and lake country of great beauty. According to the census conducted by Mantell on his travels through the region there were 146 Ngai Tahu living in the Murihiku block and a further 127 on Ruapuke (O13:21-23).{FNREF|0-86472-060-2|10.7.7|97} We agree with observations made by Mr McAloon that southern Ngai Tahu led a mobile lifestyle and that people living on Ruapuke would have required land in the Murihiku block for their subsistence and trading surplus. Therefore it would be quite unrealistic to exclude the substantial number of Ngai Tahu living on Ruapuke from consideration for reserves on the mainland in which they had an interest. We are concerned then with at least 273 Ngai Tahu at the time, without allowing for absentees.

10.7.8 Mantell made provision for seven reserves other than the life reserve of 10 acres as follows:

Tuturau 287 acres

Omaui, New River 1686 acres

Oue, New River 176 acres

Aparima, Jacobs River 527 acres

Oraka 1132 acres

Kawakaputaputa 977 acres

Ouetoto 90 acres

_____

Total 4875 acres

_____

{FNREF|0-86472-060-2|10.7.8|98}

This area, divided among 273 people, averages 17.8 acres each. Given Mantell's earlier record in the provision of reserves in Kemp's purchase and the Ports Cooper and Levy purchases it is not surprising to find yet again that he marked off, out of seven million acres, a mere 4875 acres for Ngai Tahu. By any standard this was a totally inadequate provision for the present, let alone future needs of the Murihiku people. Crown counsel in his closing address told us that in Murihiku, Ngai Tahu gained most of the reserves in the locations they sought, but "these did not prove to be adequate in area or quality" (X2:70). The Crown thus conceded that it failed to ensure that proper provision was made for Ngai Tahu at the time of the purchase. It could scarcely do otherwise given the evidence of its witness Professor Pool. We recorded Professor Pool's views in our discussion of the Otakou (6.9.10) purchase and need not repeat them here. In the comparative table 3, taken from Judge Alexander Mackay's assessment of the sufficiency of land available to Maori in 1891, the figures given as percentages for Southland are:

_____

Sufficient 7.7 %

Insufficient 50.6 %

None 41.7 %

_____

Total 100.0 %

_____

(O15:29)

These figures speak for themselves.

10.7.9 The immediate reaction to Mantell's allocation of such small reserves is to ask how he expected Ngai Tahu to survive. The Ward report suggested an answer:

It needs to be said that Mantell had a paternalistic motive in leaving Maori with little more than subsistence plots. He did not intend forcing Maori to remain only on these reservations, since he believed that full amalgamation with European ways would lead Maori to acquire land beyond the reserves as they required it. (T1:242)

But as Professsor Ward later commented:

Mantell's social economy, his vision for the tribe's future, took little account of the realities of the nineteenth-century, capitalist economy in New Zealand. Economic and

social success in New Zealand depended not just on individual effort or capability but on access to capital. In stripping Ngai Tahu of all but a tiny fraction of their lands, Mantell was depriving them of the collateral required to participate effectively in the new world, while at the same time preventing them securing access to their traditional resources. (T1:243-244)

In referring to traditional resources Professor Ward clearly had mahinga kai in mind. We note that Mantell, after describing the boundaries of the land being sold, added that it included, in addition to all the lands within those boundaries:

the anchorages and landing places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. (see appendix 2.5)

On the face of it therefore, Ngai Tahu had at one stroke alienated all their mahinga kai on which they had previously depended on for their livelihood, save for a small quantity on the land reserved to them. The tribunal cannot accept that Ngai Tahu could have contemplated that in signing the deed they were thereby surrendering all future access to their traditional food resources or indeed to their taonga pounamu. Nor, despite the strict language of the deed, do we believe that Mantell envisaged that, as from the date of signing, Murihiku Ngai Tahu would be solely dependent on the extremely limited mahinga kai available on a few thousand scattered acres. As Professor Ward perceptively noted:

Only a cursory reading of Mantell's journal is required to see just how essential such foodstuffs were to existence in Murihiku in the early 1850s. Mantell lived on eels, ducks, fish: all caught as required. (T1:244)

It is, as Professor Ward suggested, conceivable that Mantell promised Ngai Tahu they would still have access to such resources, but in common with Europeans. Whatever may have been said, and on this we can only speculate, we are in no doubt that Ngai Tahu would not have agreed to part with virtually all their vast estate had they known that in so doing they were surrendering all rights of access to the food resources on which they so critically depended.

Had a protector been appointed to ensure that Ngai Tahu were independently advised of their rights, there would have been little likelihood of their agreeing to surrender almost all their mahinga kai.

10.7.10 In our discussion of the Treaty principle that the Crown right of pre-emption imposed reciprocal duties on the Crown, we pointed out that Crown officials in New Zealand were aware that hapu maintained a system of shifting cultivations and engaged in seasonal foraging and hunting pursuits in various parts of the interior. We found it to be incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over tribal territory as well as their more permanent kainga, so as to ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs (4.7.10). Mantell clearly failed to take such steps. On the contrary, he provided in the deed for the surrender of virtually all such rights without first ensuring that adequate land had been excepted from the

sale or reserved to Ngai Tahu which would preserve reasonable access to traditional food resources.

10.7.11 This failure to ensure Ngai Tahu were left with land giving them reasonable access to traditional food resources was not the Crown's only failure. Murihiku Ngai Tahu appear to have welcomed the prospect of more Europeans settling among them and sharing the land. For many years they had experienced European sealers and whalers living and inter-marrying with them. They were aware that the Crown was purchasing land to facilitate settlement but as we have earlier suggested, they probably had only a shadowy notion of the likely magnitude and rate of settlement.

In our discussion of Treaty principles we found the right of pre-emption granted to the Crown by Maori under article 2 to be a limited right. It was not to extend to land needed by Maori. In the light of the various considerations there discussed, the tribunal found that article 2, read as a whole, imposed on the Crown a duty, first to ensure that Maori people in fact wished to sell and secondly that each tribe maintained a sufficient endowment for its reasonably foreseeable needs.

If, as they clearly desired, Murihiku Ngai Tahu were to fully and effectively engage in the new economy which would result from European settlement and the steady development of agricultural and pastoral farming, or, as later occurred, dairy farming, they needed to retain extensive areas of suitable land. It was the duty of the Crown's purchasing agent, Mantell, to ensure that this happened. But Mantell had no sympathy for such notions. Although instructed by the governor that he was to be responsible "for taking care that ample reserves are kept both for their present and future wants", Mantell paid no regard to this injunction. As a result, they were left with a mere 18 or so acres per person, and without any significant access to traditional mahinga kai resources. Mantell duly reported the outcome of his negotiations and success in having the deed completed. On 7 November 1853 Domett transmitted to Mantell Governor Grey's special commendation on completing the purchase. Grey clearly endorsed all that Mantell had done (E2:37c-d).{FNREF|0-86472-060-2|10.7.11|99} Had the Crown, through Mantell, fulfilled its Treaty obligations, it would have ensured that, in addition to their kainga and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might as development occurred be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for. Instead, the Crown's approach virtually denied the rangatiratanga of Ngai Tahu over their land, treated them as supplicants and left them virtually landless.

Finding on grievance no 8

10.7.12 The tribunal has no hesitation in finding that the Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base, and so to protect the tribal estate.

We further find that the Crown failed to ensure that Ngai Tahu were left with sufficient land to preserve reasonable access to mahinga kai.

Finding on breach of Treaty principles

10.7.13 We find that the Crown's failure to ensure that Murihiku Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. As subsequent events were to show, by 1891 only 7.7 per cent of Murihiku Ngai Tahu had sufficient land, 50.6 per cent had insufficient land, and 41.7 per cent had none. Moreover this denial of Ngai Tahu's rangatiratanga in breach of article 2 of the Treaty was a serious blow to the tribe's social system and resulted in the disintergration of Murihiku Ngai Tahu's traditional life and society, a process later to be hastened by Native Lands Acts of the 1860s. That Ngai Tahu were detrimentally affected by the Crown's Treaty breaches is readily apparent.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.8 Events After the Purchase

10.8. Events After the Purchase

10.8.1 In the 1870s the government made some attempt to relieve the parlous condition of many landless "half-caste" Ngai Tahu in Murihiku. In 1906 the Landless Natives Act made further provision for those Ngai Tahu with little or no land. The claimants, in grievance no 9, claimed that both the Half-Caste Grants Acts and the Landless Natives Act 1906 and other (unspecified) legislation were inadequate to remedy the landlessness caused by the sale to the Crown. We will defer to chapter 20 our consideration of the Landless Natives Act. At this point it is appropriate, however, to consider the claimants' grievance concerning the half-caste grants legislation.

Grievance no 9: half-caste land grants 1869-1888

10.8.2 For some time prior to 1840, European sealers and whalers had intermixed with Ngai Tahu in the Foveaux Strait area. There was a considerable amount of intermarriage between Ngai Tahu women and European men. People of this mixed ancestry were regarded as Ngai Tahu, but they were not provided for in the reserves made at the time of the Murihiku purchase.

When Rakiura (Stewart Island) was acquired by the Crown in 1864 the deed of purchase provided that a portion of land at the Neck was to be reserved for the half-castes residing there, and any surplus was to go to two named chiefs (see appendix 2). In 1873 the Stewart Island Grants Act recited that the area of land at the Neck was insufficient to make adequate provision for all the half-castes living there. Accordingly, the governor was given power to grant other land on Rakiura or the neighbouring mainland to those of mixed parentage without land. Such grants were not to exceed ten acres for each male and eight acres for each female.

10.8.3 In 1869 the Public Petitions Committee of the Legislative Council considered a petition of one Andrew Thompson. In its report the committee said:

Your Committee have the honour to report, that, in connection with this petition, they have necessarily taken into consideration the general question of the obligation on the part of the Crown to make provision out of the lands ceded by the Natives in the Ngaitahu and other Blocks in the southern portion of the Middle Island for the half-caste families resident thereon at the time of cession; and are of opinion that, inasmuch as it has been proved to the Committee that, for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown by the Commissioner for the purchase of these lands, such obligation does exist, and that the honor of the Crown is concerned in its faithful and immediate discharge. (E2:373){FNREF|0-86472-060-2|10.8.3|100}

The committee's report was referred to Alexander Mackay, as native commissioner familiar with the circumstances of Ngai Tahu. On 6 October 1869 he advised the under-secretary of the Native Department that in addition to landless half-caste Ngai Tahu at Rakiura, there were half-caste families living near the Bluff in Southland. He suggested a block of about, 1000 acres should be selected near Oraka for the Rakiura and mainland half-caste Ngai Tahu(E2:374).{FNREF|0-86472-060-2|10.8.3|101}

On 5 September 1871 Alexander Mackay reported again to the under-secretary of the Native Department. He enclosed a return which showed that of 187 half-caste Ngai Tahu, 91 had been born on Rakiura, and 93 at various places on the mainland. On the basis of ten acres for each male and eight acres for each female, 1676 acres would be required (E2:398).{FNREF|0-86472-060-2|10.8.3|102} A further report by Mackay of 19 November 1874 referred to Mantell's promise that special provision would be made for half-castes (E2:401).{FNREF|0-86472-060-2|10.8.3|103}

10.8.4 On 8 December 1877 the Middle Island Half-Caste Crown Grants Act was passed. It referred to certain promises having been made in favour of certain half-caste families then living in the South Island. Their names were listed in two schedules to the Act. The first schedule named 53 people living in Canterbury and 118 in Otago (which included Southland). The Act authorised a grant of ten acres to be made to each male and eight acres to each female. Such grants were to be deemed to be a final extinguishment of all claims of such people in respect of the promised provision of land. By later amendments various errors and omissions were corrected, the last being in 1888 (E2:383-396).{FNREF|0-86472-060-2|10.8.4|104}

10.8.5 Not surprisingly, the claimants said that a grant of 18 acres to a husband and wife in the 1870s did not provide a viable unit. As we have earlier indicated, Professor Pool pointed out that, by the 1850s, the relative sufficiency of 50 or even 100 acres was being challenged by European settlers (O15:12). Moreover, much would depend on the quality of the land, its location and accessability (O16:191-231). Professor Pool quoted from a further report of Alexander Mackay of 6 May 1881:

The small quantity of land also held per individual-viz., fourteen acres, and in some cases the maximum quantity is less-altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a hundred acres too small to be payable... (O15:13){FNREF|0-86472-060-2|10.8.5|105}

Although in 1868 Chief Judge Fenton increased the size of Ngai Tahu reserves from Mantell's average of 10 acres per person to 14 acres, (still a totally inadequate allocation), the New Zealand legislature as late as 1877 restricted the allocation of land to Ngai Tahu of mixed descent to a mere ten acres for males and eight acres for females. This in purported fulfilment of a promise by Mantell. It must have been well known to the Crown that such an allocation would provide, at best, no more than bare subsistence and at worst prove totally inadequate even for that. It is difficult to reconcile its actions with good faith on the part of the Crown.

Finding on grievance no 9

10.8.6 The tribunal finds the allocation of ten acres for male half-castes and eight acres for female half-castes in 1877 to have been insufficient to meet their need for

land and in breach of the Crown's Treaty obligation to ensure that adequate provision was made for these people. In so doing, it failed to honour the promise which it accepted had been made by the Crown representative Mantell to the Ngai Tahu people. We recall that the Public Petition Committee of the Legislative Council in its 1869 report, to which we have referred, acknowledged that "for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown...and that the honor of the Crown is concerned in its faithful and immediate discharge". Once more it is our melancholy duty to report that the Crown failed adequately to honour its obligation to many Ngai Tahu half-caste people, to their detriment and the detriment of successive generations.

Schools and hospitals

10.8.7 In their fifth grievance the claimants said that the Crown failed to provide schools and hospitals at each Ngai Tahu village, which provision was part of the price agreed upon by the Crown.

As we consider this claim in some detail in chapter 19 we say nothing of it here, except to indicate that we find the grievance to be very largely established.

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{FNTXT|0-86472-060-2|10.4.16|50}50 see n 21, pp 66

{FNTXT|0-86472-060-2|10.4.16|51}51 see n 25, p 224

{FNTXT|0-86472-060-2|10.4.17|52}52 see n 39, pp 163-164

{FNTXT|0-86472-060-2|10.4.17|53}53 see n 39, p 165

{FNTXT|0-86472-060-2|10.4.18|54}54 Smith-Nairn commission testimony, no 50, Tiramorehu, 1 March 1880, MA 67/5, pp 106-107, NA, Wellington

{FNTXT|0-86472-060-2|10.5.1|55}55 Mantell to Domett, 19 February 1852, Compendium, vol 1, p 273

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{FNTXT|0-86472-060-2|10.5.6|61}61 A Mackay, translation of Murihiku deed, Compendium, vol 1, p 286

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{FNTXT|0-86472-060-2|10.5.11|65}65 see n 58

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{FNTXT|0-86472-060-2|10.5.11|67}67 Receipt of the second instalment of Murihiku purchase, Compendium, vol 1, p 287

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{FNTXT|0-86472-060-2|10.6.4|72}72 see n 63, pp 35-37

{FNTXT|0-86472-060-2|10.6.4|73}73 see n 63, p 38

{FNTXT|0-86472-060-2|10.6.4|74}74 see n 63, pp 39-40

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{FNTXT|0-86472-060-2|10.6.6|80}80 Smith-Nairn commission testimony, no 47, Pohio, 27 February 1880, MA 67/5, p 70, NA, Wellington

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{FNTXT|0-86472-060-2|10.7.7|97}97 Mantell, Census of the Middle Island Natives, 1848 and 1853, AJHR 1886, G-16

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Ngai Tahu Land Report

11 The North Canterbury Purchase

11.1 Introduction

Chapter 11
THE NORTH CANTERBURY PURCHASE

11.1. Introduction

It will be recalled that one of the disputed questions in the Kemp purchase of 1848 was the location of the northern boundary. The claimants maintained that the boundary was at Kaiapoi pa. The Crown, that it was at or near the mouth of the Hurunui River. For reasons which we have discussed at length in chapter 8 the tribunal concluded that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui and that Kemp and Kettle also thought the boundary was at or near the Hurunui. That was where it was shown on the deed map. From there it ran in a north-westerly direction to Kawatiri on the west coast.

As we have also seen, Walter Mantell chose to disregard the deed map and fixed the north-eastern boundary some distance further south, at the site of the old Kaiapoi pa on the south side of the Rakahuri (Ashley) River. Ngai Tahu thereby forfeited any right to select reserves in the extensive area between the Rakahuri and Hurunui Rivers.
Despite immediate protests by Ngai Tahu, the Crown chose not to disturb Mantell's action in fixing the boundary at the Kaiapoi pa. As a result, Ngai Tahu title to portions of the Canterbury Association block (created in 1850, with its northern boundary at Motunau) was not extinguished before extensive areas had been sold by the association and the Crown to European settlers.

Ngai Tahu were incensed at the boundary being fixed by Mantell at Kaiapoi pa. They saw it as a totally unjustified recognition by the Crown of Ngati Toa mana over an area which they regarded as theirs. They vigorously disputed the validity of the Wairau purchase in so far as it purported to dispose of land which Ngai Tahu said belonged to them. Very soon after Mantell fixed the boundary a delegation of Ngai Tahu from Kaiapoi went to Wellington and made clear their protest to Lieutenant-Governor Eyre. As will be seen in our later discussion, in the ensuing years they continued to protest and assert their manawhenua over not only North Canterbury but the Kaikoura district also.

While Governor Grey made some tentative moves to settle the claim nothing positive was done. Lieutenant-Governor Eyre left New Zealand in April 1853 and Governor Grey departed for South Africa at the end of the year. Colonel Wynyard held office as administrator from January 1854 until Governor Browne's arrival in September 1855. In the interim the provincial councils had been established and in the absence of a strong central government became dominant. They had responsibility for land disposal on behalf of the Crown. Nothing further was done by government about Ngai

Tahu complaints until Governor Browne visited Lyttelton in 1856. Following representations from Ngai Tahu he instructed the chief land purchase commissioner, Donald McLean, to investigate their grievances.

In the meantime, there was steady and growing encroachment of settlers on the land from the old Kaiapoi pa site northwards to Kaikoura and beyond. Some held extensive areas under pasturage licences, others had acquired the freehold. By the time McLean's agent, J G Johnson, began an investigation early in 1856 following Browne's instructions, the provincial governments of Canterbury and Nelson had already leased or sold large areas between the Rakahuri and Wairau Rivers. In August 1856 W J W Hamilton assumed responsibility for settling the North Canterbury purchase. Because of difficulty in obtaining the services of an interpreter, negotiations were delayed until February 1857. On 4 February 1857 Hamilton and the interpreter, the Reverend J Aldred, met at Kaiapoi with Ngai Tahu from Port Levy, Rapaki and Kaiapoi. Principal rangatira from Kaikoura, Wainui and Wairewa were also there. The following day, 5 February 1857, a deed was signed. Ngai Tahu surrendered to the Queen the lands from Kaiapoi northwards to the Waiau-ua River, and on to the sources of the Waiau-ua, the Hurunui and the Rakahuri Rivers. Hamilton estimated the block at 1,140,000 acres. The purchase price was stated to be œ200, but Hamilton undertook to request the governor to increase the price to œ500. This was later agreed to. Although Ngai Tahu sought reserves at Hurunui and Motunau these were refused by Hamilton. His ostensible reason (given to Ngai Tahu) was that they had ample reserves elsewhere under Kemp's purchase. The real reason (given to McLean) was that the block was almost entirely occupied by European pastoralists and serious difficulties could arise if he set aside reserves for Ngai Tahu.

The Crown, during the course of our proceedings, conceded that it should have taken steps to clarify the situation arising out of the Kemp purchase and that it should have allocated reserves in North Canterbury before it was overrun by European settlers. The Crown also accepted that it acted in breach of the Treaty in failing to make provision for adequate reserves when Hamilton purchased the North Canterbury block in February 1857.

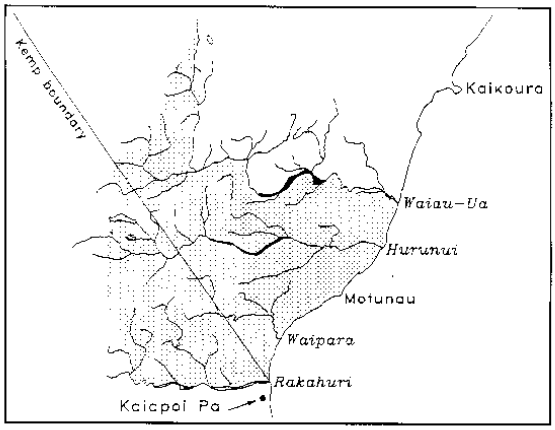

Figure 11.1: The North Canterbury purchase. Because there were no maps of the purchase the boundaries are an approximation. One interpretation of the deed could have allowed the northern tributaries of the Waiau-Ua to have been included but this would seem unlikely given the estimates of the area of the block given at the time.

Ngai Tahu Land Report

11 The North Canterbury Purchase

11.2 Statement of Grievances

11.2. Statement of Grievances

The claimants provided a single summary of grievances relating to both the North Canterbury and Kaikoura blocks. We set out here those grievances which relate in whole or in part to North Canterbury. The remainder will appear in our next chapter on the Kaikoura purchase.

1. That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau Purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms.

2. That the Crown allowed these blocks to be sold or leased to European settlers- entirely in the case of the North Canterbury Block [...] before they had been purchased from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this.

3. That the Crown refused to allow lands requested by Ngai Tahu at Hurunui and Motunau in the North Canterbury Block [...] to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.

4. That the Crown failed to provide any reserves for Ngai Tahu in the North Canterbury Block.

5. [Relates solely to the Kaikoura block].

6. That the Crown in the North Canterbury Block under the Land for Settlements Acts for the benefit of landless Europeans, from November 1895 to May 1897 resumed the Patoa, Ashley Gorge, and Horsley Downs Estates [...] but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

Ngai Tahu Land Report

11 The North Canterbury Purchase

11.3 Background to the Purchase

11.3. Background to the Purchase

11.3.1 As we have seen in our consideration of the Kemp purchase, the true location of the northern boundary gave rise to much controversy. The claimants strongly urged that the north-eastern point was at the old Kaiapoi pa site; the Crown disputed this and contended for the Hurunui river mouth near the 43rd parallel of latitude, as shown on the Kemp deed map. We do not propose to go over this well-trodden ground again. The tribunal concluded that, given their over-riding concern to assert their manawhenua over the Kaiapoi district and further north, Ngai Tahu would not have agreed in their negotiations with Kemp that the Ngati Toa purchase line under the Wairau purchase came to Kaiapoi pa. We believe that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui (8.5.11). The tribunal considers that it was Mantell's subsequent action, later in 1848, in asserting arbitrarily and categorically that the north-eastern boundary line was at Kaiapoi pa, which immediately triggered Ngai Tahu's strong and concerted objection. They were not prepared to concede that Ngati Toa had manawhenua over the Kaiapoi district. Just as they were not prepared to concede this in their negotiations with Kemp, nor were they prepared to accept Mantell's subsequent unilateral action. That Kemp and Kettle believed that the north-eastern boundary was near the 43rd parallel of latitude and probably at the Hurunui river mouth is demonstrated by the deed map.

Ngai Tahu protests against the Ngati Toa sale of the Wairau

11.3.2 Both shortly before and for some years after the Kemp purchase, Ngai Tahu protested to the governor and his officials that Ngati Toa had no right to sell land south of the Wairau valley. We do not propose to record every known instance of their protests but will outline some examples.

The first recorded protest occurred during Grey's visit to Akaroa in February 1848, some three months before the Kemp purchase. As we have earlier noted, Matiaha Tiramorehu recorded in his letter of 22 October 1849 to Eyre that in the course of his February meeting with Ngai Tahu, Governor Grey gave assurances that "(the payment for) Kaiapoi should not be given to the Ngatitoas, but that for Kaikoura was already gone to them" (L9:23).{FNREF|0-86472-060-2|11.3.2|1}

Soon after Mantell fixed the north-eastern boundary of Kemp's purchase at Kaiapoi pa, a Ngai Tahu delegation went to Wellington in September 1848 to protest to Eyre. Mantell also promised he would advise Eyre of their grievance. He told Eyre that Ngai Tahu asserted the land north of Kaiapoi pa was never occupied by Ngati Toa. Secondly, that Ngai Tahu had never ceased to live at or near the disputed land and, thirdly, that subsequent to the last inroad of Ngati Toa, Ngai Tahu had successfully

conducted an expedition against them which had not been avenged (M3:24-25).{FNREF|0-86472-060-2|11.3.2|2} There appears to be no record of what transpired between Eyre and the Ngai Tahu representatives at the September meeting.

11.3.3 In December 1849 Matiaha Tiramorehu again wrote to Governor Grey requesting part of the payment for the land north of Kaiapoi claimed by Ngati Toa (M11:1-2).{FNREF|0-86472-060-2|11.3.3|3} A month later Tikao and others wrote to the governor claiming payment for the land between Kaiapoi and Wairau (A8:II:7).{FNREF|0-86472-060-2|11.3.3|4} Tiramorehu's letter was referred to Mantell, who on 12 March 1850 reported to the colonial secretary that he understood from Eyre that Grey had decided in January 1850 not to compensate Ngai Tahu because the land had already been purchased from Ngati Toa. For his own part Mantell expressed the opinion that Ngai Tahu's claim was valid against Ngati Toa, who he thought to have no right to the disputed district (M11:3-4).{FNREF|0-86472-060-2|11.3.3|5}

Eyre did not report to Governor Grey until 4 July 1850, who on receiving it in August instructed the papers to be shown to Lieutenant Servantes. Servantes, who had acted as interpreter at the Wairau purchase, was to explain why the nominal boundary of Ngati Toa had been extended to Kaiapoi (M11:5-6).{FNREF|0-86472-060-2|11.3.3|6} As we have seen in our discussion of the Kemp purchase (8.3.6), Servantes noted that doubts were entertained at the time of Ngati Toa having an undisputed title to the land further south than Kaikoura, but it was thought advisable to include the land as far as Kaiapoi in order to extinguish whatever claim Ngati Toa had to it. On 17 October 1850 Grey sent Eyre a copy of Servantes' memorandum. He concluded that, should Eyre think that Tiramorehu and his people were entitled to some payment for the land to the south of the Kaikoura range, he should arrange, with the advice of his Executive Council, for this to be done (L9:550-551).{FNREF|0-86472-060-2|11.3.3|7} Eyre, after consulting Mantell, obtained the concurrence of the Executive Council to œ50 being paid to Ngai Tahu "for the relinquishment of their alleged claims to the country between Kaikoura and Kaiapoi" (M11:7-11).{FNREF|0-86472-060-2|11.3.3|8} No record has been found to show this payment was in fact made, although Grey approved the proposal in January 1851 (M11:12).{FNREF|0-86472-060-2|11.3.3|9}

11.3.4 Meanwhile, in January 1850, W J W Hamilton wrote to William Fox, the New Zealand Company principal agent, warning him that Ngai Tahu of Kaiapoi, Amuri, Kaikoura and Port Levy would object to the country north of the Kowai River as far as Kaikoura being occupied by settlers. They claimed the land had not been purchased from them (L9:I:31).{FNREF|0-86472-060-2|11.3.4|10} James Kelham, the New Zealand Company accountant in Wellington, in April 1850, writing on behalf of Fox to his London superiors reported that:

The assertions of the Natives that some of the country between the Kaikoura Mountains and Port Cooper Plains has not been purchased, may have some foundation. I heard the same story when I was at Kaikoura Peninsula in the "Acheron"; but the district is included in the Nelson grant, which was issued under the purchase made by Sir George Grey, in person, from Rauperaha and Ngatitoas. The few Natives resident in it assert that Rauperaha had no right to sell, having never fully conquered the inhabitants. Into the merits of such an assertion I am not prepared to

enter; but the question is of no immediate importance, and may, I have no doubt, be settled at any time for a very small sum of money, if not without. (L9:30){FNREF|0-86472-060-2|11.3.4|11}

He enclosed a copy of Hamilton's letter to Fox. The London office in turn expressed its concern to Earl Grey, the British colonial secretary, who on 7 October 1850 instructed Governor Grey to take all necessary steps to ensure the Canterbury Association obtained a clear title to the land which had been reserved for their colonising operations (L9:29).{FNREF|0-86472-060-2|11.3.4|12} We are unaware of any positive action taken by Grey as a consequence of these instructions.

11.3.5 In March 1852 Governor Grey visited Canterbury. At Lyttelton he met with a considerable number of Ngai Tahu who claimed compensation from the government for land purchased to the north of the Kemp block. According to the newspaper report, Ngai Tahu were satisfied with Grey's response (T2:68).{FNREF|0-86472-060-2|11.3.5|13} Some years later J G Johnson was to say that Grey had offered Ngai Tahu œ100 for their land north of the Ashley on that occasion (A8:II:11).{FNREF|0-86472-060-2|11.3.5|14} If so, nothing came of it, for on 27 August 1852 Poihipi Te Arorahui, a leading spokesperson for Ngai Tahu at Kaiapoi, wrote to Grey demanding œ400 for the land north of Kaiapoi. Failing satisfaction, he threatened that European settlers would be removed from land they were occupying at Kaiapoi, Motunau, Hurunui and elsewhere (T2:76-77).{FNREF|0-86472-060-2|11.3.5|15} Professor Ward noted that in September 1852 Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau, Te Hurunui, Motunau, Rakahuri and Kaiapoi (T1:263).{FNREF|0-86472-060-2|11.3.5|16}

11.3.6 The mounting discontent of Ngai Tahu at the failure of the Crown to recognise their claim was revealed by the school teacher at Kaiapoi, Henry Fletcher. He advised that, if they did not receive a satisfactory answer from the governor, Kaiapoi Ngai Tahu intended to take matters into their own hands. They would compel payment by force as they had the necessary ammunition and promises of help from Ngai Tahu on Banks Peninsula and the Ninety Mile Beach. FitzGerald, the provincial superintendent, advised the resident magistrate, Charles Simeon, that additional police might be required. Simeon passed on the reports to George Grey, who gave instructions that any acts of violence should be reported immediately so that "effectual means may be taken for at once crushing such acts of insubordination" (T2:85-86).{FNREF|0-86472-060-2|11.3.6|17} We have no evidence that Ngai Tahu carried out their threats. They later claimed however that at Grey's request they had refrained from evicting the Europeans who settled north of Kaiapoi (A8:II:21).{FNREF|0-86472-060-2|11.3.6|18} A year later Simeon again reported that Ngai Tahu were continuing to agitate their claim and he recommended that something should be done to settle the matter. He added that he had never been able to understand the nature and extent of their grievance (T2:87-88).{FNREF|0-86472-060-2|11.3.6|19} Henry Tacy Kemp, in his role of native secretary of New Munster, noted that there had been several such applications from members of the Ngai Tahu tribe. In his view, Ngai Tahu could not be recognised as claimants as they had been driven off by Ngati Toa, who had long since sold the land in question to the government (T2:88).{FNREF|0-86472-060-2|11.3.6|20} No further action was taken by the Crown.

11.3.7 The Ward report conveniently summarised the outcome of Ngai Tahu's repeated protests as follows:

Although the evidence is fragmented and somewhat confused, it does seem that during 1850-2 Ngai Tahu achieved limited government recognition of the fact that they had rights north of Kemp's purchase but this recognition did not improve their position with regard to the land. Apart from the inquiries made as a result of Tiramorehu and Tikao's letters the government does not seem to have perceived a need for an inquiry into the extent of these rights. Nor was the validity of the Nelson Crown grant and the later transfer of land claimed by the tribe to the Canterbury Association questioned. That is, this limited official recognition of Ngai Tahu interests does not seem to have translated into any thorough-going investigation of their rights, or halted the process by which they were being dispossessed of their land. No further investigation was undertaken until 1856 when the claim was brought to the attention of John Grant Johnson who was negotiating with the Kaiapoi and Akaroa hapu over their outstanding claims on Banks Peninsula. (T1:265)

The Crown historian Graham Sanders suggested that during the years 1850-1856 there was a "hiatus" in land purchases. He attributed this to what he described as the whole structure of administration and government being in seeming disarray until the mid-1850s (M7:15-16). Not surprisingly, this contention was vigorously opposed by the claimants. They correctly pointed out that Grey had three years in which to act on Ngai Tahu protests until his departure at the end of 1853 (O47:5). Instead, European settlement steadily increased. Counsel for the Crown conceded in his final address that the Crown should have taken steps to clarify the Kemp purchase and should have allocated reserves in North Canterbury before it was overrun with European settlers. Instead, as the Crown admitted, the matter was not attended to until the new governor, Browne, visited Lyttelton in January 1856 (X2:75-76).

The Crown's recognition of other claims

11.3.8 That Mr Sanders' contention of a hiatus in land purchases was misconceived is made only too clear by the Crown's very considerable activity in relation to claims to the north of Ngai Tahu territory. In our later chapter on the Arahura purchase we recount in some detail the succession of Crown purchases commencing with the purchase of the remaining Ngati Toa rights in Te Wai Pounamu for œ5000. This was followed in successive years through to 1856 with other purchases instigated by Donald McLean, purporting to extinguish the interests of Te Atiawa, Ngati Tama, Ngati Rarua and Rangitane in Te Wai Pounamu (13.3.3). The sum of œ6200 was paid out. As Professor Ward noted, these purchases show that where the Crown had the commitment to investigate and extinguish particular claims it could find the resources to do so (T1:266). But this commitment fell short of investigating and settling Ngai Tahu's outstanding claims.

Settlers progressively occupy North Canterbury and Kaikoura

11.3.9 Valuable evidence commissioned and called by the Crown was given on European settlement north of Kaiapoi by David J Alexander. Mr Alexander described European settlement in the area from the Ashley River northward to Parinui o Whiti (White Bluffs) prior to the North Canterbury purchase in 1857 and the Kaikoura

purchase in 1859. We here record, from a wealth of detail, the principal points made by Mr Alexander.

Whalers

11.3.10 The first record of shore-based whaling stations on the North Canterbury-Kaikoura coast is in 1842. Between 1842 and 1846 whaling stations were active at Motunau, Amuri Bluff, Rangi-inu-wai (Riley's Rock), South Bay, Waiopuka and Waipapa. Thereafter only the Riley brothers at Riley's Rock, and Fyffe at Waiopuka continued. Mr Alexander thought it likely that all the European whalers would have made a payment to the local Maori people for the use of their station sites (M5:4-7).

Settlers

11.3.11 The Nelson settlement was founded by the New Zealand Company in 1842. The company found it had sold more land in advance than was available so it looked beyond the hills into Marlborough. A company surveyor, Cotterell, sent to report, found south of the Awatere River (in an area later to become part of the Flaxbourne run):

a beautiful grassy plain, richly covered with grass, clear of all bushes and fern, running as far as the eye could reach... with low undulating hills to the south-east all grass. (M5:8){FNREF|0-86472-060-2|11.3.11|21}

Cotterell's enthusiastic report on this country persuaded the New Zealand Company to satisfy its need for more land in the Wairau and Awatere valleys. The attempted survey in this district resulted in the Wairau conflict in which Cotterell and twenty-one Europeans and four Maori died. As a consequence of this tragedy European settlement was suspended in the area for three years. Mr Alexander noted that only after Commissioner Spain's report and the Wairau purchase of March 1847, did the settlement regain its impetus (M5:7-8).

Professor Ward noted that the 1850s and 1860s were to be the years of the pastoralist, not the whaler. But in Kaikoura these two activities were at first combined by Robert Fyffe's operations at Waiopuka (T1:267). Fyffe was engaged in sheep-farming by 1844-45. In March 1851 however, he applied for a pasturage licence to protect his rights in the land he was grazing. When Fyffe was drowned in April 1854 he left assets which included four whaleboats, a dozen wharves and sheds at Waiopuka and 2000 head of stock, including a milking herd of 192 goats (M5:13).{FNREF|0-86472-060-2|11.3.11|22}

In 1847 Charles Clifford and Frederick Weld (later to be premier) negotiated a lease direct with Te Puaha of Ngati Toa and a signatory to the Wairau deed, giving grazing rights to an extensive area at the north end of the subsequent Kaikoura purchase from White Bluffs to Kekerengu. The first 3000 stock arrived at Flaxbourne in 1848. By 1850 there were 11,000 sheep on the property. Clifford and Weld applied for a pasturage licence and received one of the first issued by the New Zealand Company, on 1 January 1849 (M5:14).{FNREF|0-86472-060-2|11.3.11|23}

A third early run was established by three Greenwood brothers at Motunau. They had previously been occupying Purau Bay in Port Cooper. It is thought they built a homestead at Motunau in 1845 and cattle were driven there from Banks Peninsula in September 1847. By January 1850 the property was carrying some 1450 sheep, 140 head of cattle and 40 pigs (M5:14-16).

These three sheep runs were the only ones in operation before 1848. Following the Wairau purchase and the issue of the Nelson Crown grant, Nelson settlers seeking land found it in the Awatere valley. Some obtained leases, others the freehold. With the founding of the Canterbury settlement in 1850, run-holdings moved into the North Canterbury and Kaikoura blocks (M5:16). By the time of the purchases from Ngai Tahu most of the land, including the valuable coastal areas, had been occupied by European settlers for at least five years in the case of the North Canterbury purchase, and at least three years in the case of the Kaikoura purchase (M5:39-40). A substantial quantity had been freeholded by the time of the respective purchases especially in the North Canterbury block and in the Amuri and Awatere/Flaxbourne districts of the Kaikoura block. Mr Alexander referred to the requests made by Ngai Tahu to Hamilton for reserves at Motunau and Hurunui, presumably at the mouth of each of these rivers. Both areas were within the first runs to be taken up, Motunau mouth being on Greenwood's Motunau run and Hurunui mouth being the site of a proposed township (M5:29-30). A series of maps of the North Canterbury and Kaikoura blocks shows the steady increase in land taken up by European settlers from 1846 to 1859. In 1846 only the Motunau run appears; by 1859 the whole of the North Canterbury block is taken up by settlers and only an area in and adjacent to the Kaikoura peninsula is excepted in the Kaikoura block (M6:14-25). See figure 11.2.

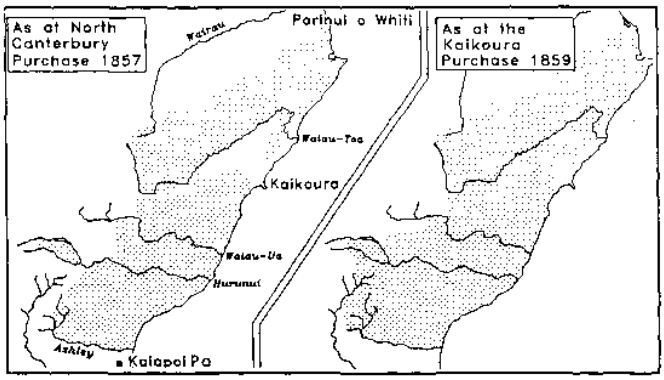

Figure 11.2: Both the North Canterbury and the Kaikoura purchases were almost completely occupied by pastoralists at the time when the Crown negotiated the sales with Ngai Tahu. By 1859 only the area around the Kaikoura peninsula was not under pastoral license or had not been freeholded.

Commissioner Johnson's investigations

11.3.12 In January 1856 Governor Thomas Gore Browne visited Lyttelton. On 12 January the governor met the Ngai Tahu people belonging to the district. He was addressed by Paora Tau, who complained that Sir George Grey had recognised the claim of Ngati Toa to land in the Kaiapoi district which belonged to Ngai Tahu. The governor promised that he would arrange for Donald McLean, the chief land purchase commissioner, to investigate the matter and pay them a visit (T2:62).{FNREF|0-86472-060-2|11.3.12|24}

In April 1856 McLean sent John Grant Johnson as a special commissioner to Canterbury. But his instructions were to complete Mantell's unfinished purchase of the Akaroa block and nothing was said about the land north of Kaiapoi which Paora Tau had complained about to Governor Browne in January. Whether this was because the governor had failed to carry out his promise or McLean had misunderstood him we do not know (L3:III:56).{FNREF|0-86472-060-2|11.3.12|25} However, Johnson reported to McLean on 11 May 1856 that Ngai Tahu made it clear to him that if the Crown was not prepared to recognise their grievance over North Canterbury they would use their influence to prevent a settlement of the Akaroa question. Johnson advised McLean that as far as he could learn Ngai Tahu's claim to be compensated for the land north of Kaiapoi was a just one. He recommended their claim be met by a payment of œ150. When, as he put it, justice had been done to the Kaiapoi Ngai Tahu, he could then use their influence in settling the Akaroa block purchase (L3:III:56-57).{FNREF|0-86472-060-2|11.3.12|26}

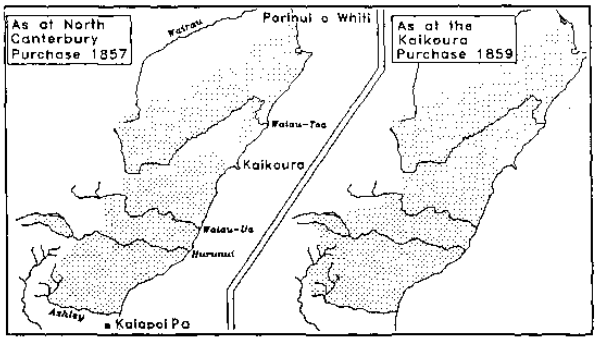

Figure 11.2: Both the North Canterbury and the Kaikoura purchases were almost completely occupied by pastoralists at the time when the Crown negotiated the sales with Ngai Tahu. By 1859 only the area around the Kaikoura peninsula was not under pastoral license or had not been freeholded.

McLean accepted Johnson's advice and obtained the governor's agreement to œ150 being paid in settlement of the Ngai Tahu claim for the land north of Kaiapoi. He acknowledged "the merit and nature of the Kaiapoi claim" which he said had "always been a source of discontent" with Ngai Tahu (L3:III:57).{FNREF|0-86472-060-2|11.3.12|27} And so Johnson was authorised to settle with Kaiapoi Ngai Tahu (L3:III:57).{FNREF|0-86472-060-2|11.3.12|28} The Ward report noted in relation to this action by the Crown that:

It cannot be said any new or compelling evidence had been presented for a change of policy by the Crown, yet McLean's decision to act was a turning point. It implicitly called into question the Crown record of inaction on Ngai Tahu representations of the past seven or eight years. (T1:272)

11.3.13 As it happened, Johnson returned to Auckland without entering into negotiations over either the North Canterbury or Akaroa blocks. It was left to Hamilton to settle both these purchases. As a result of Johnson's investigations and report, McLean accepted, as we have seen in our discussion of the Akaroa block purchase, that Ngai Tahu were entitled to be paid for the Akaroa block. In a memorandum of 13 August 1856 he also noted:

with reference to the unextinguished claims at Kaiapoi, a sum of œ150 should be paid to the Natives, conditionally, that they first settle the Akaroa claims. (A8:II:12){FNREF|0-86472-060-2|11.3.13|29}

Hamilton was instructed by McLean on 16 August 1856 to act for the Crown in respect of both the Akaroa and North Canterbury block purchases (A8:II:13).{FNREF|0-86472-060-2|11.3.13|30} As we have seen, he completed the Akaroa block purchase on 11 December 1856.

Ngai Tahu Land Report

11 The North Canterbury Purchase

11.4 The Purchase

11.4. The Purchase

The negotiations

11.4.1 Although Hamilton had clear instructions to allow 800 acres by way of reserves in the Akaroa block purchase, no mention was made of reserves for Ngai Tahu in the North Canterbury block. He was simply instructed to pay the Ngai Tahu claimants œ150. Professor Ward commented that:

In this important respect the terms of the transaction appear to have been arrived at by the Crown without reference to the wishes or interests of Ngai Tahu. (T1:272)

When reporting to McLean on 11 December 1856 the successful completion of the Akaroa purchase, Hamilton referred to the forbearance of Ngai Tahu towards the Crown which permitted trespassing by settlers on the Akaroa block. He went on to say:

And it is a fact worthy of notice that so early as the year 1850, when the Canterbury Association's Surveyors first crossed the Ashley (Rakahauri), the Kaiapoi Natives complained to me that the land north of it had never been sold by them. The Kaikoura Maoris had previously asserted the same thing to me. I represented the matter officially to the New Zealand Company's Chief Agent. But until Mr. Johnson's arrival here no official enquiry into the case seems ever to have been made. (A8:II:15){FNREF|0-86472-060-2|11.4.1|31}

11.4.2 Because of difficulties in arranging for the interpreter, the Reverend J Aldred, to be available to go to Kaiapoi, Hamilton was not able to arrange a meeting with Ngai Tahu until 4 February 1857. When reporting to McLean the outcome of his discussions, on the following day, Hamilton enclosed a copy of his "minutes of proceedings". These succinctly record the progress of his negotiations with Ngai Tahu and his misgivings about the deed of purchase which was signed that day.

Hamilton recounts meeting with Ngai Tahu from Port Levy, Rapaki and Kaiapoi. Also present as having some claim to share in the payment, but not as enjoying any positive rights of ownership, were Whakatau, chief of Kaikoura, and some Akaroa chiefs. They took no part in the proceedings. Hamilton commenced by offering "from the Governor œ150 for the land north of Kaiapoi" (A8:II:20){FNREF|0-86472-060-2|11.4.2|32} Ngai Tahu responded by requiring reserves at Hurunui and Motunau, to which Hamilton replied:

I had no instructions to entertain any question of reserves in this case. Maoris urged want of room for their increasing stock, insisting on a new reserve, also on the fact of my agreeing to one at Wairewa, without having instructions. Replied: Wairewa was agreed to, because Mautai and his people were in occupation, and would have no other place to reside on and cultivate; but besides their separate reserves at Rapaki, Purau, and Port Levy, all very ample, they had at Kaiapoi about 2640 acres, twice the quantity of all the Akaroa reserves for a population not much larger. After many long speeches, my offer positively and absolutely rejected by acclamation and counter-offer made to settle the matter then and there, first for œ500 cash; or second for the œ150 named, and an ample reserve. (A8:II:20){FNREF|0-86472-060-2|11.4.2|33}

Ngai Tahu urged on Hamilton the value and extent of their land. They drew his attention to the price the Crown had been selling it for, which proved the reasonableness of their offer. The land, they said, had been stolen from them. They challenged Hamilton to point out any houses, burying places, pa or any signs of Ngati Toa's ownership. "South of Kaiapoi", they said, "all had been fairly bought". The Crown's "ownership was unquestioned" (A8:II:20).{FNREF|0-86472-060-2|11.4.2|34}

Ngai Tahu then offered to accept œ150 as a part payment of the œ500, leaving it to the good faith of the governor to pay the remaining œ350. Hamilton declined "such a loose transaction, as well on their account as on that of the Government". But on his own responsibility he added œ50 to the œ150 previously offered and said he would pay the œ200 at once. After some three hours Ngai Tahu rejected this offer. Hamilton suggested they meet the next day when they should let him have their proposal which he would convey to the governor (A8:II:20).{FNREF|0-86472-060-2|11.4.2|35}

The next morning, 5 February 1857, Ngai Tahu renewed their offers of the previous day "dwelling strongly on the necessity for their having a large reserve". Hamilton again declined them. Ngai Tahu then expressed their willingness to accept œ200 and no reserves, provided Hamilton would give a written guarantee that he would represent their case strongly to the governor and use his influence to obtain the full sum of œ500. Hamilton was at first unwilling to agree to this as he had no assurance that their request would be met. Finally, "Being much pressed", he gave a guarantee that he would "recommend the distribution of œ200 among them all, so soon as the Kaikoura purchase should be completed" (A8:II:21).{FNREF|0-86472-060-2|11.4.2|36} The written guarantee which he gave, dated 5 February 1857, envisaged the œ200 being distributed among all Banks Peninsula, Kaiapoi and Kaikoura Ngai Tahu (A8:II:22).{FNREF|0-86472-060-2|11.4.2|37}

The deed is signed

11.4.3 Twenty Ngai Tahu rangatira signed the deed of purchase on 5 February 1857. They gave up their claim "to all the land at Kaiapoi and on to Waiau-ua and on to the sources of the Waiau-ua, Hurunui and Rakahauri [Ashley]" for the sum of œ200 (see appendix 2.7). The old pa of Kaiapoi at Te Moture was expressly reserved, (this was to implement Mantell's promise made at the time of the Kemp purchase). The area of the land sold to the Crown was estimated by T Cass, chief surveyor, at 1,140,000 acres.

After recording the signatories to the deed and the payment of œ10 to each of the 20 signatories Hamilton went on to report, in reference to his minutes, that:

I should remark that the country ceded has been for several years past almost entirely occupied by ourselves as freehold or sheepwalk. By reserving any new tract for the Maoris, serious complications might be created, and the necessity for reference to the Land Office would delay the purchase greatly. This was my chief reason (not made known to them) for declining their proposal to accept œ150 and a reserve, which otherwise I should have at once agreed to. But, under existing circumstances, it seemed absolutely indispensable to pay a large purchase money and make no reserve. (A8:II:21){FNREF|0-86472-060-2|11.4.3|38}

Hamilton referred to the copy of the guarantee, which he enclosed, saying he should have nominated œ300 instead of œ200. He urged the governor to agree to pay the additional œ300 requested by Ngai Tahu. He attributed the delay of six years or more in obtaining a hearing of their case as the reason why they had been prepared to accept so small a sum as œ200, preferring to grasp what was within their reach rather than risk further delay. Hamilton reminded the governor that about two years previously "one block of this land between Waipaoa and the Hurunui, containing 30,000 acres, was sold by the government for œ15,000 [10 shillings an acre]" (A8:II:21).{FNREF|0-86472-060-2|11.4.3|39}

It will be noted that the ostensible reason given by Hamilton to Ngai Tahu for not granting any reserves was that they had sufficient elsewhere in the Kemp block, especially at Taumutu and on Banks Peninsula. But, as he admitted to McLean, the chief reason (which he did not make known to them) was that the country was almost entirely occupied by European pastoralists either "as freehold or sheepwalk".

11.4.4 When McLean received Hamilton's report on the purchase he noted that no reserves had been made by Hamilton "inasmuch as the land demanded by the Natives was of great value" (A8:II:25).{FNREF|0-86472-060-2|11.4.4|40} But he supported the payment of the additional œ300 to Ngai Tahu:

to whom it must be conceded that great injustice has been done from the fact that their claims were not earlier enquired into and recognised. (A8:II:25){FNREF|0-86472-060-2|11.4.4|41}

In the event, the additional sum of œ200 was paid to Banks Peninsula and Kaiapoi Ngai Tahu on 12 November 1857 and the remaining œ100, to make up the total purchase price of œ500, on 6 January 1860 (A8:II:381-382).{FNREF|0-86472-060-2|11.4.4|42}

Ngai Tahu Land Report

11 The North Canterbury Purchase

11.5 Ngai Tahu's Grievances

11.5. Ngai Tahu's Grievances

Grievance no 1: Crown pressure on Ngai Tahu to sell

11.5.1 The claimants' first grievance insofar as it relates to the North Canterbury purchase is:

That the Crown's inclusion of [...] Kaiapoi in the Wairau Purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms. (W5)

This grievance is identical with the claimants' first grievance in respect of the Kemp purchase.

For reasons which we gave in 8.5.12 the tribunal was not able to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms. While in relation to the Wairau purchase we accepted that the inclusion of Kaiapoi pa would have been a source of anxiety to Ngai Tahu, the tribunal believes it was substantially mitigated by Governor Grey's 1848 assurances and the arrangement reached by Kemp and Ngai Tahu at the time of the Kemp purchase.

As we earlier recalled, Matiaha Tiramorehu recorded in his letter of October 1849 to Eyre, that the previous year when Grey had discussions with Ngai Tuahuriri at Akaroa, the governor told them that the payment for Kaiapoi should not be given to the Ngati Toa but that the payment for Kaikoura had already gone to them. Tiramorehu complained in his letter that when Kemp came he placed the boundary of Ngati Toa land at Kaiapoi. The tribunal believes this error should be attributed to Mantell, not to Kemp, who believed he was purchasing up to the Hurunui on the 43rd parallel.

When Ngai Tahu in September 1848 vigorously protested at Mantell's action in fixing the Kemp purchase boundary at the Kaiapoi pa site and journeyed to Wellington to protest to Eyre, the matter should have been put right and Grey's assurance given in February of that year honoured. But as we have said (8.5.11), once Mantell had located the pa and fixed it as the boundary, he was forced to doggedly maintain his position. When Ngai Tahu raised the matter in Wellington with Mantell's superiors, in Kemp's presence, they too saw it as expedient to stand behind Mantell's decision.

As we have seen, Ngai Tahu persisted in their protests but no effective action was taken to correct the situation until the North Canterbury deed of purchase was signed some eight and a half years later. By maintaining that the north-eastern boundary of

Kemp's purchase was at Kaiapoi pa after Mantell had erroneously fixed it there, the Crown in effect recognised the mana of Ngati Toa as extending to that point. This caused enormous distress to Kaiapoi Ngai Tahu who did not rest until their mana was restored in February 1857. But they paid a heavy price. Such was their anxiety, due to the pressure of European settlement, that their just rights would never be recognised, they parted with their lands initially for œ200, ultimately for œ500, but with no reserves whatsoever.

Finding on grievance no 1

11.5.2 The tribunal has no doubt, given all the circumstances leading up to the 1857 purchase which we have related, that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase and the Crown's acquiescence in recognising the boundary of Kemp's purchase at that point did exert unfair pressure on Ngai Tahu to part with the North Canterbury block on unfavourable terms. The first grievance is accordingly sustained.

Grievance no 2: The sale of North Canterbury land to Europeans

11.5.3 In their second grievance the claimants stated:

That the Crown allowed these blocks to be sold or leased to European settlers-entirely in the case of the North Canterbury Block [...] before they had been purchased from Ngai Tahu and that Ngai Tahu have never been adequately compensated for this. (W5)

It is clear from the evidence before the tribunal that the Crown did allow the whole of the North Canterbury block to be occupied by European settlers before purchasing it from Ngai Tahu. Substantial areas were in fact sold and the freehold granted. The remainder of the block was occupied under pasturage or other licences. The evidence is equally clear that by the time the Crown came, very belatedly, to recognise the legitimacy of Ngai Tahu's claim, the land had increased very considerably in value. We have cited an instance of 30,000 acres being sold for œ15,000, or 10 shillings an acre. Mr Alexander explained to us that due to difference in policy between Governor Grey and the Canterbury Association, all land north of the Waipara River which fell outside the Canterbury Association block, could be purchased for ten shillings an acre, or five shillings if it was of poorer quality, while œ3 an acre was charged by the Canterbury Association for land south of the Waipara. Not surprisingly more sold at the cheaper price. Between 1 July 1853 and 31 December 1854, 61,120 acres of rural land were sold at 10 shillings an acre, while 1178 acres sold at œ3 an acre (M5:23-24).{FNREF|0-86472-060-2|11.5.4|43} The stark difference in the price paid by the Crown, of œ500 for 1,140,000 acres, is only too apparent.

The Crown's attitude to meeting claims by Ngai Tahu is illustrated by Professor Ward, who in comparing this purchase with the Crown's practice in the North Island said:

The price which Ngai Tahu received was a small fraction of the sums handed over by McLean himself for blocks of pastoral land in the Wairarapa in 1853-54-a total of

roughly 1,500,000 acres for œ14,000-with large reserves granted, and much of the best land withheld from sale. (T1:276)

That Ngai Tahu were interested as early as 1848 in engaging in pastoral activities is apparent from requests made to Mantell. For instance we have earlier noted that in September 1848 they told Mantell they wanted "a run of some thousand acres" for grazing sheep (8.8.20).

Finding on grievance no 2

11.5.4 The delay of over eight years in recognising and settling Ngai Tahu's claim to the North Canterbury block saw their land completely occupied by European settlers. The Crown must accept responsibility for this. A consequence of the unjustified delay by the Crown meant that not only had the land, as a result of settlement, considerably increased in value, but also that Ngai Tahu were placed in a greatly weakened bargaining position. For all they knew the Crown would continue to rely on the Wairau purchase as giving it title to the land.

The tribunal has no hesitation in finding that Ngai Tahu have never been adequately compensated for the sale of the North Canterbury block. Grievance no 2 is accordingly sustained.

Finding on breach of Treaty principles in respect of grievances nos 1 and 2

11.5.5 The tribunal was unable to reconcile the Crown's action regarding the inclusion of Ngai Tahu land in the Wairau purchase from Ngati Toa with Ngai Tahu's rangatiratanga over such land. No investigations appear to have been made by the Crown as to Ngai Tahu rights in the North Canterbury block. While Grey in February 1848 recognised Ngai Tahu's rights at least up to the Hurunui River, this was revised by the Crown's subsequent acquiesence in Mantell fixing the boundary of Kemp's purchase at the Kaiapoi pa site. Despite persistent protests by Ngai Tahu from 1848 on, the Crown permitted all the land in the North Canterbury block to be occupied by European settlers and alienated substantial areas of the freehold to them. This was in blatant disregard of, or unconcern for, Ngai Tahu's rangatiratanga over this land. Far from consenting to this occupation of their land, Ngai Tahu vigorously objected. When very belatedly the Crown finally consented to recognise the rights of Ngai Tahu in this land, they did so by agreeing to pay no more than a nominal price, far below the then value of the land. This was inconsistent with good faith and the obligation of the Crown to deal fairly and honourably with its Treaty partner. In so doing it clearly acted in breach of article 2 of the Treaty, as equally clearly it did in denying for so long and with such serious consequences the rangatiratanga of Ngai Tahu in the North Canterbury block. Ngai Tahu have not been compensated to this day for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Grievances nos 3 and 4: Crown failure to provide reserves

11.5.6 These grievances may conveniently be considered together:

3. That the Crown refused to allow lands requested by Ngai Tahu at Hurunui and Motunau in the North Canterbury Block [...] to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.

4. That the Crown failed to provide any reserves for Ngai Tahu in the North Canterbury Block.(W5)

Finding on grievances nos 3 and 4

11.5.7 It should be said at once that the Crown does not dispute the validity of these grievances. Hamilton noted that Ngai Tahu sought reserves at both Hurunui and Motunau. His ostensible reason for refusing them was that Ngai Tahu had been provided with adequate reserves by the Kemp and various Banks Peninsula purchases. We have already found this to have been far from the case. The real explanation, as we have earlier noted, was that the country was occupied by European pastoralists, or as McLean inferred, the land demanded by Ngai Tahu was of great value. Consequently Hamilton resolutely refused to grant a single acre by way of reserves. The tribunal upholds both grievances nos 3 and 4.

Findings on breach of Treaty principles in respect of grievances nos 3 and 4

11.5.8 In no other purchase of Ngai Tahu land did the Crown fail completely to make any reserves for the tribe or wholly fail to meet their requests for reserves. Much of the North Canterbury block was very well suited to pastoral sheep-farming. Ngai Tahu were anxious to participate in this activity alongside the new settlers. Instead they received a mere œ500, and then only after years of protest. The Crown's breach of article 2 of the Treaty is self-evident. It is conceded by the Crown. In failing to meet the request for reserves at Hurunui and Motunau the Crown flew in the face of Ngai Tahu's rangatiratanga over the land preserved to them by article 2. There could be no conceivable justification for such arbitrary action so at variance with the Crown's Treaty obligation.

In failing to set aside any reserves anywhere in the block the Crown ignored its clear obligation under article 2 to ensure that Ngai Tahu was left with ample reserves for their present and future needs. The tribunal finds it impossible to reconcile the Crown's conduct in this purchase with its Treaty obligation of good faith.

In short, the tribunal finds that the Crown acted in breach of article 2 of the Treaty in failing to respect the rangatiratanga of Ngai Tahu by reserving lands the tribe wished to retain, by failing to make any provision by way of reserves for the present and future needs of Ngai Tahu, and by failing to act in good faith and honestly towards its Treaty partner.

Grievance no 6: Land for Settlements Acts

11.5.9 In their sixth grievance that claimants alleged:

That the Crown in the North Canterbury Block under the Land for Settlements Acts for the benefit of landless Europeans, from November 1895 to May 1897 resumed the

Patoa, Ashley Gorge, and Horsley Downs Estates [...] but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty.(W5)

At the time the three estates referred to in this grievance were resumed, the Land for Settlements Act 1894 was in force. This Act enabled the Crown to acquire either by purchase or compulsorily, land in private ownership, if the landholding exceeded specified acreages. The principal purpose of Crown acquisition was to provide land for settlement under the Land Act 1892. Section 32 of the 1894 Act provided that any land so acquired was to be disposed of under the lease-in-perpetuity system, or, if pastoral, under the small grazing-run system of part V of the Land Act 1892. Section 157 of the Land Act provided for leases-in-perpetuity to have a term of 999 years and a rental equal to 4 per cent of the cash price of the land. Small grazing-runs were regulated by part V of the Land Act. Section 172 provided that a first class small grazing-run should not exceed 5000 acres and a second class grazing-run should not exceed 20,000 acres. The term of the lease was for 21 years with a right of renewal at a rental of 2.5 per cent of a price fixed by the land board.

There was no requirement in either Act that the applicant for land must be either European or landless. Under section 92 of the Land Act any person of the age of 17 years or upwards might be selected to take up land under the Act, but section 93 limited the rights of married women. Section 95 of the Land Act limited the right of any person owning 2000 acres or more of freehold land from acquiring land under the Act other than under part V (small grazing-run leases) and part VI (land held for pastoral purposes). No submissions were made by counsel on this grievance. So far as the tribunal is aware there was at the time no legal impediment to any qualified Maori applying for land under the Land for Settlements Acts. We have no information whether any did so, or, if so, with what results.

Finding on grievance no 6

11.5.10 On the assumption that Maori enjoyed the same rights under the Land for Settlements Acts as Europeans, the tribunal is unable to sustain the claimants' grievance no 6.

But, having made this finding on the limited information made available to us, we make the following observations. The Crown was prepared to outlay substantial sums of money to enable predominantly, if not only, European settlers, to take up extensive areas of land on favourable terms. Land, moreover, which was fertile and relatively accessible. We note that "small grazing-runs" under part V of the Land Act 1892 could be up to 5000 acres in extent for first class runs and up to 20,000 acres for second class runs.

As we will later see in chapter 20, land assigned to landless Maori under the South Island Landless Natives Act 1906 was often in remote and sometimes inaccessible areas, often of poor or indifferent quality, and always restricted to a maximum of 50 acres per adult and 20 acres for those under 14 years of age. The two Acts stand in stark contrast to each other. While unable to uphold the claimants' grievance, it is not difficult to understand why it was put to us. It takes little imagination to appreciate the sense of deprivation of the North Canterbury Ngai Tahu for whom the Crown refused to set aside a single acre. And yet, the Crown was later prepared, at considerable cost,

to resume, either by repurchase or compulsorily, land bought from Ngai Tahu for a pittance, to facilitate closer settlement predominantly by European settlers.

References

{FNTXT|0-86472-060-2|11.3.2|1}1 Tiramorehu to Eyre, 22 October 1849, Compendium, vol 1, p 228

{FNTXT|0-86472-060-2|11.3.2|2}2 Mantell to Gisborne (for Eyre), 21 September 1848, G7/4 letters, NA, Wellington

{FNTXT|0-86472-060-2|11.3.3|3}3 Tiramorehu to Grey, 29 December 1849, G7/10 letters, NA, Wellington

{FNTXT|0-86472-060-2|11.3.3|4}4 Tikao, Te Ao, Pukurau, Tuauau, Te Hau, Kokaikai, Huanoa, Koreko, Tawa, Riri, Tae, Hia Hia to Grey, 16 January 1850, Compendium, vol 2, p 7

{FNTXT|0-86472-060-2|11.3.3|5}5 Mantell to colonial secretary, 12 March 1850, G7/10 letters, NA, Wellington

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{FNTXT|0-86472-060-2|11.3.3|7}7 Grey to Eyre, 17 October 1850, NZ Company, NA, Wellington

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{FNTXT|0-86472-060-2|11.3.5|15}15 Te Aorahui to Grey, 27 August 1852, Grey Collection, MA 510, Auckland Public Library

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{FNTXT|0-86472-060-2|11.3.6|18}18 Hamilton to chief land purchase commissioner, 5 February 1857, Compendium, vol 2, p 21

{FNTXT|0-86472-060-2|11.3.6|19}19 Simeon to Kemp, 16 May 1853, CS 53/611, NA, Wellington

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{FNTXT|0-86472-060-2|11.3.11|22}22 J M Sherrard Kaikoura: A History of the District (Kaikoura County Council, 1966) p 57

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{FNTXT|0-86472-060-2|11.3.12|25}25 McLean to Johnson, 25 April 1856, Compendium, vol 2, p 8

{FNTXT|0-86472-060-2|11.3.12|26}26 Johnson to McLean, 11 May 1856, Compendium, vol 2, pp 8-9

{FNTXT|0-86472-060-2|11.3.12|27}27 McLean to private secretary, 27 May 1856, Compendium, vol 2, p 9

{FNTXT|0-86472-060-2|11.3.12|28}28 McLean to Johnson, 30 May 1856, Compendium, vol 2, p 9

{FNTXT|0-86472-060-2|11.3.13|29}29 McLean, 13 August 1856, Compendium, vol 2, p 12

{FNTXT|0-86472-060-2|11.3.13|30}30 McLean to Hamilton, 16 August 1856, Compendium, vol 2, p 13

{FNTXT|0-86472-060-2|11.4.1|31}31 Hamilton to McLean, 11 December 1856, Compendium, vol 2, p 15

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{FNTXT|0-86472-060-2|11.4.4|40}40 McLean, 30 March 1857, Compendium, vol 2, p 25

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Ngai Tahu Land Report

12 The Kaikoura Purchase

12.1 Introduction

Chapter 12

THE KAIKOURA PURCHASE

12.1. Introduction

This purchase shared many common features with the earlier North Canterbury transaction. In both cases the respective Ngai Tahu hapu strenuously objected to the Wairau purchase from Ngati Toa extending to land which they considered rightly belonged to them.

Thus we find not only the Kaiapoi Ngai Tahu protesting but also the Kaikoura hapu. From as early as the meeting with Governor Grey at Akaroa in February 1848 Ngai Tahu sought payment for both the Kaikoura and Kaiapoi districts. When in September 1848 Mantell, in the presence of Ngai Tahu, fixed the northern boundary of Kemp's purchase at the old Kaiapoi pa site, Paora Tau rose to say that it should be put right back to Te Parinuiowhiti. In 1850 both William Fox and W J W Hamilton reported on Ngai Tahu's claim to Kaikoura along with the claim for the Kaiapoi district.

In December 1850 the New Munster Executive Council went so far as to agree to pay œ50 if Ngai Tahu would relinquish their claims to the country between Kaikoura and Kaiapoi. It does not seem that the money was ever paid over. Ngai Tahu continued to protest. For instance Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau and other places to the south.

Meanwhile, the Crown proceeded to recognise the claims of various tribes to the north, including Ngati Toa. And at the same time European settlement was progressing steadily over both the Canterbury and Kaikoura blocks. While Donald McLean was very active in settling claims of the northern South Island tribes in the years 1853 to 1856, he showed no anxiety to investigate Ngai Tahu's repeated claims.

When W J W Hamilton returned to Lyttelton after settling the Akaroa purchase in December 1856 he found Kaikoura Whakatau, the paramount rangatira of Kaikoura, and 20 or more of his principal men awaiting him. They had heard that Hamilton proposed to negotiate with Kaiapoi Ngai Tahu over North Canterbury. Whakatau

expressed willingness to negotiate with the Crown over the Kaikoura district.

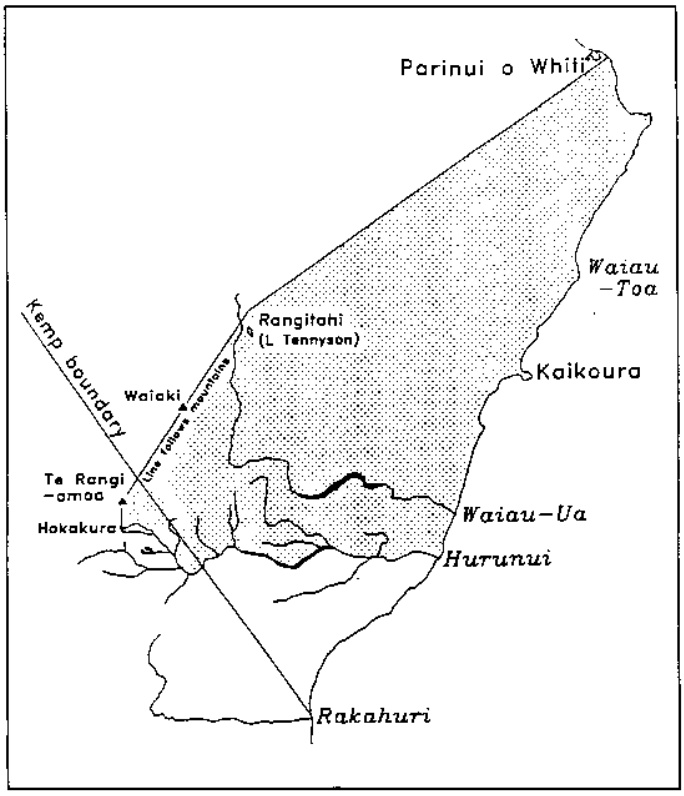

Figure 12.1: The Kaikoura purchase. The purchase overlapped with the North Canterbury purchase of 1857 which had its northern boundary at the Waiau-Ua.

He complained that Ngati Toa had no right to sell the country from Wairau to Kaiapoi. Hamilton reported his discussions with Whakatau to McLean early in 1857. McLean undertook to have the matter investigated but again showed no sense of urgency. Not until nearly two years later did McLean finally instruct James Mackay Jr to undertake the negotiations for the purchase of the Kaikoura district.

Mackay was unable to obtain the services of a surveyor from the Nelson provincial government. He complained bitterly that the provincial council was giving priority to surveying some 64,000 acres at Amuri - land which Mackay reminded McLean had never been properly acquired by the Crown and which the provincial government had no business to sell before the Crown had purchased the title to it.

Mackay's negotiations took place during February-March 1859 and a deed of purchase was signed on 29 March 1859. After weeks of protracted argument Mackay induced Ngai Tahu to accept œ300 for 2.5 million acres. He refused to grant them a reserve of 100,000 acres which they requested and instead they were obliged to accept a mere 5558 acres in the remnant of land which had not yet been leased or sold to Europeans.

Ngai Tahu Land Report

12 The Kaikoura Purchase

12.2 Statement of Grievances

12.2. Statement of Grievances

We set out here from the combined summary of the claimants' grievances relating to both North Canterbury and Kaikoura, those grievances which relate to Kaikoura in whole or in part.

1. That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau Purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms.

2. That the Crown allowed these blocks to be sold or leased to European settlers-[...] almost entirely in the case of the Kaikoura Block-before they had been purchased from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this.

3. That the Crown refused to allow lands requested by Ngai Tahu [...] between the Kahutara and Tutaeputaputa (Conway) Rivers in the Kaikoura Block to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.

4. [Relates solely to the North Canterbury block].

5. That the Crown in the Kaikoura Block provided reserves that were inadequate for agricultural purposes and inadequate as an economic basis for the prosperity of Ngai Tahu, and that were unreasonably encumbered with Crown roading and railway rights.

6. That the Crown [...] in the Kaikoura Block [under the Land for Settlements Acts for the benefit of landless Europeans] from November 1893 resumed the Cheviot, Blind River, Starborough, Puhipuhi, Richmond Brook, Waipapa, Lyndon No 1 & 2, Rainford, Annan, Flaxbourne No 1 & 2, and Culverden Estates, but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

Ngai Tahu Land Report

12 The Kaikoura Purchase

12.3 Background to the Purchase

12.3. Background to the Purchase

12.3.1 In our discussion of the North Canterbury purchase we outlined in some detail the way in which Ngai Tahu expressed their concern at the Crown's failure to recognise their mana over the land north of the Kaiapoi pa site. This concern extended, as we have seen, not just to the North Canterbury block, but to the land up to and beyond Kaikoura as far as Parinui o Whiti, or the White Bluffs, at the northern end of the Kaikoura district.

Without repeating the detailed evidence recorded in the previous chapter, the tribunal briefly notes the following incidents by way of example.

- In February 1848, as Matiaha Tiramorehu later reported, Ngai Tuahuriri sought payment for Kaikoura and Kaiapoi (L9:23{FNREF|0-86472-060-2|12.3.1|1}

- As soon as Mantell, in September 1848, fixed the northern boundary of the Kemp purchase at the Kaiapoi pa Paora Tau said that it should "be put right back to Te Parinuiowhiti". Later that day Mantell was told a party of Ngai Tahu would go to Wellington to see the Governor "and try and shift the line back to Te Parinui o whiti" (G2:773-775).{FNREF|0-86472-060-2|12.3.1|2} A party duly went and saw Lieutenant-Governor Eyre at Wellington.

- On 11 January 1850 Hamilton reported to Fox that it was probable the Ngai Tahu of Kaiapoi, Amuri, Kaikoura and Port Levy would object to the occupancy of the country to the north of the Kowai River as far as Kaikoura (L9:31).{FNREF|0-86472-060-2|12.3.1|3}

- On 16 January 1850 John Tikao and 11 other Ngai Tahu chiefs wrote to the governor on behalf of the Tuahuriri people claiming the land between Kaiapoi and the Wairau. (A8:II:7){FNREF|0-86472-060-2|12.3.1|4}

- In April 1850 Kelham, on behalf of William Fox, reported that Ngai Tahu assertions that some of the country between the Kaikoura mountains and the Port Cooper plains had not been purchased might have some foundation. Fox himself had heard this when at the Kaikoura peninsula (L9:30).{FNREF|0-86472-060-2|12.3.1|5}

- On 10 December 1850 the New Munster Executive Council, on Eyre's initiative, agreed to pay œ50 for the relinquishment by Ngai Tahu of their claims to the country between Kaikoura and Kaiapoi. Governor Grey approved the proposal in January 1851 (M11:7-12).{FNREF|0-86472-060-2|12.3.1|6} It seems the money was never paid over.

- In October 1852 Kemp, the native secretary of New Munster, paid the sum of œ60 to the chief Kaikoura Whakatau "by which he relinquishes all claims to the lands in the vicinity of Kaikoura" (T2:66).{FNREF|0-86472-060-2|12.3.1|7} Whether this was in fact the payment for Fyffe's whaling station at Waiopuka is not clear (T1:262).

- Governor Grey visited Canterbury in 1852 and was later reported by J G Johnson as having offered the Kaiapoi hapu œ100 for their rights north of the Ashley. How far this was to have extended is not clear (A8:II:11).{FNREF|0-86472-060-2|12.3.1|8}

- In September 1852 Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau, Te Hurunui, Motunau, Rakahuri and Kaiapoi (T1:263).{FNREF|0-86472-060-2|12.3.1|9}

12.3.2 Meanwhile, as we have noted (11.3.8), the Crown proceeded to recognise the claims of various other tribes including Ngati Toa. At the same time, European settlement gathered momentum in both the Kaikoura and North Canterbury blocks (11.3.9-11). As Professor Ward noted:

In the 1850s, Maori wrote, and remonstrated, repeatedly. Grey was given ample opportunity to redress the grievance. It was not lack of information that caused the delay. (T1:277)

While Donald McLean, the land purchase commissioner, was very active during this period, he clearly regarded the claims of Ngai Tahu as having little if any need of prompt attention. And so by 1858 the whole of the Kaikoura block of some 2.5 million acres was occupied by European settlers except for three relatively small blocks, including one at the Kaikoura peninsula. By the following year, 1859, only the block at the peninsula had not been leased or sold to settlers (M6:24-25).

Hamilton reports Ngai Tahu's willingness to sell

12.3.3 When Hamilton returned to Lyttelton on 24 December 1856, after laying out reserves following the completion of the Akaroa block purchase earlier that month, he found Kaikoura Whakatau, the paramount Kaikoura chief, and 20 to 30 of his principal people waiting to see him. They had heard that Hamilton was about to commence negotiations with the Kaiapoi people for the purchase of the North Canterbury block.

As Hamilton reported to McLean on 8 January 1857:

Whakatau stated at the interview I had with him, in presence of the principal Maoris of Kaiapoi, Rapaki, Port Levy, &c. (who are all members in common with the Kaikoura people of the Ngaitahu tribe), that Ngaitahu are the lawful owners of the country southwards from Pari-nui-o-whiti (The White Bluffs) between the Wairau and the Awatere (Wakefield); of this tract the Kaikoura Maoris claim the special ownership as far as the Waiau-ua, which was fully admitted by the Kaiapoi and Rapaki Maoris who, on the other hand, claim no special ownership north of the Waiau-ua. (A8:II:16){FNREF|0-86472-060-2|12.3.3|10}

Hamilton went on to report on the basis of his conversation:

- that Whakatau complained that the Ngati Toa had no right to sell the country from Wairau to Kaiapoi;

- that the whole of the country from Parinui o Whiti southwards had long been occupied by sheep owners but the Kaikoura people had never received one shilling for it except for œ50 in about October 1852 paid to Whakatau for the surrender of Waiopuka, Fyffe's whaling station on the Kaikoura peninsula;

- that by a census recently taken for the Nelson government he "understood them to say" Kaikoura Maori numbered 80. They lived or cultivated at Waipapa, Ohau, Te Hapuku, Maunga, Mahuita, Wainuaiarara, Kaikoura pa and Mikonui. They owned some cattle and horses; and

- that Whakatau and his people offered to sell all their land to the Crown except for two reserves-one of 400 acres at Waipapa old fishery, the other of 600 acres at the Kahutara River, or such other reserves as might later be agreed upon. Hamilton understood the price to be the same as for Akaroa and that to be offered for North Canterbury, that is, œ150. He strongly recommended:

that this opportunity be seized upon of satisfying, for the small sum of œ150, a claim over not less than 1,200,000 acres of country, and at the same time of dealing honourably and fairly by the ostensibly rightful owners whose property we have now so long been enjoying. (A8:II:17){FNREF|0-86472-060-2|12.3.3|11}

It was noted in the Ward report that it is not clear from the context whether Hamilton's report of the money necessary to satisfy the claim was his own estimate or was reached in discussion with Ngai Tahu leaders (T1:279). Certainly Kaikoura Whakatau was later to deny making such an offer. Moreover, Hamilton admitted to possessing only "a slight knowledge of the Maori language" (A8:II:29).{FNREF|0-86472-060-2|12.3.3|12} The possibility of a misunderstanding cannot therefore be eliminated.

12.3.4 On 31 March 1857 McLean thanked Hamilton for his report on the unsettled claims of Whakatau and his people to lands between the White Bluffs and the Waiau-ua. He said the New Munster records were being searched. If the rights of the Kaikoura tribe were clearly established the government would pay œ150 and make such reserves as might be necessary. McLean suggested that the claim had been inadvertently overlooked because the central government did not have an officer stationed in the South Island to investigate such matters. The commissioner indicated that he hoped to have the matter rectified in the course of the next summer. Again it seems he saw no need for haste (A8:II:25).{FNREF|0-86472-060-2|12.3.4|13}

12.3.5 By August 1857 Hamilton had become further concerned at the Crown's delay in commencing negotiations with "the legitimate owners" at Kaikoura and Arahura. In a letter of 6 August he urged upon McLean:

the necessity for making early arrangements for sending a competent Maori scholar to Kaikoura and Arahura to obtain the surrender of the remaining Native lands in this Island. The recent gold discoveries at Nelson are so likely to raise the value of the land in the eyes of the Maoris to the most extravagant pitch, that I fear any delay in

accepting their proposals to treat may end in totally preventing the acquisition of the land sought for by us. (A8:II:27).{FNREF|0-86472-060-2|12.3.5|14}

Hamilton might have added had he known, that the Kaikoura block was by then almost wholly overrun with European settlers. McLean, on 5 October 1857, replied that the governor would be despatching an officer at an early date to settle the claims (A8:II:27-28).{FNREF|0-86472-060-2|12.3.5|15} But again, this was an idle assurance. The summer of 1857-58 came and went without any further action by the Crown. Indeed, nothing happened until November 1858.

Ngai Tahu Land Report

12 The Kaikoura Purchase

12.4 The Purchase

12.4. The Purchase

The Crown finally authorises the Kaikoura purchase

12.4.1 More than 10 years after Ngai Tahu had first raised with Governor Grey, in February 1848, the issue of their title to the land at Kaikoura, the Crown eventually recognised the claim and took action to settle it.

On 3 November 1858 McLean wrote to James Mackay Jr, recently appointed assistant native secretary at the Collingwood goldfields, instructing him to proceed to Kaikoura to settle the claim. Mackay was told:

- to fix reserves "necessary for the maintenance and wants" of Ngai Tahu, "the proportionate area of the reserve for each individual or head of a family to vary from 10 to 100 acres, according to the quality, capabilities, relative value of the land, and rank of the owner";

- to ensure that a village site required at Kaikoura by the Europeans was not reserved to Ngai Tahu;

- that the Crown would pay œ150 for the block;

- that having completed his duties at Kaikoura he was to proceed to Arahura for a similar task;

- that the total sum estimated for the two purchases was œ300, to be apportioned as he thought best; and

- that great reliance was placed on Mackay's judgment in carrying out his duties, including the extent of the necessary reserves (A8:II:33-34).{FNREF|0-86472-060-2|12.4.1|16}

12.4.2 James Mackay was a competent Maori linguist. His father James Mackay Sr, a personal friend of McLean, had successfully sought an official appointment for his son. Mackay Jr became something of a proteg, of McLean. He considered McLean to be one of his best friends. Not infrequently, when he wrote officially to McLean he also wrote him a separate personal letter. In this way he was better able to explain or justify his actions.

Mackay arrives at Kaikoura

12.4.3 James Mackay Jr set off for Kaikoura on horseback on 15 February 1859. With him was his cousin Alexander Mackay, later to become prominent in Maori affairs and a Native Land Court judge. They reached Kaikoura nine days later on 24 February. With them came all the Ngai Tahu living between the Waiautoa River and the peninsula. Whakatau, the principal chief of the region, was still to arrive.

While awaiting the arrival of Whakatau, Mackay had some general discussion with those Ngai Tahu present. The following day he wrote two letters to McLean, one official, the other private. In his official letter he advised that:

- Ngai Tahu were very exorbitant in their demands and were seeking œ5000;

- he had "hinted" to them that the land had been once purchased already and if necessary "the Ngaitoa and Ngatiawa tribes would give possession of it to the Government";

- the district covered the whole of the Awatere, Tarndale, Clarence (Waiautoa), Amuri and Waiau-ua country, which he estimated to contain about 2.5 million acres;

- the greater part of these districts was now occupied by sheep-farmers, who in many cases had purchased considerable quantities of land from the government; and

- he would "use every means" in his power "to induce the Natives to accede to the terms offered" by him. If unsuccessful he would proceed to Arahura and then await further instructions (A8:II:34-35).{FNREF|0-86472-060-2|12.4.3|17}

12.4.4 In his private letter he was more forthcoming and was particularly critical of the Nelson provincial government.

- He expressed exasperation at being unable to persuade the Nelson provincial officials to make available a surveyor to mark out the reserves they "being all engaged in laying out runs at the Wairau and Amuri".

- He protested that a surveyor, Clarke, who had been assigned to survey 64,000 acres at Amuri by May should have been placed at his disposal to lay out reserves for Ngai Tahu:

previous to surveying land which had never been properly acquired from them, and which in fact has no business to be sold until the Native title has been extinguished over it. (M11:18){FNREF|0-86472-060-2|12.4.4|18}

- He later emphasised that:

if the Nelson Provincial Govt. had before selling an acre of land or letting a single sheep run, laid the case of the Kaikoura Natives before the General Government, and requested its immediate adjustment, the present difficulty would not have arisen. (M11:22){FNREF|0-86472-060-2|12.4.4|19}

We note that Mackay was evidently unaware that Ngai Tahu had been protesting to the governor and Crown officials since February 1848.

- He explained that the Ngai Tahu present seemed to know the exact sums paid for land at Amuri and Waiau-ua:

when they mention such sums as seven thousand eight hundred pounds being given by one man for land it is rather difficult to persuade them that the whole block is not worth five thousand pounds. (M11:20){FNREF|0-86472-060-2|12.4.4|20}

The Kaikoura Ngai Tahu were more numerous than he expected "there being altogether about seventy I hear":

...I am terribly afraid that these fellows are too wideawake for me, as to the value of the land-a good many of them are employed on the sheep stations and they know the country well both coast and inland, and seem to know every run and in some instances even the acreage of them. I told them today that they would have plenty of land reserved for their use. (M11:21){FNREF|0-86472-060-2|12.4.4|21}

It is apparent from this correspondence that Mackay was somewhat pessimistic about the prospects of a successful outcome to his negotiations. His threat, or "hint", as he preferred to disguise it, that the Crown might if necessary invoke the Wairau purchase cannot be condoned. It was made before the arrival of Whakatau and so before the negotiations proper began. It does not come well from a government official who was at the same time scathing in his criticism of the provincial government for facilitating the settlement of Ngai Tahu land before title had been obtained.

The deed is signed

12.4.5 Although Mackay commenced his discussions with Kaikoura Ngai Tahu on 24 February, a deed of purchase was not signed until 29 March 1859. It is apparent that protracted negotiations took place over the price and that discussions were broken off more than once. During the month all the reserves were identified and a list was signed on 15 March 1859. Mackay followed the practice adopted by Hamilton in keeping minutes of the proceedings. Unfortunately these are no longer available. The only contemporary record is Mackay's official report to McLean of 19 April 1859 (A8:II:35-36){FNREF|0-86472-060-2|12.4.5|22} and his personal letter to McLean of 22 April 1859 (M11:23-26).{FNREF|0-86472-060-2|12.4.5|23} The Smith-Nairn commission did not hear evidence on the Kaikoura purchase.

The boundaries

12.4.6 According to Mackay in his 19 April report the block contained about 2.5 million acres. As described in the deed:

the boundaries of the Land commencing at Karaka (Cape Campbell) and proceeding by the Sea Coast in a Westerly direction to Parinui-o-whiti (Wairau Bluffs) from thence turning inland it runs in a direct line to Rangitahi (Tarndale) at the source of the River Waiautoa (Clarence) whence turning in a South Westerly direction it continues by the mountains to Hikatura (Lake Summer) turning thence in an Easterly direction the boundary is the Hurunui to its confluence with the Sea-Thence turning at the mouth of the Hurunui in a North Easterly direction it goes along the sea beach to Karaka (Cape Campbell). Where the boundaries join. (see appendix 2.8)

Mackay explained that he was aware that the country between the Hurunui and Waiau-ua Rivers had been bought by Hamilton as part of the North Canterbury purchase. But he found that some of the Kaikoura Ngai Tahu denied having received any payment from Hamilton and they disputed the right of the Kaiapoi Ngai Tahu to sole ownership of the district. He thought it prudent therefore to include the whole of the land northward of the Hurunui in the deed. In the result the land between the Hurunui and Waiau-ua Rivers was included in both purchases.

The price paid

12.4.7 Mackay was obliged, if he wished to secure a purchase, to increase his earlier offer of œ200 to œ300. He did so most reluctantly and only after protracted stone-walling:

I set the fellows down so that none of them had anything to say, except that it was no use for them to talk to me as I was as hard as a stone and was Satan and Haukiora-and after all could not get them to take the money. (M11:26){FNREF|0-86472-060-2|12.4.7|24}

Mackay detailed his reasons for being obliged to increase his offer to œ300 as follows:

1. That the Natives refused to take the sum of œ150 (the sum I was instructed to pay them); and on my offering them œ200 (which sum I considered I was justified in tendering, as œ400 had been placed at my disposal for completing the Arahura and Kaikoura questions, to be apportioned by me in such a manner as I might deem most desirable for carrying out the duties assigned to me), they would not surrender the whole of their lands, wishing to retain the portion intervening the Rivers Kahutara and Tutai-putu-putu, containing some 100,000 acres, and which is rented from the Government by Messrs. Fyffe, Keene, and Tinline, for sheep runs, and part of which has also been purchased by them from the Crown.

2. That on my refusal to pay œ200, unless the whole of the land was surrendered to the Crown, the Natives threatened to eject the settlers from the above-mentioned block.

3. That I considered if the question was much longer delayed it would probably cost a larger amount to arrange it satisfactorily.

4. That the European settlers did not feel themselves secure unless the purchase was completed, the Natives having, in various ways, annoyed them by driving the sheep off the runs, preventing the settlers cutting timber, and from erecting buildings on their runs, and on several occasions, threatening that if they were not paid for the land, they would turn them off.

5. That although I did not think much of the threats of the Natives about ejecting the European residents, still they might be very troublesome, and should they turn any of them off land which had been purchased from the Crown, the person ejected would have strong claims to compensation, from the Government for selling him land, over which the Native title had not been properly extinguished; and the sum of œ100

would be but a small item in comparison with the loss, which would be sustained by the Government in such a case, not to speak of the probable expense of making a future arrangement with the Natives, as in the case of Pirika and Caldwell at Tukurua, Massacre Bay.

6. That the Natives were not willing to defer the payment until I could write to Auckland for instructions, assigning as a reason that they had already been deceived by the Government, and ought to have been paid long before.

7. That on my taxing the Chief Kaikoura (Whakatau) with breach of faith, in now asking œ10,000 for land which he had formerly agreed to sell for œ150, he repudiated having done so, merely stating that he had expressed his willingness to dispose of it, but had not mentioned the price. That although I produced a copy of Mr. Hamilton's report, the whole of them steadfastly denied having ever offered the whole of the land for œ150.

8. That the Natives were thoroughly acquainted with the value of the land they were selling, instancing the payment of œ7800 to Government by Mr. Robinson for a small piece of the block now offered for sale by them, and several others of the same nature.

9. That I felt assured it would be impossible to get them to surrender their claims for less than œ300, as I could not advance any more arguments against them than I had done, and although they admitted that I had controverted every argument made by them, they obstinately persisted in refusing to take œ200.

10. That it was not without considerable difficulty that I managed to get them to consent to receive even œ300, and I had to make a false start to Port Lyttelton before they could be brought to assent to it. (A8:II:35-36){FNREF|0-86472-060-2|12.4.7|25}

12.4.8 While there is no record here of any repetition of the threat made by Mackay during his discussions prior to the arrival of the paramount chief Whakatau, it is apparent that he resorted to the subterfuge of appearing to be willing to depart as a means of inducing Ngai Tahu assent to the sale for œ300.

There is a distinct possibility that Hamilton, because of his slight knowledge of Maori, misunderstood Whakatau as having earlier agreed to sell for œ150. In any event, the question of reserves had been left open and Mackay refused Ngai Tahu's request for a 100,000 acre reserve.

Ngai Tahu were extremely reluctant to accept œ300. They well knew how very inadequate such a price was, given the then well-established value of land in the district. The price, although more than contemplated by Mackay, can only be regarded as nominal. It was grossly inadequate.

The reserves

12.4.9 Mackay was unable to obtain the services of a surveyor. He laid off and marked the various reserves himself. The deed of purchase which, like the deed later made at Arahura, purported to be made under the "shining sun", made no reference to reserves. These were, however, provided for in an earlier memorandum of 15 March

signed by Kaikoura Whakatau, 20 other Ngai Tahu, James and Alexander Mackay and George Fyffe, described as a sheep farmer of Kaikoura. The memorandum reserved for Ngai Tahu the following lands:

Reserve	Acres
Mikonui	450
Te Kiekie	20
Omihi	100
Te Hiku o te Waero (Kaikoura, South Bay)	3
Kaikoura at the Pa	22«
Opokiki	12«
Pukaka	100
Maungamaunu and Waipapa	4800
Kahutara	50

(A8:II:384){FNREF|0-86472-060-2|12.4.9|26}

The memorandum provided that, should the government wish to make roads through these lands, Ngai Tahu agreed to give the portions required without payment.

12.4.10 In his letter of 19 April 1859 Mackay commented that the quantity of land provided for reserves might "appear large". But he went on to explain that:

it is of the most useless and worthless description, (especially the block of 4,800 acres), and the total value of it cannot be estimated at more than œ450 or œ500, in fact it is questionable from the nature of the reserves whether they will be found more than barely sufficient for the wants of the Native population, and for the increase of their horses and cattle, of which they now possess considerable numbers, one of the best proofs of which is that they have applied to me to be allowed to purchase land from the Government, to the extent of about 400 acres within the block just ceded by them to the Crown. (A8:II:36){FNREF|0-86472-060-2|12.4.10|27}

This is a disturbing statement. Mackay characterises the larger part of the reserves as of the "most useless and worthless description". On the plan of the large 4800 acre block officially known as M801, Mackay endorsed the following note:

Plan of the block of land reserved by the Natives of Kaipapa and Maunga Maunu for themselves, at the time of disposal of their claims to land on the East Coast, Province of Nelson.

Estimated contents 4800 acres; nearly the whole of it is utterly worthless for European settlement or cultivation, and is valued by the Natives for the Karaka, which grows on the face of the hills and cliffs. The North and south boundaries have been laid out to the full distance of fifty chains, and it is improbable that the inland boundary will ever require surveying. (M28(f)){FNREF|0-86472-060-2|12.4.10|28}

This map is dated 28 March 1859-the day before the deed was signed. Mackay over-simplified in suggesting that the 4800 acres was attractive to Ngai Tahu principally because of the karaka berries present in considerable quantities. His cousin Alexander Mackay who was present throughout the negotiations some years later noted:

Although the Kaikoura reserve is large, it is very worthless, consisting chiefly of steep hillsides clothed with a small growth of timber. It was given to the Natives at their own request when surrendering their claims to land in that locality, in order to secure to them the right of fishing along the coast. (A8:II:312){FNREF|0-86472-060-2|12.4.10|29}

12.4.11 W J Elvy in his history of the Kaikoura coast published in 1949 was cited by Dr Donald Loveridge (M10:47-48). Elvy, in noting that Mackay had made excuses in his report for granting the large reserve at Maungamaunu, said Mackay "would probably be surprised if he could visit it nowadays to find that it carries about 5000 sheep and 500 cattle". Elvy also commented that when he was surveying on the block in 1908 he:

railed at the Maori for being so foolish as to take his [sic] land in such a rough locality. "Why didn't you take your land at Bendemere, that lovely strip of good land between Mill and Schoolhouse roads?", I asked. "That's all very well for you to talk," they said. "When the Pakeha came the Maori knew nothing of the cow and the sheep. He only knew the foods of the forest and the sea. At Wai-o-patiki (Bendemere stream) there were no fish and no foods of the land. But at Maungamaunu there were the paua (mutton fish), the pipi and pupu (cockles and whelks), the kuku and kopukopu (mussels) on the rocks. In the sea there were the koura (crayfish), the kahawai, the marari (butterfish), the pakirikiri (rock-cod), the ngaira (conger eel) and the hapuku. On the land were the karaka, the pigeon, kaka, and other birds. The Maori says: "that's the place for me-plenty of kai. Lay my land off there." (M10:47-48){FNREF|0-86472-060-2|12.4.11|30}

12.4.12 While the tribunal has no doubt that the mahinga kai available was a major reason why Ngai Tahu requested this reserve it does not accept that in 1859 Kaikoura Ngai Tahu were not anxious to retain land for pastoral purposes. In the passage already quoted from his report Mackay, after referring to the horses and cattle owned by Ngai Tahu, told McLean that they had asked him to be allowed to purchase 400 acres from the government within the block they had just ceded to the Crown. This is the Akaroa purchase situation repeating itself. In the tribunal's view it reveals an appalling attitude on the part of the Crown's agent, who to prove how hard a bargain he has driven, virtually gloats over the fact that to obtain land they want and need

Ngai Tahu are driven to seeking permission to buy back 400 acres of their own land. We cannot condemn too strongly such a cynical disregard by the Crown's agent of the rights of its Treaty partner. We turn now to consider the claimants' various grievances.

Ngai Tahu Land Report

12 The Kaikoura Purchase

12.5 Ngai Tahu's Grievances

12.5. Ngai Tahu's Grievances

Grievance no 1: Crown pressure on Ngai Tahu to sell

12.5.1 In their first grievance the claimants stated:

That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau purchase of 1847 from Ngatitoa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms. (W5)

We have considered this grievance in relation to the North Canterbury purchase and upheld it. The only material difference between the circumstances of the Wairau purchase, insofar as it impinged on the North Canterbury and Kaikoura purchases, relates to the discussions between Ngai Tahu and Governor Grey at Akaroa in February 1848. As Matiaha Tiramorehu noted in his October 1849 letter to Eyre, Governor Grey told them at Akaroa that the payment for Kaiapoi should not be given to the Ngati Toa "but that the payment for Kaikoura was already gone to them [the Ngati Toa]." Just as Kaiapoi Ngai Tahu continued to protest the recognition of Ngati Toa's right to be paid for the North Canterbury block, so did Kaikoura Ngai Tahu similarly protest the recognition by the Crown of Ngati Toa's right to be paid for the Kaikoura block. Despite these protests the Crown refused or neglected seriously to investigate Ngai Tahu's title to the land until 1856, and further delayed its recognition of their right by not effecting a purchase until March 1859, by which time virtually all the land was held under pasturage licence or had actually been sold to European settlers.

Finding on grievance no 1

12.5.2 The tribunal is satisfied, given all the circumstances leading up to the 1859 purchase which we have related, that the Crown's inclusion of the Kaikoura block in the Wairau purchase did exert unfair pressure on Ngai Tahu to part with the block on unfavourable terms both as to price and reserves. The first grievance is accordingly sustained.

Grievance no 2: The sale of Kaikoura land to Europeans

12.5.3 The claimants' second grievance was:

That the Crown allowed these blocks to be sold or leased to European settlers-[...] almost entirely in the case of the Kaikoura Block-before they had been purchased

from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this. (W5)

Mr D J Alexander's evidence showed that by the time of the North Canterbury purchase in February 1857 the whole of the block had been either leased or sold to European settlers. Mr Alexander's evidence also showed that by 1859-the year of the Kaikoura block purchase-all but a relatively small area comprising the Kaikoura peninsula and the hinterland to the north back to the seaward Kaikoura range, had likewise been leased or sold to European settlers (M6:24-25). Just as with the North Canterbury block so in the Kaikoura block the price of land to the settlers was in 1859 at least ten shillings an acre, in the case of good land, or five shillings if of poorer quality. But Ngai Tahu received a mere œ300 for 2.5 million acres. At five shillings an acre the price would have been œ625,000; at just one shilling an acre œ125,000. We cite these figures to indicate the vast disparity between the price at which, after one month's hard bargaining, Ngai Tahu were induced to part with their land, and its established market value in the hands of the Crown. Our comments on the North Canterbury block in respect of this grievance are equally applicable to the Kaikoura block.

Finding on grievance no 2

12.5.4 For substantially the same reasons as we gave for upholding this grievance in respect of the North Canterbury block (11.5.3) we likewise conclude that Ngai Tahu have never been adequately compensated for the Kaikoura block purchase. Grievance no 2 in respect of this purchase is accordingly sustained.

Finding on breach of Treaty principles in respect of grievances nos 1 and 2

12.5.5 In the discussion of grievance no 1 the tribunal pointed out the one material difference between the circumstances of the Wairau purchase insofar as it impinged on the North Canterbury and Kaikoura purchases (12.5.1). That distinction is not, however, material for the purposes of any finding as to breach of Treaty principles. Accordingly, rather than repeat the reasons given in 11.5.5 we simply record that for the same reasons we find the Crown acted in breach of article 2 of the Treaty in respect of the Kaikoura purchase. We also find that to this day Kaikoura Ngai Tahu have not been compensated for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Grievance no 3: The Crown's refusal to allow requested reserves

12.5.6 In their third grievance the claimants alleged:

That the Crown refused to allow lands requested by Ngai Tahu [...] between the Kahutara and Tutaeputaputa (Conway) Rivers in the Kaikoura Block to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty. (W5)

As we have seen, Mackay in his report to McLean of 19 April 1859 noted that Ngai Tahu refused to accept œ150, and on his offering œ200:

they would not surrender the whole of their lands, wishing to retain the portion intervening the Rivers Kahutara and Tutai-putu-putu [Conway], containing some 100,000 acres, and which is rented from the Government by Messrs Fyffe, Keene, and Tinline, for sheep runs, and part of which has been purchased by them from the Crown. (A8:II:35){FNREF|0-86472-060-2|12.5.6|31}

Later in the same report Mackay advised that it would have been impossible to obtain Ngai Tahu's surrender of their claim for less than œ300. Even then he had to resort to making a "false start" to Port Lyttelton before they could be brought to assent.

The area which Ngai Tahu wished to retain was a little south of the Kaikoura peninsula and lay between the Kahutara and Conway Rivers. Ngai Tahu no doubt sought to keep it for pastoral farming. Mackay must have been inhibited from agreeing to the reservation of this land, or any lesser area, because it was entirely occupied by European settlers and part had actually been sold to them. We note that Fyffe, one of the three Europeans concerned, was a witness to the deed of purchase.

12.5.7 The Crown did not seek, in evidence or submissions to us, to justify the refusal by the Crown agent to reserve the 100,000 acres requested by Kaikoura Ngai Tahu on any ground other than that it had been leased or sold to settlers. It was, of course, an area far in excess of the quantity of reserves which McLean had suggested to Mackay might be made. His formula was for reserves for each individual or head of family to vary from 10 to 100 acres according to the quality and relative value of the land and rank of the owner. In laying down such a formula McLean completely overlooked that article 2 of the Maori version of the Treaty guaranteed to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full exclusive and undisturbed possession of their land so long as they wished to retain it. It is apparent that Ngai Tahu wished to retain a substantial area of land for pastoral purposes and no doubt for greater access to a variety of mahinga kai resources. Instead their wishes were ignored and they were induced to settle for a mere 5558 acres.

Finding on grievance no 3

12.5.8 By imposing on its agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu the Crown acted in clear breach of article 2 of the Treaty. This breach was exacerbated by the action of the Crown in facilitating the leasing and, in part, the sale of land to which Ngai Tahu's title had not been extinguished. The Crown's agent Mackay, as his correspondence to his superior McLean only too clearly revealed, was fully aware of this. Mackay was obliged by the Crown to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they wished and were entitled to retain. It was the Crown's responsibility to respect Ngai Tahu's title to their land and to restore it to them if, as was the case, they wished to retain it.

It follows that Ngai Tahu's grievance no 3 is sustained

Grievance no 5: The adequacy of reserves

12.5.9 In grievance no 5 the claimants stated:

That the Crown in the Kaikoura Block provided reserves that were inadequate for agricultural purposes and inadequate as an economic basis for the prosperity of Ngai Tahu, and that were unreasonably encumbered with Crown roading and railway rights. (W5)

Following protracted negotiations and refusing to set aside the 100,000 acres sought by Ngai Tahu, the Crown agent reserved some 5558 acres, including the 4800 acres at Maungamaunu. To European eyes at the time this land was of little value. This was no doubt why it had not been taken up by them. Mackay knew at the time he was making inadequate reserves. He was asked if the Crown would sell back some 400 acres. At what price he did not say.

In his closing address, Crown counsel conceded both that the Crown had paid insufficient for the land and that it should have reserved more land for Ngai Tahu (X2:88).

12.5.10 Counsel for the claimants, in his reply to the Crown's closing address, challenged an estimated Ngai Tahu population of Kaikoura as being approximately 80 persons. This figure comes from a comment by Hamilton, in his letter of 8 January 1857 to McLean, in which he referred to a census taken recently for the Nelson government as numbering the Kaikoura Maori at 78, since increased by two births. From the context it appears Hamilton obtained this information from the chief Kaikoura Whakatau.

Mr Temm drew the tribunal's attention to what he called the great danger of making any conclusion on Ngai Tahu population figures, whether in Kaikoura as a result of "Hamilton's estimate" or anywhere else. He criticised some of Mantell's calculations made during the titi season when Ngai Tahu were absent from their kaika.

The tribunal readily accepts that estimates of population must be viewed with caution. It is likely that in many cases they will have been understated. But if the tribunal is to make a finding in any given case, whether reserves set aside for Ngai Tahu were ample for their present and future needs, it is desirable that it should have evidence not of the exact population but of the likely order of the population of the group. Without that information it may be very difficult for the tribunal to make a finding.

In the present case counsel for the claimants submitted that the Crown's observation that there were only 80 people at Kaikoura in January 1857 was "completely wrong". Unfortunately he did not inform the tribunal of the basis for that categorical statement, nor did he refer to any evidence which substantiated it. The claimants called no evidence on the question.

The tribunal accepts that there were at least 80 Kaikoura Ngai Tahu and possibly more at the time of the March 1859 purchase. The question before us is whether the Crown failed to ensure, as it was obliged by Treaty principles to do, that Kaikoura Ngai Tahu retained sufficient land for their present and future needs, or, as the claimants put it, sufficient land for an economic base.

12.5.11 The Crown purchased some 2.5 million acres of land for which Ngai Tahu received œ300. The 5558 acres by way of reserves were clearly insufficient for their

present needs, as Mackay himself conceded in his report to McLean. Had the Crown agent agreed, as he should have, to Ngai Tahu's request to retain 100,000 acres, it is unlikely there would have been any later complaint. While the reserve of 4800 acres did ensure access to valuable marine and other food resources, it was of very small dimension. In subsequent years even this area was seriously eroded by Crown action in taking substantial and valuable areas of land adjacent to the coast for road and railway purposes. This aspect of the claimants' grievance will be further considered by the tribunal in the later report dealing with ancillary claims. It was totally inadequate as a long term base for ensuring that Ngai Tahu in the Kaikoura block could prosper alongside the European settlers who had overrun their land. The Crown, as the tribunal has said on numerous earlier occasions, was under an obligation to ensure that Ngai Tahu retained generous areas of land, amply sufficient to secure reasonable access to mahinga kai and to engage in agricultural and pastoral pursuits. Once again the Crown failed to meet its Treaty obligation. In the result, Ngai Tahu suffered and have continued to suffer substantial loss.

Finding on grievance no 5

12.5.12 The tribunal finds that grievance no 5 is sustained for the reasons given above (12.5.11).

The tribunal further finds that the Crown's failure to ensure that Kaikoura Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

Grievance no 6: Land for Settlements Acts

12.5.13 In their final grievance the claimants alleged:

That the Crown [...] in the Kaikoura Block [under the Land for Settlements Acts for the benefit of landless Europeans], from November 1893 resumed the Cheviot, Blind River, Starborough, Puhipuhi, Richmond Brook, Waipapa, Lyndon No 1 & 2, Rainford, Annan, Flaxbourne No 1 & 2, and Culverden Estates, but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

The tribunal has considered an identical grievance in relation to the North Canterbury block. For reasons already given (11.5.9-10) the tribunal was unable to sustain that grievance. The legislation in force during the period when the various estates referred to in this grievance were resumed was not materially different from that applying to the North Canterbury block resumptions.

Finding on grievance no 6

12.5.14 As the situation is not materially different to that considered in the North Canterbury purchase, the tribunal is unable to sustain the present grievance no 6.

But the tribunal makes the same observations by way of criticism of the Crown's actions in relation to this grievance as it made in 11.5.10 of the North Canterbury purchase.

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{FNTXT|0-86472-060-2|12.3.1|2}2 Smith-Nairn commission testimony, Tainui, 3 April 1880, MA 67/94, pp 725-726, NA, Wellington

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{FNTXT|0-86472-060-2|12.4.9|26}26 "Memorandum of Reserves set apart for Natives of Kaikoura", Compendium, vol 2, p 384

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Ngai Tahu Land Report

13 Arahura

13.1 Introduction

13.1. Introduction

While Europeans, whether whalers, sealers, traders or itinerants, were to be found in various parts of Ngai Tahu territory east of the Southern Alps from early on in the nineteenth century, the west coast of Te Wai Pounamu remained largely undisturbed by such newcomers. Europeans knew little about the west coast. Occasional sealing gangs worked a certain way up from Foveaux Strait from the early nineteenth century, but for the most part they ventured no further north than Piopiotahi (Milford Haven). European exploration of any significance dates from the mid-1840s. Heaphy, Brunner and Fox were active at this time. Their reports did not excite further exploration or settlement. Between 1848 and 1857 there was little European contact with the Poutini (western) coast. In 1857 a young man, James Mackay Jr, ventured south from Nelson. He was more favourably impressed with west coast prospects. In 1858 and 1859 several sheep runs were selected there, but none were actually stocked at the time. Coal was known to be abundant and the presence of gold became known, but not its likely quantity.

The growing interest of Europeans in possibly settling in the area forced the Native Land Purchase Office to give serious thought to extinguishing all remaining Maori title in the area. Initially it was thought the Crown had acquired the land by Kemp and other purchases, but little of the purchase price had gone to Poutini Ngai Tahu and no reserves had been set aside for their benefit. Quite apart from these uncertainties several tribes from the Nelson area had invaded, and for a time occupied, the Poutini coast during the 1830s. By the end of this decade however, Ngai Tahu had regained control of much of their territory and progressed northwards to Kawatiri and beyond in the 1840s.

Between 1853 and 1856 Donald McLean, the chief native land purchase commissioner, entered into a series of agreements buying out the respective interests of Ngati Toa, Ngati Awa, Ngati Tama, Ngati Rarua and Rangitane. These tribes purported to sell their interests in the various parts of the northern South Island and extending down to the west coast. Poutini Ngai Tahu heard of these sales and were greatly incensed. In 1857 James Mackay Jr was given a letter from leading Poutini chiefs offering to sell the land from West Wanganui in the north, to Piopiotahi in the south, for œ2500. They made it clear they would oppose any European settlement unless they first received payment.

McLean, in the belief that there was a mere remnant of 25 or so Poutini Ngai Tahu on the west coast, felt no need to act hastily. Finally, however, James Mackay was appointed by McLean to purchase both the Kaikoura and Arahura blocks. After purchasing the Kaikoura block Mackay traversed the alps, arriving on the Poutini coast in May 1859. He was authorised to pay no more than œ200 for the 7.5 million

acres on the west coast, and to set aside no more than 500 acres as reserves for Ngai Tahu. Despite spending over four months on protracted negotiations Mackay failed to persuade Poutini Ngai Tahu to accept such parsimonious terms. Werita Tainui treated the offer with contempt, describing the sum offered as no more than the price of a horse.

On 25 October 1859, following a visit by Mackay to Auckland, where he saw McLean's deputy and Governor Browne, McLean issued fresh instructions. Mackay now had authority to offer up to œ400 and set aside 10,000 acres in reserves, plus a further 2000 acres to meet surveying costs. By this time gold had been discovered in the Buller River. Poutini Ngai Tahu were well aware of the discovery as the survey party which found the gold included several Ngai Tahu from Mawhera. At this early stage it was not known how extensive the gold deposits might prove to be. But the possibility of a gold rush gave the renewed negotiations a certain impetus.

Just as they had done in 1859, Poutini Ngai Tahu in 1860 emphasised their concern to retain ownership of the Arahura River and access to its banks. This was an important source of their taonga, pounamu (greenstone). They sought not only to keep the river but a substantial reserve of some 8000 acres on either side of the river, so they could access the pounamu. In the event, Mackay agreed that the Arahura River should remain the property of Poutini Ngai Tahu, but he declined to set aside the 8000 acres requested and instead allocated only 2000 acres. This was insufficient to extend the whole way up either side of the Arahura. To meet this contingency Mackay agreed that Ngai Tahu would have the right to repurchase additional land from the Crown at 10 shillings an acre. This proved to be 12,000 times more than the Crown paid for an acre of land.

A deed of purchase was signed on 21 May 1860. The purchase price was œ300. A total of 6724 acres in various parts were reserved for individual allotment, a further 3500 acres for religious, social and moral purposes (in effect, as an endowment), and 2000 acres in the Mawhera valley as Crown land to meet survey costs. Included in the 6724 acres was a reserve of 524 acres for Ngati Apa. On the south bank of the Mawhera or Grey River, in the vicinity of the Mawhera pa site, 500 acres were reserved for Poutini Ngai Tahu. This was to be the future site of Greymouth. In return Ngai Tahu surrendered their claim to land from Kahurangi Point in the north, to Piopiotahi (Milford Sound) in the south. Fourteen chiefs signed the deed, including Tarapuhi, Werita Tainui, and Makariri of Poutini Ngai Tahu, and Puaha te Rangi of Ngati Apa.

The claimants have 11 grievances arising out of the Arahura purchase. Of these, seven relate directly to the purchase and will be considered here. The principal issues arising from these grievances are:

- Should a protector have been appointed to assist Ngai Tahu?

- Did the Crown wrongfully use the Ngati Toa and other purchases to put pressure on Ngai Tahu to sell?

- Did the Crown fail to ensure that Ngai Tahu retained sufficient land for an economic base? Associated with this is a complaint that the Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude.

- Did the Crown fail to protect the right of Ngai Tahu to retain possession and control of all pounamu?

- Did the Crown pay an inadequate price and in particular fail to protect Ngai Tahu by not revealing the value of gold bearing land?

Ngai Tahu Land Report

13 Arahura

13.2 Statement of Grievances

13.2. Statement of Grievances

1. The Crown failed to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.

2. The Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale.

3. The Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude.

4. The Crown wrongfully imposed a price on land that Ngai Tahu had wanted to exclude from the sale.

5. The Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu.

6. The Crown failed to protect Ngai Tahu by ensuring that they had kept enough land to provide an economic base and so preserve their Tribal Estate.

7. The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.

8. The Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land which was a breach of the duty of good faith.

9. The Crown failed to protect Ngai Tahu by later causing or permitting lands that had been excluded from the sale to be reduced in area (for example, within the town of Greymouth; D3:65).

10. The South Island Landless Natives Act 1906 and other legislation was inadequate to remedy the landlessness caused by the sale to the Crown.

11. The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Enquiry into Maori Reserved Lands, [1975]. (W6)

Ngai Tahu Land Report

13 Arahura

13.3 Background to the Purchase

13.3. Background to the Purchase

Early history

13.3.1 The evidence before us, particularly that of the Crown historian Dr Donald Loveridge, traversed the early history of Poutini Ngai Tahu. It seems likely their ancestors were in occupation of the west coast of the South Island from as early as the seventeenth century, having subdued the original occupiers, Ngati Wairangi. During much of the first four decades of the nineteenth century Tuhuru appears to have been the leading Poutini Ngai Tahu chief (N2:4-5).

During the 1830s Poutini Ngai Tahu suffered some set-backs but appear to have retrieved their former position a year or two before 1840. The events of the 1830s and 1840s have been summarised by Dr Loveridge.

- Poutini Ngai Tahu in the Mawhera-Hokitika district had been defeated in battle in the early 1830s by Ngati Rarua and Ngati Tama;

- the district was occupied for about six years (1832-1837) during which time Niho, a Ngati Rarua chief, and his followers exacted tribute from the Poutini Ngai Tahu who remained in residence;

- in December 1836 or January 1837, at Tuturau in Murihiku, Tuhawaiki and Taiaroa led Ngai Tahu to a victory over a Ngati Tama fighting unit headed by Te Puoho. It was shortly after this that Niho left the west coast. Although he never returned, Niho continued to claim authority over the whole of the west coast. Poutini Ngai Tahu probably did not recognise his claims to the south of Kahurangi Point; and

- a decade after their "liberation", Poutini Ngai Tahu living in the Mawhera area were taking steps to occupy and cultivate land on the Kawatiri River (N2:6-11).

Crown purchases 1848-1856

13.3.2 As we indicated in our discussion of the Kemp purchase, it cannot be stated with any certainty whether or not any Poutini Ngai Tahu (apart from Werita Tainui who was resident at Kaikanui on the Waimakariri River) participated in that purchase. Werita Tainui received part of the initial payment of œ500, a small part of which may have gone to his kinsmen on the west coast. While Mantell allotted portions of the second and third instalments for Poutini Ngai Tahu, it is unlikely they received any part of it. We agree with Dr Loveridge's conclusion, that since Poutini Ngai Tahu did not receive any significant sum of money from the Crown, and Mantell made no effort to lay out any reserves for them on the west coast, they had every right to

believe that any agreement to sell their interests in the land on the west coast was of no effect (N2:13). The Kemp deed was effective only as disposing to the Crown the interests of the east coast Ngai Tahu in the west coast.

13.3.3 In the 10 years following Kemp's purchase the Crown did, however, make a number of other purchases affecting the west coast. These purchases were all made from tribes other than Poutini Ngai Tahu. In the early 1850s, Donald Mclean, the government's chief land purchase commissioner, set out to extinguish all outstanding Maori claims to land in the northern part of the South Island.

- On 10 August 1853 Ngati Toa signed a deed of sale with the Crown transferring all their land in Te Wai Pounamu. The purchase price was œ5000, of which œ2000 was paid that day to Ngati Toa. Under the deed the balance of œ3000 was to be paid to Ngati Toa, "and to the Ngatiawa, the Ngatikoata, the Ngatirarua, Rangitane and Ngaitahu", who jointly with Ngati Toa "claim the land" (A8:I:307-308){FNREF|0-86472-060-2|13.3.3|1}. In a letter of 7 April 1856 to the colonial secretary, McLean explained why all these tribes were included in the deed:

their relative rights, through inter-marriage, the declining influence of the chiefs, and other causes, had [become] so entangled, that, without the concurrence both of these occupants and of the remnants of the conquered Rangitane and Ngaitahu Tribes, no valid title could have been secured. (A8:I:301){FNREF|0-86472-060-2|13.3.3|2}

In December 1854 it was agreed that, instead of the remaining œ3000 being paid by yearly instalments of œ500, one sum of œ2000 would be paid forthwith. The receipt specified the extent of the purchase as including all Ngati Toa claims "to Wairau and Hoiere, and Whakapuaka, and Taitapu, and Arahura and the Waipounamu, including all our lands which we have not sold in former times..." (A8:I:311-312).{FNREF|0-86472-060-2|13.3.3|3} While Taiaroa of Ngai Tahu appears to have been present, and possibly Werita Tainui and others (R4:6), there is no evidence that Ngai Tahu chiefs received any part of the œ2000.

- On 10 March 1854 Ngati Awa agreed, for œ500, to give up their claims to "the whole of the lands to which we lay claim in the Middle Island, or Wai Pounamu", including the area from "Whanganui, to Paturau, Te Awaruato, and from thence to Arahura" (A8:I:309-310).{FNREF|0-86472-060-2|13.3.3|4}

- On 10 and 13 November 1855 Ngati Tama and Ngati Rarua, for œ600, transferred all their lands from "Wairau, and thence to Arahura, continuing until it joins the land sold by the Ngaitahu" (A8:I:312-313).{FNREF|0-86472-060-2|13.3.3|5}

- On 1 February 1856 Rangitane accepted payment of œ100 "for all our claims on the Island, that is for all the lands of the Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of the Rangitane extend" (A8:I:313).{FNREF|0-86472-060-2|13.3.3|6}

Following these various transactions McLean submitted a comprehensive report, dated 7 April 1856, to the colonial secretary. In it he noted:

The only tribe having claims upon this purchase, whom it was impossible for me to visit, are a small remnant of the Ngaitaha [sic], about twenty-five in number, residing at Arahura, on the West Coast, a remote and as yet almost inaccessible part of the country. From a settlement of their claim I do not apprehend any difficulty; but, as a matter of justice, if the district is occupied by Europeans, a revenue [sic] of 300 or 400 acres should be secured to them, together with a small amount of compensation for their claims. (A8:I:303){FNREF|0-86472-060-2|13.3.3|7}

While McLean here recognised that Poutini Ngai Tahu had a claim to lands on the west coast which should be attended to, it is apparent that he regarded it as a minor matter, of no urgency.

Growing interest in the Arahura region

13.3.4 Early in 1857 McLean was being urged by W J W Hamilton of the desirability of settling the Poutini Ngai Tahu claim (A8:II:17).{FNREF|0-86472-060-2|13.3.4|8} On 5 February 1857, in a further report concerning his recently completed North Canterbury purchase, Hamilton told McLean that the Ngai Tahu vendors:

claimed no right over the land to the westward of the watershed of this portion of the Middle Island. They stated that the Arahura, or Putini [sic], Natives own it. (A8:II:20){FNREF|0-86472-060-2|13.3.4|9}

In February 1857 James Mackay Jr, then a settler from the Collingwood district, went on an exploratory journey down to the west coast. The first Ngai Tahu settlement he encountered was at the mouth of the Kawatiri. It consisted of only three inhabitants, "the sole survivors of the inhabitants-they had all died of the measles and influenza" (N2:25-26).{FNREF|0-86472-060-2|13.3.4|10} The first Poutini Ngai Tahu settlement of any substance reached by Mackay was near the mouth of the Mawhera, on its south bank. On 7 March 1857, as Mackay noted in his journal, he:

Had a long conversation with the natives today, when they stated that they would not allow white people to settle on the land till they were paid for it, and on my telling them that the land had been sold, they said that the Ngatitoa tribe had no right to sell it; some of them proposed that I should not be allowed to go any further, but this was not agreed to. They asked me if I would take a letter to Mr. McLean for them. I said I would, but at the same time assured them that they might save themselves the trouble of writing, as they would get nothing from him for the land. (N2:26){FNREF|0-86472-060-2|13.3.4|11}

The letter from Poutini Ngai Tahu was dated 15 March 1857. Translated it read:

Friend McLean, salutations to you,

We have heard from the white man Mackay that the land we inhabit has been sold by the Ngatitoa tribe, they are thieves, as their feet have never trodden on this ground, they are equal to rats which when men are sleeping climb up to the storehouses and steal the food.

Let the money which Rawiri Puaha has received be placed against Onepaka, and Martins (aupouri) go against Moetoa.

We do not wish white people to come here unless they pay for the land as it is our property. We are quite willing to sell to the Government the whole of the land along the Coast, from West Wanganui to Piopiotai, from the latter place the boundary proceeds inland to the Mountains, Tiori Patea, Teraotama, Kaimata, Taiwaniuta, Maruia, Maungawaripa, Otutaki, Porehia, Matakitaki, Te Ikahapuku, Te Rotoroa, Wangapeka, Aoraki (Mt Arthur), Onetoke, Rangiora (Snowy ranges between Takaka and Aorere[)] Wakamarama, (Range to the west of Aorere Valley) Te Hapu (about 6 Miles South of the entrance to West Wanganui).

We desire the sum of Two thousand five hundred pounds (œ2500) for this block of land. We are living in poverty, as we have never received any money, it will also complete the purchase of all land in this island. We will make arrangements with you when you come to purchase the land about Reserves for ourselves, this is all we have to say. (N3:71){FNREF|0-86472-060-2|13.3.4|12}

Mackay forwarded this letter to McLean with a covering letter of 18 June 1857 (N3:72-73){FNREF|0-86472-060-2|13.3.4|13} He noted:

- that while at the Grey (Mawhera) River he made friends with Tarapuhi and was able to explore the Mawhera valley;

- he thought the country, as far as he had seen it, extending five or six miles south of the Grey, as being very suitable for European settlement; and

- there were very few Maori on the west coast. He understood there to be only 87 from West Wanganui to Foveaux Strait, but they expected an accession in numbers from Port Cooper.

McLean did not acknowledge this correspondence from Mackay, nor a letter from Mackay's father, until 22 December 1857, when he told James Mackay Sr that he was anxious to have James Mackay Jr settle a land question at Arahura. In February 1858 Mackay Jr was appointed assistant native secretary at the Collingwood gold-fields (N2:30).

13.3.5 McLean, by the end of 1857, had come to realise the desirability of resolving the Arahura land question. But delays in the appointment of Mackay Jr as an assistant native secretary, and lack of funds, led him to wait until the following summer. In the meantime, European interest in the west coast was growing. Leonard Harper, in November 1857, was the first European to cross the island to the far coast, with the assistance of Tarapuhi and Werita Tainui, among others. In 1857 the Nelson Provincial Government accepted applications for pastoral leases on the west coast, and the Canterbury Provincial Council followed suit in 1858. James Mackay Sr was involved with several such applications between December 1857 and February 1858, including one in December, filed in his son's name. This covered some 24,000 acres in the Mawhera district. Dr Loveridge's investigations suggest that James Mackay Jr later retracted or cancelled this application. In February 1858 he made a new application for a cattle-run, at West Wanganui to the north, and down the west coast

for some 25 miles to Kahurangi Stream (N2:34-35).{FNREF|0-86472-060-2|13.3.5|14}

Dr Loveridge gave us details of other applications made in December 1857 for land in the Mawhera valley. These were for substantial areas ranging from 10,000 to 60,000 acres. Other applications were made in 1858 (N2:36-37).

Whereas in 1857 Mackay Jr found no indication of gold on the west coast, specimens of gold in small amounts were found by a European, Lee, on a trip to the coast with Tarapuhi and Tainui early in 1858. The gold was in the vicinity of the Whakapoi or Heaphy River. As Loveridge notes, Poutini Ngai Tahu were aware of the presence of gold by this time (N2:37).{FNREF|0-86472-060-2|13.3.5|15}

James Mackay Jr is instructed to purchase the west coast

13.3.6 On 3 November 1858 McLean instructed Mackay Jr to effect two purchases. He was to go first to Kaikoura to settle outstanding claims of Ngai Tahu there, and once these duties were completed Mackay was told to:

have the goodness to proceed to Arahura on the west coast for the purpose of carrying out similar arrangements at that place by marking off a reserve, or reserves, not exceeding if possible, a total area of about 500 acres, which it appears, would be sufficient for the few Natives residing there.

You will have a conveyance of all their claims duly executed by Tuhuru and the other Chiefs and people residing on the west coast, to whom you will pay on surrendering their rights, a sum of œ150, or œ200.

...Great reliance is placed on your own judgment and discretion as to the carrying out of the details of this arrangement including the extent of the necessary reserves for the Natives. (A8:II:33-34){FNREF|0-86472-060-2|13.3.6|16}

Mackay evidently contemplated some difficulty in settling with Poutini Ngai Tahu on the niggardly basis proposed by McLean.

On 19 November 1858 he wrote to McLean seeking directions as to whether he should purchase the whole of the west coast and advising:

From what I recollect of the conversation I had with Tarapuhi (son of the late Tuhuru) [in 1857], I believe he claimed the whole of land from West Wanganui (Province of Nelson) to Dusky Bay, Piopiotai (Province of Otago), for this he asked œ2500; he, however, admitted that the Port Cooper Natives and Taiaroa had received payment for the west coast, and to a certain extent allowed the conquest of part of the district by the Ngatitoa tribe. I do not anticipate any difficulty in persuading them to sell the land, as they were willing to do so when I was there two years ago, but I think it probable they may wish for a larger sum of money for it than the Government are willing to give. (A8:II:34){FNREF|0-86472-060-2|13.3.6|17}

The 1859 negotiations

13.3.7 Mackay's negotiations with the Kaikoura Ngai Tahu took some time. He finally reached Mawhera, via an arduous journey over Harpers Pass, on 19 May 1859. Some time elapsed while a message was sent to the southern-based Poutini Ngai Tahu requesting them to come to Mawhera. It was 25 July before the southern Maori arrived and negotiations could start. After some initial differences between the Mawhera, Arahura and Taramakau Ngai Tahu on the one hand and the Waitangi, Mahitahi and Jackson Bay Ngai Tahu on the other were settled, the Poutini Ngai Tahu maintained a consistent stance. They were prepared to sell their land from Mawhera north to Te Hapu and from Okitika (Hokitika) south to Milford Haven (Piopiotahi), but they wished to retain the block between the Mawhera (Grey) and Kotukuwakaoka (Arnold) Rivers, and the Okitika. Mackay's record of the discussions on 30 July includes the following:

Werita Tainui, one of the principal Chiefs of Kaipoi, and brother of Tarapuhi offered the land in the Nelson Province (stipulating for Reserves at Karuroha, and Kawatiri (Buller River)) and the land situated in the province of Canterbury to the Southward of the river Okitika, and from there to Milford Haven, retaining the block between the river Okitika and the rivers Mawhera and Kotukuwakaho (this contains quite 200,000 acres of heavily timbered and tolerable level country).

I said I could not agree to this as they wished to retain the best of the land, and receive payment for bluffs like Otahu, Tauparekaka, Te Miko, and paripako-and I refused to pay for the land at all unless [they] chose to except reasonable reserves. It was then argued that they would lose the Arahaura River (Note. The Arahaura River is between the Okitika and Tarawakau) from which the much coveted Green stone is procured if they sold the land on each side of it.

I informed them that the Greenstone was of no use to the Government, and if it was all they wanted, they might have the whole of the Arahaura River bed, that it was of no use to any one and even if they sold it to the Government, no objection would be raised as to their procuring Greenstone from it.

Little more was done this day, the Natives contenting themselves with offering the land from Mawhera to Te Hapu, and from Okitika to Milford Haven, and demanding the price. I objected to this course and offered a Reserve of 500 acres of land at Arahaura, and the river bed, This was indignantly rejected. (N3:16){FNREF|0-86472-060-2|13.3.7|18}

Two days later Mackay offered to set aside 800 acres in reserves in a variety of places and to pay a purchase price of œ200. But this offer was also rejected. Poutini Ngai Tahu still insisted on retaining the block of land between the Rivers Mawhera, Kotukuwakaoka and Okitika, while accepting œ200 for the remainder. Werita Tainui was particularly contemptuous of the price offered, asking Mackay whether he had "come to pay for the land with the price of a horse" (N3:18).{FNREF|0-86472-060-2|13.3.7|19}

On 3 August 1859 there was more fruitless discussion, with Mackay recording that Poutini Ngai Tahu were unwilling to alter their terms at all:

and after some more arguments Taetae and his people made a start for Waitangi telling me to return to the Governor, and if I came back with four or five hundred pounds, they would sell the land. This ended the negotiations with the Natives. (N3:21){FNREF|0-86472-060-2|13.3.7|20}

The failure of the 1859 negotiations

13.3.8 Mackay reported the unsuccessful outcome of his negotiations in a letter of 27 September 1859 to the native secretary. He noted that the Poutini Ngai Tahu numbered 101 people and the block which he sought to purchase contained at least 7.5 million acres. He found the Ngai Tahu title to the west coast district to be good (N3:23-24).{FNREF|0-86472-060-2|13.3.8|21} He related the impasse in his negotiations in this way:

The Ngaitahu refused to surrender the whole of their claim for the sum of two hundred (200) pounds offered by me wishing to retain the block of land intervening the rivers Mawhera and Kotukuwakaho, and the river Okitika. They expressed their willingness to dispose of their lands in the province of Nelson, and those to the Southward of the Okitika in the province of Canterbury for the sum of two hundred pounds (œ200) (being œ100 for each block) but they could not be brought to give up the centre piece of land also for that amount (œ200)-As my instructions were to pay them on the surrender of the whole of their claims to land, I did not consider myself justified in paying them unless they did so, and the same urgent necessity did not exist as at Kaikoura, there being no European settlers as yet in the Arahaura district.

I used every exertion to induce the Natives to part with the country laying between the Mawhera and Kotukuwakoha, and the Okitika-but as the highly prized Greenstone is procured from the Arahaura River, which is situated within this block, and as it has been the scene of many bloody contests I found it impossible, from the value attached to its possession, to extinguish the Native title with the sum of money at my disposal for that purpose-It is my opinion that if I had been empowered to pay three hundred pounds (œ300) that I could have purchased, with the exception of 800 acres required for reserves, the whole of the land claimed by this division of the Ngaitahu. (N3:11){FNREF|0-86472-060-2|13.3.8|22}

Mackay returned to Nelson on 19 September and immediately embarked on the Airedale for Auckland, which he reached on 24 September. He submitted his report three days later. During the following week he had discussions with McLean's deputy, Thomas Smith, and with Governor Browne. Dr Loveridge suggested, we think correctly, that in addition to proposing the need for an increase in the purchase price, Mackay stressed the necessity for an increase in the reserves to be left with Ngai Tahu (N3:57-59).{FNREF|0-86472-060-2|13.3.8|23}

Mackay receives fresh instructions

13.3.9 On 25 October 1859 Thomas Smith, on behalf of McLean, sent fresh instructions to Mackay. Smith enclosed Mackay's 27 September report, with annotations by the governor, the minister for native affairs and the Native Department. These annotations cannot now be found, but Smith appears to have summarised them in his covering letter:

You will perceive that it is intended that 6000 acres should be reserved for individual allotment, as proposed in the minute of the Assistant Native Secretary, that 4000 acres should be reserved to be brought under the Native Reserves Act; and that an additional reserve should be made for the purpose of providing a fund for defraying the expense of surveying the individual allotments above referred to when required. 2000 acres will probably be sufficient for the last named purpose. All these reserves should be defined with as much precision as may be found practicable, without actual survey and cutting the lines on the ground, and in the case of those set apart for individual allotment, it will be well to indicate the names of the persons in a schedule to be attached to the Deed, to whom portions out of each block are assigned. As for instance in a block estimated to contain 1000 acres, the names of the proposed allottees should be specified as entitled to certain portions out of such particular reserve, according to the scale proposed in the minute above referred to.

His Excellency relies much on your own judgment in making such arrangements as may practically carry into effect the objects in view, as set forth in the minutes on your report.

Instructions have been issued to the Sub-Treasurer at Nelson to advance to you on requisition a further sum of œ280, making with the œ120 now in your hands a sum of œ400 at your disposal for this purchase. You are authorised to pay to the Ngaitahu Natives a sum not exceeding the above in full satisfaction of all their claims. (A8:II:39){FNREF|0-86472-060-2|13.3.9|24}

Mackay was now in a more favourable position to negotiate a settlement. He could pay up to œ400 and set aside reserves totalling 12,000 acres.

Ngai Tahu Land Report

13 Arahura

13.4 The Purchase

13.4. The Purchase

13.4.1 In December 1859, only a month or so after receiving his new instructions, Mackay learned that significant quantities of gold had been found in the Buller River the previous month by his friend John Rochfort. This news was first published in the Nelson Examiner on 21 December 1859. Mackay had sent news of the discovery on to McLean four days earlier. He remarked that:

this forms an additional reason why the purchase of the lands should be terminated as speedily as possible. I have no doubt but if the above important fact becomes generally known that the Natives will endeavour to get more money for their claims to the land. (N3:38){FNREF|0-86472-060-2|13.4.1|25}

In commenting on this passage Dr Loveridge, the Crown historian, said:

This statement could be interpreted as a desire on Mackay's part to conceal from the Poutini Ngai Tahu the fact that gold had been discovered. Such was not the case. Rochfort's survey party included a large number of men from Mawhera pa. Indeed, he had not been able to start work until they arrived at the Buller River, after the crops at Mawhera had been sown. The local Maori already knew what had happened, and Mackay must have been aware of this. His comment to McLean undoubtedly refers to the possibility of a gold rush on the Coast, if and when "the above important fact" became "generally known" to Europeans. The presence of a large number of them in Poutini Ngai Tahu territory could have complicated his task enormously. (N2:63)

The claimants challenged this interpretation. They invoked a statement by Hamilton to McLean on 6 August 1857 that:

The recent gold discoveries at Nelson [on the Aorere River] are so likely to raise the value of the land in the eyes of the Maoris to the most extravagant pitch, that I fear any delay in accepting their proposals to treat may end in totally preventing the acquisition of the land sought for by us. (A8:II:27){FNREF|0-86472-060-2|13.4.1|26}

And, in more general terms, they cited from an article by Mackay in the Nelson Examiner of 26 August 1857, that prompt action should be taken to acquire the west coast from Poutini Ngai Tahu because:

I was informed that several of the Port Cooper natives intend settling at Mawera, and it would be easier to deal with the few at present residing there, than with a more numerous and wideawake population. (N2:28){FNREF|0-86472-060-2|13.4.1|27}

This evidence, the claimants said, indicates a consistent intention to acquire the Poutini coast for a great deal less than its value (O49:9).

We agree with Dr Loveridge's response to this comment, that it is unrealistic to think that Mackay was attempting to conceal from Poutini Ngai Tahu the fact the gold had been discovered by Rochfort in November 1859. Ngai Tahu already knew about the discovery and Mackay must have been aware of this. But Dr Loveridge rightly conceded that the Crown's hope to acquire the Poutini coast with a nominal payment is clear from all the available evidence. Moreover, he drew attention to his earlier evidence, that there was scant justification for the Crown applying this policy to either the Kaikoura or Arahura purchases (R4:12).

The negotiations begin

13.4.2 James Mackay Jr and others left Collingwood on 16 January 1860 for the west coast. The journey proved to be an arduous one. Mackay seriously injured his knee and finally limped into Mawhera on 2 March 1860 (A8:II:40).{FNREF|0-86472-060-2|13.4.2|28} While detained at Mawhera waiting for his injured knee to improve, James Mackay appears to have had some discussions with Poutini Ngai Tahu chiefs. In his belated report to McLean of 21 September 1861, Mackay said:

On the 28th March, I left the Pah at Mawhera, and, accompanied by Mr. S. Mackley, and the Chiefs Tarapuhi te Kaukihi, Taetae and Werita Tainui, and the Natives of that place, proceeded southwards with the intention of collecting as many of the Ngaitahu as possible at Poherua (Poera on charts), the residence of the Chief Taetae, for the purpose of discussing the question. It had, however, been previously arranged that the payment was to be made on our return to Mawhera, after all questions relative to the lands to be reserved for the use of the Natives had been finally arranged. We reached Poherua (distant 70 miles) on the 5th April. (A8:II:40){FNREF|0-86472-060-2|13.4.2|29}

There are hints here of a tentative agreement that the sale would proceed when all questions of reserves were settled.

From Poherua Mackay proceeded further and laid out reserves at Mahitahi, at Makawiho, at Manakaiau, and other small reserves "at various places' on the way back to Poherua. His party reached Poherua later on 20 April:

On the 21st the land question was recommenced, I found the Natives still desirous as on the former occasion to retain all the land intervening the rivers Mawhera and Kotukuwhakaho, and the river Hokitika, comprising some 200,000 acres of valuable country, unless they received œ300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven), and larger reserves than had on my first visit been offered to them (800 acres was offered at that time). After some days spent in discussing the question, and on my having informed them of the very liberal provision in that respect ordered by His Excellency the Governor, they agreed, on the 26th April, 1860, to accept the sum of œ300, as compensation for the whole of their claims to land in the Arahura or Poutini districts, excepting over such portions as were reserved for their own use or benefit.

It was specially stipulated that a very large reserve should be made at the river Arahura or Brunner, and that the reserves should be taken in a strip up each side of the river with a view of giving them a right to its bed, from which is obtained the highly prized greenstone, which gives the name Wahi Pounamu,-place of greenstone,-to the Middle Island, it was also arranged that there should be a reserve or reserves of 1000 acres at the Mawhera or Grey, which was assented to, the locality to be fixed on our arrival there, and [previous] to the payment being made. (A8:II:40){FNREF|0-86472-060-2|13.4.2|30}

The total area of reserves made for individual allotment was 6724 acres, 724 acres more than authorised by the governor. Mackay explained that two Poutini Ngai Tahu chiefs were jealous that in following his instructions, he had awarded 500 acres to three superior chiefs, namely, Tarapuhi, Taetae and Werita Tainui. He compromised by giving Hakiaha and Koeti 250 acres each instead of 100 acres. This accounted for an additional 300 acres. The remaining 424 acres were allocated to Puaha Te Rangi as compensation for certain claims of Ngati Apa to lands in the Buller and Kawatiri districts. Mackay reported that the majority of Poutini Ngai Tahu admitted the justice of Puaha Te Rangi's claim, and so he allotted reserves to Te Rangi and a few other Ngati Apa (A8:II:41).{FNREF|0-86472-060-2|13.4.2|31}

13.4.3 Having reached an agreement on 26 April 1860, Mackay set off for Mawhera accompanied by all the Poutini Ngai Tahu except Taetae (who was seriously ill and later died). On the way north Mackay laid out various reserves. At Mawhera further reserves were agreed on. Mackay relates that a dispute arose over the site for a reserve of 500 acres at Mawhera for individual allotment:

...I wishing the Natives to select it up the river, but they objected to do so preferring to have it near the landing place. As this spot had always been their home, and on the hill above it in a cave repose the remains of Tuhura and others of their ancestors; nothing could move them to give up this place, which I much regretted, as it enables them to retain the best landing place. I however found that further argument would have endangered the whole arrangement entered into at Poherua, on the 26th April, and therefore deemed it politic to acquiesce in their demand. It may be imagined from the position of this reserve that it would be a suitable site for a town, but the whole flat portion of it is liable to be flooded, of which we had practical demonstration by finding on our return from the south that several of the houses at the Pah had been carried away by a flood which took place in our absence. (A8:II:41){FNREF|0-86472-060-2|13.4.3|32}

The deed is signed

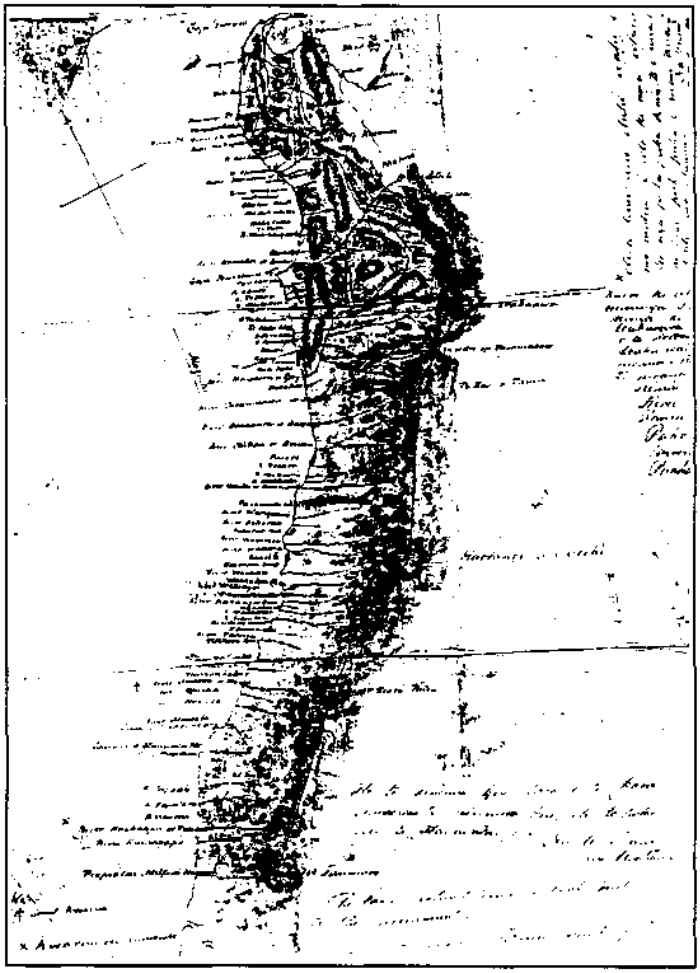

Figure 13.1: The map of the Arahura purchase was on the deed itself. The detail of the boundaries of the purchase contrasts dramatically with that of the Kemp deed map. Courtesy of DOSLI, Wellington.

13.4.4 On 21 May 1860, a deed of sale was signed by some 13 Poutini Ngai Tahu, including Tarapuhi and Werita Tainui, and also by Puaha te Rangi for Ngati Apa. Ngai Tahu transferred to the Crown for the sum of œ300 all their land except that reserved from sale and described in two schedules to the deed (see appendix 2.9).

The boundaries of the land sold were succinctly described by Mackay in his report as being:

all the portion of the West Coast district lying between Kaurangi Point in the Province of Nelson, and Piopiotai, or Milford Haven, in the Province of Otago, and bounded inland by the watershed range of the east and west coast of the Middle Island. (A8:II:41){FNREF|0-86472-060-2|13.4.4|33}

The English translation of the deed transferred the land described "with its trees minerals waters rivers lakes streams and all appertaining to the said Land or beneath the surface of the said Land" to the Crown.

By the time the deed was signed Mackay had settled the individual allotments for 6724 acres of reserved land. He had laid off the reserves between Mahitahi and Mawhera Valley (nos 4 to 35). Three reserves further south, at Jackson's Bay and Paringa (nos 1-3), had been "distinctly described" but not "defined on the ground".

Twelve to the north of the Mawhera Valley (nos 36-47) would be laid out after the deed was signed (N2:71).{FNREF|0-86472-060-2|13.4.4|34}

In addition, Mackay made provision for a further 3500 acres to be reserved "for the benefit of the aboriginal inhabitants of the West Coast, and for the promotion of social, moral, and religious objects among them".{FNREF|0-86472-060-2|13.4.4|35} In fact, the governor had ordered 4000 acres to be reserved for these purposes. But, as Mackay had exceeded the authorised allocation of 6000 acres for individual allocation by 724 acres, he make a compensatory reduction in the second category of reserves. Finally, as instructed, he set aside a block of 2000 acres at Totara Bush in the Mawhera Valley as a general government reserve. This was intended to be sold later, to defray the costs of surveying the 54 reserves scheduled in the deed. Copies of the plans of the reserves were supplied to Ngai Tahu with the names of persons allotted land noted on each (N2:76).

The deed was defective in that it did not mention an agreement between Mackay and Poutini Ngai Tahu concerning the Arahura riverbed and the adjacent land between the Arahura reserve and Mount Tuhua. We discuss this later in connection with the grievance concerning pounamu.

Ngai Tahu Land Report

13 Arahura

13.5 Ngai Tahu's Grievances

13.5. Ngai Tahu's Grievances

Having related the principal events leading up to the sale we now consider various of the claimants' grievances. Some, which relate to after-sale events, we consider in other contexts.

Grievance no 2: Crown pressure on Ngai Tahu to sell

13.5.1 The claimants stated that:

The Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale. (W6)

We have earlier discussed (13.3.3), the Crown purchases between 1848-1856, made at the instigation of the chief commissioner for land purchases, Donald McLean. The following points are clear from our discussion.

- Donald McLean attached a much higher priority to the desirability of purchasing the interests of the conquering tribes in the northern part of Te Wai Pounamu. As Professor Ward commented, the relative size and power of each tribe was taken into account when determining the purchase price.

- According to the terms of several deeds signed from 1853 on, the Crown acquired rights of a number of northern tribes in the whole of the South Island. In 1853 Ngati Toa sold all their remaining interests in Te Wai Pounamu for œ5000. The following year the land involved was more specifically described to include Arahura; the 1854 agreement with Ngati Awa for œ1000 disposed of their land in Te Wai Pounamu including their claims to Arahura; in November 1855 Ngati Tama and Ngati Rarua transferred all their lands including that at Arahura for œ600. Finally, in 1856, Rangitane were paid œ100 for their interest in land from Waiau to Arahura. At this point the only remaining interest not extinguished by the Crown was that of Poutini Ngai Tahu.

- McLean reported in April 1856 that if the inaccessible area where Ngai Tahu lived was ever required for European occupation, their claims could be settled for a small cash sum and a reserve of 300-400 acres.

- Political considerations (including security) appear to have had considerable influence in McLean's dealings with Ngati Toa and Ngati Awa.

- By 1857 McLean was being urged by Hamilton and others to settle the Poutini Ngai Tahu claim. The imminent prospect of more settlers, possible migration of some east coast Ngai Tahu, and rumours of the discovery of gold, were said to make a settlement desirable.

- In May 1857, after his exploratory journey to the west coast, James Mackay Jr brought back with him a letter from leading Poutini chiefs offering to sell the land from West Wanganui to Piopiotahi for œ2500. The letter expressed their anger that McLean had purchased from others the land on which Poutini Ngai Tahu were living. They expressed opposition to any European settlement of their land unless they received payment.

- McLean was slow to act on the Poutini offer. Some 18 months went by before James Mackay was instructed to settle the Arahura claim.

- During the abortive 1859 negotiations with Poutini Ngai Tahu Mackay had several discussions with them about the claims of Ngati Toa and other iwi to the west coast. On 30 July he reported:

We then got into a discussion about the Ngatitoa and Ngatirawa [sic], the Ngaitahu denying their claims, and I contending they were just, but at the same time telling them that the Government were willing to pay them as well as the Ngatitoa. If we acted according to Native law we could take the ground from them, as we had paid for it, but the Government wished to act fairly by them, and had deputed me to purchase the land, I recommended them to surrender there [sic] claims to the Crown, and take the Reserves offered by me, as it was possible that if they obstinately persisted in refusing to dispose of the land, that the Government would ask the Ngatitoa to put them in possession. (N3:16){FNREF|0-86472-060-2|13.5.1|36}

On 1 August Mackay records that he told Ngai Tahu that:

The Sun was then shining on them, it was fine weather to cut the ripe corn, if they did not do it at once, it might rain and they would lose it all, it would all be spoiled. (N3:33){FNREF|0-86472-060-2|13.5.1|37}

This, Mackay said:

they at once took as meaning that the Ngatitoa would put us [the Crown] in possession, and they said they were not the slaves of the Ngatitoa. They then rose in a body and said that they would write to the Governor for more money, they would not accept two hundred pounds. (N3:33){FNREF|0-86472-060-2|13.5.1|38}

Notwithstanding their 1857 offer to sell, Poutini Ngai Tahu refused in 1859 to accept what they no doubt regarded as a miserly offer of œ200 and 800 acres for reserves. After much wrangling, negotiations were broken off and Mackay returned to Nelson. His threats failed to intimidate Poutini Ngai Tahu.

In 1860 Mackay returned to the west coast and a much more generous offer by way of reserves, plus an increase in the purchase price of œ100 to œ300, resulted in an

agreement. By this time a gold rush was imminent and Mackay was anxious to complete the purchase.

13.5.2 It is not easy to judge the effect on Poutini Ngai Tahu of the earlier purchases from Ngati Toa, Ngati Awa and other tribes. Clearly they resented the Crown's apparent recognition of other tribes' interest in their land. Not surprisingly they expressed willingness to sell in 1857. But, that they were not prepared to accept what must have seemed to them a contemptuous offer in 1859, indicates that, while willing to sell, they were prepared to insist on terms which they found acceptable. Nor were they willing to bow down to Mackay's threats. The tribunal finds it difficult to accept that McLean adopted a purchase strategy which was deliberately designed to pressure Poutini Ngai Tahu into selling, and selling cheaply. Rather, McLean appears to have almost entirely disregarded Ngai Tahu in his dealings with the more northern tribes, on the basis that they (Ngai Tahu) were a mere "remnant"; remote, few in number and hence of very little consequence.

At the same time, we note that the Crown, in a series of agreements with the more northern tribes, had in some cases at least paid substantial sums to extinguish any claims the tribes might have in Arahura. This would have made Poutini Ngai Tahu very anxious to have their mana over their lands recognised, which an acceptable sale would do. It is to their credit, however, that, keen as they were to assert their mana, they were not prepared to accept what they clearly regarded as a derisory offer in 1859. As Dr Loveridge said at the conclusion of his evidence:

The fact that the final agreement was as good as it was, owed more to the bargaining skills of the Poutini Ngai Tahu leaders rather than the generosity of the Crown. (N2:88)

Finding on grievance no 2

13.5.3 Having carefully weighed all the factors we have enumerated, the tribunal is unable to find that the Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale. While in 1859 Mackay did use threats, these proved of no avail. We believe Poutini Ngai Tahu agreed to sell in 1860 because, while no doubt disappointed that the price was not higher, the Crown had increased both the price and the area of land to be retained as reserves. It follows that the claimants' grievance no 2 is not sustained.

Grievance no 8: Crown failure to reveal to Ngai Tahu the value of gold-bearing land

13.5.4 In their eighth grievance the claimants alleged that:

The Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land which was a breach of the duty of good faith. (W6)

We infer from this grievance that the claimants were saying that, had Poutini Ngai Tahu been aware of the value and importance of gold-bearing land, they would have insisted on a higher price than they received. We propose to consider this grievance under two heads. First, as to the state of Crown knowledge regarding the potential for gold mining on a commercial scale and Ngai Tahu's knowledge in 1860. Secondly,

the implications of the discovery of gold and wider considerations on the adequacy of the price paid.

13.5.5 The extent of the Crown knowledge is, we believe, fairly stated by Dr Loveridge as follows:

Rochfort, of course, had found gold at several points along the Buller River in 1859. The Poutini Ngai Tahu were well aware of this event, but it cannot have come as a surprise. Even assuming that they had never seen any trace of gold in their rivers themselves, (Rochfort's, incidentally, was found "lying upon the surface of the ground" in 1859), the Whakapoi finds of 1857 were a recent memory. Neither they, nor James Mackay Jr. nor anyone else, could tell if there was enough gold to support commercial mining, but it was fairly certain that many prospectors would descend upon the coast in the near future. Indeed, news that a party of fifteen men from Canterbury were digging on the Buller reached Mawhera shortly before the Deed was signed. (N2:84-85)

We have no evidence of the extent to which Poutini Ngai Tahu appreciated the potential significance of a major gold find. They were actively associated with the Whakapoi finds in 1857 and no doubt something of the excitement of the Europeans involved would have rubbed off on them. In the absence of such evidence it is not possible to say whether, at the time they agreed to sell in 1860, Poutini Ngai Tahu were aware that, should gold be discovered in commercial quantities, this would, in the short term at least, significantly enhance the value of some of their land. This we suggest demonstrates the value of an official protector. While Mackay was unlikely to go out of his way to emphasise the potential significance of the discovery of gold, an independent protector would certainly have done so. In the absence of a protector we believe Mackay was under a duty to ensure that Poutini Ngai Tahu were fully and fairly informed.

13.5.6 However, the adequacy or otherwise of the price can be judged by other factors besides the gold-yielding possibilities of the land. We recall that in 1853 the Crown agreed to pay Ngati Toa œ5000 to extinguish their title. In 1854 œ500 was paid to Ngati Awa and in 1855 œ600 to Ngati Tama and Ngati Rarua, again for much smaller interests than the 7.5 million acres on the west coast. As we have seen, Murihiku Ngai Tahu were paid œ2600 for a somewhat similar area of land in 1853.

The Crown's historian, Dr Loveridge, was critical of the price paid by the Crown:

The Crown's final offer, however, cannot be described as a generous one. The Governor himself called the cash payment an "almost nominal sum". He was referring, mistakenly, to œ200, but œ300 was hardly an improvement when more than seven million acres of land (by Mackay's reckoning) were being ceded to the Crown. This sum constituted 72,000 pence: the payment thus works out to about 100 acres per penny. I noted in respect to the Kaikoura Purchase (M10:52-53) that the Crown's policy of paying a nominal gratuity for Maori lands could not be justified when the lands in question had acquired a specific commercial value by virtue of European settlement and agricultural development. Although the Arahura District had not yet been physically occupied by such settlers at the time of the Purchase, applications for pastoral leases on the Grey River had apparently been accepted by both the

Canterbury and Nelson Provincial Government. Both Donald McLean and James Mackay Jr. were aware of the 1857-58 Nelson applications, at least. They were also aware, by the time negotiations were resumed in 1860, that gold was definitely present in the District - although the actual extent and value of these deposits remained to be determined. I would suggest that this information should have been given much greater weight in determining the monetary compensation due to the Poutini Ngai Tahu from the Crown. (N2:86-87)

It seems clear that, by the time the sale was completed, the Crown officials responsible were aware that the 7.5 million acres was potentially of considerable value not only for settlement, in part at least, but on account of the presence of gold. The price paid was miserly, the more so as Mackay had in his possession œ400, up to which sum he was authorised to settle. Perhaps the crowning insult was Mackay's verbal agreement that, having purchased in excess of 7 million acres of land for œ300 or one penny per 100 acres, he agreed they could repurchase certain of that land at the rate of 10 shillings an acre, or 12,000 pence per 100 acres; land moreover which they had strongly urged should be excepted from the sale in the first place (A8:II:50). Expressed in another way, the Crown, in 1860, purchased 7.5 million acres for œ300; in 1873, when Werita Tainui and other Poutini Ngai Tahu exercised their option to buy back a small portion of their land from the Crown at 10 shillings an acre, they bought 1050 acres for œ500 (N4:27).

Finding on grievance no 8

13.5.7 We find that the Crown was under a duty to advise Poutini Ngai Tahu that, if gold was discovered in commercial quantities, this would enhance the value of their land. Moreover, the Crown was aware that European settlement on the west coast was imminent. In offering to pay no more than a nominal price for land which had the potential for a very early substantial rise in value we believe the Crown failed to act with the degree of good faith required of one Treaty party to the other. We find the Crown acted in breach of its Treaty obligation in this respect. We sustain the claimants' grievance no 8.

Grievances nos 3 and 4: Crown failure to reserve lands requested by Ngai Tahu

13.5.8 The claimants stated both that:

The Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude;

and that:

The Crown wrongfully imposed a price on land that Ngai Tahu had wanted to exclude from the sale. (W6)

We propose to discuss grievances no 3 and 4 together as the difference, if any, between them is not readily apparent. The grievances appear to relate to two separate areas of land. First, an area of some 8000 acres which Ngai Tahu sought at the Arahura River. Secondly, the area of some 200,000 acres already discussed, between the Mawhera and Kotukuwakaoka Rivers and the Hokitika River.

Request for 8000 acres at the Arahura River

13.5.9 In a memorandum of 6 June 1866 James Mackay Jr noted:

The question of the reserve at Arahura or Brunner River, was the great stumbling block in completing the purchase of the west coast district. Natives wished for a reserve which would have contained about 8000 acres. I objected to this, but agreed that they could have 2000 acres and the whole of the river bed, and entered into a verbal agreement that they should be allowed to purchase at 10s per acre, any land lying between the eastern extremity of the 2000 acres and Mount Tuhua. (A8:II:50){FNREF|0-86472-060-2|13.5.9|39}

Poutini Ngai Tahu had requested this reserve as they wished to have a strip of land adjoining either side of the Arahura River from its source at Mount Tuhua right down to its junction with the sea. The purpose, of course, was to protect their access to the cherished pounamu. As we have seen, Mackay noted in his report on the abortive 1859 negotiations that, after he declined Ngai Tahu's request for the 200,000 acres between the Mawhera and Hokitika Rivers, Ngai Tahu argued that they would lose the Arahura River from which the "much coveted greenstone" was procured if they sold the land on either side of it. Mackay's response at the time was to say that the greenstone was of no use to the government and, if it was all they wanted, they might as well have the whole of the Arahura riverbed. During the 1860 negotiations Mackay declined to grant the reserve of 8000 acres requested and instead allotted 2000 acres only, together with an option to purchase more at 10 shillings an acre.

Mackay's reason for granting no more than 2000 acres was that he was constrained by his instructions from Governor Browne from granting more than 6000 acres for individual allotment. The 8000 requested was not only considerably in excess of this maximum but, had it been acceded to, would have prevented Mackay from granting any of the other 46 reserves, amounting to some 4724 acres. While this explains Mackay's action, it does not justify it.

13.5.10 By imposing a limit on the maximum area of the three categories of reserves which Mackay might settle on for Poutini Ngai Tahu, Governor Browne and his officials were acting in clear breach of the Treaty. As we have seen, article 2 of the Maori version of the Treaty preserved to Poutini Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full, exclusive and undisturbed possession of their land so long as they wished to retain it. It is abundantly clear that Poutini Ngai Tahu wished to retain tino rangatiratanga over the area of land on either side of the Arahura River from its mouth at the sea to its source in the alps. Mackay estimated this to be of the order of 8000

acres. In fact he allocated only 2000 acres.

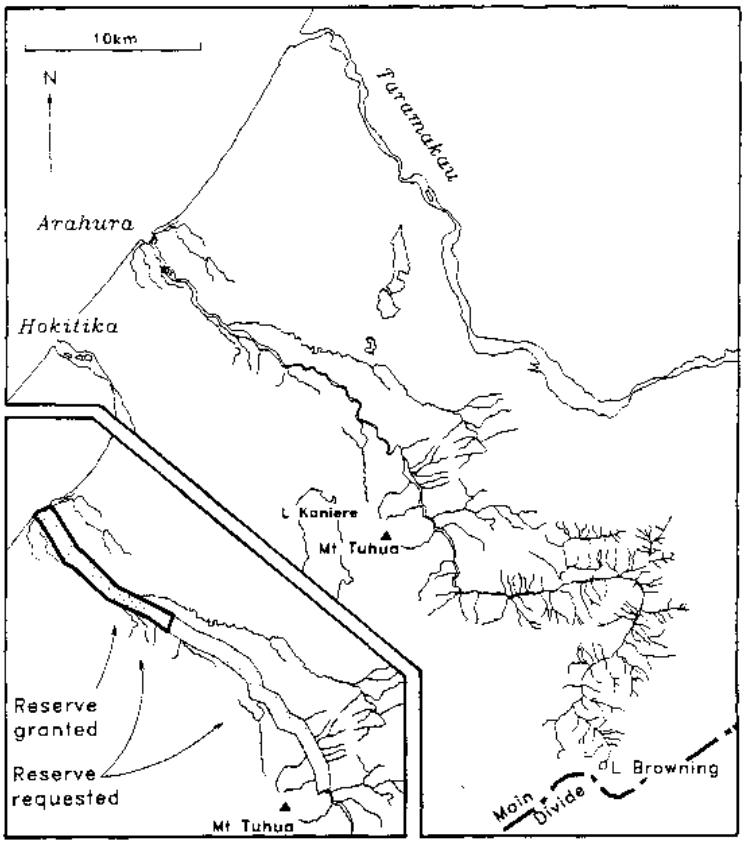

Figure 13.2: The Arahura River showing the reserve requested by Ngai Tahu and the lesser area granted by Mackay. The map also shows the river and its tributaries. In 1976 the Mawhera Incorporation was given title to the main course of the river from Lake Browning to the sea, but this did not include the river's tributaries.

Finding on grievance no 3 as it relates to Ngai Tahu's request for 8000 acres at the Arahura River

13.5.11 By imposing on the Crown's agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu, Governor Browne acted in clear breach of article 2 of the Treaty. Mackay was forced to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they very much wished, and were entitled, to retain. As we will see when we discuss grievance no 5 relating to pounamu, Ngai Tahu have suffered serious loss ever since.

It follows that Ngai Tahu's grievance no 3 is in this respect sustained.

Request by Ngai Tahu to retain 200,000 acres between the Mawhera and Kotukuwakaoka Rivers and the Hokitika River

13.5.12 This is the second limb of grievances no 3 and 4. As we have seen, Poutini Ngai Tahu consistently maintained during the 1859 negotiations that they wished to retain this land. They feared that if they agreed to sell it they would lose access to the Arahura River and the associated pounamu, as the Arahura was north of the Hokitika and hence within the limits of the 200,000 acre block. Because he was instructed to provide, if possible, no more than "about 500 acres" by way of a reserve or reserves,

Mackay was unable to meet the understandable desire of Poutini Ngai Tahu to protect their treasured pounamu. This, and the nominal nature of the price of œ200 offered by Mackay appear to be the principal reasons for Ngai Tahu's refusal to sell. We have earlier cited Mackay's note, that on 3 August 1859 Poutini Ngai Tahu would not alter their terms at all and Taetae and his people departed, telling Mackay to return to the governor and come back with œ400 or œ500 and they would sell the land. Although Mackay does not here say so, it became apparent from his subsequent actions that he also realised he would have to obtain authority to agree to substantially larger reserves.

13.5.13 When Mackay returned in 1860 to re-open negotiations with Poutini Ngai Tahu he had less restrictive instructions. He could now pay up to œ400 and set aside three categories of reserves totalling 12,000 acres. Following preliminary discussions at the Mawhera pa, Mackay met with the assembled Poutini Ngai Tahu at Poherua on 20 April. As we have earlier recorded, Mackay noted:

On the 21st the land question was recommenced, I found the Natives still desirous as on the former occasion to retain all the land intervening the rivers Mawhera and Kotukuwhakaho, and the river Hokitika, comprising some 200,000 acres of valuable country, UNLESS they received œ300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven), and larger reserves than had on my first visit been offered to them (800 acres was offered at that time). After some days spent in discussing the question, and on my having informed them of the very liberal provision in that respect ordered by His Excellency the Governor, they agreed, on the 26th April, 1860, to accept the sum of œ300, as compensation for the whole of their claims to land in the Arahura or Poutini districts, excepting over such portions as were reserved for their own use or benefit. (A8:II:40){FNREF|0-86472-060-2|13.5.13|40} (emphasis added)

Immediately after citing this passage in his evidence Mr McAloon commented:

In terms of Article Two of the Treaty, the Crown did not have the right to pressure Ngai Tahu to give up the block between the Mawhera, Hokitika, and Kotukuwhakaoho Rivers. The statement by Ngai Tahu, on two separate occasions, that they wished to keep the block, should have been enough to guarantee it to them. The Crown was not in the position of trying to strike a deal with a sectional interest group; it was negotiating with the other party to the Treaty, and the independence and equality of that party was guaranteed. It was not for the Governor to make 'very liberal provision' of reserves, but to accept what was offered. (D3:6-7)

It is unnecessary for us to rule on the point of principle raised by Mr McAloon.

In the particular case in question Mr McAloon appears to be on somewhat shaky grounds. Poutini Ngai Tahu, in the passage cited by him, did not in fact decline to sell the land in question. Rather they made it a condition of their willingness to sell that they received œ300 and not the œ200 previously offered by Mackay in 1859, and also that they received larger reserves than previously offered. In the event, the Crown met both these conditions and a deed of sale was concluded.

Findings on grievances no 3 and 4

13.5.14 We have already found that the governor, in imposing an arbitrary limit on the size of the reserves which might be granted, was acting in breach of the Treaty. But in the case of the 200,000 acre block at present under discussion, we are satisfied that provided Poutini Ngai Tahu received œ300 and larger reserves, they were willing to sell the block. And, in the circumstances, we are satisfied that the Crown did not impose a price on the 200,000 acre block which Ngai Tahu wanted to exclude from the sale. For the reasons given above (13.5.13) we find grievances nos 3 and 4 regarding Ngai Tahu's request to retain 200,000 acres between the Mawhera and Kotukuwakaoka Rivers and the Hokitika River are not sustained.

Grievance no 6: Crown failure to reserve Ngai Tahu sufficient land

13.5.15 In their sixth grievance the claimants stated that:

The Crown failed to protect Ngai Tahu by ensuring that they had kept enough land to provide an economic base and so preserve their Tribal Estate. (W6)

The question here is whether the Crown failed to ensure, as it was obliged by Treaty principles to do, that Poutini Ngai Tahu retained sufficient land for their present and reasonably foreseeable needs, or as the claimants put it, sufficient land for an economic base.

Poutini Ngai Tahu sold some 7.5 million acres of land for which they received œ300. Some 6724 acres were scheduled as reserves for individual allotment (D5:18, schedule A). Poutini Ngai Tahu accepted that Ngati Apa should be allocated 424 acres leaving a nett acreage of 6300. An additional 3500 acres was reserved to be conveyed to the Crown in trust for Poutini Ngai Tahu under the provisions of the Native Reserves Act 1856. Poutini Ngai Tahu were promised exclusive control over the bed of the Arahura River and were to be permitted to purchase any land lying between the 2000 acre reserve at Arahura and Mount Tuhua at 10 shillings per acre. A further 2000 acres were set aside as a general government reserve to meet the cost of surveying the other reserves.

Just as in the Murihiku purchase, which involved a roughly similar area of land purchased by the Crown, so here a quite infinitesimal area of land-6300 acres-was set aside for the direct use of the 100 or so Poutini Ngai Tahu.

Dr Loveridge, the Crown historian, presented to us a comprehensive and thoroughly researched account of the Arahura purchase. We cite his conclusion on the provision of reserves:

As for the 12,224 acres of reserved land and the promises respecting the Arahura River which made up the territorial component of the compensation, there are few signs of a spirit of generosity here either. The 6724 acres set aside for individuals-the only portion of the reserved acreage left under the direct control of the owners-represented about 66 acres apiece, on average, for the 101 people involved. This might have been adequate for the immediate requirements of the Poutini Ngai Tahu, but their future requirements apparently received scant consideration. The evidence indicates that James Mackay did his utmost to reduce the acreage reserved to the bare minimum which the owners could be induced to accept. Both Donald McLean and the

Governor approved of this approach. It is very difficult to understand why it was deemed to be appropriate-particularly with respect to the Arahura River. (N2:87)

In fairness to the Crown it should be recognised that the various reserves were well sited at Poutini Ngai Tahu kainga and included some 500 acres at the mouth of the Mawhera (the present town of Greymouth). But, as we discuss in the following chapter, the value of this land has been adversely affected by being perpetually leased. While on average an allocation of 66 acres per person might be thought relatively generous compared with those allowed on the east coast, we are satisfied, particularly having regard to the nature of the land and climatic conditions that the reserves were inadequate to provide a sustainable economic base for the future. We reserve for our discussion of the claimants' grievance no 5 the very unsatisfactory situation concerning pounamu.

13.5.16 Quite apart from the failure of the Crown to provide adequate land to enable Poutini Ngai Tahu to engage in agricultural, pastoral or (later) dairy farming on an equal basis with European settlers, little thought appears to have been given to the need to ensure continued access by Poutini Ngai Tahu to mahinga kai. As with earlier purchases we have discussed, the Crown failed, in considering the present and future needs of Poutini Ngai Tahu, to have any real regard to ensuring their continued access to important food resources. We agree with Dr Loveridge's considered conclusion about reserves that the future requirements of Poutini Ngai Tahu apparently received scant attention. Given the size of the area acquired -7.5 million acres-the land retained from Ngai Tahu was little more than nominal and, again to quote Dr Loveridge, "the bare minimum which the owners could be induced to accept".

Findings on grievance no 6

13.5.17 The tribunal finds that grievance no 6 is sustained for the reasons given above (13.5.16).

The tribunal further finds that the Crown's failure to ensure that Poutini Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

Grievance no 5: Crown failure to protect Ngai Tahu rights to pounamu

13.5.18 The claimants stated that:

The Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu. (W6)

In his final reply on behalf of the claimants Mr Temm, after criticising Mackay, the Crown purchase agent, for failing to protect Ngai Tahu's interests in pounamu, went on to say that:

the pounamu is and always was intended to be ours. It has been taken by other people and exploited for years. It has been taken for nothing, stealthily by helicopters from

inaccessible places and sold commercially in the market place. It is our taonga and belongs to us. It has always been for us a valuable asset not only for cultural purposes but as a means of trade. We have traded pounamu up and down New Zealand for centuries. We say that we are entitled to pounamu and that it should be a recommendation of this Tribunal that all pounamu in the South Island should be the property of the Ngai Tahu and that they should be allowed to use it for traditional purposes in any way Ngai Tahu see fit. (X1:121-122)

The tribunal notes that the grievance refers to the right of Ngai Tahu to retain all pounamu. Mr Temm in his submission referred to all pounamu in the South Island. We interpret this to mean all pounamu in Ngai Tahu's territory in the South Island. Whether this would include all pounamu in the South Island we have not been told. The tribunal is aware however that there is pounamu in South Westland, for example, outside the Arahura block and within the Kemp and Murihiku blocks.

It is convenient to consider first the pounamu in and adjacent to the Arahura River and its tributaries; secondly, elsewhere in the Arahura block; and thirdly, in Murihiku and any other Ngai Tahu sale areas in which pounamu is to be found.

Pounamu in and adjacent to the Arahura River and its tributaries

13.5.19 In his report of 21 September 1861 to the chief land commissioner, Mackay said:

It was specially stipulated that a very large reserve should be made at the river Arahura or Brunner, and that the reserves should be taken in a strip up each side of the river with a view of giving them a right to its bed, from which is obtained the highly prized greenstone, which gives the name Wahi Pounamu,-place of greenstone,-to the Middle Island. (A8:II:40){FNREF|0-86472-060-2|13.5.19|41}

As we have seen in our discussion on grievance no 3 (13.5.9), Mackay in 1866 characterised the question of the reserves at Arahura "the great stumbling block" in completing the west coast purchase. He declined the Ngai Tahu request for a reserve going the whole way up both sides of the Arahura River, which he said would have contained about 8000 acres, but agreed they could have 2000 acres and the whole of the river bed. He further verbally agreed they could purchase at 10 shillings an acre "any land lying between the eastern extremity of the 2000 acres and Mount Tuhua" (N3:93).{FNREF|0-86472-060-2|13.5.19|42} We have earlier found that the failure of the Crown to reserve the 8000 acres requested by Ngai Tahu to be a breach of article 2 of the Treaty (13.5.11).

Two maps were made of this reserve by Mackay, of which copies were produced in evidence. One (N19A) marks the strips of land reserved on each side of the river. It purports to show the respective strips of 1000 acres each stretching the whole way along each side of the Arahura River from the sea up to Mount Tuhua. A notation on the plan gives Ngai Tahu the right of purchase at 10 shillings an acre, as mentioned above. Given Mackay's 1866 statement that a reserve of 8000 acres would have been required to secure the land on each side of the Arahura up to Mount Tuhua, his map (N19A) seems to be misleading. It may well have induced Poutini Ngai Tahu to believe that reserves on either side had been secured up to Mount Tuhua.

The other map, (N19B), shows the river (as part of the same map (N19A)) extending up to Mount Tuhua and as being reserved to Ngai Tahu. Unfortunately the river bed was not made a formal "reserve" under the terms of the deed but there can be no doubt that both Mackay and Poutini Ngai Tahu considered it to be part of the agreement.

After referring to these two maps Mackay, in his 8 June 1866 report, concluded by saying:

I think, as a vast territory was acquired by the Government for a very small sum of money, and it has since become very valuable, and the reserves, though much enhanced in value, are very small in comparison with the whole block ceded, that the Provincial Government would be justified in giving to the Natives the land at Arahura which forms the subject of Mr. Bealey's letter. (N3:93){FNREF|0-86472-060-2|13.5.19|43}

It appears Mr Bealey's letter is not now available. But Mackay is here recommending that additional reserves in the Arahura area should be provided for Ngai Tahu.

13.5.20 In 1873 Werita Tainui and some others, in exercise of their right of pre-emption granted by Mackay, acquired 1050 acres near Mount Tuhua for œ500, that is to say, at a cost 12,000 times more than the Crown paid for it 13 years earlier. The land was subsequently sold (N4:27).

In 1876 some 14,150 acres commencing at the eastern boundary of the 2000 acre Arahura reserve (MR30) was vested in the Hokitika Harbour Board. This land was subsequently disposed of by the harbour board. Most is now owned by Tasman Forestry Limited (N5:28-32). Mr Blanchard, in his evidence for the Crown, argued that due to the operation of the rule against perpetuity, the option to purchase the land adjoining the Arahura up to Mount Tuhua is now inoperative. He stressed that he was merely attempting to assess the present legal position rather than making any submission as to what ought to be the outcome in terms of the Treaty (N5:33-34).

The bed of the Arahura River within the Arahura reserve (MR30) is now vested in the Mawhera Incorporation and the balance of the Arahura riverbed from the eastern boundary of MR30 to Lake Browning (the source of the Arahura) is now also vested in the Mawhera Incorporation by section 27, Maori Purposes Act 1976 (N4:5). As Crown counsel Mr Blanchard pointed out, the title purports to be to the bed of the river, but if the river shifts its course the title boundaries do not follow it (N4:35).

Crown counsel, in submissions on Poutini Ngai Tahu mining issues (N8:13), after referring to certain provisions of section 8, Mining Act 1971 and section 59, Land Act 1948, submitted that it could be argued that the pounamu did not vest in the Mawhera Incorporation when section 27 of the Maori Purpose Act 1976 was passed, since that section is silent concerning minerals on or under the land. Mr Blanchard thought the doctrine of aboriginal title would apply, but said that if the tribunal felt the point remained doubtful the Crown would be prepared formally to undertake to vest the pounamu in the incorporation.

We strongly urge that this should be done to avoid any future doubts. The tribunal's recommendation to this effect is in 13.5.31.

13.5.21 Mr Blanchard, in his closing address, discussed the Arahura River in some detail. We cite the following passage from his submissions:

The Crown accepts that the intention of Mackay was that the bed of the river and the tributaries, together with their banks, were to be vested in Poutini Ngai Tahu.

Certificates of Title have been issued to the Mawhera Incorporation in respect of the river bed itself from the Arahura reserve to Lake Browning pursuant to s. 27 of the Maori Purposes Act 1976 but those titles are inadequate to give effect to Mackay's promise because:

(a) The tributaries are not included.

(b) The banks of the river and the tributaries are not included.

(c) Changes in the course of the river are unable to be accommodated by the fixed lines of the Certificate of Title boundaries.

They are not, however, merely centre line titles: their apparent lack of breadth is because of the scale of the title diagrams.

The Crown accepts that it would be proper for the Tribunal to recommend that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu but that, in accordance with the views expressed by the tribe, pounamu should not be commercially exploited by any person and thus the Poutini Ngai Tahu right to take it should be for non-commercial purposes. (X2:5:24-25)

Although not expressly stated, we understand the Crown's concession that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu to extend to all pounamu in the Arahura River and its tributaries, and the banks of the Arahura and its tributaries. In other submissions on Poutini Ngai Tahu mining issues (N8) Crown counsel, after noting that under the deed of sale minerals passed to the Crown, submitted that Ngai Tahu's rights to pounamu were extinguished in lands other than the bed of the Arahura River and the other reserves. We will consider this submission when we discuss the claimants' claim to all pounamu. In the meantime we note that the Crown's concession is to be understood as confined to the Arahura River, its tributaries and their banks.

13.5.22 Crown counsel did not, however, define what land was intended to be encompassed by the "banks" of the various rivers. If, as envisaged by the Crown, Ngai Tahu should have the exclusive right to control the taking of pounamu, should they not have vested in them a reasonable amount of land on either side of the Arahura River and its tributaries, to their respective sources, if such land can be acquired by negotiation by the Crown? At present, as the evidence made clear, there are formidable problems in policing the unlawful taking of pounamu from the Arahura. Further, the whole purpose of Ngai Tahu seeking the extensive reserves on either side of the Arahura was not only to ensure its continued ownership of the

Arahura River and its tributaries, but also the pounamu within such rivers and on land adjacent to them. Pounamu is often to be found on such adjacent land and is more readily taken than pounamu in the river itself. Pounamu was and remains a cherished taonga of Ngai Tahu. The Crown clearly acted in breach of its Treaty obligations in failing to meet the wishes of Ngai Tahu to retain ownership of the pounamu in and adjacent to the Arahura and its tributaries. Although we are conscious of the fact that some of the adjacent land is no longer in Crown hands we consider the Crown should accept responsibility and make every effort to redeem its long-standing Treaty breach by negotiating for the repurchase of appropriate blocks of land adjacent to the Arahura and its tributaries, and if successful, settling such land on Ngai Tahu in addition to Crown owned land.

13.5.23 In accepting that it would be proper for the tribunal to recommend that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu, the Crown suggested, "in accordance with the views expressed by the tribe", that such pounamu should not be commercially exploited by any person and therefore Poutini Ngai Tahu's right to take it should be for non-commercial purposes. The Crown may well have gained the impression that Ngai Tahu was opposed to the commercial exploitation of pounamu from the evidence of Mr Maika Mason, a leading spokesperson for Poutini Ngai Tahu and then deputy chairperson of the management committee of the Mawhera Incorporation. Mr Mason did, however, make it clear that the views he expressed were his, and not necessarily those of the committee of management.

Mr Mason told the tribunal that at Mawhera Incorporation meetings the commercial exploitation of pounamu by Pakeha is seen as being destructive of his people's mana. This, he said, is seen as the most crucial issue in Arahura, more important even than the question of the leases. "In the old days", Mr Mason said, "the pounamu and the carvings made from it enshrined everything that our people were and was a source of trade for them" (P4:4). For these reasons, we were told, Ngai Tahu have consistently tried to obtain control of this resource.

Mr Mason referred to a decision of the District Court in an application by Westland Greenstone Limited for a road licence under section 93 of the Mining Act 1971. The purpose of the application was to enable a road to be formed to give vehicular access to certain land over which the applicant held a mining licence to extract pounamu. The application was opposed by the Mawhera Incorporation in whom the river bed was vested. Judge Fraser stated the tenor of the Mawhera Incorporation's case to be as follows:

1. The Poutini Ngaitahu attach a special traditional and cultural status to greenstone.

2. The Arahura Valley is an important source of greenstone.

3. For those reasons when the Poutini Ngaitahu sold their land to the Crown in 1860 they sought to exclude the valley from the sale.

4. The vesting of the bed of the Arahura River in Mawhera (as representative of the Poutini Ngaitahu) is only partial recognition of that claim.

5. The Arahura Valley because of its significance as a major source of greenstone ought to be kept free of commercial operation.

6. The partial construction of the access track was a trespass onto Mawhera land and an un-authorised disturbance.

7. The valley ought to be kept as far as possible in its natural state. The proposed road is ecologically undesirable. (D5:658){FNREF|0-86472-060-2|13.5.23|44}

The judge commented that the views summarised in 1 to 5 above-at least in their entirety-did not seem to have been shared or regarded as binding by all Ngai Tahu at all times. He cited the late Mr Walter Tainui, a member of Ngai Tahu and a man of standing, as having been one of the original shareholders of Westland Greenstone and as being supportive of the applicants' commercial operation. The judge also noted that Mr Tipene O'Regan (a principal spokesperson for Ngai Tahu) had acknowledged that the spirit of the agreement with the Crown in 1976 (to vest the Arahura River in Ngai Tahu), included the understanding that Mawhera would respect all existing mining licences. Mr Mason cited to us the following conclusions by Judge Fraser:

The balancing of the historical and cultural beliefs and views of the people represented by Mawhera on the one hand and the commercial interests of Westland Greenstone and the economy generally on the other is a question of public interest of some importance. It is not readily susceptible of judicial evaluation.

...I consider that the continued existence of the mining and the business based thereon in today's economic circumstances outweighs the limited detriment to the beliefs and wishes of the proprietors of Mawhera. I recommend that the objection be declined. (D5:661-662){FNREF|0-86472-060-2|13.5.23|45}

Mr Mason expressed the view that this decision demonstrated the inadequacies and insensitivities of the Mining Act at least so far as it relates to pounamu and Maori values. He went on to express his belief that the value of pounamu to his people was so great that, as a minimum, there should be a special statutory control over its extraction and use (D4:5).

We note that, according to Mr Mason, and we accept his evidence, Ngai Tahu traditionally traded in pounamu and pounamu carvings. We will defer our final consideration of the various Crown proposals we have discussed and any recommendations we might make until we have considered the wider aspect of grievance no 5, that is, that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu. We turn next to consider all other pounamu within the boundaries of the Arahura deed of sale and not just that in and adjacent to the Arahura River and its tributaries.

Pounamu in the Arahura block other than that in and adjacent to the Arahura River and its tributaries

13.5.24 Mr Maika Mason, whose objection to the commercial exploitation of pounamu by Pakeha we have already noted, prefaced these comments by the

following observations. We quote them at length for the insight they give on the basis for the Ngai Tahu grievance we are considering:

The Tribunal will have already heard that when James Mackay was negotiating the purchase of Arahura, our people wanted to reserve from the sale all the land between the Rivers Mawhera, Hokitika and Kotukuwhakaoho. Their reason was that it is between those rivers that the pounamu was found. The pounamu was the most important resource for our people in Arahura and was a major source of their mana and of trade.

Even today many people consider the riverbeds, especially the Arahura, to be the source of the pounamu, and in the sense that the stone is brought down the riverbeds by water action that is true. Nevertheless, then and now, the most accessible source of pounamu is the land onto which the stone was washed over the centuries. In particular, the richest source is the land lying between the rivers I have named.

I believe that at the time of the sale our people were insisting on the reservation of the pounamu to them, by which Mackay and other Pakeha understood them to mean the need to reserve a river or rivers for that purpose. These Pakeha did not understand, as many do not understand now, that when the stone is in the river, it is covered by water and therefore difficult to find and extract. Our people knew that the best and most easily recovered pounamu was on the land.

I believe that our people on one side, and Mackay and his assistants on the other, never really understood what each was talking about when it came to pounamu. This misunderstanding was almost certainly coloured by the fact that neither side could [foresee] the day when the Arahura lands were fully settled and the pounamu found on the land might become the property of the landowner or lessee, and therefore inaccessible to the Maori people.

The result is that today our people have little lawful access to the pounamu. That is a tragedy for both our culture and our mana. Today we see cheap gimcrack pounamu ornaments being sold to tourists, much of the carving being done by Pakeha working in factories and with no knowledge at all of the spiritual values which our people enshrine in their carving. Our people are not entirely blamefree in this, some of them are also involved in that trade, but that is almost an inevitable result of the debasement of our heritage. They see Pakeha making money out of this business and almost inevitably some will try to do the same. (D4:2-3)

Mr Mason here claimed that the reason why Poutini Ngai Tahu wanted to reserve from the sale all the land between the Rivers Mawhera and Kotukuwakaoka and Hokitika was that it was between those rivers that the pounamu was found.

13.5.25 In our earlier discussions of the 1859 purchase negotiations (13.3.7) we cited a lengthy passage from Mackay's report. In this he referred to Ngai Tahu's wish to retain the area of some 200,000 acres between the three rivers. His response was that this was the best land, and he was being offered various bluffs, which he named. He then noted Ngai Tahu's response, which was that they would lose the Arahura River, from which the much coveted pounamu was procured, if they sold the land on either side of it. In the course of his lengthy report, which he described as "minutes of

proceedings" Mackay nowhere records that the reason Poutini Ngai Tahu were standing out for the whole of the 200,000 acre block between the named rivers was that they wished, thereby, to retain ownership of the pounamu. It was clearly his understanding, however, that they did wish to retain the Arahura River and access to it. When Taetae departed and the negotiations were terminated, as we have seen, he told Mackay to return to the governor, "and if I came back with four or five hundred pounds they would sell the land". This would appear to include the 200,000 acres apart from the Arahura River and its adjoining land.

We also recall Mackay's 1861 report in which he noted that, as part of the oral agreement reached on 26 April 1860, "it was specially stipulated that a very large reserve should be made at the River Arahura ... and that the reserves should be taken in a strip up each side of the river". This would give them a right to the river bed "from which is obtained the highly prized greenstone". That Ngai Tahu were insistent on retaining ownership of the Arahura River and adjacent land was confirmed by Mackay in his 1866 memorandum, to which we have earlier referred. There Mackay commented that the question of the reserve at Arahura River "was the great stumbling block in completing the purchase of the west coast district", as Ngai Tahu wanted to retain about 8000 acres and Mackay was able to agree to only 2000 acres.

It is difficult for the tribunal, in the absence of any contemporary or later evidence from any Poutini Ngai Tahu, to know whether Mr Maika Mason is correct in asserting that the reason Ngai Tahu stood out in 1859 for the retention of the 200,000 acre block was because only by this means would they retain ownership of all pounamu in the whole of the block. But the tribunal accepts that pounamu was treasured by Ngai Tahu and would have been of very great concern to them.

13.5.26 The Crown submitted that because all minerals (which term it says would include pounamu) passed to the Crown under the deed of sale, Ngai Tahu's rights to pounamu were extinguished in lands other than the bed of the Arahura River and the other reserves. The tribunal has carefully examined the Maori text of the Arahura deed of purchase as signed by Poutini Ngai Tahu rangatira (see appendix 2.9). We would say at the outset that neither the Maori or English version recognises the value attached by Poutini Ngai Tahu to pounamu. The Maori text refers to "kowhatu" (stones), translated in the English version as "minerals". But there is no mention of pounamu as such in the deed. The tribunal is satisfied that there would have been a clear demarcation in Ngai Tahu thinking between ordinary stones and greenstone, so great were the spiritual and cultural values attached to its possession. Was not the island inhabited by Ngai Tahu known as Te Wai Pounamu? We believe that since pounamu was not mentioned by name in the deed and since Ngai Tahu were so clearly concerned to retain it, there is every reason to believe that Ngai Tahu did not realise they might be thought to be assigning it to the Crown. The tribunal is satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey it to the Crown.

This is another instance where the presence of a protector to advise Ngai Tahu would have ensured that they were not put in the position where they might inadvertently part with their so greatly treasured possession. The tribunal finds that Ngai Tahu did not sell or assign to the Crown their interest in pounamu within the Arahura purchase block. Had the Crown appointed a protector as it should have done, the tribunal

believes this would have been discussed with the Crown's purchasing agent, Mackay, and specific provisions would have been made to make clear that Ngai Tahu retained ownership of all pounamu.

Pounamu in areas other than the Arahura block

13.5.27 As we have indicated, Mr Temm sought a recommendation that all pounamu in the South Island should be the property of Ngai Tahu. We have interpreted this as all those parts of the South Island formerly owned and occupied by Ngai Tahu. The tribunal was advised that pounamu is to be found in parts of South Westland, in the Murihiku purchase block and in parts of the Kemp block, in addition to the Arahura block. The tribunal has examined the Murihiku deed and all other deeds of sale between Ngai Tahu and the Crown. In none of these does pounamu appear in the Maori text signed by Ngai Tahu, nor in the respective English translations. Given the high intrinsic value of this taonga to all Ngai Tahu, the tribunal considers for the reasons already discussed in the case of Poutini Ngai Tahu, that specific mention of pounamu in each deed would have been required to signify Ngai Tahu's intention to part with their pounamu. The tribunal finds that in none of the deeds of sale did Ngai Tahu agree to part with any pounamu to be found in the respective purchase blocks.

13.5.28 Pounamu is an irreplaceable treasure. Once mined and commercially exploited much of it (at present sold to foreign tourists) is gone for ever. The tribunal believes that the unique nature of pounamu and its deep spiritual significance in Maori life and culture is such that every effort should now be made to secure as much as possible of the steadily declining supply to Ngai Tahu ownership and control.

Unfortunately the tribunal did not receive any significant evidence or submissions as to the proportion of pounamu which is owned by the Crown, on the one hand, and privately on the other. Our understanding is that the greater part is on Crown owned land. This should present no problem. We believe all such pounamu and any other owned by the Crown should be returned by the Crown to Ngai Tahu. Any such action would of course have to be on the basis that any current mining licences relating to pounamu should run their normal course, to ensure that those licence holders are not adversely affected. The same protection should be afforded any licensees of pounamu in the state forests which have been excepted from the provisions of the Mining Act 1971. The aim should be for the Crown as expeditiously as possible to return to Ngai Tahu ownership and control all such pounamu within its traditional boundaries.

Some pounamu we understand is the property of proprietors of privately owned land. The tribunal considers that it would be appropriate for an order in council to be made in respect of such pounamu pursuant to section 7 of the Mining Act 1971, and that an appropriate amendment be made to ensure that mining privileges should be granted only to Ngai Tahu under that section.

Finding on grievance no 5

13.5.29 The tribunal finds that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu:

(a) in and adjacent to the Arahura River and its tributaries;

(b) in the remainder of the Arahura purchase block; and

(c) in the Murihiku and any other Ngai Tahu blocks purchased by the Crown where pounamu was to be found.

Finding regarding breach of Treaty principles

13.5.30 The tribunal has already found, in relation to grievance no 3, that the Crown acted in breach of article 2 of the Treaty in failing to reserve to Ngai Tahu the 8000 acres requested at the Arahura River (13.5.11). The principal purpose of this request was to ensure continued Ngai Tahu ownership and control of the pounamu in the Arahura River and its tributaries. In refusing to meet the expressed wish of Ngai Tahu to retain such possession and control of all pounamu in the Arahura River and its tributaries and land adjacent thereto, and thereby failing to respect the tino rangatiratanga of Ngai Tahu over their taonga, the Crown acted in breach of article 2 of the Treaty.

The tribunal further finds that although Ngai Tahu wished and intended to retain possession and control of all pounamu both throughout the remainder of the Arahura block and in all other blocks sold to the Crown, the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.

Recommendations in respect of pounamu

13.5.31 1 That to remove doubts as to the ownership of the pounamu in or on the land described in section 27(6) of the Maori Purposes Act 1976 the Crown take appropriate legislative action to vest all such pounamu in such body or bodies as may be nominated by Ngai Tahu.

2 That section 27 of the Maori Purposes Act 1976 be amended so as to vest the beds of all tributaries of the Arahura River in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

3 (a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired and any such land already owned by the Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 That the Crown transfer ownership and control (including the right to mine) to Ngai Tahu or such other body as may be nominated by Ngai Tahu of:

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfers to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

5 (a) That the Crown pursuant to section 7 of the Mining Act 1971 by order in council declare in respect of all pounamu which is the property of proprietors of privately owned land, on or under the land in the districts described in the preceding paragraph 4 (a) and (b), that pounamu on or under such land shall be prospected for or mined only pursuant to the said section 7.

(b) An appropriate amendment should be made to the Mining Act that no prospecting, exploration, mining or other licence relating to pounamu shall be granted under that or any other Act to any person or body other then Ngai Tahu or such other body or person as may be nominated by Ngai Tahu.

Grievance no 1: Crown failure to provide a protector

13.5.32 The claimants stated that:

The Crown failed to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights. (W6)

In our discussion of the Murihiku purchase we discussed an identical grievance. We there found that the failure of the Crown to appoint a protector was in breach of the Treaty principle which required the Crown actively to protect Maori Treaty rights. Just as in Murihiku so here, the tribunal believes that Ngai Tahu were seriously disadvantaged in their negotiations with the Crown's agent James Mackay Jr. As we have indicated, a protector would surely have impressed on Poutini Ngai Tahu the potential value of a major gold discovery and its effect on land values. A protector would have been able to ensure that they retained the right to ownership and control of all pounamu. A protector would surely have encouraged them to demand substantially greater reserves, and emphasised that they were entitled to retain whatever land they did not wish to sell. Mackay, anxious as he was to report a successful mission, and circumscribed as he was by the very restrictive terms he could offer, was in no position to perform the role of a protector.

Finding on grievance no 1

13.5.33 The grievance is sustained. The failure of the Crown to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights was a breach of the principle of the Treaty which required the Crown to actively protect Maori Treaty rights. As a result Ngai Tahu were denied the right to retain

certain lands they wished to retain and were left with insufficient land for their present and future needs. As a further result Ngai Tahu lost their right to ownership and control of all their pounamu.

Remaining grievances

13.5.34 The claimants' remaining grievances were:

7. The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.

9. The Crown failed to protect Ngai Tahu by later causing or permitting lands that had been excluded from the sale to be reduced in area (for example, within the town of Greymouth).

10. The South Island Landless Natives Act 1906 and other legislation was inadequate to remedy the landlessness caused by the sale to the Crown.

11. The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Enquiry into Maori Reserved Lands, [1975]. (W6)

Grievance nos 7 and 11 will be considered in the next chapter dealing with the reserved lands.

Grievance no 9 will be considered in our further report on ancilliary claims.

Grievance no 10 will be considered in chapter 20.

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{FNTXT|0-86472-060-2|13.3.3|3}3 Translation of receipt for œ2000 paid to Ngatitoa tribe, Compendium, vol 1, p 311

{FNTXT|0-86472-060-2|13.3.3|4}4 Translation of receipt for œ500 paid to Ngatiawa tribe, Compendium, vol 1, p 309

{FNTXT|0-86472-060-2|13.3.3|5}5 Translation of deed of sale by the Ngatitama tribe, Compendium, vol 1, p 313

{FNTXT|0-86472-060-2|13.3.3|6}6 Translation of receipt for œ100 paid to Rangitane, Compendium, vol 1, p 313

{FNTXT|0-86472-060-2|13.3.3|7}7 see n 2, p 303

{FNTXT|0-86472-060-2|13.3.4|8}8 Hamilton to McLean, 8 January 1857, Compendium, vol 2, p 17

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{FNTXT|0-86472-060-2|13.3.5|15}15 For evidence of this see report in Lyttelton Times, 3 April 1858, p 4

{FNTXT|0-86472-060-2|13.3.6|16}16 McLean to J Mackay Jr, 3 November 1858, Compendium, vol 2, p 33

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{FNTXT|0-86472-060-2|13.3.9|24}24 Smith (for McLean) to J Mackay Jr, 25 October 1859, Compendium, vol 2, p 39

{FNTXT|0-86472-060-2|13.4.1|25}25 J Mackay Jr to McLean, 17 December 1859, MA Collingwood 2/1 letters, NA, Wellington

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{FNTXT|0-86472-060-2|13.4.4|34}34 Nelson Examiner, 30 June 1860, p 3, "The West Coast", for a copy of a letter of 20 June 1860 from J Mackay Jr to J Mackay Sr, which refers to his "seeing about native reserves" in the Buller area on way back to Collingwood.

{FNTXT|0-86472-060-2|13.4.4|35}35 see n 28, p 41

{FNTXT|0-86472-060-2|13.5.1|36}36 see n 18, p 58

{FNTXT|0-86472-060-2|13.5.1|37}37 see n 18, p 59

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Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.1 Introduction

Chapter 14

THE PERPETUAL LEASES OF NGAI TAHU RESERVES

14.1. Introduction

This section of the report deals with the claimants' grievance that the Crown, in breach of the Treaty, unilaterally imposed perpetual leases containing unjust terms over lands reserved from the Arahura purchase of 1860.

We shall be referring to a number of submissions presented to the tribunal as well as a volume of other relevant evidence. Submissions were made not only by counsel for the claimants and counsel for the Crown, but also on behalf of the Maori Trustee. Comprehensive submissions were made on behalf of the West Coast (South Island), Maori Leaseholders Association Incorporation, and certain lessees of Mawhera Incorporation, by Dr Willie Young. The tribunal also had before it the overview report of Professor Alan Ward.

We received in evidence the Report of the Commission of Inquiry into Maori Reserved Land that was set up in 1973, completed its investigations by the end of 1974, and published its findings in early 1975. Evidence was also given to the tribunal by Ngai Tahu owners and by other residents of Greymouth including the mayor, Dr B Dallas. We shall be referring to the views of these various persons, bodies and organisations where relevant during this examination of the Greymouth leases. We shall be primarily concerned with the reserve known as MR 31 or the Mawhera Reserve, comprising originally 500 acres on the south bank of the river Mawhera or Grey, as this reserve highlights the main issues and events on the perpetual lease question.

During the course of a hearing held at Greymouth in September 1988 the tribunal allowed three Maori authorities to tender submissions in support of the claimants' grievance. These were lodged on behalf of:

1 Parininihi-ki-Waitotara Incorporation of Wanganui (N10)
2 Wakatu Incorporation of Nelson (N11), and
3 Wellington Tenths Trust and Palmerston North Maori Reserves Trust of Wellington (N12)

These three bodies have vested in them lands reserved from other deeds of sale entered into by their respective iwi with the Crown. Grievance claims have been lodged with the tribunal in respect of these other tribal areas and include inter alia similar allegations concerning imposition of perpetual leases. Although there is a

common thread between the claimants and these other three bodies in certain areas of their respective claims, nevertheless there are factual distinctions in the respective backgrounds which have an important bearing on the crucial question of whether there has been a breach of Treaty principles in each case.

One of these factual differences relates to the question of whether or not consent was given or obtained. It will therefore be necessary for the tribunal to examine separately each of the iwi claims. However, the submissions have been useful to the tribunal and indicate the wide area of dissatisfaction with the present leases. The tribunal also notes there is a difference between the claimants and the other three supporting groups on the statutory remedy sought from the Crown although no doubt this may be a reconcilable matter.

It was explained to the tribunal by counsel appearing for the Maori Trustee that government was aware of the need for statutory changes, and remedial legislation was proposed. An interdepartmental committee was set up to complete proposals for legislation by October 1988, but the Minister of Maori Affairs had indicated his intention to consult with lessees and Maori owners before enactment of legislation (N32:8).

We had hoped rather optimistically when it was stated that legislation was intended for introduction in 1988 that there would be no need to address the claimants' grievances over the reserved land perpetual leases. Despite a press statement by the Minister of Maori Affairs on 18 January 1990 that legislation would be introduced in 1990 it would seem necessary in the light of continuing delay in government action that we must deal with Ngai Tahu's grievance. Whether in due course the grievances of other iwi will need inquiry by the tribunal will depend on government moves to address the question.

We propose therefore to look at this grievance and in so doing will deal with the claim under the following headings:

1 A brief history of the reserves and legislation affecting them
2 Ngai Tahu's grievances
3 Ngai Tahu evidence
4 The response of the Crown to the claim
5 The response of the lessees to the claim
6 The response of the Maori Trustee
7 The tribunal's examination of the evidence and its findings
8 The tribunal's views on remedies

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.2 History of Mawhera Reserve and Legislation Affecting It

14.2. History of Mawhera Reserve and Legislation Affecting It

14.2.1 The Mawhera reserve comprising 500 acres was one of the portions of lands reserved under the 1860 Arahura deed of sale. It formed part of schedule A of the deed being one of those blocks reserved for individual allotment. The purchase was negotiated on behalf of the Crown by James Mackay who was very much aware that this reserve was the site of a future town. Because of the importance of the land to Poutini Ngai Tahu, however, he was compelled to set it aside as a reserve. James Mackay, describing the site of the reserve, had this to say:

On the 17th May, a dispute arose as to the site of a reserve of 500 acres for individual allotment at the Mawhera or Grey, I wishing the Natives to select it up the river, but they objected to do so preferring to have it near the landing place. As this spot had always been their home, and on the hill above it in a cave repose the remains of Tuhura and others of their ancestors; nothing could move them to give up this place, which I much regretted, as it enables them to retain the best landing place. I however found that further argument would have endangered the whole arrangement entered into at Poherua, on the 26th April, and therefore deemed it politic to acquiesce in their demand. It may be imagined from the position of this reserve that it would be a suitable site for a town, but the whole flat portion of it is liable to be flooded, of which we had practical demonstration by finding on our return from the south that several of the houses at the Pah had been carried away by a flood which took place in our absence. (D5:13){FNREF|0-86472-060-2|14.2.1|1}

Giving evidence one of the Maori owners, Andrew Maika Mason, gave four reasons why the Maori owners insisted on the reservation. These were:

a) It was the traditional site of their principal pah. It was strategically located as the gateway to the pounamu for those coming down from the North. Control of Mawhera gave control over the pounamu.

b) There were two urupa there. The chiefs were buried in a urupa on a hill over what is now Greymouth and there was another urupa in what is now Blaketown. The bones have now been removed from the latter.

c) It was an ideal landing place for the canoes of fishermen or travellers.

d) Mackay and the Maori people all realized that it was the best natural site for any town in the area. The Maori certainly wished to preserve the area for the reasons given above, but they were not fools, and they could see the additional economic advantage which would accrue following any Pakeha settlement there. (D4:8)

Professor Ward had this to say about the development of the Mawhera site:

By the mid 1860s the reserve there had acquired considerable commercial value. In 1865 a new town had been founded in the wake of the discovery of gold in the Mawhera River. At the beginning of that year the small European settlement of Blaketown, on the north bank of the river had been in decline. Almost overnight the discovery of gold transformed the area and the town started spilling over on to the land on the south bank. The overflow, a commercial centre in its own right, was dubbed Greymouth. A shortage of flat land around the harbour put a premium on suitable building sites, including much of the Maori reserve. Faced with a dearth of suitable Crown land, merchants leased parts of the reserve directly from its Maori owners. By July 1865, four thousand feet of the Mawhera River frontage was occupied, 37% leased from Poutini Ngai Tahu. The majority of these leases seem to have been short term ones of no more than three years. Miners were also reported to be paying Poutini Ngai Tahu for the right to prospect on other reserves. (T1:301)

This state of affairs did not last long. In August 1865 the Native Minister instructed Alexander Mackay, the resident magistrate at Nelson, to go to Greymouth and investigate the leasing arrangements. The minister anticipated that problems would arise from the informal leases and considered intervention necessary to ensure the orderly development of the town and the provision of necessary amenities such as roads and other public services.

Mackay's trip resulted in the reserve at Mawhera being placed under the Native Reserves Act 1856 and thereafter it was administered by the government through a succession of trustee arrangements. At various times throughout the following years other Poutini Ngai Tahu lands were also placed in this category. In 1882, when the public trustee took over the administration of the reserves previously under the 1856 Act, it became responsible for 5,936 acres of Maori owned land in Westland.

Native Reserves Act 1856

14.2.2 This Act was passed to provide a means of efficient management of lands set aside for the benefit of Maori. The Act applied to a variety of reserves including those set aside under the New Zealand Company tenths, land that had never been sold such as the reserve at Mawhera and land granted by the government. The Act gave the governor authority to appoint commissioners, who were given extensive powers to deal with the reserves. They were empowered to exchange, sell or otherwise dispose of the lands, subject to the assent in writing of the governor, however no consent was required if the term of the lease did not exceed 21 years. The commissioners, with the consent of the governor, had power to set aside lands and administer these for special endowments for schools, hospitals and charitable purposes for the benefit of the aboriginal inhabitants. The consent of owners was required to place land under the Act. Ms Catherine J Nesus, a solicitor in the legal division of the Department of Maori Affairs, in a summary of legislation, had this to say about the 1856 Act:

There was little debate over the Bill when it passed through the Legislative Chamber and the House of Representatives. It was described as an instrument of practical good to the Native race and seen as a mechanism to ensure those reserves created by the New Zealand Company were used to the best advantage. (N36:8)

The effect of this Act was to vest land in the Crown once the owners' consent was obtained and a conveyance made. It is interesting to note in this legislation that, although the consent of owners was required to place land under the Act, there was no provision for Maori owners to take part in any matters relating to the control of the land, nor was there any provision for consultation once their land had been transferred.

Native Reserves Amendment Act 1862

14.2.3 The 1862 amendment to the Native Reserves Act 1856 abolished the position of commissioners created under the earlier Act and all the powers that they previously held. The administration of the reserves was put into the hands of the governor, who was given a power of delegation. One of the features of this Act was that it empowered the governor by order-in-council to declare that assent had been obtained from the owners, whereupon the land became vested in the Crown as if ceded or conveyed. The result was that management of the reserves passed from the local commissioners back to the Native Department.

Mawhera leases brought under 1856 Act

14.2.4 Consequent upon Alexander Mackay's investigations into the problems affecting the township leases, he reported:

that a number of persons had unadvisedly entered into arrangements with the Native owners for the occupation of the land adjacent to the river frontage, without being aware that such agreements were invalid. The agreements entered into were mostly for a short time, with a right of renewal, and as all the occupants had paid the full sum that had been demanded by the owners for the use of the land, it was considered advisable, in order to rectify any difficulties that might eventually occur if this state of affairs was allowed to continue, as well as to protect the interests of all concerned, to bring the reserve under the operation of "The Native Reserves Act, 1856". with the consent of the Native owners. (N7:30){FNREF|0-86472-060-2|14.2.4|2}

Mackay had this to say:

This proposition was willingly assented to by the Natives, as they foresaw the difficulties that were likely to ensue through the irregular occupation of their land, as well as their own incapacity to deal with the question. (N7:30){FNREF|0-86472-060-2|14.2.4|3}

The reserve was brought under the Native Reserves Act 1856 by order-in-council of the 3rd February 1866.{FNREF|0-86472-060-2|14.2.4|4} A system of leasing thereupon commenced.

At this point it should be mentioned that there were two schedules attached to the Arahura deed. Schedule A listed 39 blocks totalling 6724 acres which were set aside as "Lands Reserved for Individual Allotments", and schedule B listed seven blocks totalling 3,500 acres as "Lands Reserved for Religious, Social, and Moral Purposes". The whole of the lands in schedule B were brought under the 1856 Act but only seven

of the blocks in schedule A, including Mawhera 31 totalling 3498 acres, were similarly vested (D5:18).

It is clear from the reports of Professor Ward (T1:304-305) and the Crown researchers Messrs Armstrong and Walzl, (N6:8-24) that Alexander Mackay, who had been appointed commissioner and had day to day control of the reserves, managed those reserves in a conscientious way with the interests of the owners and lessees at heart. Mackay was undoubtedly interested in promoting the development of the town, deliberately setting low rentals to compensate lessees for the work incurred in creating commercial properties from unimproved land. In his 1873 report Mackay says:

The object in letting this land at what may be considered a low rate of rental, was to encourage settlement, and enable the occupants to reimburse themselves for the outlay expended on reclaiming land covered with a very heavy growth of timber, and on making permanent improvements, such as clearing and forming streets, etc. (N7:16){FNREF|0-86472-060-2|14.2.4|5}

Professor Ward had this to say of the position of Ngai Tahu during the 1860s and 1870s:

Poutini Ngai Tahu were comparatively well served during the 1860s and 1870s. They had come out of the initial purchase negotiations with the Crown with proportionally larger reserves than their east coast relatives and through an accident of geography, part of their land acquired considerable commercial value. (T1:305)

While Alexander Mackay managed their estate, Poutini Ngai Tahu had an administrator who was conscientious and with whom they had a long-standing personal relationship. A little further in his report Professor Ward referred to various actions of Mackay in administering the leases and said:

Poutini Ngai Tahu's regard for Mackay was such that in 1884 and 1885, following Mackay's removal from the post of Native Reserves commissioner they petitioned Parliament for his return. (T1:306-307)

At the same reference Professor Ward also said:

During the period 1865-82, Poutini Ngai Tahu may not have been permitted to manage their own land but it is not at all clear that they wished to do so. Under the trustee arrangements made with the Crown they were spared the landlessness which was the fate of other tribes who sold, or were forced to sell, land in the flurry of shady dealing which followed the passage of the 1865 Native Lands Act.

Professor Ward outlined how monies were outlayed from the rental income to help finance public works such as roads and flood protection works and said:

Apart from the question of what proportion of the income from the estate should be distributed to the beneficial owners, there was no evidence that Poutini were unhappy with the fact that the reserve at Mawhera was being leased to Europeans. However the European influx did alter their use of the area. As the European community became more dominant, that is, as Mawhera gave way to Greymouth, the town became less

congenial to Poutini Ngai Tahu. In 1869 the hapu, with the exception of Werita Tainui who stayed in Mawhera until his death, moved to Arahura. Following this shift the sections which had been set aside at Mawhera for Maori to live on were also leased. The area which Poutini Ngai Tahu had refused to abandon in 1860 because of its ancestral importance was becoming a European preserve. (T1:307)

Report of commissioner of native reserves, 1870

14.2.5 This report of Major Charles Heaphy describes fully the period of transition undergone by the Greymouth Maori on the arrival of the European. This section of the report was first published in the Report of the Commission of Inquiry into Maori Reserved Land in 1975:

Independently of the great value attaching to many of the Reserves from the discovery of gold deposits in their vicinity, the land is, from its position and fertility, of great worth. The Native estate is quite equal in value, town for town, and farm for farm, to the crown lands of the County.

In 1846, the Natives of the West Coast were about seventy in number, and, of all the tribes in New Zealand, had benefited least by the coming of Europeans to the country.

Ships had never frequented the coast, and the Dusky Bay sealers who, forty years ago, had occasionally pushed a boat through in the surf at the Teremakau or the Mawhera, had then long since disappeared. When Mr Brunner and myself walked from Nelson to Arahura, in 1846, we found the Natives at the latter place without either pigs or goats. Potatoes they had, but neither melons, cabbage, pumpkins or maize. Their clothing was the coarse Native koka, and the dog skin, and they were almost destitute of iron implements for cooking purposes, or for clearing the bush. Of boats or sea-going canoes they had none, and Dreading to be seen by the northern natives, they lived in the remote Arahura country, partly from the security it afforded, and partly to work the greenstone which was to be found in the river bed. But, poor as their condition was, they were hospitable almost to improvidence, towards their white visitors. Beyond seeking to obtain an iron pot or an axe in exchange for a meri pounamu, their life appeared to be without aim or purpose. They now derive a rental of nearly 4,000 a year from white tenants. They had weatherboarded cottages with chimneys and glass windows, and their children are educated in English schools.

It may be without the limits of a Report on Reserves to touch upon circumstances of this nature, but when it has been so often written in England that the Maori suffers materially and socially by contact with the settler, it is but proper, I think, to show that even in the midst of a gold digging community-proverbially rough, and not disposed to regard a dark skin with much sentiment-the Maori has improved in social condition, and is well cared for. (N7:4){FNREF|0-86472-060-2|14.2.5|6}

Lessees' grievances leading to a report of Commissioner Heaphy 5 June 1872

14.2.6 In their submission for the Crown, Messrs Armstrong and Walzl noted that a committee of leaseholders, in a letter of January 15 1872, had complained of heavy ground rent and stated that:

after the payment of insurance premiums, taxes, and ground rent, very little profit in the best instances, and no profit at all in most instances, is realized by the owner (of the lease). (N7:8){FNREF|0-86472-060-2|14.2.6|7}

About this time the leaseholders mounted pressure for the sale of the Mawhera reserves. They claimed there was a need to replace wooden buildings with brick and stone, not only to improve the town, but to prevent fire damage and reduce insurance premiums. Heaphy reported:

On all gold fields there is a great amount of social hurry, and the absence of a lasting tenure to land must tend to increase this. Nothing that could be done by the government would conduce more to the benefit of the Town of Greymouth than the judicious conversion of the existing leases into absolute conveyances. (N7:8){FNREF|0-86472-060-2|14.2.6|8}

The Ward report also confirmed the pressure to freehold:

Equally serious was the fact that the land also became vulnerable to pressure group politics. Under the 1856 Act decisions relating to the future of the reserves were in the hands of the Governor-in-Council. During the 1870s and 1880s, the Executive Council, that is, the government of the day, was subjected to intensive lobbying with regard to the Greymouth reserve. Many leaseholders wished to buy the Maori out, or alternatively for the government to buy out the Maori and resell the land to them at 'a fair valuation'.

The lessees' campaign reached a pitch in the early 1870s, died down a little until the end of the decade and then intensified again in response to changes in the administration of the reserves. During these years Poutini Ngai Tahu consistently opposed sale, emphasising the importance of the land to them for what were described by Mackay as 'the ground of sentiment'. (T1:308)

Heaphy reported on 5 June 1872 (N7:7-10).{FNREF|0-86472-060-2|14.2.6|9} His report indicated that, as at 1872, 181 acres had been laid off in town allotments, leaving a balance of 319 acres on a steep and densely wooded hill which was unsuitable for building purposes.

In his report Heaphy discussed in some detail the attitude of the owners to selling and rejected the leaseholders' contention that Maori owners were not justly entitled to the enjoyment of the increased value that had accrued to the property as a result of the settlement. The following is an extract from the report, which indicates the Maori owners' attitude:

The resident natives participating in the revenue derived from the reserve are adverse to the idea of a sale. Some who were present at the discussion of the subject had come from so far as Bruce Bay, and all appeared much interested.

Inia, their spokesman, said, In their minds it was fixed, the present order and system had only been arrived at after considerable time, and they did not want to see it changed.

In respect to longer leases being granted, he (Inia) said, The white people get a lease at a small rent from the commissioner, then they let it at a higher rent, then again at a higher to another, and so on. And how do we gain? If longer leases were granted the price might still be increasing, but not for us. (N7:9){FNREF|0-86472-060-2|14.2.6|10}

However Heaphy noted that:

Notwithstanding the opinion of the natives it might be judicious to sell portions of the reserve, from time to time, if a sufficient price were offered-one that would yield a permanent revenue equal to, or not much less, than the present rental. (N7:10){FNREF|0-86472-060-2|14.2.6|11}

There is a further very clear indication of Heaphy's attitude embodied in his recommendation:

That it is desirable that the land in the Reserve should be made available for purchase without any restrictions by the original lessees or their representatives, at a price that would yield at 7 per cent, a revenue not less than 5/6 of the present rental.{FNREF|0-86472-060-2|14.2.6|12}

It is interesting to note that in a report dated 14 June 1872 concerning the Arahura reserve, just nine days after the report on the Mawhera lands, Heaphy considered the Arahura settlers, in asking to be allowed to purchase the freeholds did not have as strong a case as the Greymouth tenants. He recommended against sale but thought that longer terms of lease might be granted.(N7:12){FNREF|0-86472-060-2|14.2.6|13}

These two reports of Heaphy are in contrast to each other, but seem to show Heaphy was in favour of freeholding in certain situations that would not expose the Maori owners to significant pecuniary disadvantage. However, it is also significant that he was prepared to recommend freeholding even when this was against the express wishes of the Maori owners. The Heaphy reports were presented to Parliament. The government's attitude was to refuse to agree to freehold land unless the full consent of the Maori owners was first obtained. The following is a report of a statement by Mr McLean in the House:

there had been no desire on the part of the government that any alienation should take place unless it was for the benefit of the Natives, and with their full concurrence. (D5:106){FNREF|0-86472-060-2|14.2.6|14}

Alexander Mackay's report of 30 July 1873

14.2.7 In his report Mackay expressed his firm view against the sale of the freehold and noted:

The disposition manifested by a few of the tenants about a year ago to acquire the fee simple of the land has evidently subsided, and another cause of disquietude has been circulated. (N7:15){FNREF|0-86472-060-2|14.2.7|15}

Mackay goes on to refer to a resolution passed by the Greymouth Borough Council to borrow œ7,000 by rating all property in the borough, in order to carry out certain improvements in the township. Apparently the borough council had expressed concern about the renewal of leases held by the trust and the right of the owners to ask a higher rental at the expiration of the leases (N7:15).{FNREF|0-86472-060-2|14.2.7|16} Mackay had for some years indicated to the tenants that they would get a renewal of their leases when the original leases expired. In his report he comments:

With regard to the renewal of the leases, no practical difficulty exists, and that fact must be generally known, as assurance has been given over and over again, although a right of renewal cannot be inserted in the leases, that the intention is to let the land in perpetuity for the benefit of the Natives, and that whoever is in possession at the expiration of any of the terms of the lease, provided the occupant would agree to pay an equitable rent for the premises in proportion to the increased value of the property, that an extension of lease would be granted him. (N7:15){FNREF|0-86472-060-2|14.2.7|17}

Mackay then goes on to make this significant statement:

This principle is based on an old established practice in England, where it is considered that those who are in possession of leases for lives or years, particularly from the Crown, have an interest beyond the subsisting term which is usually denominated 'the tenant's right of renewal.' This interest, although it is not a certain or contingent estate, there being no means to compel a renewal, yet it influences the price in sales and conduces to the security of the tenure beyond the fixed term.

One argument adduced in favour of the views held by the residents of Greymouth, is, that there could be no right of property in land that remained unsubdued to the purposes of man.

If this principle was maintained in regard to the right of property in land irrespective of to whom it might belong, it might possibly be admissible, but why it should be specially applied to the case of the Greymouth Reserve it is difficult to understand; and it may be argued, in opposition to this doctrine, that if the right of property go along with labour, how can the land of persons who have bestowed but little labour upon the soil, be usurped by civilized people from a distance, who have only laboured on it with the permission of its recognized owners.

The weakness and ignorance of the Native owners demand a more scrupulous fidelity from their civilized guardians, and any attempted infringement of their rights as British subjects, should be carefully guarded against.

Did the land belong to the same number of Europeans no allusion would have been made to such heterodox principles, nor would legislative intervention be continually sought to cure imaginary grievances. (N7:15){FNREF|0-86472-060-2|14.2.7|18}

Native Reserves Act 1873

14.2.8 In late 1873 an Act was passed which allowed for longer leases and more involvement by the Maori owners. Control of the reserves was reinstated to the local

district level by establishing district commissioners. Three local Maori assistant commissioners together with the commissioner formed the Board of Direction for the management of reserves in the district. Provided the board assented, the commissioner, under section 19 of the Act, could let land in any native reserve for building purposes, for any term of years not exceeding 60 years. Leases for other than building purposes continued to have the limit of 21 years imposed. In his report Professor Ward commented that Mackay was opposed to the Act because he felt it was unworkable. He objected to the commissioner being "so hampered with the restrictions that he cannot act without the consensus of the Board" (T1:313).{FNREF|0-86472-060-2|14.2.8|19}

Professor Ward commented that the provisions of this Act did not seem to have been brought into operation (T1:313).

Alexander Mackay's report of July 1877

14.2.9 In this memorandum Mackay again discloses the concern of Ngai Tahu at the move to have their land sold:

The principal cause of uneasiness that prevails among the Native owners is owing to the opinion expressed that the Governor would sell the land under the provisions of The Native Reserves Act, 1876, coupled with the efforts continually being made by the tenants to obtain the fee of the land. The feeling is also considerably augmented by injudicious statements, made by thoughtless individuals, that the government is disposed to sell the land-statements which the Natives, unfortunately, place full confidence in. The Governor, it is true, is empowered to dispose of property vested in him under the provisions of the Native Reserves Act, by absolute sale or otherwise; but the Act forbids the alienation of the land except for the benefit of the Natives interested, and, as it is not probable that adverse action would be taken against the expressed wishes of the owners, there is no real cause of apprehension that the sale of the Greymouth estate would have been sanctioned. Moreover, the Natives, if for no other reason, would oppose the alienation of the reserve on the ground of sentiment, even if the sale would actually secure to them in perpetuity an income far in excess of the amount they now receive.

The most equitable mode of procedure for all concerned would be to repeal the Act empowering the Governor to sell, and pass a fresh measure enabling leases to be issued for sixty years with the assent of the owners (where such assent was necessary), to persons who are desirous of improving the land by erecting a permanent class of buildings of brick and stone, as would be the case at Greymouth if the tenants were secured in possession. (N7:31){FNREF|0-86472-060-2|14.2.9|20}

Young commission report 1879

14.2.10 Despite Alexander Mackay's assurance to Ngai Tahu that their land would not be sold, they endeavoured to protect their position by applying for a Crown title to the land (N7:31){FNREF|0-86472-060-2|14.2.10|21} and in 1879 the Young commission was set up to establish ownership of the land preparatory to the issue of a title. In his report Thomas Young stated:

that the general wish of all the Native owners, who are the persons for whose benefit the lands were set apart, is that alienation by sale or by mortgage should be absolutely prevented. (N7:34){FNREF|0-86472-060-2|14.2.10|22}

This move by Ngai Tahu to seek a Crown grant of title prompted the citizens to take a deputation to the minister of mines who was on a visit to Greymouth in September 1879. The deputation had this to say:

What we ask for, therefore, is a diminution of rent and longer leases, with a right of continual renewal; but we freely admit that, whatever arrangement is made, it should be fair to the Natives as well as to ourselves, and, as this might be a matter very difficult to adjudicate, we would suggest that perhaps, upon the whole, it might be found most just and practical that the Crown should in the first place purchase from the Natives, at a reasonable price, and then resell or let the land to us at a fair valuation. (N7:28){FNREF|0-86472-060-2|14.2.10|23}

Again we see the pressure that is being applied for the freehold to be sold, in this instance to the Crown.

Alexander Mackay's report of 14 May 1881

14.2.11 In this report Mackay commented on the difficulties being experienced by the lessees, mainly due to economic depression caused by a downturn in goldmining and its effect on trade. Mackay emphasised the need for security of tenure and suggested new terms of leasing. He says:

For instance, a twenty-one years' lease should be granted for arable or pastoral purposes, and for building purposes a lease for twenty years, renewable for two further periods of twenty years, a reassessment of the rent to be made at each renewal; the tenant to have the right to call in the aid of a neutral authority to arbitrate in cases where a difference of opinion existed as to the fairness of the rent imposed. (N7:174){FNREF|0-86472-060-2|14.2.11|24}

Native Reserves Act 1882

14.2.12 A significant change in the management of reserves came with the passing of the 1882 Act. Management of the reserves was vested in the public trustee. Other changes also occurred. The definition of reserve was extended but more importantly the public trustee was empowered to lease reserves for 30 years for agricultural or mining purposes, and 63 years in 21-year terms for building purposes. Apparently this change of administration was not universally welcomed. Professor Ward said:

The public trustee, in contrast with the commissioner of Native Reserves, had little discretionary authority with regard to the management of the reserves. Lessees were later to complain about the legalistic approach of the Trustee and the fact that the centralisation of administration frequently made it necessary to refer matters to Wellington creating extra expense and delays. (T1:315)

The Act set up a system of disposing of leases by way of public tender or auction with the rent reserved to be the best improved rent obtainable at the time. Previously, the

tenants in possession were considered to have the right of a new lease over strangers. This was not the position under the new Act. It thus became obvious to the tenants that they not only risked being outbid for their lease and losing it, but also losing the improvements that they had made to the property. It would seem therefore that neither the tenants nor the Maori owners were satisfied with the statutory provisions.

This Act brought about another important change. Under section 8 title to the reserves was vested away from the Crown to the public trustee.

South Island Native Reserves Act 1883

14.2.13 This Act made provision for compensation for improvements. Section 4 of the Act provided that control and management of the reserve should remain with the Public Trustee. Under this Act the leases of the Greymouth reserve were confined to a term of 21 years, whereas leases in respect of other reserves were to be 30 years or 63 years as the case might be. The effect of the 1883 legislation was to ensure that the value of improvements would be paid to tenants on the expiry of their then leases. However there was still opposition from the lessees, who said that the provision to allow the leases to be competed for by tender would prejudice their interest. We shall return a little later to discuss this 1883 legislation in order to see the reaction of Ngai Tahu owners.

In 1884 the west coast Members of Parliament endeavoured to get legislation passed which would give the existing lessees a right of renewal, and petitions were also lodged in the House seeking confirmation of rights of renewal. This activity and the general complaints of the lessees led to the Kenrick commission.

Report of the 1885 Royal commission

14.2.14 On 14 July 1885, Henry Kenrick, Gerhard Mueller, and James Catley were appointed commissioners to inquire into and investigate the condition of settlers on Maori reserves on the west coast of the South Island. The commission found that the lessees suffered serious damage to their interests as a result of the legislative enactments of 1882 and 1883. The commission made it clear also that it accepted the statements of the tenants that they counted upon Commissioner Mackay's assurances of a renewal of their leases. The commission examined the possibility of freeholding the land but noted that the owners unanimously and strongly protested against any such alienation and considered that:

leases for sixty-three years given at a fair rental, with a compensation clause for improvements, most, if not all, of the benefits expected to be derived from the sale of the land would accrue to the tenants under this improved tenure. The Native grantees favour this course. (N7:186){FNREF|0-86472-060-2|14.2.14|25}

Attached to the report was Alexander Mackay's translation of a letter addressed by Maori with interests in Greymouth and other Maori reserves to the native minister. It stated their opposition to the sale of these lands, and their willingness to grant long leases. The following is the text of that letter:

The Native Minister, Mr Ballance. Arahura, October, 1885

We, the persons whose names are hereto appended, desire to place this letter before you and the government in case good may be derived from it for both parties, through the continual crying of the persons occupying the reserves. The government have appointed a commission to inquire whether the reserves can be sold.

We, the owners of the land, earnestly state that we will not sanction the sale, but are willing to consider what else can be done to improve matters for the benefit of both Maori and pakeha.

We therefore propose that the original leases should be renewed for sixty-three years and when that term is ended a further renewal of sixty-three years be granted.

It is provided by subsection (2) of section 15 of the Act of 1882 that leases be issued for a period not exceeding sixty-three years, to encourage the erection of houses on the land: let this period be enlarged.

A grant has been issued under the Act of 1883 to prevent the sale of the land.

We believe that the plan we suggest-ie, the lengthening the terms of lease, is one that will best conserve the interests of all concerned.

That is all from your friends.

Ihaia Tainui, Kinehe te Kaoho, Hoani Tainui, Moroati Pakapaka, Inia Tuhuru, Henare Meihana, Teoti Tauwhare (N7:189){FNREF|0-86472-060-2|14.2.14|26}

14.2.15 For reasons that will become apparent later in this report we think it desirable also to set out the full text of three letters presented to the Kenrick commission at Hokitika during the course of its inquiry.

Inia Tuhuru told the commission:

I am one of the owners of the Greymouth Reserve and have also an interest in the Arahura Reserve. We object to the alienation of the freehold: we could not agree to it though the revenue derived from the purchase money were equivalent to the rent we are now receiving. We shall be agreeable to the extension of the existing leases. The tenants should have the first right of renewals before putting the leases to public competition: if they do not accept, then strangers should be admissible. If a lease goes to public competition and a stranger gets it, we feel the improvements belong to the tenant but are not prepared to say whether the incoming should pay the outgoing tenant for them. We think that while the tenant pays his rent, as fairly assessed, ALL LAND NOT REQUIRED FOR OUR OWN USE SHOULD BE LEASED IN PERPETUITY.

WE SEND A COPY OF A LETTER TO THE NATIVE MINISTER RELATIVE TO THE FUTURE DEALINGS WITH OUR LANDS. (N7:322){FNREF|0-86472-060-2|14.2.15|27} (emphasis added)

Teoti Tauwhare also gave evidence:

I appear on behalf of my wife. We don't agree to alienate our freehold but will extend the leaseholds to 63 years on the Greymouth Reserve. We are willing at the end of the first 63 years to grant another lease of 63 years: IN FACT WE WISH THE LEASING SYSTEM PERPETUATED. Leases for agricultural and other purposes should be for a shorter period but, in regard to them also, we wish the same principle carried out. (N7:323).{FNREF|0-86472-060-2|14.2.15|28} (emphasis added)

Henare Meihana spoke briefly:

I have heard what the other witnesses who preceded me have stated and I agree entirely with what they have said, and also with the tenor of the letter we are forwarding to the Native Minister. (N7:324){FNREF|0-86472-060-2|14.2.15|29}

The Kenrick commission recommended that a special reserves commissioner be appointed with power, subject to the direction of the Public Trustee to:

- negotiate a final settlement of all conflicting interests of lessees or sublessees on the Greymouth lands; and

- appoint one or more valuers to assess the improvements effected by lessees or sublessees on their respective holdings.

The special commissioner so appointed was to be given power to decide who was entitled to a renewed lease in fulfilment of the promise or agreements reported by the Royal commissioners to have been entered into by Commissioner Mackay.{FNREF|0-86472-060-2|14.2.15|30}

Bunny report

14.2.16 Henry Bunny was subsequently appointed as a special commissioner and reported to the Public Trustee on May 29 1886 (N7:191-192).

Bunny reported that he had interviewed about 80 lessees and sublessees. On the question of acquiring the freehold, Bunny had this to say:

It may be, however, that the government might itself be able to acquire the freehold from the Native owners, and, by placing the reserve under local control, give the persons interested some voice in deciding the future management of the estate. This seems upon the whole the best course, if feasible.

When I visited the Arahura Reserve I saw some of the Native owners, and had a long conversation with them as regards selling their interests in the Greymouth Reserve, but I have found the strongest objection on their part to disposing of them. I did not fail to point out that, if they sold, the interest on the purchase-money would far exceed the amount of the rentals now received. They appeared to be entirely indifferent to the amount of rentals or interest, so long as they retained the ownership of the land. They expressed themselves perfectly willing that leases for sixty-three years should be granted, with a right of renewal for another sixty-three years. (N7:192){FNREF|0-86472-060-2|14.2.16|31}

We shall come back a little later to this portion of the Bunny report.

Westland and Nelson Natives Reserves Act 1887

14.2.17 There is no doubt that the Kenrick commission report and the Bunny report led to the passing of this Act in 1887. Although the Act did not put into effect directly the recommendations of either the Kenrick commission or the Bunny report, the need to address the grievances of the tenants forced the introduction of the new law. The Act repealed the South Island Native Reserves Act 1883 and largely focused on the terms of reserved land leases. In place of the old 30-year and 63-year terms a new term was substituted which was standardised at 21 years. In all leases a perpetual right of renewal was granted to the lessee. This perpetual lease fixed the rights of the parties in the original contract and gave the lessee perpetual rights of use of the land. The rent was reviewed at the end of every 21-year term. Effectively the land was removed from the control, use, or occupancy of the Maori owners. Provisions were inserted in the Act for arbitration of any questions relating to the valuation of improvements. In respect of the Arahura and Motueka reserves where buildings had been erected or the land improved, the trustee was obliged to offer a new lease to those who were in occupation and only then, if the offer was refused, were the leases to be put up for sale.

The new law continued the administration by the Public Trustee. Professor Ward gave a very useful summary of the passage of the Act:

The legislative history of this Act is rather complicated. It began in May 1887 as the South Island Native Reserves Bill. The Bill was introduced in the House of Representatives by the Premier, Sir Julius Vogel, on 17 May. On 8 June it received its second reading and was considered in Committee on the 9th. The Bill was reported on the same day and read for a third time. It then went to the Legislative Council where it lapsed because an election was called. A similar measure titled this time the Westland and Nelson Native Reserves Bill was introduced in the new Parliament in November 1887. The Bill was read in the House for a first time on the 9th of November. No further action appears to have been taken until the pre-Christmas legislative rush had started. The Bill was read for a second time, committed, reported on, the report considered and the third reading given all on the 20th of December. During this week the House was sitting after midnight every night, including a marathon effort to 2.50am on the 20th. On the 21st the Bill was amended by the Legislative Council and the amendments approved by the House. The Bill was amended again by the Governor on the 22nd, and the amendment agreed to by the House and the Legislative Council. It then became law. (T1:322)

This then was the legislation which introduced the perpetual lease with its 21-year terms of renewal, and with review of rent at the expiration of each 21 years.

We will shortly be looking at the debate in Parliament on the passage of the Bill and in particular the reactions of the Maori Members of Parliament and Legislative Council.

In addition to the rights of perpetual renewal and 21-year rental review, the Act also contained provisions for the valuation of improvements and the fixing of rentals. The Ward report stated that:

In practice this arrangement does not seem to have resulted in fair rents being set. Because such a high proportion of the Greymouth community were leaseholders it was difficult to get real competition for the leases. Lessees were effectively enabled to set their own rent. (T1:326-327)

The 1909 petition and the Poynton report

14.2.18 In 1909 Felix Campbell and 476 other residents of Greymouth petitioned Parliament over the Greymouth reserves. They complained of having to pay heavy ground rent and as well having to meet capital improvements. The lessees again demanded to acquire the freehold of the sections and proposed that steps be taken to buy out Maori owners at a fair valuation. During examination by a committee of the House, Mr Joseph William Poynton, Public Trustee, produced a brief history of the reserve which strongly criticised the lessees' complaints. His report tabled a schedule of the annual amounts collected from the Greymouth rents from 1874 to 1909, a period of 36 years. This table showed that the tenants were paying no more in 1909 than they had in 1874. Poynton said:

The concessions from time to time given to the lessees in allowing them their improvements, security of tenure, and an equal voice in fixing the rents, though of enormous benefit to the receivers, have brought no corresponding advantage to the givers.

The Natives particularly desire me to impress upon the members of the Committee that this Reserve differs from most others in the Dominion. Many of these were set apart by the Crown out of lands purchased from the owners. But this was never parted with at all. (N7:207){FNREF|0-86472-060-2|14.2.18|23}

Following the examination by the Public Trustee, four of the Maori owners gave evidence to the committee. They were Piripi Tauwhare, John Tainui, John Uru and Tu Meihana. These were the same persons who signed a letter on behalf of the owners of the Greymouth reserves objecting to the statements made by the Mayor of Greymouth to Apirana Ngata who was then Member for Eastern Maori.

The letter signed by these four owners was produced to the tribunal in evidence. In their letter the four Maori owners said this about the leases granted under the 1887 Act:

the leases are exceptionally fair, and could not be bettered without injustice to the owners. The tenants own absolutely all improvements, and their leases are perpetual, with an adjustment of ground-rent every twenty-one years, which is a reasonable term. (N40:70){FNREF|0-86472-060-2|14.2.18|33}

The letter went on to say:

The Greymouth lessees have nothing to complain about. The only thing they lack is an appreciation of the advantages they enjoy. The naive admission in the circular, The Lessees wish to acquire the freehold of their sections, and propose that steps should be taken to buy out the Native owners, at a fair valuation, explains everything.

In considering this demand these facts should be borne in mind:

a) To give the tenants the right to convert their leases into freehold would be a violation of the promise to the Native owners, given that this Reserve would be for them and their descendants for ever.

b) The Reserve is not in the same position as Crown lands leased to tenants. The Crown and the tenants only are concerned in that case, and the contract can be varied when both parties are agreed by allowing the tenant to acquire the freehold instead of continuing to hold the lease. In this case third parties, the Native owners, are concerned, and no alteration should be made without the consent of a majority of them. At present they are unanimously opposed to giving the freehold, but on further consideration may be disposed to consider the proposal favourably. (N40:71){FNREF|0-86472-060-2|14.2.18|34}

This was a plea from those four owners, on behalf of the wider group, that the small remnant of land which they still held should be specially excluded from sale to the Crown. We make the observation that this letter, written ostensibly by those four owners, appears to this tribunal to have been actually written by the Public Trustee himself. We shall be examining this correspondence along with other evidence shortly, when we are considering the submissions by the Crown and by Dr Young on behalf of the West Coast (South Island) Maori Leaseholders Association.

1913 commission of inquiry into the Public Trust Office

14.2.19 A commission was set up in 1913 to look at the work of the Public Trust Office in relation to Maori reserved lands. The commission consisted of Alexander Macintosh and John Henry Hosking. The commission was asked to consider whether Maori affairs were being carefully and satisfactorily managed and whether this business, managed by the Public Trustee, should be separated from the Public Trust Office and managed instead by a board or trustee especially appointed for the purpose (N37:285).{FNREF|0-86472-060-2|14.2.19|35}

The commissioners expressed their opinion that all Maori reserves and their administration should be vested in an independent body and suggested the setting up of a Native Reserves Trustee.

This report led to the introduction of legislation for the appointment of the Native Trustee. A Bill was prepared in 1914 but the war intervened. Six years later the Native Trustee Act 1920 established the Office of the Native Trustee as a corporation sole with perpetual succession and a seal of office.

All Maori reserves that had been vested in the Public Trustee were vested in the Native Trustee who also inherited the former's powers, duties, and functions.

The Maori Reserved Land Act 1955

14.2.20 This Act was an attempt to create a common code in respect of Maori reserves by incorporating the provisions of 43 statutes into one piece of legislation. It was also directed to stopping further fragmentation of the interests of beneficial owners in reserve lands and standardising those leases held by lessees of this land (N36:78).

In her excellent submission to the tribunal backgrounding all of the legislation and reports affecting the Maori Trustee, counsel Ms Nesus referred to the 1955 Act, stating that fragmentation of interests were perceived to be the greatest obstacle to the administration of reserved land (N36:78-79). While the smallest of these interests did not affect the leasing of the land, the Minister of Maori Affairs of that time, Mr Corbett, was reported in Hansard as saying:

it has made a very onerous task for the administration, and one which, because of Audit, has to be carried out with the greatest care and accuracy. (N36:79){FNREF|0-86472-060-2|14.2.20|36}

Part II of the Act was intended to deal with this problem. Hansard provides an insight into the thinking of government at that time:

Many of these minor amounts are so small that they are not worth collecting. Another factor is that the original beneficiaries were small in number and in a confined area. Over the years such tribes as the Taranaki and Ngaitahu, which hold reserves, have spread out over New Zealand, and their members have gone into the cities and taken up other interests. They have practically no knowledge of their Maori Land interests and they just do not care. (above){FNREF|0-86472-060-2|14.2.20|37}

This part of the Act provided that uneconomic interests in the reserves could be vested in the Maori Trustee by the Maori Land Court. An uneconomic interest in reserved land meant a beneficial freehold, the value of which did not exceed œ25, ascertained in a manner prescribed by this legislation. These interests would be paid for out of the conversion fund established under the Maori Affairs Act. There was no obligation to pay for those interests which were less than five shillings.

We therefore see the introduction of a form of compulsory acquisition of Maori interests through this statutory provision relating to uneconomic interests.

In Part II of the Act power was given to the Maori Trustee to convert term leases to leases with a right of renewal in perpetuity. We thus have the position, after a period of almost 70 years, of all leases being made to conform with those which were created in Westland under the 1887 Act. Another important provision was the introduction of a prescribed rental of 4 per cent of the unimproved value of the land for any substituted or renewed lease of urban land, and 5 per cent in the case of rural land. This provision, under section 34 of the Act, therefore introduced a new contractual term between the Maori beneficial owners and the lessees, by which rentals were fixed by statute.

Section 9 of the Act specified that the Maori Trustee could not sell reserved land although there was an exception in the case of land which could not be profitably used in the interest of the beneficiaries when the land could be sold or gifted with the consent of the Minister of Maori Affairs. In neither situation was the consent of the owners required. We received no evidence or submissions from the claimants, or the Crown or from any other body concerning the attitude of the Maori owners to the provisions of the 1955 Act.

Maori Affairs Amendment Act 1967

14.2.21 Sections 155 and 156 of the 1967 amendment introduced two new sections, 9A and 9B, into the Maori Reserved Land Act 1955. Under section 9A the Maori Trustee was enabled to sell settlement or township land or any land in a prescribed renewable lease to lessees where the lessees desired to acquire the freehold of the land. They were required to give notice to the trustee together with details of the purchase price determined by special valuation. The trustee had the authority to act in his absolute discretion to determine whether a particular sale was impractical or inexpedient. Again, section 9B set up a situation where the Maori Trustee in his absolute discretion could sell to lessees the land leased to them instead of granting prescribed leases. These 1967 amendments were heavily criticised by the Commission of Inquiry into Maori Reserved Lands which said that, "A total of nearly 18,000 acres has been disposed of and obviously the areas sold would be the choicest sections" (D1:51).{FNREF|0-86472-060-2|14.2.21|38}

A table attached to the commission's report at page 52 showed that 35 sections had been sold at Greymouth since the 1967 amendment. The commission recommended that the legislative provisions allowing the sale to lessees of the freehold of Maori reserved land be repealed, and this was later given effect to in the Maori Purposes Act 1975.

The report of the Commission of Inquiry into Maori Reserved Land

14.2.22 This commission of inquiry was established in 1973 to inquire into and report upon seven terms of reference but in particular, and in relation to our inquiry, into:

(d) Whether the provisions of existing leases of the land as to rights of renewal, and as to the frequency of the review of rentals and the methods of reassessment of rentals are satisfactory. (D1:6){FNREF|0-86472-060-2|14.2.22|39}

The commission reported in 1975, making 66 recommendations. Many of these have been given effect to by government, but there has been no implementation of those recommendations relating to perpetually renewable leases, fixed rentals, and rent reviews.

The commission stated that:

Many submissions were made which were critical of the perpetual nature of the leases prescribed under the Maori Reserved Land Act 1955. The general feeling informing this criticism appeared to be that these lands are forever removed from the control, use, or occupancy of the beneficial owners. For some beneficial owners this destroyed

any concept of the lands being regarded as ancestral lands. Indeed, should the owners walk thereon they would in fact be trespassers.

Many witnesses had no idea where the lands in which they held an interest were situated. The impression was left with the commission that this was one of the contributing reasons to the willingness of so many of the beneficiaries to sell their interests in these lands. (D1:62){FNREF|0-86472-060-2|14.2.22|40}

The commission had this to say about the perpetually renewable leases:

a) It must be said that the aims of our forbears in granting perpetually renewable leases were entirely good. It was to give to the lessees such security of tenure that there would be no hesitation to improve the land to a maximal degree. The lessee did this knowing that he had unassailable rights of occupancy for himself and his descendants, and if possible, it made even more secure the ownership and enjoyment of his improvements.

b) This applied with special force to those improvements such as clearing and draining land which appear in time to merge in the land itself. In the rural lands it is even doubtful if less secure tenure would have encouraged the development of virgin lands at all. There is no doubt, however, that a terminating lease for a long term of years offers adequate security for the maximal development possible of urban lands and the commission received convincing evidence on this point both in Auckland and in Wellington.

c) Perpetually renewable leases may possibly be appropriate for the Crown or a Municipal corporation to grant because these are immortal legal entities and the revenues received are a very minor part of their total income. This however, is by no means true of the Maori beneficial owners of reserved land who endure the uncertainties of human life and whose revenues are derived in the main from the labour of their hands.

d) To secure the maximal use and development of lands, even rural lands, the security offered by the perpetual right of renewal is by no means necessary. It gives a degree of security curiously incongruous with our mortality and one that endures not only through the lessee's life but the lifetime of his descendants from generation to generation. While extending certain advantages to children yet unborn it imposes serious disadvantages on the living, namely the Maori beneficial owners whom the Maori Trustee represents. (D1:64){FNREF|0-86472-060-2|14.2.22|41}

The commission reviewed the situation as it applied to perpetually renewable leases in the United Kingdom, and reported that this type of tenure was abolished in that country by the Law of Property Act 1922. The English statute abolished copyhold and a whole cluster of mediaeval tenures. It also abolished leaseholds for life and perpetually renewable leases. It is interesting that the 1975 commission, although it was heavily critical of the provision for perpetually renewable leases and of the unfairness of their operation on the Maori owners, in fact did not give a clear recommendation that the perpetual lease should be broken. The commission clearly felt that the right of sale of land should be repealed, but did not recommend statutory change to the perpetual term. Instead, the commission recommended procedures to

review rent at periods of not less than five years, to provide for indexation of rentals, and also for rents to be fixed at a basic rent of 1 per cent above that for government stock (D1:124-125){FNREF|0-86472-060-2|14.2.22|42}. To be fair to the commission, it did recommend that in all new leases of Maori reserved land the term be fixed relative to the span of human life, or to the economic life of the improvements on the land, and that no new leases containing a perpetual right of renewal be granted. This, of course, would not affect any of those leases currently in existence.

We shall refer later to the work of the 1975 commission.

Formation of Mawhera Incorporation

14.2.23 The Mawhera Incorporation was created by The Mawhera Incorporation Order 1976 following the 1975 commission's recommendation and administers just over 900 leases of its land. These leases are subject to the provisions of the Reserved Lands Act 1955.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.3 Claimants' Grievances

14.3. Claimants' Grievances

Preliminary statement of grievances

14.3.1 The first statement of Ngai Tahu's grievances in respect of their leased lands were contained in their amended claim of 2 June 1987. They stated that the Crown:

(e) Without the consent of its Ngai Tahu owners has converted freehold land into leases in perpetuity and fixed unrealistically low rentals for their leased lands.

(f) Without the consent of its Ngai Tahu owners has fixed unrealistically low rentals for their leased lands.

(g) Without the consent of its Ngai Tahu owners has fixed unrealistically long rests between rent reviews in respect of their leased lands. (appendix 3.4)

Further statement of grievances

14.3.2 In their amended claim of 5 September 1987 the claimants filed this further statement of their grievances:

It is the applicant's position that the Crown acted in a manner contrary to the spirit and intent of the Treaty of Waitangi in unilaterally imposing the form of leasehold now known as Maori Reserved Land Leasehold on the lands reserved from the Arahura Purchase of 1860 against the clearly expressed wishes of the Poutini Ngai Tahu owners.

The applicant further contends that the above form of leasehold has severely disadvantaged the Poutini Ngai Tahu owners since that time and continues to do so in that they are deprived and have been deprived of the ordinary benefit of those lands, they are effectively prevented forever from enjoying the ordinary use and benefit of those lands and that they have not been able to enjoy the ordinary rights of ownership. (appendix 3.5)

Supplementary statement of grievances

14.3.3 The following specific allegations in relation to this matter appear in the claimants' summary of grievances filed on 17 August 1989, and are taken from the list of grievances arising out of the Arahura Crown purchase:

(7) The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.

(11) The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Inquiry into Maori Reserve Lands, 1973.[referred to in this report as the 1975 commission] (W6)

Summary of Ngai Tahu position

14.3.4 In essence Ngai Tahu were saying that the legislative action of the Crown in 1887 and 1955, in passing laws that imposed on them perpetual leases with 21-year reviews, and prescribed rentals of 5 per cent for rural land and 4 per cent for urban land, was done without Ngai Tahu consent. They further claimed that although some remedial action was recommended in the 1975 commission report, government has taken no action to change the law.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.4 Ngai Tahu Evidence

14.4. Ngai Tahu Evidence

Views of Kaumatua

14.4.1 Strong feelings were expressed to us by several of the claimant witnesses. Andrew Maika Mason, deputy chairperson of Mawhera Incorporation which now administers the leases, had this to say:

By the time the miners came, control of Mawhera had passed into the hands of the Crown which had it leased to the Pakeha settlers and miners, and our people were therefore driven off it

Wherever our people went they could not go farming, their land was in the hands of the Crown which had leased it out to the Pakeha. Put shortly, they could not live in their spiritual and cultural centre, Greymouth, because there land had been effectively removed from their control. As a consequence they could not grow with the town's economy and neither could they farm in order to supply the town. They were reduced to subsistence living.

The Maori Reserved Land Act is a very sore point with our people. When the Incorporation took over from the Maori Trustee, it was found that the original 500 acre Mawhera Reserve had been reduced to approximately 350 acres. The public trustee and the Maori Trustee had sold 150 acres. In theory we own 350 acres but in practice that ownership does not give us control because the land has all been leased in perpetuity. Further, we cannot even negotiate realistic rentals for the land because the rents are controlled by the Act. It is a sore point that in spite of the recommendation of the commission on Maori Reserved Land that something should be done about the leases and the rentals, nothing has been done in the 13 years since it reported its findings.

The result of all the things which I have described is that our people have not been able to develop any capital base. Economically they have fallen behind the Pakeha and are largely trapped in the labouring class. They have been effectively deprived of their own land and, because of the way that land has been leased, they have not been able to borrow against it and so could not raise the capital needed to develop an economic base.

The effects of this lack of access to capital do not stop with the loss of opportunity to go into farming or other businesses. Possibly the worst effect is that because of the inability to go into business, our people have been denied the chance to acquire business acumen

Another result of what I have described is the loss of our language and culture. Deprived of their land base, our people were also deprived of the chance to develop as a strong cohesive group built around its ancestral land

... I blame the Crown which enacted those laws and, when it did so, took no account of the partnership created by the Treaty of Waitangi. That partnership created an obligation for each party to consult the other before taking any action that might affect the other. The Crown did not require the administrators of our land to consult us so they did not do so. Had they consulted us, they would have been told that we did not agree to our land being leased in perpetuity or to any of it being sold. (D4:7-13)

14.4.2 In a very well prepared submission James Mason Russell said:

Throughout the history of Maori Reserved Land legislators have put pen to paper and broken the sanctity of contract regarding Maori leases, for the benefit of the lessees.

The lessees were given the perpetual right of renewal because of the Kenrick commission as perpetual right of renewal was introduced two years later in the 1887 Act. Legislators listened to the voice of the lessee but did not listen to the voice of the Maori when the Maori was agreeable to a 126 year lease that would have been beneficial to the lessees. Legislators broke the existing contract when they gave the lessee the perpetual right of renewal in 1887. That was not observing the sanctity of contract. The perpetual right of renewal came about as a result of pressure from lessees. It was a stipulation which came into the contract that one side never asked for.

My tupuna that agreed to a 126 year lease should have been listened to, to a more degree than they were. A grave injustice was done to our tupuna. (D17:26)

Effect on Mawhera income

14.4.3 Mr S B Ashton, a chartered accountant of Christchurch and secretary of the Ngai Tahu Maori Trust Board, also gave evidence (D4:19-21). Mr Ashton was critical of the action of the Crown and confirmed that from the total rental income received in 1987 the gross return on the value of the land was 1.95 per cent and the net return was 0.58 per cent. Mr Ashton considered that a realistic gross return on an investment of 9 million dollars should not be less than 10 per cent, that is, nearly $900,000.

Views of the chairperson of Mawhera Incorporation

14.4.4 Mr Tipene O'Regan, chairperson of the Ngai Tahu Maori Trust Board and chairperson of the Mawhera Incorporation, submitted that perpetually renewable leasehold was a form of freehold which in effect meant that the owners could never again enjoy the ordinary rights of ownership.

They cannot walk on the land, they are entirely separated from its control or management. (D18:3)

Mr O'Regan went on to say:

It is our view that the unilateral imposition of perpetual leasehold combined with Crown Trusteeship is in some respects worse than the direct confiscation of land suffered by some tribes. Confiscation would, perhaps, have been more honest. It would have offered a clear cut cause for compensation and a more obvious injustice to touch the conscience of the Pakeha power culture. Instead that culture, as represented by the Borough and citizens of Greymouth, has had the benefits of confiscation for over a century without any such compensation. It has been confiscation on the cheap and by stealth.

This form of dispossession of the Maori owners has conveyed wealth and power to the lessees and the culture they represent for more than a century whilst we have remained the nominal owners of the land-theoretically we have not been dispossessed, theoretically we are still the owners. However, the majority of Kati Waewae have been forced to leave the Poutini coast and find work and sustenance in Christchurch and elsewhere. We have not even been able to farm the fertile soils of our own Arahura valley or the other lands in the region of which we have remained the nominal owners. Even though the Trusteeship ended in 1976 the lands are still imprisoned in the perpetual leasehold and the Maori owners still forced to live at a distance from their heritage. (D18:5)

Describing the effect on the claimants, Mr O'Regan said:

We have, in the course of establishing a viable economic future for our mokopuna, purchased the freehold of certain of our lands, both urban and farmland in the Arahura. In order to stand again on the lands reserved from the Poutini Purchase we have had to pay the full freehold price of our own lands in order to recover them. This has involved heavy economic and mortgage burdens and our capacity to do this has reached the limits of financial prudence already. This is a continuing injustice and the recovery offers little joy tinged as it is with the sense of resentment that it is the only avenue open to us to regain our mana under the present law. (D18:8)

Mr O'Regan gave a number of examples of how the fixed percentage rentals denied either party the capacity to exercise flexibility in the application of the leasehold rent, and how this operated unfairly against the claimants. He said:

The fixed rental provision prevents us dealing in the ordinary way of business with our lessees. Rent is never able to be a negotiable factor in our business relationships. In the case of commercial leasehold this is clearly inequitable. There is no reason in equity and justice why Maori Land should not be able to be managed and negotiated on in the same way as is freely available to other business activity. It is clearly discriminatory. If other lessors in business in Aotearoa can freely negotiate rental and other provisions then Maori should also be able to. (D18:10)

Mr O'Regan was severely critical of the actions of the Crown trustees, namely the commissioners, the Native Land Boards, the Public Trustee and most lately the Maori Trustee. He condemned the lack of action of the statutory trustees in consulting with the owners and in failing to invest in or develop the lands of the Mawhera owners:

As a result of this neglect on the part of the Crown's trustee agents the owners have suffered loss of value in their lands in real terms and they have been faced

subsequently with heavy costs and real difficulty in bringing order and a measure of modest profitability to the administration of their lands.

Insofar as the trusteeship has been accountable only to the Crown, established by the Crown and paid by the Crown, the acts of the trustees must be considered as acts of the Crown. It is our contention therefore that the neglect or omissions referred to above ... are acts of the Crown contrary to the spirit and intent of the Treaty. (D18:18)

We shall look a little later at the position of the Maori Trustee, in particular in relation to the administration of the perpetual leases and criticism of the trustee's administration.

Lease terms outdated and ineffective

14.4.5 Another criticism of the perpetual lease system was raised in the submission of the Wakatu Incorporation, which said in effect that, because the leases were subject to perpetual rights of renewal, the lease document itself provided that the lessee was entitled to a renewal on the same terms and conditions as the current lease. Wakatu said this resulted in the continual use of lease documents that were drawn up at the turn of the century, and because of this there were a number of significant omissions in the lease. For example, the lease documents fail to provide penalty for late payment of instalments and consequent delays in the recovery of rent. The leases do not provide for payment of any rental between the date of expiry of the lease and the determination of any arbitration on the rent. Owners were further affected by the continual use of the concept of unimproved value of the land as the basis for the determination of the rental (N11:6-7).

Reduced rental return

14.4.6 Obviously the most significant effect that the perpetual leases have had is in the reduced rental to the Maori owners. The claimants called Mr M R Hanna of Wellington, a registered valuer. The tribunal had placed before it, both in Mr Hanna's evidence and also in the evidence of another valuer, Mr T I Marks, called by the West Coast (South Island) Leaseholders Association, a series of tables showing the percentage interest rate return on 21-year perpetually renewable leases from various parts of the country. Mr Hanna indicated that:

the Greymouth Harbour Board is reported recently to have adopted a policy whereby rentals for the lease of its industrial land on 21-year Glasgow leases with seven year reviews will be charged at the rate of 10% upon the land value. (Q14:5)

Mr Hanna went on to say that, were the incorporation's leasehold land in Greymouth freed of the controls imposed by the Maori Reserved Land Act:

one could expect that leasehold yields throughout the Borough would move to match those ruling for similar tenure through the rest of the country. (Q14:6)

We shall look at Mr Marks' evidence when we are addressing the response of the lessees to this claim, as at this point we are largely looking at the effects of the grievance as alleged by the claimants. Mr Hanna gave consideration to the broad

question of what rentals the Mawhera Maori owners could expect to have received if their perpetual leases had been subject to rentals at current market rates from time to time, and reviewed on the basis of 7 rather than 21 years. Mr Hanna set out the methodology of his calculations, but we do not propose at this point to examine this evidence in detail.

Loss of rental measured by valuer

14.4.7 Mr Hanna calculated that the minimum loss to the Mawhera Incorporation may have been about $750,000 for rent reviews calculated on 21-year renewals at market rate, and $2,250,000 if the rental had been fixed at market rate at seven yearly reviews.

Mr Hanna agreed with Mr Marks, however, that a change from perpetual leasehold tenure to a lesser term, such as 42 years, would result in a redistribution of the interests in the land to the lessees' disadvantage. This disadvantage would be further compounded by shortening the period of review from 21 years to 7 years and by freeing the interest rate or yield up to market rates. Both valuers agreed that the lessees could expect to pay more rent, have their rent reviewed more regularly, have the length of their tenure severely limited, and suffer any penalty which would result from the new tenure, such as increased difficulty in negotiating mortgage finance on their interest or improvements. Mr Hanna believed that in calculating the monetary disadvantage to the Mawhera owners resulting from the imposition of 4 per cent and 5 per cent rental rates for a 21-year perpetually renewable lease, the year 1960 would be an appropriate date for commencement. Mr Hanna based this view on the grounds:

that prior to that time the general inflationary pressures in the economy at large were not sufficiently strong for the leasehold provisions of the Act to be a serious penalty to the owners. It appears that this view is shared by Mr Marks. (Q14:9)

Summary of effects

14.4.8 There can be no doubt that the combined result of the perpetual lease with its 21-year review and its fixed rental rates has, since the 1960s, imposed a monetary disadvantage on the claimants. We will return to this question later.

As will be seen from the above summary the claimants submitted that there has been serious economic loss to the Mawhera owners and indeed to all those owners who have been affected by the perpetual lease provision. The effect of the Crown's actions, in the view of the claimants, has been widespread and has resulted in not only the loss of control of their lands but in other consequential effects on Maori people. We propose now to look at the Crown's response to this claim and also to the evidence and submissions of the lessees.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.5 The Crown's Response

14.5. The Crown's Response

Crown denies breach of Treaty

14.5.1 In his closing address Mr Blanchard, counsel for the Crown, strongly contended that it would be wrong for the tribunal to conclude on the evidence presented to it that there had been any breach of the principles of the Treaty in relation to the west coast leases. He stated the Crown recognised that, for the last 15 years approximately, legislation had worked unfairly against the Maori owners and the Crown was presently endeavouring to devise a plan to improve the situation. This plan would enable the leases to be put on a basis which was more commercially appropriate.

The Crown's case was that although Ngai Tahu were opposed to sale:

The Ngai Tahu beneficiaries plainly recognised that there had to be some degree of permanency of tenure for the lessees who were making their land at Mawhera so valuable and providing them with a substantial income... they wanted to have the entire benefit of the leasing situation. They could see the advantage of permanency in the leasing situation. (Y2:127)

The Crown argued that Ngai Tahu favoured permanency of terms for their lessees in 1887 and did not object to the 1887 legislation. Mr Blanchard submitted that the objection to the perpetual leases was a modern development because of the effects of modern inflation. Counsel also proposed that Ngai Tahu wanted to avoid the risk that the lessees would elect to leave Mawhera and resettle at Cobden, or that the Crown might force sale of the freehold.

Conclusions from Crown researchers

14.5.2 The Crown presented a joint research report by Messrs David Armstrong and Tony Walzl. This report is an excellent overview of the history of leasing on the west coast and has been most helpful to the tribunal. Indeed, the evidence produced by the Crown witnesses, together with the submission and evidence of the lessees as led by Dr Young, and further, the submissions and supporting material of the Maori Trustee, have all contributed to providing the tribunal with a comprehensive picture of events from 1856 down to the present time. The tribunal has also had the benefit of its own research in Professor Ward's overview report. We will analyse those submissions and evidence shortly but return now to the Crown case.

Messrs Armstrong and Walzl surveyed six areas of relevant matters and drew these conclusions:

a) That with the consent of Ngai Tahu owners the Crown assumed responsibility for administering Greymouth reserves following the chaos which developed in the early 1860s after discovery of gold.

b) Prior to Crown intervention Ngai Tahu had themselves leased portions of their reserve. There were no subsequent demands from the owners for their lands to be returned to them for occupation purposes.

c) Alexander Mackay, as commissioner of native reserves, administered the reserves largely for the benefit of the owners while attempting to maintain impartiality. The commissioner interested himself in the general welfare of the owners and often with the consent of the owners strove to reconcile the requirements of the European land management with Ngai Tahu interest.

d) The leaseholders' desire for security of tenure led to constant agitation for freeholding. As Ngai Tahu repeatedly rejected sale, perpetual leases could be seen as a compromise solution. If this solution had not been reached, leaseholding in Greymouth would have become less attractive.

e) Ngai Tahu were cognisant of the need for a compromise solution. No evidence was found that showed Ngai Tahu opposition to perpetual leases while there was evidence available that indicated several owners favoured such a course.

f) The public trustee administered the lands in much the same way as Mackay had done and at a time of violent leasehold agitation. (N6:79-81)

Summary of the Crown's view

14.5.3 The Crown urged the tribunal to look at the evidence in its proper historical context rather than in relation to current economic circumstances over the past 20 to 30 years. The Crown said that if the 1887 legislation had not been passed the reserves might well have been lost. The result of the legislation had been the retention of the Mawhera lands in Maori ownership and although there may be some need for legislative change now, by and large the leasing system had worked in a reasonably fair manner. There was, therefore, no breach of Treaty principles in the passing of the 1887 legislation.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.6 The Lessees' Response

14.6. The Lessees' Response

General reaction of lessees

14.6.1 Principal submission on behalf of lessees was made by the West Coast (South Island) Maori Leaseholders Association Incorporated represented by counsel, Dr Young. Other submissions were also received from individual lessees or groups of lessees who either sought the right to freehold their land or protection for the lessees if any changes in legislation were recommended.

Some lessees of residential land expressed concern about their inability to pay higher rents or to sell their leaseholds. One large New Zealand retail company agreed that the formula for fixing rent was not consistent with present day economic conditions and values, and that the terms of the leases were not consistent with current or common usage. That same firm suggested that the leases should be modified to include some of the provisions of the Public Bodies Leases Act 1969, particularly section 22, which provided for five yearly rental reviews. It was suggested to the tribunal by two other commercial firms that compensation or favourable government loans should be advanced to Maori owners to buy out lessees improvements, but that this tribunal should not recommend interference with lessees guaranteed title under the Land Transfer Act 1952.

In most of these submissions there was sympathy expressed for the Ngai Tahu position, but also concern at the effect on the leaseholder. We pass now to look at the views of the leaseholders association.

Legal submissions by leaseholders association on jurisdiction

14.6.2 In opening his submissions on behalf of the lessees Dr Young made two very interesting submissions to the tribunal. The first of these related to article 2 of the Treaty. Dr Young argued that once the Mawhera land came under the Native Reserves Act 1856 those lands could be disposed of with the assent of the governor. By assenting to place the lands under the Act Maori owners consented to a situation where their absolute rights of ownership were abandoned. For the purposes of article 2 of the Treaty therefore, it was no longer "their wish and desire to retain (the Reserves) in their possession" (N39:7). Thus having disposed of the land they were not entitled to the protection of article 2.

In a second legal argument Dr Young introduced article 3 of the Treaty. Dr Young submitted that a claim based on maladministration of the Arahura reserves was not a breach of the Treaty of Waitangi or its principles. Dr Young submitted that the real

villain in this piece was inflation and Maori had suffered just as other New Zealanders had who might have held fixed interest securities. He said:

The claimants must establish that the Treaty of Waitangi protects not only their land but also statutory and equitable rights Maori tribes and groups did not enjoy in 1840 but obtained subsequently ... If the commissioners of Native Reserves or the public trustee or the Maori Trustee or the Mawhera Incorporation have maladministered the Arahura reserves, and that is yet to be established, then it is regrettable. But it is not a breach of the Treaty of Waitangi or its principles... To accord Maori claimants a remedy based on maladministration would be to give them a remedy, or to use the language of the English text of the Treaty, a Right and Privilege not enjoyed by the British subjects. So article 3 of the Treaty has no application either. (N39:7)

Dr Young therefore submitted to the tribunal that the grievances of Ngai Tahu are not properly Treaty claims. In order to keep the continuity of this report relative to the Crown response, as earlier stated, we do not propose to deal with these two legal arguments at this point but will return to them later (14.8.14).

Lessees say Maori owners consented to leasing arrangement

14.6.3 Dr Young then moved to deal in some detail with the history of the Mawhera lands and in particular with the consent of Maori that the land be leased. He said it was evident from the pattern of leasing that the best interest of the Maori owners clearly depended upon the town continuing to thrive and flourish and that a commercial approach to the issue was called for. Dr Young referred to the statement by Alexander Mackay in his 1877 report who said of the lessors:

Neither have they any occasion to complain of not having had a fair share of the income devoted to their use, as they have received in cash and its equivalent, during the last eleven years, the sum of œ21,515.4s9d: and the recipients only number about twenty. (N7:31){FNREF|0-86472-060-2|14.6.3|43}

Dr Young considered that, allowing for the changes in the value of money, those sums of money were considerable indeed.

Dr Young developed the point that the Maori owners were in full accord with a process of leasing. He said there had been no objection made by the Maori owners to the passing of the Native Reserves Act 1882, which provided for administration by the public trustee and which in fact extended the term of leases up to 63 years, provided the lease was for building purposes.

Dr Young then asserted that the South Island Native Reserves Act 1883 introduced compensation for lessees' improvements into the leases. He said that in his 1887 memorandum, Mackay assessed the value of the improvements at œ400,000 (N7:3).{FNREF|0-86472-060-2|14.6.3|44} One would have expected that this valuable asset would have been sought by the Maori owners to be returned to them on expiry of the lease. On the contrary, Dr Young argued, the Maori owners wished the leases to continue and consented to the provision in the Bill. He referred to a statement by Mr Seddon MP during the passage of the Bill through the House, when Seddon observed:

that the Natives interested were quite as desirous as the tenants to have this Bill passed. The reason was this: that up to the present time there had been uneasiness amongst the tenants, and the property was depreciating in value. The Natives were as much alarmed and as desirous for this legislation as the tenants. (N40:33){FNREF|0-86472-060-2|14.6.3|45}

Counsel referred the tribunal to the comments of the Member of Parliament for Southern Maori, Mr Taiaroa, which were set out in his submission in which Mr Taiaroa said that the commissioner of Native Reserves and Maori who owned those reserves had consulted together and agreed that some means should be adopted by which a greater benefit should accrue to Pakeha as well as to Maori (N39:28){FNREF|0-86472-060-2|14.6.3|46}.

At page 29 of his submission Dr Young set out another extract from Mr Taiaroa's address to the House. It was reported Mr Taiaroa said:

[he] could not oppose the Bill altogether, because he had received a wire from Tainui and Mutu and all the other Natives interested in these reserves. He did not approve of what they put into the wire, but he would read it to the House, so that honourable members should see what it contained. It was this: H K Taiaroa, Wellington-We, who are the owners of these reserves are agreeable to the Bill, and we further agree that the leases shall be extended for a further term of sixty years.{FNREF|0-86472-060-2|14.6.3|47}

Dr Young submitted to the tribunal, therefore, that the assent of the Maori owners to the 1883 Act showed a process of communication that existed between the Maori legislators and their constituents. He argued that there were a limited number of Maori owners who had a substantial interest in the reserve and as Ihaia Tainui had been a Member of Parliament and was familiar with the legislative process, the owners of the Greymouth reserve were in a position to make their views known to Parliament.

Dr Young's submission was that in 1883 the Maori owners of the reserves clearly wished the leasing arrangement to continue. Dr Young referred further to the Kenrick commission and the subsequent Bunny report in which a proposal was made by the owners for 63-year leases with a further right of renewal for 63 years. This offer was contained in the letter to the Native Minister Mr Ballance which was referred to earlier in this report (14.2.14).

Dr Young submitted that:

One hundred years later the difference between leases in perpetuity and leases in essence for 126 years may appear, at least to the owners, to be very significant. It certainly now is from the point of view of the lessees. But viewed, as it must be, from the perspective of the 1880s the difference is infinitesimal. (N39:34)

Lessees say Maori owners favoured commercial dealing

14.6.4 Dr Young argued that the only way the tenants' interest in improvements could be funded out was by the adoption of what can be loosely described as a perpetual leasing system. By the 1880s there was no suggestion that the Maori owners wanted

to reoccupy the land and Dr Young said that the tribunal must not look at this situation wearing 1988 spectacles but rather how the position was viewed in the 1880s. From the point of view of the owners a system of perpetual leases was already in place in the early 1880s. In this submission therefore, counsel for the leaseholders was saying that the Maori owners had a commercial leasing system in place which they wanted to continue, even though they were resolutely opposed to the sale of the land.

Lessees say Maori owners were consulted and consented to 1887 Act

14.6.5 In his next submission Dr Young examined the background to the Westland and Nelson Native Reserves Act 1887 and referred to a number of passages from the debate in the House and later in the Legislative Council.

To the questions:

- Was there a fair process of consultation in relation to the 1887 legislation?

- Were the Maori owners generally in agreement with the course of action proposed?

- Did they have a fair opportunity to have their views heard?

Dr Young answered that:

a) if there was insufficient evidence to enable any firm conclusions to be drawn to answer the questions, then the claimants had not proved their case and established that there was a breach of any Treaty principles.

b) in determining what constituted a proper consultation and consent the issue had to be looked at in a realistic and practical way and the series of investigations and reports as to Maori attitude to sale and lease could not be ignored (N39:46).

Dr Young said that the statements made by Major Atkinson and Sir Frederick Whitaker could not be ignored and the Crown clearly believed that the Bill had the assent of the affected owners. He further submitted that Mr Parata's attitude to the legislation could not be ignored. It could not be assumed that the Maori members would not have performed their moral duties to the Maori owners and consulted them between June and December 1887 as to the legislation.

Dr Young continued that:

c) although Mr Taiaroa opposed the Bill it was on grounds that had nothing to do with its intrinsic merits and in circumstances which lent weight to Major Atkinson's assertion that the Bill had Mr Taiaroa's consent.

d) the Bill had the assent of the Maori legislators most directly concerned. They would not have given their consent unless they were satisfied that the owners were in agreement with what was proposed (N39:47).

By way of further substantiation of the owners' understanding of the perpetual leases counsel produced and commented on the 1909 action in which four signatories indicated their views on the leases. Dr Young urged that this evidence shows the Maori owners were properly organised, they instructed a solicitor, and were a reasonably cohesive group able to articulate their concerns effectively. He further noted that the 1909 proceedings were only 20 years after the legislation. If the perpetual leases were at issue then, why was this criticism not raised.

Lessees refer to Maori Reserved Land Act 1955

14.6.6 Dr Young also made the comment that no evidence was called by the claimants in relation to the 1955 legislation. Dr Young called a witness, Mr A M Jamieson, a retired solicitor, who was born in 1903 and had lived in Greymouth all his life. Mr Jamieson stated that the rate of rent prescribed under the 1955 Act at 4 per cent was in fact an advance on the rent that the Maori owners had been receiving of 3.75 per cent.

Dr Young summarised his submissions saying:

a) The assertion there has been a breach of Treaty principles in relation to the legislation is unfounded.

b) The Maori owners originally submitted voluntarily their land to a statutory regime which from the very outset contemplated the possibility of sale or lease in perpetuity.

c) Although the issues as to rent were a running sore, it was an underlying community of purpose at all times between the Maori owners and the lessees which dictated largely the ultimate form of lease provided.

d) There is no evidence at all from which it can be fairly concluded that any of the legislation was passed without adequate consultation. What evidence there is suggests that there indeed was consultation.

e) On the whole the rent recovered by the Maori owners was in line with the rent recovered in relation to other Glasgow leases in New Zealand at all relevant times.

f) The 1955 legislation was, on the material which the lessees can produce, an advance and not a retrograde step as far as the Maori owners were then concerned.

g) To approach the issues of the legislation and the policies adopted from the point of view of current values of money, and current inflationary expectations was to adopt a blinkered and ultimately distorted view of the historical process. (N39:54)

14.6.7 Valuation evidence was called on behalf of the lessees to establish that from 1878 to 1984, a period of some 106 years, the average increase in land value for the Greymouth borough was a mere 4.8 per cent, the last 20 years having had a completely disproportionate effect on that figure. For the Grey county the figures had been calculated, from 1891 to 1986, a period of 95 years. The rate of increase during this time was 3.2 per cent, again with a disproportionate effect on the general rate of increase over the last years.

Dr Young submitted the evidence showed that up until 1955 the Maori owners, in relation to the Mawhera leases, did not appear to have been particularly disadvantaged. The rate of return that was referred to in 1909 and later established in the 1953 arbitration was 3.75 per cent.

Lessees' rights should not be disregarded

14.6.8 In conclusion, counsel stated that although it was undeniable that negotiated or arbitrated rents were producing rentals significantly in excess of the rents provided for under the 1955 Act, it was questionable if those rents would be as high as anticipated by the claimants. A strong statement was made by Dr Young in conclusion that it would be manifestly unjust and impolitic if the tenants of Mawhera incorporation should be selected to fund the compensation assessed to meet any loss suffered by the claimants. He urged upon the tribunal that it was a very serious thing indeed to interfere with settled titles to lands, titles which had been bought and sold and which had been offered as security for advances of money.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.7 The Maori Trustee's Response

14.7. The Maori Trustee's Response

Allegations levelled at Maori Trustee

14.7.1 In this part we look at the response of the Maori Trustee to the allegations made by the claimants. The allegations were divided into two groups, the first of which covered:

a) failure to allocate reserves set aside in the Arahura purchase deed;
b) failure of Crown to protect Ngai Tahu by allowing reserves to be reduced in area;
c) inadequate provision under South Island Landless Natives Act
1906 to remedy landlessness caused by sale;
d) marginal nature of reserves; and
e) failure to provide for reforestation of the Mawheranui block.

The second group dealt more particularly with the failure of the Crown's appointed trustee to administer properly the reserved lands and included:

a) failure to prevent taking of reserved land for public works;
b) failure to consult owners as to use of land;
c) adoption of an unfavourable attitude as Maori Trustee to the
prospect of incorporation between 1967-1978;
d) failure to act as a prudent trustee by acting in a passive role in
respect of town planning matters;
e) failure in duty as trustee to amalgamate land titles;
f) failure to consult with owners over termination of Greymouth
Post Office lease negotiations in 1974;
g) failure in duty as trustee by attempting to recover for the Crown its expenditure in acquiring shares instead of the equity value fixed by the incorporation valuer; and
h) failure as trustee to invest in or develop Mawhera lands.

14.7.2 The above allegations were contained in the submissions and evidence of claimant witnesses James McAloon (D3:14) and Tipene O'Regan (D18:16A-18). Elsewhere in this report we shall be dealing more specifically with those questions falling within the first group above. We shall in this section set out the responses of the Maori Trustee and later look at our findings on the alleged grievances in the second grouping above.

General denial of liability by Maori Trustee

14.7.3 In his opening submission on behalf of the Maori Trustee, counsel Mr Woods said the Maori owners were not alone in their concern that the Maori Trustee had:

expressed for some time that the current legislation is most iniquitous in respect of the interests of the beneficial owners and has openly advocated and given every practical support to numerous petitions for change in the legislation. (N32:1)

Mr Woods emphasised the Maori Trustee was a corporation sole constituted under the Maori Trustee Act 1953 and was not a department of government nor an agent of the Crown in the administration of reserved lands. Counsel said firstly, the Maori Trustee denied the allegations of breach of trusteeship and charges of mismanagement and secondly, the allegations fell outside the scope of the claimants' claim. Mr Wood then gave a summary of the Maori Trustee's role in reserved lands in the South Island and of recent developments in policy and administration since the 1975 report of the commission of inquiry. Counsel argued that the claimants were apparently confused as to the role of the Maori Trustee, and further, that the claimants did not appear to be directly challenging either the constitution of reserved lands or the necessity of maintaining a policy of reserved lands.

Counsel further argued that the claimants had failed to distinguish between acts of day-to-day administration and acts of omission resulting from the performance of a statutory requirement, or direction. Mr Woods submitted that only the latter were caught by section 6 of the Treaty of Waitangi Act 1975. He called two witnesses Ms Catherine J Nesus and Mr Richard T Wickens.

14.7.4 Ms Nesus, solicitor from the Department of Maori Affairs, presented a 115 page summary of the legislation dealing with reserved lands (N36), accompanied by a document bank of 540 pages (N37).

Ms Nesus described her submission as "navigating a bumpy course through the volume of law that exists". We agree with her view and as expressed previously, appreciate her useful contribution.

Submission of Deputy Maori Trustee

14.7.5 Mr Richard T Wickens, Deputy Maori Trustee and with more than 14 years duty in the Maori Trust Office, dealt more specifically with the alleged grievances. He said his submissions fell into two categories:

a) to provide an administrator's perspective to the management of reserved lands; and

b) to comment in rebuttal of the allegations made by Mr McAloon, concerning prejudiced administration of the reserved lands. (N34:1)

Mr Wickens offered the tribunal a quote from an observation made by a previous Maori Trustee, Mr Jock McEwen, to the 1975 commission.

The Maori Trustee is a man walking through a narrow defile on a course chosen by somebody else with stones raining down upon his head from the beneficial owners on

the one bank and the lessees on the other. He is quite unable to placate either side. (N24:1)

Mr Wickens provided a carefully drawn analysis of the early history of the trusteeship including steps taken to appoint the Public Trustee in 1882 and subsequently the Maori Trustee in 1921. More importantly however, Mr Wickens drew from this historical analysis a number of salient points that had direct bearing on allegations levelled at the Maori Trustee which in his view should have been directed to government. In summary these points were as follows:

(a) There are constraints placed on the trusteeship by the legislation. To describe the legislation as having evolved is perhaps inaccurate, FOR THE 1873 NATIVE RESERVES ACT GAVE THE TRUSTEE NO MORE FREEDOM TO MANAGE THE RESERVES THAN DID THE MAORI RESERVED LAND ACT 1955. (emphasis added)

(b) Although consultative mechanisms were put in place in several enactments, accountability continued throughout to be to the government and not to the owners. It would seem that the real power over the fate of the reserves has always been firmly concentrated in the hands of the government.

(c) Successive governments never contemplated large scale consultation but merely a kind of representative consultation. It is also relevant that consultation of a quality to satisfy trustee requirements may have been considered impractical in many instances as the beneficiaries of the individual blocks were not determined until the 1920s.

(d) The Crown's attitude up until the 1955 Act was one of special interest. The concentration of power in the hands of the Crown may have circumscribed the role of the trustees. The Crown saw itself as having a duty to the Maori people and introduced 'policies which it saw as necessary to fulfil that duty'.

(e) The shortage of funding has always been a characteristic of Maori land administration.

(f) Apart from early provisions in the 1856 and 1873 Acts, administration of the reserves was centralised in Wellington.

Mr Wickens then dealt in some detail with specific cases and allegations. He submitted that:

- the appropriate forum for dealing with breaches of trustee law was with the High Court and that avenue was and is available to the claimants (N34:11); and

- notwithstanding that remedial right and because the claimants had chosen to raise allegations in a public forum it was necessary to point out the generality of the claimants conclusions but in some cases the absence of recorded reasons and other factors such as local knowledge and experience which guided the decision making process of decisions made long ago (N34:8-10).

Mr Wickens in his concluding submission emphasised the costs involved in proper consultation due to multiple ownership, and said that achievement of the ideal would be prohibitive without regular subsidies from government (N34:19).

In summarising of the Maori Trustee's position it is evident that the main thrust of the response to the claimants' allegations was that the claimants had remedies in the general courts for their complaints; that the grievances should be directed to the Crown rather than the Maori Trustee, and that in most specific instances there was an adequate answer to the claimants' criticism.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.8 The Tribunal's Examination of the Evidence and Findings

14.8. The Tribunal's Examination of the Evidence and Findings

Perpetual leasing is main complaint

14.8.1 The principal grievance of Ngai Tahu over their reserved lands was that the Crown failed to protect Ngai Tahu by passing legislation to impose perpetual leases without the consent of Ngai Tahu. Within the framework of that grievance come the associated grievances that the Crown fixed unrealistically low rentals and long review periods. The second grievance also relates to the perpetual leases, in the Crown's refusal to implement the recommendations of the 1975 commission of inquiry report which advocated change to the form of those leases. The third category of grievances voices the claimants' concern over the Crown's administration of the reserved lands, and in particular acts and omissions of the various statute-appointed trustees.

We propose to look in sequence at each of these matters and commence with the perpetual lease.

Grievance must be looked at in proper time perspectives

14.8.2 The first grievance requires consideration of the particular statutory provisions which created the perpetual leases. It also requires determination of whether or not Ngai Tahu consented to the leases. Both questions require a study of the historical background, so it will be necessary for us to retrace, in as brief a manner as we can, how the system of leasing started and progressed. We will have to look not only at the 1887 and 1955 Acts, which expressly covenanted the perpetual lease provisions, but a number of other earlier and later Acts which also relate to the reserved lands. The chronology and principal content of the statutes, reports and other relevant events have already been summarised (14.2). In this section we will draw on the main threads from that chronology. We were admonished by counsel on several occasions not to look back on past events with a current day outlook and knowledge. We have in fact been conscious of this requirement in our consideration not only of this part of the claim, but the many other grievances going back to even earlier periods in the Ngai Tahu claim.

Classification of resources

14.8.3 As we have earlier stated, there were two classes of land reserved from the Arahura 1860 sale to the Crown. The first area, totalling 6724 acres, was land set aside for individual allotments (herein referred to as schedule A lands) and the second area of 3500 acres was reserved for "Religious, Social and Moral Purposes" (herein

referred to as schedule B lands). In his report to the chief land purchase commissioner on 21 September 1861 James Mackay said:

On the 21st May 1860, the Ngaitahu Title was completely extinguished over all the portion of the West Coast district lying between Kaurangi Point in the Province of Nelson, and Piopiotai, or Milford Haven, in the Province of Otago, and bounded inland by the watershed range of the East and West Coast of the Middle Island, the reserves mentioned in Schedules A and B being the only portions excepted from sale

As previously stated, reserves for individual allotment amounting in the whole to 6724 acres have been set aside.

Reserves amounting in the aggregate to 3500 acres have also been made for the benefit of the aboriginal inhabitants of the West Coast, and for the promotion of social, moral and religious objects among them.

The last mentioned reserves have been conveyed to Her Majesty, subject to the provisions of the New Zealand Native Reserves Act 1856; the Deed of Conveyance being enclosed herewith ...

The Natives are not sufficiently enlightened for a sub-division of the reserves to be now effected, and it was also impossible for me in every case to ascertain the number of persons interested in each reserve{FNREF|0-86472-060-2|14.8.3|48}

The schedule B lands, therefore, were placed under the 1856 Act immediately on transfer to the Crown.

Alexander Mackay's view on sale and lease

14.8.4 We have earlier seen how well Alexander Mackay administered the leases during the 1860s and 1870s. By 1873 the leases were for terms of 14 or 21 years (N7:16).{FNREF|0-86472-060-2|14.8.4|49} It was in this year that Mackay reported to Parliament on the reserves (N7:13-17) and made the statement previously set out (14.2.7), that it was intended to let the land in perpetuity for the benefit of Maori.{FNREF|0-86472-060-2|14.8.4|50} In case this is taken to indicate that Mackay was in favour of leasing these reserve lands forever we need to look at a further statement he made a few months later in a letter to John Greenwood where he disagreed with the proposition of leasing land for building purposes for 60 or 99 years in a young country like New Zealand (N7:168).{FNREF|0-86472-060-2|14.8.4|51}

That Mackay continued to hold this view is evident from his memorandum on the status of Mawhera reserves in July 1877 (N7:30-31).{FNREF|0-86472-060-2|14.8.4|52} In this report, referred to in detail in an earlier section (14.2.9) Mackay continued to oppose the sale of land and recommended leases for 60 years to persons wishing to erect permanent buildings of brick and stone. Alexander Mackay was, on the face of it, not only opposed to sale but also to leases beyond 60 years.

14.8.5 The tenants kept up pressure to sell through the 1870s. Under the 1873 Native Reserves Act, leases for building purposes were extended to a maximum term of 60 years. Mackay, as we have seen, was in favour of such a term but resolutely opposed

to sale. However, Greymouth lessees still urged the Crown to buy the land and lease it to the tenants at lower rents and with rights of continual lease renewal (N7:28).{FNREF|0-86472-060-2|14.8.5|53}

In 1881 Mackay was still promoting the 21-year farming lease and the total 60-year term building lease (N7:174).{FNREF|0-86472-060-2|14.8.5|54} The following year saw the passing of the 1882 Act which passed title and control of the reserves to the Public Trustee, who was empowered to lease for 30 years for farming, and 63 years in 21-year terms for building.

Did the Maori owners agree to perpetual leases in 1883?

14.8.6 The South Island Native Reserves Act 1883 was a most important statute in the chain of events affecting the Mawhera leases. In the first place, section 3 authorised the governor to grant the 500 acres of the Mawhera reserve to 26 Maori whose names and the acreage each took were set out in a schedule to the Act. At that date therefore, 8 September 1883, the relative interests and persons to whom title was to pass were clearly ascertained and named in the Act. In the second place the Maori owners agreed to a system of compensation for improvements being introduced into the leases provided they did not have to buy those improvements themselves if the lease terminated. The owners were consulted by their representative in Parliament, Mr Taiaroa, who said they were perfectly satisfied to grant leases for 21 years and 60 years. However the Act provided only for 21 years in respect of Mawhera leases. The reduced term and dissatisfaction of tenants over the form of the compensation for improvements led to the 1886 Royal commission and the subsequent Bunny report. Again there was great pressure put on the owners to sell. They steadfastly refused and expressed the view they were prepared to grant leases for 63 years with a right of renewal for another 63 years (N7:190).{FNREF|0-86472-060-2|14.8.6|55}

We set out in 14.2.14 the text of the letter signed by seven Maori and translated by Mackay on 20 October 1885. We also set out the written depositions handed in to the commission by three of those seven, namely Inia Tuhuru, Teoti Tauwhare, and Henare Meihana. The evidence of these three persons contained references to leasing land in perpetuity and were tendered by the Crown and the Westland Lessees Association as evidence that the Maori owners consented to a perpetual leasing arrangement. Examination of the depositions does not in our view give any clear indication at all that those witnesses consented to the introduction of perpetual renewal clauses into the leases.

Inia Tuhuru qualifies his statement by the words "all land not required for our own use." (N7:322){FNREF|0-86472-060-2|14.8.6|56}

Teoti Tauwhare uses the words "in fact we wish the leasing system perpetuated" (N7:323){FNREF|0-86472-060-2|14.8.6|57} and Henare Meihana simply agreed with the others. It is further quite evident from Meihana's evidence that his views were in accord "with the tenor of the letter we are forwarding to the Native Minister." (N7:324){FNREF|0-86472-060-2|14.8.6|58}

Inia Tuhuru also referred to this same letter in his deposition when, after referring to leasing in perpetuity, he added "We send a copy of a letter to the Native Minister

relative to the future dealings with our lands." (N7:322){FNREF|0-86472-060-2|14.8.6|59}

As is clearly shown in that letter the signatories were agreeable to a 63-year term lease and a further renewal of 63 years, not to leasing in perpetuity.

The tribunal therefore does not see the evidence up to this point as indicating that the local Ngai Tahu people intended leasing their lands in perpetuity. We consider that Professor Ward correctly assessed the situation when he said:

Nothing in the evidence suggests that leases in perpetuity were being considered as an option at this stage. The Kenrick and Bunny Reports had not discussed them. The alternative which, rightly or wrongly, the owners of the reserve felt they were being presented with was sale. (T1:321)

This view is further supported by the following comment in the report of the 1975 commission:

(iv) It is pertinent to observe that the Wakefield concept of perpetually leasing the land is not the same as granting leases with perpetual right of renewal. In the former the rent and terms of all ensuing leases are negotiated while in the latter the rights of the parties are fixed by the original contract.

(v) The promise made by Alexander Mackay for perpetual leasing was spelled out in different form in the 1887 legislation in section 14 of that Act as a covenant for perpetual renewal with 21-year revisions of rent. (D1:59){FNREF|0-86472-060-2|14.8.6|60}

As we have seen, the Kenrick Royal commission recommended that leases be granted for 63 years.

Did the Bunny report recommend perpetual leases?

14.8.7 Following on the recommendation of the Kenrick commission, Bunny, as special commissioner, again raised the question of sale. However, as we noted in 14.2.16 the owners were strongly averse to this notion, although they were willing to grant leases for 63 years with a right of renewal for a further 63 year term. There is therefore no indication whatsoever up to this point, that the Crown intended to introduce perpetual leases or that the Maori owners favoured perpetual rights of renewal.

Bunny, in his report, commented that the existing leases with their 21-year terms, made it impossible for the tenants to borrow money. He suggested as one of several desirable alternatives that the lessees be allowed to buy the freehold, and intimated that:

the government might itself be able to acquire the freehold from the Native owners, and, by placing the reserve under local control, give the persons interested some voice in deciding the future management of the estate. This seems upon the whole the best course, if feasible. (N7:192){FNREF|0-86472-060-2|14.8.7|61}

So, at this point in 1886, there was a Royal commission recommendation for 63-year leases instead of 21 year terms and a special commissioner advocating Crown purchase of the freehold, but no perpetual leasing proposed. Nor was there discussion or consultation with Poutini Ngai Tahu about perpetual leasing.

The introduction of the perpetual lease clause

14.8.8 We looked earlier (14.2.17) at the Westland and Nelson Native Reserves Act 1887. This Act did not put into effect either the Kenrick commission recommendation of 63-year leases or the Bunny report alternative of the Crown purchasing the freehold. Instead, in section 14, five words were inserted which introduced the perpetual lease. The section read:

14. In all leases to be hereafter granted there shall be a condition for a new ascertainment of the rent at the expiry or surrender of every such lease, and that the then holder shall have the right of renewal for a like term upon the same conditions and covenants (INCLUDING THE RIGHT OF RENEWAL) subject only to the difference that the rent shall be the rent so ascertained as hereinbefore provided. (N7:06) (emphasis added)

Section 3 of the Act had repealed the provision of the 1882 Act allowing 30-year and 63-year terms and fixed a uniform term of 21 years. Whilst we have section 14 before us it is also appropriate to draw attention to the words included in it, "upon the same conditions and covenants".

That is, not only did this 1887 Act create the perpetual lease, but it also created the provision which imposed the restrictive form of the lease. How then did this provision become part of the law? We look at some possible reasons.

Was the perpetual renewal clause inserted to appease the tenants?

14.8.9 The 1975 commission of inquiry report suggested that the perpetual right of renewal could indeed have been prompted by the Bunny report, where it said of Greymouth in 1886:

It is almost impossible to borrow money, for the purpose of making necessary improvements, upon the present title. (D1:432){FNREF|0-86472-060-2|14.8.9|62}

Professor Ward said of the clause:

it was clearly passed in response to these investigations (Kenrick commission and Bunny Report) both of which had argued that the tenants had genuine grievances which required redress. (T1:322).

Messrs Armstrong and Walzl said:

The leaseholders desire for security of tenure led to constant agitation for freeholding. As Ngai Tahu repeatedly rejected any suggestion that they sell the Reserve, PERPETUAL LEASES CAN BE SEEN AS A COMPROMISE SOLUTION. (N6:81) (emphasis added)

Mr McAloon said:

The Act may, perhaps, be seen as a government attempt to compromise between the demands of Greymouth leaseholders to freehold, and the absolute refusal of the Maori owners to countenance this. (D3:22-23)

In his submission Dr Young said:

It being recognised as fair and appropriate and lawful that the tenants should be compensated for these improvements, the only practical way that compensation could be provided for was in the nature of what was in essence a perpetual leasing system. [There was not] the slightest suggestion the Maori owners wished to resume occupation of the land. (N39:34)

Objective of 1887 Act as seen by Parliament

14.8.10 Let us look now at the explanation given by Parliament for the introduction of the 1887 legislation as it pertained to the Greymouth reserve.

Sir Julius Vogel said:

The object of the Bill is not so much for the purpose of altering the position of the Natives as for making clear what are the relative positions of the lessees and sublessees. (D5:109)

Seddon said:

As regards the question raised by the honourable gentleman, that the titles have been individualized, I may say that I see nothing in this Bill which, as far as Greymouth is concerned, interferes with that. It merely says that these reserves, though the title vests in the Natives under the original Act, shall be placed in the hands of the public trustee-that is, that the Natives shall not take the land as a freehold and administer it themselves. It is quite possible that it would be against the interests of the Natives themselves if they had the land given to them in that way; for, very possibly, it would be sold to the present occupiers, or to speculators, and those who are now living on the rental from those lands would spend the money, and find themselves without anything to keep them. (D5:114)

Guinness said:

as the tenants are uncertain as to their rights of renewal and of payment for improvements, the consequence is that there is no inducement to them to improve their holdings ... Another important point to consider is, that by giving fixity of tenure and right of renewal it will encourage the tenants to put up substantial buildings: it will have the effect of improving the buildings and increasing the value of the township generally. As the township improves, every twenty-one years the rent, under this Bill, as also under the Act of 1883 will be adjusted, and if the township improves and land increases in value, as we have reason to expect, the rent that the Natives will Draw will increase in proportion. Therefore, this Bill, instead of having a detrimental

effect on the interests of the Natives, will have a contrary and very great beneficial effect in that direction. (D5:115){FNREF|0-86472-060-2|14.8.10|63}

There can be no doubt that the 1887 Act was introduced after the Kenrick commission and Bunny report as a means of remedying tenants' grievances, and to allow them a form of tenure which would permit them to carry out substantial improvements to the properties. Although the Bunny report advocated purchase of the freehold by the Crown, this alternative was not acceptable as the Maori owners strongly opposed it. In the view of this tribunal the principal purpose of the 1887 Act was to protect and improve the tenants' position.

In a later 1909 report of the public trustee J W Poynton, to Parliament's Native Affairs Committee to which we will later refer, Mr Poynton, in referring to the grant of perpetual leases, said:

By section 14 of The Westland and Nelson Native Reserves Act, 1887, the position of the tenants was further improved. This section is very innocent-looking ... It, however, made a complete revolution in the leases. (N40:94){FNREF|0-86472-060-2|14.8.10|64}

As we have earlier stated, until the 1887 legislation, neither Mackay nor the Maori owners had been consulted or had consented to leases with perpetual renewal clauses. These virtually came out of the blue, as government sought to appease the tenants on the one hand, but not to upset the Maori owners by dealing with the freehold. What then was the attitude of Poutini Ngai Tahu to this legislation? Were they consulted? Did they consent?

The claimants alleged that the government acted unilaterally and without the consent of Poutini Ngai Tahu. The tribunal has therefore examined very carefully the evidence presented to it and in particular the events surrounding the 1887 legislation. As already explained, we do not consider that the pre-1887 evidence gives any indication of either consultation or consent, although that evidence was relied upon by the Crown and West Coast Leaseholders Association as indicative of consent. Poutini Ngai Tahu, or at least those of the tribe from whom statements were taken, opposed sale.

In Professor Ward's view:

Whether they would have opposed alienation by perpetual lease cannot be definitely established from the available evidence because this form of leasing was not being discussed. (T1:321)

We propose here to refer to a lengthy passage from Professor Ward's report on the passage of the 1887 Act:

Several issues have been raised before the tribunal with regard to the passage of this Act. It has been suggested that the Bill was rushed through and that the objections of the Maori Members of Parliament were not heeded. (D3:22-29) A close examination of the evidence suggests that some haste was involved in the final stages of the passage of the Act, but that one of the Maori members concerned came to support its

measures and the other, although opposed, cannot be said to be specifically opposing the provisions relating to leases in perpetuity. The qualified support given to the Bill by these members cannot however be taken as an indication that the Bill was supported by the Maori whose land was affected by the Act. Several petitions presented around the time the Act was passed would appear to indicate otherwise.

When the Bill was first discussed in June, Tame Parata, the Member for Southern Maori opposed it and presented a petition from H K Taiaroa, a Legislative Councillor and an owner of the Greymouth Reserve (T2:97).{FNREF|0-86472-060-2|14.8.10|65} This petition was referred to the Native Affairs Committee but the report does not indicate what Taiaroa's objections to the Bill were. (T2:109){FNREF|0-86472-060-2|14.8.10|66}

Parata had a number of concerns. The Bill had not been available in translation until the morning of the 8th and he felt that he had not had sufficient opportunity to consider it. The owners of the reserve at Greymouth, were, he said, in ignorance of its provisions. He also had some substantive arguments. He had misgivings about a clause in the Bill allowing land to go out of Maori ownership for mining purposes or for public works. The clause allowing leases to be renewed in perpetuity did not meet his favour either because he felt it effectively took the land away from its owners.

Another objectionable power the Bill proposes to give the public trustee is that of extending the leases another twenty-one years if he sees fit; and so he will go on extending the leases time after time to the end of the world, and the Natives will never obtain possession of their ancestral land again. (D5:110){FNREF|0-86472-060-2|14.8.10|67}

He asked that consideration of the Bill be postponed until the next session. The House did not agree to this and put the Bill through its final reading on the 9th. The Bill was amended in the process and Parata supported it on the third reading despite the fact that it still contained the provisions concerning perpetual leasing, mining and public works. The amendment had provided that two Maori assessors be appointed to assist the other Assessors under the Act. Taiaroa and Parata were themselves suggested for these positions. (N7:237){FNREF|0-86472-060-2|14.8.10|68}

On the following day the Bill was opposed by Taiaroa in the Legislative Council. Taiaroa objected to being denied the opportunity to manage his own land and to the provision giving the lessees rights of perpetual renewal. He accused the five members from Greymouth and Hokitika of bringing the Bill forward to improve their chances of re-election. He too mentioned the prospect of the owners losing control of their land.

The Council must be perfectly aware that this land will never return. I understand from this Bill that the public trustee is to lease the land for a term of twenty-one years, and the land can be relet then for a second twenty-one years without the Natives having any voice in the matter whatever. These twenty-one year leases will be renewed and renewed until other generations spring up, and possibly until the day of judgment. (T2:112){FNREF|0-86472-060-2|14.8.10|69}

Parliament was prorogued later the same day.

When the issue came up for reconsideration in December, Parata again had problems getting a Maori translation. On 2 December he told the House that although the Bill had been on the order paper for a considerable time he had not been able to get a copy to circulate amongst his constituents. (N72:40){FNREF|0-86472-060-2|14.8.10|70} He did not want the Bill rushed through. On the 21st of December he noted that many Maori interested in reserves had petitioned the House or written to him asking to take up their lands when the existing leases expired. One of these petitions was from Inia Tuhuru and seven other owners of the Greymouth reserve asking that the management of the reserve be left to them. (T2:98){FNREF|0-86472-060-2|14.8.10|71} A similar petition from Pamariki Paaka and eight owners of reserves in Motueka affected by the Bill was presented by Parata on 3 November. This asked for the repeal of the South Island Native Reserves Act and the grant of the power to deal with their land as they thought fit. (R6:3){FNREF|0-86472-060-2|14.8.10|72}

Parata did not go this far on the issue of owner control and management. He thought that the Bill could be amended to make it acceptable and suggested that any new leases should only be granted with the consent of the owners, and that renewals should not be granted without their knowledge and consent. He said he would carefully examine the Bill at its third reading, and if amendments were made there would be no reason for him to oppose it. The Bill was given its third reading straight after its second, Parata offering no further arguments against it despite the fact that it had not been amended to accommodate his suggestions. (N7:241-2){FNREF|0-86472-060-2|14.8.10|73}

The tribunal observes from an examination of Parata's Parliamentary address, that he was most insistent that before any fresh leases were granted the consent of the Maori owners should be obtained and that no renewals should be granted without their knowledge or consent.

Having made that statement he proceeded then to talk about the reserves in Motueka and, almost at the end of his address, he made this statement:

I ask the Premier to strike out from the Bill the references to the Wakanui lands in the South Island, so that it may be quite clear that this measure will apply to reserves on the west coast of the South Island. That would distinguish the land to which it is to apply from the other part. While asking for this amendment, I support the second reading of this Bill. (D5:133){FNREF|0-86472-060-2|14.8.10|74}

In response, the Premier Major Atkinson said that he would be glad to consider the question raised by Mr Parata, and that he would introduce a clause giving the governor a general power to deal with the matter if he was satisfied that no injustice would be done. This obviously must have satisfied Parata because the record discloses that the Bill was then read immediately a second and a third time. It is also clear from an earlier statement made by Parata in the same final address he made to the House, that he was not going into the question of the reserves at Arowhenua, Mawhera, and Greymouth, because there was:

an honourable gentleman in Wellington who knows all about these reserves, and no doubt he will take advantage of the opportunity and, if necessary, he will improve the

measure so far as it relates to these reserves, and, if any necessary amendments are needed, will see they are inserted. (D5:132){FNREF|0-86472-060-2|14.8.10|75}

The tribunal does not consider that Parata's consent to the passage of the Act represented support in any way for the content of the Bill including, in particular, the provision relating to perpetual renewal. Parata was speaking to the second reading of the Bill and obviously intended that there should be further amendments made to it. Another important fact is that just prior to the committal of the Bill, the member of Parliament for Dunedin, W D Stewart, pointed out that the time had arrived when South Island Maori should have an independent power over their reserves. He raised the question so that the Prime Minister might consider the matter before the Bill went into committee. The premier in reply, said that he hoped in the next session to bring down a Bill that would give Maori such a right as Stewart had raised wherever they were fit to exercise that power. Obviously the closure was taken very quickly and perhaps the premier's statements to both Parata and Stewart gave them some encouragement that there would be changes made to the legislation that would return some measure of control to the owners. We do not consider that, because Parata did not appear to have continued with his opposition, he necessarily agreed with the content of the Bill.

We now return to continue the review of this matter by Professor Ward:

In the Legislative Council Taiaroa opposed the Bill to the end, though his opposition does not seem to have been primarily directed to the perpetual leases. He wished to amend the Bill to provide that the Native Lands Administration Act 1886 would not apply to land in the South Island or Stewarts Island because South Island Maori were unclear about how the 1886 Act affected their interests. Taiaroa was willing to vote for the Bill if his amendment was included. The amendment was not accepted. Following its rejection Taiaroa made an eloquent plea to the Council to delay the passage of the Bill for three weeks, complaining that he did not have an up-to-date copy of the Bill and its amendments in Maori. The Bill was passed over his objection. (N7:243-4){FNREF|0-86472-060-2|14.8.10|76}

In summary it would seem that on both occasions that Parliament considered the proposals which were eventually enacted in the Westland and Nelson Native Reserves Act it did so under pressure and at the tail end of a session. There was, however, a six month gap between the two debates. On both occasions Maori members complained that they did not have access to updated Maori versions of the Bills. It is not clear whether this materially affected their ability to represent the Maori affected by the Act Parata, the M.H.R for Southern Maori spoke against provisions in the Bill including the clause giving lessees a perpetual right of renewal, but on both occasions he voted for the Bill. In December 1887 he helped make the Bill law despite the fact that he knew it to be contrary to the wishes of some of the owners of the affected land. Taiaroa maintained his opposition to the end, but as he expressed willingness to vote for an amended Bill containing the perpetual lease arrangements it does not seem that his opposition was directed at the perpetual leasing. (T1:325-326)

The tribunal does not accept that either of the Parliamentary representatives' actions amounted to a consent by Poutini Ngai Tahu to the perpetual leasing provisions of the 1887 Act. We think it necessary to observe that many measures are passed into law

with no voice being raised on the final reading despite the fact that a member of the House does not agree with certain contents of the measure. The evidence in this particular case certainly does not amount to an estoppel that would operate against Poutini Ngai Tahu that their Parliamentary representatives had given their consent to the statutory provision.

Was consent of Ngai Tahu necessary to validate Crown action?

14.8.11 It might be asked whether Crown consultation with Maori owners, and the latter's consent to the legislation was necessary.

With a few strokes of a pen, by the insertion of the words "including the right of renewal" in section 14 of the 1887 Act, the legislation took away from the Maori owners a valuable property right and gave it to the tenants. It may have been done for any one or more of the reasons explained, including the purpose of encouraging development of the land and thereby enhancing the future rental return to Maori, but it was nevertheless an action that was to deprive the owners of use and occupation as well as a property right. The Mawhera lands were reserved for individual occupation. They were not to be set aside as lands for tribal endowments. The owners were known and had been determined in number and acreage only four years previously, in the 1883 Act. They were entitled to informed advice on the meaning and effect of such an important change to their title. They did not get it. In 1866 the Mawhera lands were placed under the 1856 Act so as to permit management and control. The Maori owners agreed to this course. They were not then able to cope with the European commercial processes of leasing. Alexander Mackay handled these proceedings to the satisfaction of the owners. Mackay and those owners were prepared to grant long term leases with compensation provisions. They were opposed to sale. By 1887 the Maori owners were becoming more conversant with commercial matters and indeed had petitioned Parliament for control of their lands to be returned. The Crown, in response to tenant pressure, gave into settler lobbying and answered its conscience to Maori interests by suggesting in its Parliamentary debate that the move was in the best interests of Maori as they would gain more rent and as they were incapable of managing their own affairs anyway.

Looking back with 1887 eyes, as we were urged to do, it is perhaps understandable that politicians acted as they did in the circumstances. Looking back however, with those same 1887 eyes, but with lens that require us to focus on the principles of the Treaty of Waitangi, this tribunal cannot accept that the actions of the Crown were in accordance with the Crown's duty to protect Ngai Tahu interests. It is ironic but pertinent that today, when Maori are seeking to reverse the position, this tribunal has been urged by tenants to respect their property rights and their guaranteed title under the Land Transfer Act. They do indeed have a valuable right. The Crown has also declared its intention to consult with the lessees before amending legislation is introduced. That is entirely proper too. It was not done in 1887. Unfortunately, that was not the only omission of the Crown. Legislation and Crown actions and omissions in 1955, 1967 and from 1975 to now, continued a breach of the duty to protect Maori owners of reserved lands, as we shall shortly see. At this point however we must look at the responses of the Crown and the lessees.

Did Ngai Tahu and the Crown agree to a compromise?

14.8.12 It was suggested by the Crown that perpetual leases could be seen as a compromise solution. This may well be the case, but it raises the question-who made the compromise? If the Crown are suggesting that the Maori owners saw this solution as the only way in which they could prevent their land from being sold, then of course it is not so much a compromise as a form of forced agreement to which the Maori owners had no alternative. If, on the other hand, it was a compromise of the Crown, then obviously it was intended to be a way of placating the tenants and yet upholding the owners' refusal to sell. The tribunal believes that it was indeed this latter form of compromise and certainly not an agreement that had the full knowledge and consent of the Maori owners.

The introduction of the 1887 perpetual lease clause would likewise not seem to be consistent with the principle of good faith, seen by the Court of Appeal in its 1987 decision as being an important principle of the Treaty. The Crown had seen the need to provide a system of management and control of lands to protect Maori reserved land. In effect it created a statutory trust under which it retained ongoing fiduciary obligations. It was a trust in which the Crown retained its control. Its intervention in 1887 to transfer a valuable property right, giving perpetual rights of use and occupation to the lessees, can hardly be interpreted as an act of good faith. The Crown's simple duty to its Treaty partner was to protect the land until such time as effective management and control could be transferred back to Maori. It breached that duty by legislating to take from the owners the right to future use and occupation, and conferring that right on a third party. Furthermore, the land was not public land but privately owned land. It was not until 1976, following the 1975 commission's report, that Maori regained management from the Crown-appointed trustee. Even so, the title to the land was then, and is still, burdened with perpetual leases containing unsatisfactory covenants such as 21-year rent reviews and rents of 4 per cent (urban) and 5 per cent (rural).

Ngai Tahu were in favour of a commercial leasing regime

14.8.13 Dr Young, on behalf of the lessees, put forward the proposition that the Maori owners' best interests were served by the pattern of leasing that emerged and were clearly dependent upon the town continuing to thrive. Counsel considered that Maori adopted a commercial approach to the issue and were in full accord with the process of leasing. He argued that the difference between leases in perpetuity and leases offered by the Maori owners for 126 years, when viewed from an 1880 perspective, raised only an infinitesimal difference. There is no doubt that a relatively small number of owners were in fact receiving the benefit of rental from the Mawhera lands. There is also no doubt that the owners were anxious to cooperate with the tenants to allow the leases to continue for a long period. However, these actions cannot be taken as implicit consent to the 1887 provision.

Legal argument of the lessees

14.8.14 We proceed now to consider Dr Young's legal arguments set out above (14.6.2). Briefly stated, counsel argued:

a) that when Ngai Tahu consented to their land going under the 1856 Native Reserves Act in 1866 it was no longer land they wished to retain in their possession and article 2 of the Treaty no longer applied; and

b) that article 3 of the Treaty had no application to give claimants a remedy based on maladministration.

Dealing with the first question, we cannot accept that the Maori owners understood or agreed that by passing over control of their land to commissioner Mackay they no longer wished to retain the reserve in their possession. In our view, the act of consenting to the land passing to the Crown under the Act was not a disposition of the land in terms of the Treaty. Despite the vesting of the legal estate, Maori still retained a beneficial interest until the land was actually sold by the Crown. If land was subsequently sold by the commissioners, it would be no longer in the possession of the beneficial owners and Maori would have no further rights in respect of that land. We interpret the Treaty provision as intending to apply to land in respect of which Maori still retain a beneficial interest. Until Maori deliberately sell the land it remains protected under article 2 of the Treaty. The Mawhera owners resolutely opposed sale of their reserved lands, as is clearly shown and acknowledged in the evidence and in both Crown and lessees' submission to the tribunal.

We pass to consider the second contention, that the Treaty does not protect the statutory and equitable rights which Maori tribes and groups enjoy and that any claim for maladministration does not lie under the Treaty. In answer to this, we agree that the claimants enjoy the same common law and statutory rights as non-Maori. If a fiduciary duty is established, Maori would have rights to bring an action in the courts to remedy any breach of that duty.

However the claim is not based solely on maladministration, but rather challenges the action of the Crown in passing legislation which is alleged to be inconsistent with a principle of the Treaty. The tribunal is asked to determine whether there has been a breach of Treaty principle and if there has, to then recommend a remedy. In exercising its statutory jurisdiction the tribunal is charged to establish whether any act or omission of the Crown infringes a Treaty principle. To this extent the jurisdiction is particular to Maori by the express words of the statute. We do not therefore accept that the tribunal has no jurisdiction to proceed.

Is lack of objection sufficient to establish consent?

14.8.15 Both the Crown and lessees put forward the view that there was little or no objection from the Maori owners to the proposed perpetual leasing arrangement, and advanced in support of this contention the evidence given by the Maori owners at the 1885 Royal commission and in the Bunny report. We have already examined this evidence. Counsel also referred to the assent given by the Maori legislators most directly concerned with the Bill, and said that they would not have given consent unless they were satisfied that the owners were in agreement. We have also previously looked at what took place during the passage of the Bill.

A strong submission was made to the tribunal that the letter signed by four owners produced to the Parliamentary committee in 1909 examining further complaints of

tenants, (14.2.18) was subsequent consent to the 1887 Act. Consideration of the evidence indicates that letter had been prepared by the Public Trustee himself, as the same language and terms are used, almost exactly, as in a letter later sent by Mr Poynton to the Honourable Mr A T Ngata. We do not consider that this letter is evidence that Maori owners, 22 years prior to that date, were satisfied with the perpetual lease provision or even aware of it. We also query whether any strong inference at all can be drawn from the letter. The circumstances in 1909 clearly showed that the tenants were again moving to purchase the freehold, and this was being resisted by the public trustee who sought the support of certain owners to prove to the parliamentary committee that the leases were favourable to the tenants. The Maori owners who were making the submission would certainly have wanted to endorse the action of the public trustee in preventing their lands from being sold.

Looking, therefore, at the circumstances attending the 1909 evidence, we do not consider that it does anything more than substantiate once again the owners' continued opposition to the sale of the freehold. Viewing the whole question of owners' objection however, the tribunal must agree that there is no evidence of strong opposition to the 1887 legislation. Lack of opposition, however, does not constitute consent although it might certainly give rise to the inference that there was lack of consultation. Lack of objection might also be due to lack of knowledge on the Maori owners' part of the full meaning and effect of the provision inserted into the 1887 Act. More importantly however, the lack of objection may have been due to the satisfactory way in which the land had been administered by Mackay, at least up until he left the scene in the 1880s. Maori owners had no need to register any objections, in that they were receiving rents from the land at a rate which was obviously based on the current market rate at that time. Indeed the evidence before the tribunal showed that there was little objection raised by the owners right through the period up to and including the 1955 legislation. Bearing in mind that the management and control of the reserves was out of Maori hands and being administered initially by the Public Trustee and then subsequently by the Maori Trustee, and that there was no structure representing the Maori owners interest as a whole until the 1960s, it is easier to understand the reason why there was not continual objection from those owners. We consider that the lack of objection by the owners may not be so much indicative of their attitude to the perpetual leasing of their land but more especially related to their lack of complaint about how the land was being administered and rentals received. We shall also come back to this question a little later.

Further reason for lack of objection by owners

14.8.16 We consider that the insertion of the perpetual leasing clause was a breach of the Crown's duty to protect under article 2. The Crown could well have persisted with a regime of 21-year leases or even moved to the longer term offered by the Maori owners. The Crown had no right to move to a system of perpetual leasing without proper informed negotiation and consultation, followed by consent of the Maori owners. It is true that there was little objection from the owners. Indeed in 1955, apart from some objection to the setting up of the conversion fund, it was presented in the House by the Minister of Maori Affairs that there was no criticism of the measure. This could well have arisen for the reason stated by the minister, Mr Corbett, and referred to in 8.2.20, that fragmentation of land and the spread of the Ngai Tahu and Taranaki tribes had removed them from their lands. The entrenchment of control

under a perpetual leasing system which was centrally located in the Maori Trustee's office under the Reserves Act was, in our respectful view, the main contribution to loss of interest. Despite the lack of objection for whatever reason, the Crown continued with the perpetual lease regime but took a further step to intervene in the statutory contractual relationship between the Maori Trustee and the lessees by introducing in section 34 of the Maori Reserved Land Act 1955 a new prescribed rental. This rental was fixed at 4 per cent of unimproved value for urban land and 5 per cent for rural land. At the time this rental rate may not have been disadvantageous to Maori owners, but it nevertheless imposed a new contractual term in the reserved land leases. It is appropriate that we look at this statutory contract.

What was the nature of the reserved land leases?

14.8.17 Throughout the hearing these reserved land leases have been referred to as Glasgow leases (ie, 21-year perpetually renewable leases). It was suggested to the tribunal that this form of lease was quite usual in New Zealand and certainly a well known type of lease in 1887. That is so, but there is an important difference between the position obtained with the Mawhera leases and most Glasgow-type leases in New Zealand which are made under some empowering Act, and are generally between a local body such as a harbour board, city council or a church body, and citizens.

In the leases made under an Act such as the Public Bodies Leases Act 1969, for example, the empowering Act confers wide powers as to nature and term. The parties to the lease then, within the overall statutory umbrella negotiate their terms. As the 1975 commission said of leases under the Maori Reserved Land Act 1955:

There are in fact four distinct parties concerned. These are the Legislature, the Maori Trustee, the lessee, and the beneficial owners who are represented by the Maori Trustee. (D1:60){FNREF|0-86472-060-2|14.8.17|77}

The 1975 commission went on to look at the role of these four parties and made some strongly critical statements about the position of the Maori owners:

The beneficial owners are not a contracting party and their role is a completely passive one. They are treated as children or persons under disability. They are not well informed upon the law or the facts concerning the lands in which they have an interest. They are not adequately consulted either ... or indeed capable of being consulted, even when major changes in the law or the leases which affect their interests are contemplated. Even on occasions when they have expressed views in these matters their representations have not carried weight. (D1:62){FNREF|0-86472-060-2|14.8.17|78}

So in this reserved land leasing situation, although the Maori Trustee is the nominal representative of the beneficial owners, as the 1975 commission said:

in reality the parties who alone are free to determine the nature and terms of the leases are Parliament, ie, the Crown and the lessees. (D1:61).{FNREF|0-86472-060-2|14.8.17|79}

and:

To call the Maori Trustee a free, responsible, and informed person entering freely into a contract on behalf of those whom he represents, is completely unreal and indeed to call it absurd would not be too harsh a term.{FNREF|0-86472-060-2|14.8.17|80}

It has been the Crown therefore, who has set the contractual terms and changed them. The Crown in 1955 fixed the rental rates. At the time they were in line with market rental. There was no disadvantage to Maori owners. However, during the 1960s the fixed rates dropped below the market rate as inflation started to take effect. The Crown took no action to review the prescribed rates, and it was really from this point that the Maori owners began to suffer serious disadvantage. Another event occurred in 1967 which really showed the Crown had progressed the full way in yielding to the tenants-the passing of the Maori Affairs Amendment Act 1967.

The Crown allows the freehold to be sold to the tenants

14.8.18 Sections 155 and 156 of the Maori Affairs Amendment Act 1967, as we have seen (14.2.21), allowed lessees to purchase the freehold from the Maori Trustee. Again, this action of the Crown was strongly criticised by the 1975 commission. It said:

As far as the commission is aware no consideration of any kind accrued to the Maori Trustee or the beneficial owners in return for this provision. CLEARLY THIS IS A UNILATERAL ALTERATION BY LEGISLATION OF A LONG EXISTING CONTRACT BETWEEN THE MAORI TRUSTEE AND THE LESSEES. (D1:53){FNREF|0-86472-060-2|14.8.18|81} (emphasis added)

The commission reported that the Maori Trustee had not been invited to put forward any views on freeholding to government.

Thus the owners now stood to lose the freehold of their land. They had been separated from administration or control of it since 1866. They had had perpetual leases imposed on them without proper consultation or their consent in 1887. They had had prescribed rents of 4 and 5 per cent imposed in 1955 and finally, in 1967, the Crown allowed their land to be sold to the tenants. The tribunal has no doubt that the owners were so far removed from management of their lands and so lacking in co-ordinated grouping for resistance that there was little they could do.

However, as inflation continued into the 1970s, Maori were beginning to express concern about management of their estate. On 20 December 1973, as a result of New Zealand Maori Council representations supported by various Maori authorities, the commission of inquiry was constituted with seven terms of reference to inquire into Maori reserved lands and their administration.

Management and control of Mawhera is restored to Ngai Tahu

14.8.19 We saw in 14.2.23 the results of the commission's work, which recommended a number of remedial changes to the terms of the perpetual lease. These were directed to five-yearly reviews of rent, indexation of rental and rents being fixed at a basic rent of 1 per cent above government stock.

The commission felt that it could not recommend breaking the perpetual term because of the compensation payable but it noted:

It is true that many years ago it [the right of perpetual renewal] was arbitrarily imposed by legislation without the consent of the beneficial owners. (D1:68){FNREF|0-86472-060-2|14.8.19|82}

The commission published its 500 page report in 1975, and although it was obviously hesitant to recommend the end of perpetual leasing in the existing leases, it saw the unfairness of the prescribed lease. Its recommendation that incorporation be legislated to allow Maori owners to take over management of their own lands was put into effect by government, and thus we saw the statutory birth of Mawhera incorporation, on 31 May 1976 and the end of Maori Trustee control. However, the commission's recommendations in respect of rent review and rent fixing have not been implemented in any form, despite assurances given to the Mawhera Incorporation and other Maori authorities that the position was to be reviewed. It is possible that if government had moved in respect of rent review and rental as quickly as it moved to transfer management these grievances would not have come before this tribunal. Despite its stated intention to intervene, the Crown has failed for 16 years to remedy the lease terms. We observe here that in 1975 it did repeal the tenants right to freehold.

Summary of tribunal findings as to breach

14.8.20 In our view the following acts and omissions of the Crown are inconsistent with the principles of the Treaty:

1 The insertion of the perpetual right of renewal in the leases of Maori Reserved Lands by section 14 of the Westland and Nelson Native Reserved Land Act 1887.

2 The insertion of sections 9A and 9B into the Maori Reserved Land Act 1955 by sections 155 and 156 of the Maori Affairs Amendment Act 1967.

3 The failure of the Crown to implement those recommendations of the Commission of Inquiry into Maori Reserved Land 1975 relating to renewal of terms and review of rent.

We set out earlier in this report (chapter 4), relevant Treaty principles governing the relationship of Maori and the Crown. The retention by Maori of tino rangatiratanga under article 2 requires the Crown not only to respect but further, to guarantee and protect mana Maori. It cannot be said that the Crown, in legislating to take away forever from Maori their future rights of use and enjoyment in respect of Mawhera lands, was discharging its guarantee to protect rangatiratanga under article 2. Nor can the Crown's unilateral action in respect of these perpetual leases, and their imposed unreasonable statutory terms, be seen to be dealing with Maori on the basis of sincerity, justice and the good faith of a Treaty partner.

The tribunal finds, therefore, that there has been a clear breach of article 2 of the Treaty. Furthermore, the tribunal is satisfied that, as a result of the Crown's actions and omission, the claimants have clearly been prejudicially affected thereby. Not only

have the claimants lost a right of use and occupation but they also lost a valuable property right in their land when the Crown gave away that right to the tenants.

We therefore find that the claimants have established grounds 7 and 11 as set out in their summary of grievances.

Allegations against the Maori Trustee

14.8.21 In 14.7.1 we set out a number of allegations made by the claimants in respect of the Crown's failure to administer properly the reserved lands. We also examined the Maori Trustee's response. The whole question of Maori Trustee administration was investigated as part of its terms of reference by the 1975 commission. The commission considered there was a solid basis of fact underlying and supporting opinions put to the commission criticising lack of consultation, and the remote and impersonal administration. However the commission came to the view:

There is no doubt that a lot of the criticism levelled at the present administration of the Maori Trustee comes about by reason of the restrictive legislation within which he must operate. (D1:31){FNREF|0-86472-060-2|14.8.21|83}

The tribunal endorses this view and indeed, at various times in the submissions of claimant witnesses Messrs McAloon and O'Regan, the administration's deficiencies were directed back to the Crown and its legislative control. We also accept the six points made by the deputy Maori Trustee as a major contribution to the dissatisfaction of the Maori owners (14.7.5).

The tribunal has considerable sympathy for both the Maori owners and the Maori Trustee but very little for the Crown. From 1856 until 1975 the Crown persevered with a form of trust management in which, as we have seen, the Crown made the rules and supervised the process. The system adopted alienated Maori from any real consultation or knowledge about their interests in the reserved lands. The 1975 commission recommended alternative management systems for Maori incorporations and trusts that had been part of the Maori land utilisation system from 1909, (the year when the Native Land Act gave powers of management to Maori land incorporations). They were not new. They were there to be used many years earlier. There is no doubt that the fragmented title of Maori land, which was completely out of their control and use, led to alienation; a process certainly speeded up by the conversion procedures of the 1967 legislation. But the perpetual lease, the 21-year reviews and the 4 and 5 per cent rentals were the key elements of owner grievance. These elements, exacerbated by remote trustee control, estranged Maori from their land. Although management of the land has been returned, the major disadvantages remain and the Maori owners are bound by lease contracts containing terms imposed on them by enactments of Parliament. As each day continues without redress the financial loss of Maori owners accumulates.

14.8.22 It is the finding of the tribunal that primarily the actions or omissions of the Crown have been responsible for the general complaints laid at the door of the statutory managers. The tribunal accepts that some of the specific matters alleged against the Maori Trustee may be properly justiciable in the New Zealand courts of ordinary jurisdiction. The incorporations and trusts which have taken over

management of the reserves are corporate bodies with powers to commence such proceedings. Generally, however, this tribunal considers that the number of specific complaints made to us during the hearing of the substantial grievances add weight to the claim, and support the findings made by us in 14.8.20 in respect of the principal grievance. By reason of the generality of the complaints listed in the second grouping in 14.8.20, and for the other reasons given above, we do not intend to make specific findings against the statutory trustees.

Ngai Tahu Land Report

14 The Perpetual Leases of Ngai Tahu Reserves

14.9 The Tribunal's Views on Remedies

14.9. The Tribunal's Views on Remedies

What do the parties seek?

14.9.1 Having found that the Crown's legislative enactments in 1887 and 1967, and its omission since 1975 to implement remedial action, were respectively acts and an omission inconsistent with Treaty principles we must now consider the question of remedy.

What are the views of the parties and the other key figures in these grievances, namely the claimants, the Crown, the lessees and the Maori Trustee.

Remedy asked for by Ngai Tahu

14.9.2 The claimants seek as follows:

(a) Monetary compensation from the Crown calculated on the basis of the difference between ordinary term leasehold rates pertaining to similar lands and the actual rates derived to the owners from the perpetually renewable leasehold imposed by the Maori Reserved Land Act 1955 and its preceding Acts. Calculated as a lump sum from 1872 to the present.

(b) Amendment to the Maori Reserved Land Act 1955 to the effect that the leases prescribed in that Act will:

(i) Over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act.

(ii) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act.

(iii) Immediately change from the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

The above statement of remedies was set out in a statement attached to a letter dated 5 September 1987 (appendix 5) addressed to the tribunal's registrar.

However in his address to the tribunal at Greymouth on Tuesday 1 December 1987, Mr Temm, for the claimants, said this:

We say that the owners are prepared to be reasonable, as the Maori have been down through the years. They don't ask for compensation for what they have lost. Lord knows if they were to work it out, it would be figures that would run into astronomical calculations if you took into account compound interest they would otherwise be entitled to for breach of trust. And as we all know when a breach of trust is committed by a big trustee compound interest is the ordinary role of damages. The cost would be absolutely astronomical but they don't ask for that. They are being very simple and practical. They are simply saying that they want their annual losses to be brought to an end. That's the first thing they ask for. And they seek a recommendation from the tribunal that the law be changed to put them on the same footing as Pakeha land owners. (W1)

The above statement would seem to indicate the claimants are not seeking the compensation referred to in the earlier claim dated 5 September 1987. There is no reference to compensation in either Mr Temm's closing address (W1:267-271) or in his final reply (Y1:122-124).

The Crown reserved its submissions on remedies

14.9.3 The Crown, whilst arguing that it had acted at all times in good faith and certainly not in breach of the Treaty, nevertheless recognised that for the last fifteen years approximately the legislation had worked unfairly. The Crown reserved submissions on the quantum of loss and also made no submissions on terms of remedial legislation as that matter was before a cabinet committee (X2:140).

The lessees oppose breaking perpetual leases

14.9.4 The West Coast (South Island) Leaseholders Association also said there had been no Treaty breach but, if so found by the tribunal, then the party in default was the Crown. Counsel Dr Young strongly opposed as unfair and unjust the claimants' proposal that the perpetual lease terms be broken. He claimed the lessees had settled land transfer titles which should not be expropriated and that if any monetary compensation was to be paid out then that was to be paid by the Crown. Counsel had called valuation evidence to establish that the lessees stood to lose $4.5 million if the government met the claimants' proposal (N32:18).

The position of the Maori Trustee

14.9.5 The Maori Trustee supported the claimants' case for a review of leaseholds and provisions for rent fixing (N32:18). Deputy Maori Trustee Wickens commented:

The Maori Trustee is well aware of the defects in the Maori Reserved Land Act 1955, and has been conscious of the need for change to it. An attempt was made to change the leases in 1971 following the introduction of an amendment to the Local Bodies leases, allowing for rent reviews at five yearly intervals. The Maori Trustee had drafted an amendment along similar lines, but was instructed by government not to proceed with it. The amendment to the Local Bodies leases was a short-lived piece of legislation as it was repealed not long after it had been passed due to the public outcry against it. (N34:21)

The recommendation of the tribunal

14.9.6 The tribunal has no difficulty in coming to a view on remedy. We commented earlier that the sanctity of title now pleaded by the lessees is what the Maori owners lost by Crown action in 1887. If this was simply a matter between Crown and the lessee involving Crown land, then the lessees plea would have a strong base. But this case involves Maori land. It is not public or Crown land. It is private land. We see that an injustice occurred and still continues. It must be righted. The tribunal knows of no other privately owned land, management of which has been taken from the owners and the land placed under perpetual lease with 21-year rent reviewals at fixed rentals of 4 per cent (urban) and 5 per cent (rural). Counsel for the Maori Trustee referred to a comment by the then Minister of Local Government in 1977:

The resolution of this issue will necessitate an arbitrary decision one way or the other and, clearly whichever of the alternatives is adopted there will be very considerable resentment from the proponents of the other. (N32:21)

As will be seen throughout this report, inadequate lands were reserved for Maori in almost every South Island Crown purchase. To have land which was set aside for individual allotment placed in perpetual lease was a further indignity. Kaupapa Maori and government's stated policy are directed to Maori self-determination and return of Maori land to Maori control.

The tribunal also accepts that the lessees are justly entitled to be compensated by the Crown for such loss they may suffer consequent upon implementation of this tribunal's recommended actions. That loss is an ascertainable figure. The tribunal considers that the statutory changes sought by the claimants should be implemented without further delay. The claimants do not appear to be seeking compensation for the loss suffered and the Crown have reserved submissions on this question. The tribunal is therefore not minded to make any present recommendations on compensation by way of solatium for loss. This question is reserved and may be raised and dealt with in the event that the tribunal is required, at some future time, to address remedies upon completion of negotiation between the parties.

If compensation is insisted upon by the claimants-and their valuer gave a minimum figure of $750,000 on 21-yearly reviews and a maximum of $2.25 million on 7-yearly reviews then it will be necessary for the question to be argued later. Crown counsel suggested that their values did not agree with the claimants' assessment of loss and suggested there might well be a need for the respective valuers to reappraise the situation in order to resolve the issue. The question of compensation is therefore presently deferred.

14.9.7 We proceed therefore to make the following recommendations in respect of the principal grievance:

1 That the Maori Reserved Land Act 1955 be amended (as sought by the claimants and set out in paragraph 6 page 2 of appendix 5) so that the leases prescribed in that Act will:

(a) Over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act;

(b) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act; and

(c) Immediately change the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

2 That the lessees be reimbursed by the Crown for any provable loss suffered by them as a result of the legislative changes recommended above.

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Ngai Tahu Land Report

15 Rakiura

15.1 Introduction

Chapter 15

RAKIURA

15.1. Introduction

Rakiura (Stewart Island) was the last major land mass to be purchased from Ngai Tahu by the Crown. Although Rakiura had been settled by Maori/European families for a number of years, the increasing unsupervised European encroachment on the island and the accompanying confusion over land titles, finally motivated the government into arranging the transaction. In 1854 a single land purchasing commissioner, Henry Tacy Clarke, was sent to negotiate the purchase. The deed of purchase, signed after a week's negotiation with 120 representatives having interests in the island, conveyed to the Crown all of Rakiura and the outlying islands where the titi seasonally burrow. Nine reserves were provided for Ngai Tahu and 21 islands were reserved for their exclusive use. The œ6000 payment provided for immediate and long term benefit to the tribe.

Although Clarke carried out his duties diligently in comparison with his predecessors, the full implementation of the agreement was delayed for some years. The claimants have stated that the Crown failed to appoint a protector to advise Ngai Tahu of their Treaty and other rights. Under the Rakiura umbrella also were two grievances regarding the administration of the Titi Islands and the inclusion of Whenua Hou (Codfish Island) in the sale.

Ngai Tahu Land Report

15 Rakiura

15.2 Background to the Purchase

15.2. Background to the Purchase

15.2.1 Rakiura was the scene of a great deal of Maori-European contact. During the first decade of the nineteenth century vessels involved in the sealing industry operated in Foveaux Strait. Although there were occasional fracas between Ngai Tahu and these sealers, relations were generally good and many European men married Ngai Tahu women and began families. In the mid-1820s a semi-permanent settlement of these families was established with Ngai Tahu consent on Whenua Hou, the largest of Rakiura's off-shore islands.

Sealing was in decline in the 1820s but the rise of the shore-whaling industry meant that the Foveaux Strait area continued to see a significant amount of traffic during the 1830s. In addition to shore-whaling ventures, Rakiura became the summer home of many whalers and their families. By the mid 1830s a sizeable community had grown up around "The Neck" on the eastern peninsula of Paterson's Inlet.

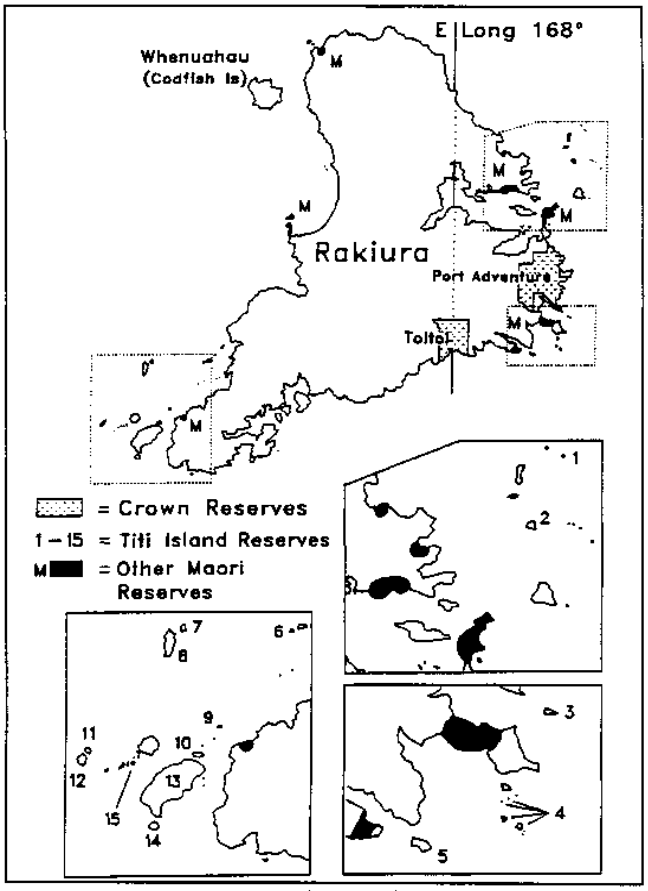

Figure 15.1: Rakiura and the Titi Islands, showing Maori reserves and Crown islands. The land west of the 168th parallel of longitude was offered in 1860 by Topi Patuki for sale to the Crown.

Titi Island Reserves

Old name	No.	Modern equivalent
Pikomamaku Is	1	Womens Is
Herekopare Is	2	Herekopare Is
Tia Is	3	Tia Is
Potuatua Is	4	Breaksea Islands
Pomatakiarehua Is		
Kaihika Is		
Wharepuaitaha Is		
Horomamae Is	5	Owen Is
Timore Is	6	Chimneys Is
Mokiiti Is	7	Little Moggy Is
Mokinui Is	8	Big Moggy Is
Kaimohu Is	9	Kaimohu Is
Rerewhakaupoko Is	10	Solomon Is
Tamaitemioka Is	11	Tamaitemioka Is
Pohowaitai Is	12	Pohowaitai Is
Taketu Is, Hereatua Is, Taukiepu Is, Te Pukeotahoka Is	13	Big South Cape Is
Poutama Is	14	Poutama Is
Huirapa Is	15	Huirapa Is

On 5 June 1840, Major Bunbury landed at the uninhabited harbour at Point Pegasus (Zephyr Bay) and proclaimed British sovereignty. Four days later his ship left for the island of Ruapuke where several Ngai Tahu chiefs, including Tuhawaiki, signed the Treaty of Waitangi.

15.2.2 In a letter dated 21 December 1854 an offer was made by Topi Patuki, the principal representative of Rakiura Ngai Tahu, to gift the Titi Islands to the Queen (U3:20).{FNREF|0-86472-060-2|15.2.2|1} The offer had one important condition attached to it. Patuki wished retain exclusive rights to the titi. He expressed concern about the plundering of titi by strangers. The tone of the letter suggests that this desire

to secure access to the titi and to stop European ravagement of the resource may have been the principal concern motivating the offer. In her report on Rakiura, Deborah Montgomerie stated that Patuki's letter is one of the clearest indications we have of a belief on the part of Ngai Tahu that the transfer of legal title to land to the Crown could be compatible with the retention of tribal rights to mahinga kai (U3:4). However, nothing appears to have come of the offer as Mantell, in his capacity as commissioner of Crown lands, seems to have made a decision not to relay the offer to the Queen.

15.2.3 While the Titi Islands and the titi may have been Ngai Tahu's major concern in the area, the large land mass and its timber made the question of ownership of Rakiura more significant to European administrators. The first official approach from Ngai Tahu to the government over the possible sale of the island to the Crown was made by Patuki in 1860. He offered to sell the Crown a portion of Rakiura westward of the 168th degree of longitude (A8:II:53){FNREF|0-86472-060-2|15.2.3|2}. According to Basil Howard, Patuki thought to retain the eastern portion of the island, as it contained all the populated area, the frequented harbours and the profitable timber zone. Howard suggested that increased European interest in Rakiura was related to Patuki's desire to sell the island.{FNREF|0-86472-060-2|15.2.3|3} There were already a number of established European settlers on the island and an increasing demand for secure land titles, particularly for sawmilling operations (A8:II:53){FNREF|0-86472-060-2|15.2.3|4}. On 10 May 1861, Patuki wrote to the government stating that he did not wish Europeans to locate themselves on the island.{FNREF|0-86472-060-2|15.2.3|5} Yet in another letter dated later that month he repeated his offer to sell the island to the Crown.{FNREF|0-86472-060-2|15.2.3|6}

15.2.4 The Crown faced a number of obstacles in expediting the Rakiura sale. Macandrew, the Otago superintendent who had been the prime mover behind the purchase within the Otago provincial government, had been removed from office. The cession of Southland from Otago complicated matters, as did the northern war and the instability of government ministries.

In this period, the problems with European encroachment on Rakiura seem to have continued to grow. In 1863 the native secretary, Francis Dillon Bell, urged the government to purchase Rakiura, as he considered the government might find itself in difficulty in consequence of unauthorised transactions from people "unlawfully occupying and dealing with portions of land in the island" (A8:II:53-54).{FNREF|0-86472-060-2|15.2.4|7} At least one of these transactions was recognised by Patuki as binding. In November 1863 he informed the government that he had entered into an arrangement with certain Europeans for the sale of a portion of Stewart Island (U3:5-6).

By this time the government had already decided to purchase Rakiura and Bell proposed that somebody should be appointed immediately to do so. He informed his ministers that Rakiura was not formally annexed to any province, but that it naturally belonged to Southland. He proposed to introduce legislation to annex the island to Southland, arguing that it was quite immaterial whether the island was ceded or not at the time, as the Queen's sovereignty existed over it under the Treaty of Waitangi (A8:II:53-54).{FNREF|0-86472-060-2|15.2.4|8} In December 1863 the Stewart Island's Annexation Act was passed. This move does not seem to have prejudiced the

interests of the Maori owners of the island, being merely an expression of the Queen's sovereignty. Maori title to the area was not affected.

15.2.5 In September 1863, Theopilus Heale, the chief surveyor of Southland, was asked to negotiate the purchase as soon as possible. His instructions were detailed. He was to:

ascertain and make a list of all the natives, such as Topi [Patuki], and others who are immediately interested as owners of the land in Stewart's Island, determining and defining what right they have, either generally or individually, to any and to what portions of the island and from what date their claims originate respectively. (A8:II:54){FNREF|0-86472-060-2|15.2.5|9}

It is not clear when the decision was made to attempt to purchase the entire island rather than the western portion offered by Patuki, or at what point it was decided to attempt to include the offshore islands. Heale's instructions show that the government had decided to attempt to purchase the whole of Rakiura. They do not explicitly mention the Titi Islands. The instructions also show there was a clear intention to provide an endowment for the vendors and not simply make a one-off payment. Regarding the payment, Heale was to:

offer as the purchase price of the land a certain sum to be paid at once, and a certain proportion-not exceeding one third-of the proceeds of future sales or leases of Crown lands in the island, on the understanding (to be explained to the sellers) that of the one-third so reserved, two-thirds will be spent for the benefit of the tribe by trustees to be appointed by the governor; and the remaining third to be distributed annually to Topi, Paitu, and the heirs of Tuhawaiki. (A8:II:54){FNREF|0-86472-060-2|15.2.5|10}

With the change of government in October 1863, it would seem that Heale was replaced in his commission to purchase Rakiura. This was placed in the hands of Henry Tacy Clarke in February 1864. In accepting his commission Clarke was to follow the instructions issued to Heale. Further, he was to adjudicate those land claims between Europeans and Ngai Tahu that were still outstanding. No specific instructions were given to Clarke regarding the making of reserves, nor were the Titi islands mentioned (A8:II:54-55).{FNREF|0-86472-060-2|15.2.5|11}

Ngai Tahu Land Report

15 Rakiura

15.3 The Purchase

15.3. The Purchase

15.3.1 Clarke arrived in Invercargill in March 1864, but could not make much progress as this coincided with the mutton birding season. He noted in his report of 30 March 1864 that he had personally communicated with the local Maori residents (A8:II:55){FNREF|0-86472-060-2|15.3.1|12}. A letter had also been sent to Otago informing Ngai Tahu there that the government intended to proceed with the purchase and asking them to be ready to meet with the Southland claimants when called upon. Disputes about rights on the island had arisen, some Maori claiming rights through Ngati Mamoe. Patuki, as a principal claimant through Ngai Tahu, rejected the Ngati Mamoe claim. Clarke also recommended the prosecution of the proposed purchaser who had agreed to give œ4000 for about two-thirds of the island. This was an agreement made directly with Patuki, who acknowledged that he had received œ10 on account.

In May 1864 Clarke was able to begin negotiations in earnest. He considered his position inherently unsatisfactory, being charged with both protecting Maori interests, and buying the island as cheaply as possible. He wrote to the superintendent of Southland in April 1864:

The position in which I stand is, I conceive rather an anomalous one. On the one hand I shall be expected to purchase for the Provincial Government on the most favourable terms. On the other, I am instructed to have due regard to the interests of the Natives. (A8:II:58){FNREF|0-86472-060-2|15.3.1|13}

15.3.2 Consequently, before entering into any purchase negotiations Clarke was careful to come to a clear understanding with the Southland Provincial Government over the purchase price. The payment schedule proposed by Clarke differed in several respects from that set out in the government's original instructions to Heale.

Clarke proposed a total price of œ6000. Two thousand pounds of this was to be paid over at the time that the deed was signed, and œ2000 was to be held by the government, with interest at 8 per cent per annum to be paid annually to certain named chiefs. The remaining œ2000 was to be used to buy land in Southland as a reserve for Maori education and other purposes. Clarke considered that the instructions given to Heale about making payments out of the proceeds of land sales were inconvenient and unworkable. He wrote on 6 May 1864:

This would be especially the case with regard to Stewart's Island. The Provincial Government may find themselves trammelled in their mode of dealing with those lands, and it may become the source of frequent disputes and complications. On the

other hand I know from my knowledge of the Natives, that eventually misunderstanding and dissatisfaction would inevitably arise. (A8:II:59){FNREF|0-86472-060-2|15.3.2|14}

The general government and the provincial government both agreed to his proposal, although the provincial government did try to reduce the rate of interest that was to be paid on the œ2000 invested with it to 6 per cent.

15.3.3 Clarke's letter to the superintendent of Southland on 26 April 1864 asking for approval of the revised payment schedule, contains the first official mention of an intention to make reserves on Rakiura for Ngai Tahu. Heale had previously noted that it would be necessary to make provision for the half-castes resident on the island. Clarke also recognised this, but suggested that other reserves would have to be made, including several reserves to provide Ngai Tahu with continuing access to titi. However the tenor of his comments on these reserves suggest that he did not see any conflict between making these provisions and the government's intentions.

In his letter he wrote:

The reserves necessary for the Natives will be two only;- one at Port Adventure, for William John Topi (Topi Patuki's half brother), and others residing in that locality; and one at Paterson's Inlet. It will also be necessary to reserve THREE OR FOUR OF THE SMALL Islands adjacent where the Natives procure the "titi," or mutton bird. (A8:II:58){FNREF|0-86472-060-2|15.3.3|15} (emphasis added)

It would appear that Clarke had been given authority to make reserves before leaving for the south as he saw no need to discuss the arrangements regarding reserves in his letter to the superintendent. He updated his proposed course in a letter to the colonial secretary in May 1864 (A8:II:59){FNREF|0-86472-060-2|15.3.3|16}. Clarke met with Mr Menzies, the Superintendent of Southland, in late June, and pressed upon him the necessity of settling the matter immediately. His view prevailed and Menzies arranged for the money to be made available.

15.3.4 On 24 October 1864 Clarke reported that the sale was complete (A8:II:60-61).{FNREF|0-86472-060-2|15.3.4|17} His report mentions that there was a dispute between Ngai Tahu and Ngati Mamoe over ownership of the island but does not record any division over the question of whether or not to sell, or any uneasiness about the fact that the government wished to purchase the whole of Rakiura. He had met with 120 representatives of Ngai Tahu and Ngati Mamoe on 23 June, and found that the issue of ownership had been settled. To make sure that no undue pressure had been applied Clarke went through the dispute again. He did not record the discussion, but concluded that Ngai Tahu "indisputably" established their right over Ngati Mamoe and that Ngati Mamoe kaumatua were content "to hold a secondary position, and claim through their Ngai Tahu ancestry"(A8:II:60).{FNREF|0-86472-060-2|15.3.4|18}

A second meeting was held the next day to discuss the price. Clarke claimed to have told Ngai Tahu at the beginning of the negotiations that the government was willing to pay œ6000. This was thought to be too low and Patuki asked for œ50,000, then revised it to œ22,000, and finally dropped his price to œ12,000. Clarke refused to

budge as he felt œ6000 "was a liberal and just payment for an Island which was of little or no value to themselves" (A8:II:60).{FNREF|0-86472-060-2|15.3.4|19}

On 29 June Clarke held another meeting with the owners, this time at Bluff, and a deed was executed. Thirty-four chiefs signed the deed which conveyed to the Crown all of Rakiura and the adjacent islands. Nine reserves were made, amounting to about 935 acres, plus an unspecified amount of land on the Neck (out of which half-castes' grants, with ten acres for men and eight acres for women, were to be made). Clarke appended to his report on the purchase a list of 28 half-castes residing at the Neck, but acknowledged that this was probably incomplete. Twenty-one of the Titi Islands were reserved for Ngai Tahu-Ngati Mamoe but there is no indication how this list was compiled. Most significant, however, was the exclusion of Whenua Hou (Codfish Island) and some of the smaller Titi Islands from the list of those reserved for the vendors.

The œ6000 was to be divided into three equal portions. The first was to be paid at the time of signing, the second invested with the government at 8 per cent and the income distributed annually, and the third used to buy land in Southland "for educational, and other Native purposes". This latter endowment, Clarke explicitly stipulated related "to Stewart's Island only" (A8:II:58).{FNREF|0-86472-060-2|15.3.4|20} In essence, he was conveying to the Southland provincial government that it should not use these funds and lands to set up schools in the Murihiku area for people other than Stewart Islanders.

Although Clarke's journal of proceedings, if it existed at all, has not been found, it is clear from the detailed list of islands in the deed that they were indeed negotiated for by the vendors. It is clear that some discussion on the Titi Islands must have taken place for them to be included in the list of reserves described in the deed. This is contrary to the witnesses' testimony, that specific islands were unintentionally included in the purchase.

Ngai Tahu Land Report

15 Rakiura

15.4 Developments After the Purchase

15.4. Developments After the Purchase

The education endowment

15.4.1 In January 1868 Alexander Mackay visited southern Ngai Tahu settlements, including those on Stewart Island. In reporting on the education endowment he wrote:

... I would beg to point out the necessity that immediate action should be taken to make the third instalment of the Stewart's Island purchase money productive, either by way of investing it on mortgage, or by any other mode that would produce an immediate income. There appears to be very little doubt that if the terms of the Deed are strictly adhered to, and the amount invested in land, that there is every chance of its laying dormant for years, or at the best produce but a very limited amount.

The several Acts were explained for the benefit of the Natives, and they promised to hold meetings among themselves to concert measures to secure the return of a representative. A good deal of dissatisfaction was expressed by them, that the amount set apart out of the Stewart's Island purchase was lying idle, more especially as it had been withheld from them without their consent. They were given to understand that what was then done was for their ultimate benefit, but they failed to see any real advantage they had gained by the arrangement, whereas, if the money had been apportioned among them as they wished at the time, they would have the satisfaction to know, at any rate, what had become of it.

I explained to them that the Government were very anxious to find a safe investment for it, but many circumstances had occurred to prevent this intention being carried out. (A8:II:150){FNREF|0-86472-060-2|15.4.1|21}

On 4 April 1870 G S Cooper, under-secretary of the Native Department, reported on the delay in implementing the deed:

There is another question to be settled in reference to the Stewart's Island purchase. By the terms of purchase œ2,000 were to be invested in purchase of land in the Province of Southland, as an endowment for educational and other purposes for the benefit of the vendors. This land has recently been selected, and has to be granted to three trustees, who are to execute a Deed of Trust. These trustees (two of whom had better, if possible, be residents in Southland, and the third, Mr. A. Mackay) have to be appointed.

The Provincial Government also wish to know by whom the expense of surveying this land is to be borne. There can be no doubt, in this case, at least, of the liability of the

Province to execute the survey, as it is as much a purchase of their land as if it had been made with 2,000 sovereigns, instead of being, as it was, a remission of payment of œ2,000 of the Stewart's Island purchase money, which the Province was under engagement to provide. But the question still remains unsettled. (A8:II:66){FNREF|0-86472-060-2|15.4.1|22}

In May 1870 Cooper reported that the provincial government was unable and unwilling to carry out the surveys (A8:II:67).{FNREF|0-86472-060-2|15.4.1|23} Cooper then obtained approval from the colonial government to pay for and engage Major Heaphy V C to arrange for the necessary surveys. At this time Heaphy had reported excellent land had been purchased as the education endowment, being Education Reserve Lot 225 Hokonui and Lot 13 Waimumu. This land was let for a period of 21 1/2 years at a rental of œ75 per annum for the first three years, and thereafter at œ100 per annum for the remainder of the term. As no survey had been carried out, no Crown grant or lease had been issued and therefore no rent paid. Heaphy wrote that œ75 would be due on 1 June 1870 and suggested a Crown grant be prepared. He also nominated two trustees to administer the trust: himself and I N Watts, the resident magistrate at Bluff (A8:II:72).{FNREF|0-86472-060-2|15.4.1|24}

15.4.2 There was some confusion about how the endowment was to be administered and what conditions were on the trust. For two years following the purchase nothing was done. In 1866 the government made available œ320, being two years' interest, to establish a school at Ruapuke.{FNREF|0-86472-060-2|15.4.2|25} The endowment was inadequate to provide for the education of all the children of the Southland kaika. Ngai Tahu were far from happy with the constant delays in providing for their educational needs.

The sum realised from the endowment was too small to pay all the running costs of the Ruapuke school and in 1868 the school committee decided that it would have to get contributions from the kaika so the teacher could be paid an adequate salary. The school had a difficult history and as the Maori population on Ruapuke declined it was only the dedication of Reverend Wohlers (who took over the teaching in 1869) that kept it operational.

In 1868 only one third of the children entitled to benefit from the fund lived on Ruapuke and no money was left over from the fund to set up other schools. The secretary of the Otago Education Board agreed to admit half-caste children to the school at Bluff and the central government agreed to pay the fees of those half-caste children whose parents could not afford to educate their children. A school had been built by the Riverton Maori five years earlier, but the community had not been able to find a teacher for their school. In 1868 I N Watt persuaded the teacher at the local provincial school to agree to teach Maori children before and after ordinary school hours. The parents of the Riverton children were obliged to pay five shillings per quarter per child.

It was not until 1875, eleven years after the purchase, that a school was finally established on Rakiura (M20:34). In 1877 the inspector reported:

I was disappointed to find the schoolhouse not yet built. This is very much to be regretted. I pointed out in my report last year that the small, smoky, overcrowded

room now occupied as a schoolroom is unfit in every way for the purpose for which it is used. (M20:34-35){FNREF|0-86472-060-2|15.4.2|26}

Despite having specific provision made in the deed for educational needs, Rakiura Ngai Tahu were called on to provide a further œ150 for the erection of the schoolhouse.

15.4.3 Today the endowment is still used for educational purposes. There is accumulated trust capital of $3600 and income is derived from a lease over section 13 block I Waimumu and section 225 block LXIV Hokonui which is registered as Maori freehold land and vested in the Maori Trustee. The lease is a perpetually renewable 21 year lease which is subject to the provisions of the Maori Reserve Land Act 1955 and Maori Trustee Act 1953. The present term of the lease expires at the end of 1991.{FNREF|0-86472-060-2|15.4.2|27}

The purpose of the trust is to provide financial assistance in the post-primary education of all descendants of the original owners of Rakiura. Although the Maori Trustee holds the endowment, seven advisory trustees from the region, appointed by the Maori Land Court, decide how the funds are allocated. Applications for assistance are sent to the Hokonui Endowment Trust Board every year. The application must be approved by three or more trustees before being sent on to the Maori Trustee who then pays out the grant to the applicant.

No representations were made to the tribunal concerning either the question of ownership or the terms of lease of the endowment lands. As yet the beneficial owners have not been identified by the Maori Land Court. Various procedures are available in the Maori Reserved Land Act 1955 for those with an interest in the land to make changes to the present administration of the endowment. The tribunal therefore sees no need to intervene by way of recommendation. We do however highlight the following:

- under section 11 of the Maori Reserved Land Act 1955 the court may determine the beneficial owners of any reserved land;

- under section 14 of the Act the court may vest the land in the beneficial owners determined by the court, or, in section 14(5) make an order in terms of section 438 of the Maori Affairs Act 1953 vesting the land in a trustee or trustees; and

- under section 15a the land may also be vested in and administered by a Maori incorporation.

Regarding the lease and its perpetual right of renewal, we note that it is subject to the same restrictions as those imposed on the Mawhera leases referred to in the preceding chapter. The advisory trustees may wish to join this issue to that of the Mawhera Incorporation and have the endowment lands freed from the perpetual lease and its restrictive terms. The tribunal would support such a move.

The œ2000 investment

15.4.4 As related earlier, œ2000 of the purchase payment was to be invested with the government and interest of 8 per cent per annum distributed to the people specified in the deed, namely Paitu, Teoni Topi Patuki, Tioni Kihau, Frederick Kihau and Ellen Kihau and their descendants. This was subsequently carried out although the rate of interest was reduced to 6.4 per cent by the National Expenditure Adjustment Act 1932.

In 1954 there were fifteen beneficiaries of the investment, six of whom were receiving a mere ten shillings and eight pence per quarter. It was decided that a lump sum of œ3200 be distributed to the existing beneficiaries before any further fragmentation of interest occurred.{FNREF|0-86472-060-2|15.4.4|28} Section 7 of the Maori Purposes Act 1954 gave effect to this decision, and the money was distributed accordingly.

Reserves

15.4.5 In his report on the purchase Clarke did not give any acreage for the reserve at the Neck. A list of 28 half-castes residing there was prepared, but Clarke acknowledged that there were more. In 1868 Mackay, in his report on southern settlements, wrote that no reserves had been surveyed, nor had the old land claims referred to by Clarke been settled. He reported that the land at the Neck was insufficient for the reserves promised under the deed and other land should be obtained (A8:II:64).{FNREF|0-86472-060-2|15.4.5|29}

In 1869 Andrew Thompson presented a petition seeking redress for the lack of land allocated for half-castes. Mackay was appointed to examine the situation, arrange surveys of suitable land and report back to government. Mackay compiled a corrected list and this resulted in 94 claimants being recognised as landless half-castes.{FNREF|0-86472-060-2|15.4.5|30}

In April 1870 G S Cooper reported on the southern Ngai Tahu reserves:

But in the Stewart's Island purchase a great and substantial injustice has been inflicted on the Natives and on a large number of half-castes for whom land was specially contracted to be reserved, by the delay in defining the reserves, a delay which had now reached the length of very nearly six years.

The claim of the half-castes was brought under the notice of the Legislature by a petition from Andrew Thompson to the Legislative Council last session, and the Council passed a resolution praying His Excellency to give immediate effect to the recommendation of their Public Petitions Committee, who urged that steps should be taken without delay to put the half-castes in possession of the land which had been promised them. The obstacle to marking off this land is not only the ordinary difficulty of obtaining a survey and the question of who is to pay for it (there are 94 sections to be laid out), but there is also the fact that the half-castes' land, and some other reserves as well, are to be laid off after certain "old land claims" are disposed of. Many of the claimants to these "old claims" cannot now be found, and there is reason to believe that most, if not all, of them are unable to defray the expense of surveying their claims. It would, I think, be advisable if the parties interested (the half-castes and the Provincial Government) could be got to agree to it, to exchange the claim on

Stewart's Island for a block of land on the main, on which the half-caste families could be located. (A8:II:66){FNREF|0-86472-060-2|15.4.5|31}

The Stewart's Island Grants Act 1873 made provision for the issuing of Crown grants to half-castes born on the island and resolved a number of claims. As there were others equally entitled to land Mackay temporarily reserved 1676 acres from sale in the area of Foveaux Strait.

In 1874 the surveys were completed. The Stewart's Island Grants Amendment Act of 1876 vested two blocks at the Neck to Ihaia Whaitiri and Hoani Timarere, the persons named in the deed.

This completed the laying out of the reserves mentioned in the deed. However there remained the need for reserves for the "half-castes" who had not been provided for at the Neck. It was some years before provision was made for them and the subsequent legislative history is referred to in chapter 20. Save in the case of the "half-castes" the delay caused no great hardship, for the Maori continued to occupy the land in the vicinity of the proposed reserves.

Ngai Tahu Land Report

15 Rakiura

15.5 Ngai Tahu's Grievance

15.5. Ngai Tahu's Grievance

15.5.1 The claimants stated:

The Crown failed to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights. (W6)

Mr McAloon in his evidence was critical of the unilateral determination of the Crown in fixing the purchase price below that sought by Ngai Tahu. He was also critical of Clarke's opposition to their request to administer the endowment fund. Mr Temm contended that Clarke failed to make the deed perfectly clear. He stated that Ngai Tahu wanted to preserve their birding rights on all of the islands and today they are not satisfied that these islands are Crown land.

Findings on grievance

15.5.2 There is no doubt that the Crown should have provided Ngai Tahu with a protector; an independant advisor to explain their Treaty and other rights to them. Clarke himself was aware of the ambiguity of his position: acting as a Crown agent on the one hand and keeping the interests of Ngai Tahu in mind on the other. The evidence however, suggests that Clarke did his utmost to ensure that there would be no subsequent complaints about the way the island was acquired. He met with a large contingent of Ngai Tahu with interests in the area and made sure internal disputes were resolved before any terms were negotiated. The deed with the annexed plan made it clear what was sold and what was reserved. Provision for ongoing benefit for Ngai Tahu from the purchase was made through the education endowment, and for a smaller group through the œ2000 investment. Regarding the latter, he ensured that a full 8 per cent interest be paid. In comparison with his predecessors then, Land Commissioner Clarke executed his duties diligently. There is no evidence that Ngai Tahu were substantially prejudiced by the lack of a protector during the negotiations, or that the negotiations were carried out in a manner inconsistent with the principles of the Treaty of Waitangi.

However, as we have detailed, the implementation of the deed was greatly delayed, to the detriment of Ngai Tahu. Had a protector been available to ensure that the terms of the deed were abided by, income from the education endowment may well have been made available promptly and to greater effect. In the same way, it was 10 years after the sale before the survey of the reserves was completed, and many more before those of mixed parentage were given land. Such delays are inconsistent with the Crown's duty actively to protect Maori interests. The tribunal was given no details as to any loss suffered by those living on the reserves and who eventually were given such land.

For those half-castes who had to wait many years for an allocation of land there must have been loss, and this has been addressed in chapter 20.

The tribunal finds that the claimants' grievance is sustained to the extent that it applies to the implementation of the agreement.

Ngai Tahu Land Report

15 Rakiura

15.6 Titi Islands

15.6. Titi Islands

Introduction

15.6.1 The Titi Islands are those lying adjacent to Rakiura where the titi burrow on their annual migration from the northern hemisphere. On 29 June 1864 the islands were conveyed to the Crown as part of the Rakiura deed of purchase. Twenty-one of the islands, those closest to Rakiura were:

Returned to us [Ngai Tahu] as reserved for us and our descendants ... under the Protection and management of the Government. (appendix 2.10)

These were purported to be the islands most frequented by the titi.

These islands at present have very great value, not only to Rakiura Maori as taonga and an important traditional mahinga kai, but also to New Zealand and indeed the world as a last refuge for many endangered species. Maintaining these sanctuaries requires very strict control of entry as risks arise not only from human activities but particularly from chance introduction of rodents. At present access and wildlife are managed by the Department of Conservation.

The claimants' grievance is that the tribe has been deprived of the full administration of the Titi Islands. The right to collect titi is known throughout Maori society to be the prerogative of Ngai Tahu. Any restrictions imposed on such rights creates an intensity of feeling illustrated to the tribunal by witnesses at this hearing.

The inclusion of the Titi Islands in the deed

15.6.2 The Rakiura deed of purchase refers explicitly to "all the large islands and all the small islands adjacent to Rakiura", and these islands are indicated on the plan annexed to the deed. However, there are no existing records of discussions regarding the inclusion of the Titi Islands. A number of submissions were put before the tribunal stating that Ngai Tahu had no wish to include the islands in the purchase.

Harold Ashwell of Ngai Tahu stated that the sale of Rakiura was not unanimously approved by all Ngai Tahu, and that the tangata whenua "unsuccessfully sought to exclude the Titi Islands from the sale". According to Ashwell, Clarke, the purchasing officer, was resolute in his stipulation that the islands must be included in the purchase, but reached an agreement with Ngai Tahu that access by Rakiura Maori to the titi would be guaranteed (E3:1). Mr Ashwell made a particular claim to the island of Poho-o-Tairea. He stated that Poho-o-Tairea is the Maori name for Big Island,

Stage Island or Women Island. The sealers' Ngai Tahu wives and children stayed on this island while the men went on sealing expeditions. Mr Ashwell claimed rights of ownership through his ancestress who lived there 160 years ago with her children, and through the concept of ahi ka roa, long-term association with the island. He stated that the lists of the original owners were published in 1864 and any island not spoken for at that time was designated as Crown land. As his ancestor had died before the sale no person came forward to claim for his family succession.

In the Titi (Mutton Bird) Regulations 1978 there is no mention of Poho-o-Tairea, but Big Island is named as a Crown island and Pikomamaku, or Women Island, as a beneficial island. In the list of islands supplied by Mr Ashwell in his claim on behalf of Rakiura Maori entitled to titi rights through descent, Pikomamakuiti is given the European name "North" and is a Crown island (E3:4).

Mr Ashwell held that ownership of Poho-o-Tairea should be vested in himself and equivalent measures extended to those people who have maintained a similar presence of the islands of Pukeweka, Putahinu and Kani.

Syd Cormack stated that he had read that Clarke had selected 32 men as trustees for all owners, and as a result they became the owners of the reserved islands. The remaining islands became Crown land, thus dispossessing Ngai Tahu of their rights to claim title to these islands (E1:9).

Jane Davis claimed that several families were not included in the list of Maori owners of the occupied Titi Islands. She stated that as a result, these families have established greater ties with unoccupied islands, used less frequently by their tupuna, which are now Crown islands. She claimed that her family and others have rights to Putau Hunua or Putauhinu (a Crown island) through seasonal association since 1930.

Eva Wilson, of Ngati Mamoe descent, records the story of the Titi Islands as passed down by kaumatua in Titi Heritage. Her book attempts to prove by research the truth of their story. Wilson suggests that Ngai Tahu were adamant in wishing to exclude the islands from the Rakiura sale. Because Clarke's offer of purchase mentioned only "the island" and "an island", Ngai Tahu assumed that only Rakiura was being negotiated for and agreed to the sale on this understanding. Wilson claims that it was not until after the sale that Ngai Tahu realised that the Titi Islands were included. After some discussion amongst themselves, Ngai Tahu accepted this fact but asked that the resource be managed in the traditional manner and the islands protected from trespassers. Clarke then composed a list of reserved islands and their beneficial owners, and guaranteed government protection of the resource.{FNREF|0-86472-060-2|15.6.2|32}

15.6.3 The purchase negotiations have been outlined earlier. We have clear evidence that in April 1864, before the negotiations had begun, Clarke intended to reserve three or four islands for Ngai Tahu "to procure the 'titi' or mutton bird" (A8:II:58).{FNREF|0-86472-060-2|15.6.3|33} The negotiations extended over several days and involved a substantial number of people. Clarke's report on the purchase included an enclosure which listed the islands reserved for Ngai Tahu and named in the deed, together with a list of chiefs for whom such islands were reserved. It is this list which is cited by Wilson as being post-dated to the deed, made in response to

Ngai Tahu's belated realisation that the islands were part of the sale of Rakiura. We find it hard to substantiate Wilson's claim that the sale of the Titi Islands was inadvertent. Clarke made such lists for all reserves; not only the Titi Islands. Birding rights on these islands must have been discussed prior to the signing of the deed. Not only are the number of islands increased from the original three or four to twenty-one, but all are specifically named in the deed. It could well be that the list of beneficiaries, as distinct from the designated islands, was prepared after the signing of the deed. Ashwell's evidence refers to the preparation of such a list but he did not state that the islands were inadvertently sold, rather that they were included over the objections of the owners. The manner in which the list of reserved islands was made confirms our view that the islands were not unwittingly sold: it appears that the islands specifically reserved were the most popular resting places of the birds.

Legislation since the deed of purchase

15.6.4 The first piece of legislation to affect the administration of the Titi Islands was the Special Powers and Contracts Act 1886. By clause 48 of the first schedule the governor was authorised to make regulations for the protection and management of the Titi Islands and to protect the mutton birds in order to conserve them for the exclusive use of those Ngai Tahu who were beneficially entitled. These people were those listed in Clarke's appendage to the deed, and their descendants.

In the early part of this century disputes arose about Ngai Tahu rights to take titi and Pakeha trespassing on the islands. It was generally acknowledged that Clarke's list of beneficial owners was incomplete. In 1909 an Order-in-Council conferred jurisdiction on the Native Land Court to determine birding rights (P8b:38).{FNREF|0-86472-060-2|15.6.4|34} In 1910, Chief Judge of the Native Land Court, Mr Jackson Palmer, after a detailed investigation and consideration of submissions, made an order which established the rights of various members to beneficial islands, that is, to those islands specifically reserved to Ngai Tahu in the deed of purchase (P8b:43). With the owners of the birding rights established, the Crown was able to discuss with them the regulations to be applied to the Titi Islands. After consultation with the main kaika at Bluff, Riverton and Colac Bay, the regulations were gazetted on 30 May 1912, under the authority of the Land Act 1908.{FNREF|0-86472-060-2|15.6.4|35}

15.6.5 These regulations have been rewritten and amended slightly at different times since 1908.{FNREF|0-86472-060-2|15.6.5|36} They are enforced today as the Titi (Mutton Bird) Regulations 1978. The islands reserved to Ngai Tahu are defined as "beneficial islands". Although the beneficial ownership of these islands has always remained with Ngai Tahu, they are held in trust for such owners by the Crown. The other islands which were not specifically reserved in the deed of cession, but are named in the regulations, are defined as "Crown islands". Under the regulations a beneficiary is a Rakiura Maori who holds a succession order from the Maori Land Court entitling him or her to any beneficial interest in any beneficial island. Beneficiaries do not require a permit to enter such an island. However, no Rakiura Maori can enter any Crown island without first obtaining written permission.

The regulations make specific provision for the protection of the food source of the Rakiura Maori and their descendants and the protection of the islands from despoliation by people and animals.

In the administration of the regulations, Rakiura Maori and their spouses have supervisory powers and representation on a committee through which recommendations on matters concerning the islands can be made. The commissioner is statutorily bound to call an annual meeting of all interested Rakiura Maori.

Ngai Tahu's grievance

15.6.6 Counsel for the claimants contended that the problem of the Titi Islands is primarily a matter of establishing how the islands on which the titi burrow should be protected. The importance of the Titi Islands as a past and present food resource was evident in the submissions of Ngai Tahu witnesses. "Te Heke Hau Kai Titi", mutton birding, is an ancient tradition which takes place every autumn and has survived through to the present day. The claimants' grievance was that:

The tribe has been deprived of the full administration of the Titi Islands. (W6)

Robert Whaitiri submitted that the time had come for the Ngai Tahu Trust Board to administer the 1978 regulations. Paddy Gilroy, in his submission, urged that more stringent measures be put in place to protect the mahinga kai for future generations (H:13).

The Crown's response

15.6.7 The Crown contended that the regulations provide a mechanism for mutual benefit, balancing the free access of beneficial owners against the policy of protection of endangered species. In his evidence to the tribunal Ronald Tindal, then conservator for the Rakiura district, referred to the islands as the "last ark of many endangered species" (P8b:2). He said that the continued existence of these species depends on an unaltered habitat and protection against accidental or deliberate introduction of competitors such as predators or grazing animals. He submitted evidence to show that already in some islands rat infestation had occurred. In 1964 a rat invasion on Big South Cape, the largest of the beneficial islands, caused irreparable damage to bird life. Four Crown islands and three beneficial islands alone support the entire breeding stock of South Island's saddleback, banded rail, gecko, skinks, and other insects. In order to maintain these populations at risk, an understanding of the species, a knowledge of management, a policy of control of access and a monitoring of invasion are necessary (P8b:2-5). The Crown maintained that it alone has the highly skilled workforce required to protect these treasures. The Conservation Act 1987 which established the Department of Conservation, provides under section 4 that the Act is to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. Ronald Tindal claimed that the history of Crown administration of the titi resource upheld at least three identified principles namely:

- the principle of protection of the tangata whenua food source;

- the principle of mutual benefit for both Rakiura Maori and the Crown by the protection of the island from despoliation; and

- the principle of options whereby regulations were established by consultation and have protected the economic opportunity for food or barter to titi as a solely Rakiura Maori right. (P8b:9-10)

He stated that it is probably one of the best protected Maori food sources in New Zealand.

Crown counsel claimed that it is established by case law that the Crown has the power to regulate for conservation purposes providing it gives priority to the indigenous people where their rights to take game conflict with the rights of the other people (see Kruger v Queen 1978 (Canadian Case) 1 SCR 104) (P8a:15-17). No evidence was given that Rakiura Maori have been refused permits to hunt for titi. They may be restricted in some way by the regulations, but these regulations are administered in consultation with a representative committee for the mutual benefit of all parties to hunt for the titi and to protect these islands from despoliation. Claimant Rakiihia Tau himself said:

Our relationship, management and administration as Ngai Tahu whanui of the mutton bird or Titi Islands is perhaps the nearest living example we have to the meaning of Rangatiratanga to our natural resources or mahinga kai. (J10:25)

The same view was taken by another witness Robert Whaitiri when he agreed:

the Titi Island Regulations...work and they were drawn up by Maori people. The fact that they were drawn up by Maori people makes them unique. (E1:7)

15.6.8 Rakiura Maori attach great importance to their exclusive right. It is essential that any legislative change which could impinge on such a right be discussed with the committee created under the regulations. In our view the regulations provide a good compromise of birding rights for Rakiura Maori and the conservation of endangered species. The Department of Conservation has the skilled workforce to implement policies arrived at by the representative committee. We are satisfied that under the present regime the islands on which titi are found are sufficiently protected.

The Crown islands

15.6.9 A further claim became apparent in submissions of claimants before the tribunal relating to the Crown islands. There was strong feeling among Ngai Tahu that the Crown islands should be returned to Ngai Tahu, that is, similarly vested for a beneficial interest in Ngai Tahu.

Both the Crown islands and the beneficial islands are governed by the regulations and Rakiura Maori have exclusive birding rights over these islands. Retention of full ownership of the Crown islands at this time is related to conservation management. While no grievance has been established in respect of the Titi Islands, there would be meritorious reasons relating to mana and rangatiratanga in recognising a Ngai Tahu status over the Crown islands.

We consider that vesting the beneficial ownership of the Crown islands in designated Ngai Tahu, or such other body as may be nominated by Ngai Tahu, would be

recognising to a large degree the actual situation which at present exists. This matter is discussed in greater detail in chapter 17.

If this course was followed it could satisfy the claim of Jane Davis, who claimed her family have rights to Putauhinu through long seasonal association since 1930. Mr Ashwell claimed ownership by long family association to Poho-o-Tairea. The tribunal cannot see how long association with an island can make it the subject of an ownership claim when such islands were included in the deed of sale. If Poho-o-Tairea is a Crown island then Mr Ashwell would be in the same position as Mrs Davis. The tribunal finds that there was no breach of Treaty principles in the action of the Crown in issuing regulations governing the administration of these islands.

Ngai Tahu Land Report

15 Rakiura

15.7 Whenua Hou (Codfish Island)

15.7. Whenua Hou (Codfish Island)

15.7.1 Whenua Hou is the largest of the Crown islands, being approximately 1400 hectares, and lies three kilometres off the western coast of Rakiura. In the deed of cession it was not mentioned as one of the islands to be reserved for the Maori people. The claimants stated that: According to oral tradition the island Whenua Hou (Codfish Island) was included in the purchase against the wishes of the people. (W6)

They further alleged that Rakiura Maori originated from this island and that it is their ancestral ground. They said that at the time of the purchase in 1864 it was settled by retired sealers and their Maori wives and children, but this last assertion is doubtful. In retrospect it is surprising, as it was a home to the ancestral Maori population, that it was excluded from the list of islands reserved from the sale. While some discussion was held prior to the deed being completed regarding which Titi Islands were to be reserved, it was either an oversight or a conscious decision that Whenua Hou was excluded from the rest of the beneficial islands.

It is clear that Whenua Hou was traditionally a stopping off place of Aparima Maori on their way to the Titi Islands. However, three boat landing reserves were provided on the eastern side of Stewart Island, including Mitini Island on the south coast of Masons Bay for Aparima Maori whilst on bird catching expeditions. There would appear to be no reason why Whenua Hou should be included in the sale if a request for its exclusion had been made, and no reason for Clarke to refuse such a request.

15.7.2 Further claims surfaced during the hearing which related to the designation of the island as a nature reserve, thereby restricting access to those with traditional associations with the island.

Whenua Hou was made a scenic reserve in 1915.{FNREF|0-86472-060-2|15.7.2|37} From 1968 access restrictions were applied requiring any intending visitor to first obtain a permit from the commissioner of Crown lands. In 1983 it was intended to classify the island as a nature reserve. This was thought to be more appropriate than a scenic reserve because access to a nature reserve is by permit only and preservationist in intent. A scenic reserve by comparison carries a presumption of public access except in special circumstances.

Ronald Tindal, then conservator for the Rakiura district, impressed upon the tribunal the extreme value of Whenua Hou both nationally and internationally as a last refuge for many endangered species of plant, bird, animal and insect life. Because of its size and distance from the mainland, the island provides an ideal sanctuary for the introduction of species at risk (P8b:10-15).

15.7.3 On 29 September 1983 the Rakiura Maori Land Incorporation submitted an objection about the classification of the island as a nature reserve.

The Rakiura Maori Incorporation concluded:

There must be provision to recognise the traditional worth of Codfish Island. It is not satisfactory to have the very basic of traditional sites, as this one undoubtedly is, held within the confines of a nature reserve and known only to a privileged few who have no connection with the island beyond their position of employment or academic qualifications. (014B:160)

It was claimed by the incorporation's representatives that these restrictions, imposed for conservation, virtually preclude access to the island by the local people. They also wanted Ngai Tahu involvement in management decisions regarding the island.

A meeting was held on 30 May 1985 between the incorporation and the Assistant Commissioner of Crown Land, Invercargill. In reply to their objections the assistant commissioner claimed that he had not, as yet, ever seen an application from Ngai Tahu for a permit to visit the island, and that permits were given to anyone with a responsible and legitimate reason for entering the island. Restriction of access was necessary to preserve the island's special ecology. He stated that once the classification was in place, the descendants of the original residents may be accommodated in the island's management plan and he invited the Rakiura Maori Land Incorporation to submit suggestions on what this management plan should contain (O14B:161-163).{FNREF|0-86472-060-2|15.7.3|38}

Further representations were made to the Minister of Lands on 7 September 1985, but he supported the change of classification and the island was subsequently gazetted as a nature reserve in 1986.

Finding on grievances

15.7.4 The tribunal finds that no grievance exists in respect of Whenua Hou, but recognises that it is of great importance to Ngai Tahu as their ancestral ground and can only surmise that its inclusion in the sale was an oversight. Had a protector been engaged to oversee the transaction it could be that the islands would have been reserved to Ngai Tahu. As that is only speculation however, the claim cannot be substantiated.

The tribunal is now aware that tours of Codfish Island are available. These are conducted by Ronald Tindal and operated as a commercial venture. The tribunal considers that subject to prior notification, free access should be given to Rakiura Maori, consistent with the security of the wildlife. The tribunal also supports the involvement of Ngai Tahu in the management of the island.

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Ngai Tahu Land Report

16 The Eight Crown Purchases_An Overview

16.1 Introduction

Chapter 16

THE CROWN PURCHASES - AN OVERVIEW

16.1. Introduction

16.1.1 With the Rakiura purchase in 1864 the Crown completed its acquisition of Ngai Tahu land first begun 20 years earlier. For the sum of œ14,750 the Crown had acquired 34.5 million acres from Ngai Tahu. This was most of the South Island and more than half the land mass of New Zealand, which is some 66,200,000 acres in extent. All but an insignificant fraction of Ngai Tahu's land was gone; only 37,492 acres remained. No doubt the Crown's representatives were well satisfied with their efforts.

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them. No wonder their voices came to be heard more and more in protest.

Why did this happen? The short answer, as must by now be abundantly clear, is that the Crown failed, time and time again, to honour the principles of the Treaty of Waitangi. Why then did the Crown so consistently act in breach of its Treaty obligations? There were various reasons. Probably the most important was that in all the evidence relating to these purchases there is no indication that either the governors giving the instructions or the Crown purchasing agents responsible for carrying them out ever so much as adverted to the Treaty. Other reasons stem in large part from radically different assumptions on the part of Crown officials on the one hand and Ngai Tahu, the tangata whenua, on the other.

Contemporary assumptions

16.1.2 Professor Ward noted several contemporary assumptions of Crown officials and settlers at the time of the purchases (T1:5-6). These we discussed at chapter 5.7. They included an assumption of cultural superiority often manifested in an attitude of arrogance, condescension and at times aggressiveness by officials towards Maori. In

some officials however, it could on occasions lead to a sense of obligation and responsibility.

Europeans widely believed that the Maori were dying out. We agree that this almost certainly conditioned officials' assessments of Ngai Tahu's "present and future needs", particularly in relation to their land requirements.

To the extent that the Maori could be saved from extinction it was thought desirable to assimilate them speedily into western culture and values. This would include abandoning their communal way of living and the break up of their reserves.

The nineteenth century values of self-reliance and the ethic of competition would, it was said, need to be absorbed by Maori. And so continued reliance on their traditional communal social structures and lifestyle would need to be abandoned. The retention of such values would "sap" initiative and independence. It is apparent that Mantell, for instance, was strongly influenced by such convictions. Hence his extreme reluctance to agree to more than minimal reserves. He and other purchasing officers shared a desire to be seen by their superiors as hard bargainers. This strongly influenced the outcome, notably in the case of James Mackay Jr at Kaikoura.

Intermarriage between Maori women and Pakeha men had taken place and was likely to continue. The children of these mixed marriages would, it was thought, merge increasingly with the European community through further intermarriage, thereby enhancing assimilation. In this way the tribal social fabric would be weakened.

16.1.3 It is clear that Ngai Tahu wished to engage actively in the new economic order and profit from trade and the opportunity to acquire European goods. By the early 1840s Ngai Tahu had in fact absorbed many of the Europeans who had married Ngai Tahu women. This was assimilation in reverse. By 1840 the incursion into Ngai Tahu territory by northern tribes had been repelled and the tribe was at peace with its neighbours. But Ngai Tahu were not in a strong bargaining position. Unlike many North Island tribes they constituted no real threat to prospective settlers. They had been weakened by civil war, by battles with northern tribes and struck down by European diseases. Some had dispersed, temporarily at least, from their traditional kaika. Whaling and the prosperity it had brought was in decline. In various ways they were in a weakened condition.

There remained however a strong desire to enhance tribal mana. To this end Ngai Tahu were prepared to accommodate prospective settlers and to sell land to the Crown to facilitate settlement. It is, however, unlikely that they had a real appreciation of the likely speed of settlement or of the numbers of settlers soon to be spreading over the land. It is highly likely they expected many of their traditional usages to continue in the foreseeable future over much of their land, in particular their access to mahinga kai. Throughout the 1850s Ngai Tahu cultivated or grazed stock beyond the reserves and continued to hunt and forage much as previously.

Ngai Tahu, in agreeing to sell their lands to the Crown, contemplated an ongoing relationship with the Crown and with the new owners of the land. For, at the time of the early purchases, they 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. Only over time, as settlement increasingly pressed upon them, did they come to realise the full significance of the land transactions. As settlement built up and properties were fenced in Ngai Tahu found their access was tolerated on less and less of the land other than the little reserved for them. The full significance of the deed of sale and later Crown grants to settlers gradually became impressed upon them. There seemed little scope for further discussion or negotiation. Increasingly the settlers claimed the right to exclusive possession of their land. Increasingly Ngai Tahu became confined to their minimal reserves and the prospect of poverty and isolation.

16.1.4 But they were parties to the Treaty of Waitangi. Ngai Tahu rangatira were prepared to treat with the governor and his representatives in good faith. They had expected that dealings over land would lead to ongoing relationships and be for the mutual benefit of the parties. The Treaty provided or should have provided an essential protection to Ngai Tahu in their dealings with the Crown over land. Yet only in the Otakou purchase negotiations was an independent protector made available. Following Grey's abolition of the Protectorate Department, Ngai Tahu had to rely entirely on their own resources, with such assistance and good will (if any) as might be offered by the Crown's agent whose principal role was to extinguish their title to the land. The primary loyalty of the various land purchase commissioners clearly lay with the Crown, not Ngai Tahu. It is instructive to assess their actions and those of their superiors, the governors, in the light of the relevant Treaty principles.

Ngai Tahu Land Report

16 The Eight Crown Purchases_An Overview

16.2 Crown Protection of Maori Rangatiratanga

16.2. Crown Protection of Maori Rangatiratanga

16.2.1 In chapter 4 we have discussed the principles of the Treaty as they apply to this claim. We propose now to test the Crown actions over the various purchases against certain of these principles. First, the principle that:

cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.

As our earlier discussion of Treaty principles shows, rangatiratanga is both a complex and subtle concept. When in article 2 the Crown guaranteed to Maori tino rangatiratanga-full authority-over their lands and other property and valued possessions, it guaranteed more than ownership, so long as they wished to retain it. Rangatiratanga signifies the mana of Maori not only to possess what they own but to manage and control it in accordance with their preferences. That is, in accordance with Maori customs and cultural preferences. And so land retained by Maori and over which they exercised rangatiratanga would involve continuing to hold the land communally as a community resource with the subordination of individual rights necessary to maintain tribal unity and cohesion. But as we have seen, the Crown denied the right of Ngai Tahu to retain land they wished to keep and left them with the merest fraction of the vast lands they formally owned. Such deprivation meant not only a loss in material terms but also a loss of the exercise of their rangatiratanga upon which the viability of their social system itself depended. When, as later happened, much of what little tribal land they retained came to be individualised under the Native Lands Acts of the 1860s, this allowed the irreversible process of dismantling the tribal social structure to be accomplished.

16.2.2 For Ngai Tahu's social system to remain in place it was essential they kept ample lands and access to traditional food resources. When it is recalled that Ngai Tahu had customary title over more than half of Aotearoa it is idle to suggest they could not have been left with substantial areas in locations of their own choice. But instead we find Kemp purchasing some 20 million acres and promising, but not actually setting aside, any land for Ngai Tahu. Mantell, who followed, denied their requests when he felt so inclined and left them with a few thousand acres in places not always of Ngai Tahu's choosing. On Bank's Peninsula he acted with a high hand, inducing Ngai Tahu to accept totally inadequate reserves. In Murihiku he again acted as sole arbiter in deciding what land of their own they would be allowed to retain. Hamilton had no sooner settled the Akaroa purchase with a mere 1200 acres than he received a request from Ngai Tahu for a further 400 acres.

This he felt compelled to deny, as did James Mackay Jr, who received a similar request at Kaikoura. Hamilton denied Ngai Tahu the right to retain any land at all in the North Canterbury purchase. James Mackay was again constrained by arbitrary limits imposed by his superiors on the amount he could leave with Poutini Ngai Tahu and denied their request to retain substantial lands on either side of the Arahura River. In none of these purchases was the land which remained in Ngai Tahu ownership and possession remotely adequate to enable them to maintain their traditional way of life and social structure, let alone engage in new activities such as pastoral farming.

16.2.3 Under article 1 the Crown secured sovereignty over New Zealand. This was conceded by the Maori people in exchange for the protection of their rangatiratanga by the Crown. The Crown however failed in its Treaty duty to protect Ngai Tahu's rangatiratanga over their lands and other valued possessions, including pounamu. This failure lies at the heart of their many grievances.

Mr Bill Dacker, in his evidence to us on the prejudicial effects Ngai Tahu suffered by the lack of land, emphasised that the loss of land and the consequential loss of traditional resources deprived the people of an economic base for their communities. This eventually forced more and more of them to migrate to where there was work. As Mr Dacker explained, once the strength of the communities was broken in this way, the people were exposed increasingly to the predominantly negative European attitudes towards Maori and their culture. And so the loss of economic strength flowed through into loss of culture. In short, Ngai Tahu's rangatiratanga had become seriously eroded. The magnitude of the Crown's failure of its Treaty obligation to protect Ngai Tahu's rangatiratanga will be considered further in the context of the next Treaty principle.

Ngai Tahu Land Report

16 The Eight Crown Purchases_An Overview

16.3 The Crown Right of Pre-emption Imposed Reciprocal Duties

16.3. The Crown Right of Pre-emption Imposed Reciprocal Duties

16.3.1 While under article 2 of the Treaty the Crown guaranteed to Maori their tino rangatiratanga over their lands and other valued possessions, Maori in turn made a valuable concession to the Crown. Lord Normanby had instructed Hobson that he should, if at all possible, obtain from the Maori people their agreement to sell their land only to the Crown. Article 2 accordingly gave the Crown the extremely valuable monopoly right to purchase land from the Maori to the exclusion of all others. The tribunal has found that the granting of this right to the Crown by Maori imposed a reciprocal obligation on the Crown. This was to ensure, when exercising its right of pre-emption, that the Maori people in fact wished to sell; secondly that each tribe was left with a sufficient endowment for its own needs-both present and future.

16.3.2 This raises the question of what might constitute a sufficient endowment for the tribes' present and future needs. As we pointed out in our discussion of Treaty principles, there can be no single answer to this question. Much might depend upon a wide range of demographic and other factors such as

- the size of the tribal population;

- the land the tribe was occupying or over which various members enjoyed rights;

- the principal food resources and their location;

- the location of wahi tapu; and

- the likely impact of European farming practices.

It was well known by Crown officials, including Governor Grey, that the Ngai Tahu people would for many years remain dependent upon traditional sources of mahinga kai, including sea and inland fisheries. To secure these the Crown, in negotiating a purchase, was under a duty to ensure that extensive areas of land in suitable locations remained in the tribe's possession. In other words, that Ngai Tahu's rangatiratanga over the land was maintained.

It was known that Ngai Tahu, in welcoming Europeans amongst themselves, were anxious to engage in the new economy. It was apparent by the late-1840s that much of the land east of the Southern Alps was well suited to the development of pastoral farming. To engage in this activity alongside the new settlers, Ngai Tahu would need to be left with extensive portions of their land. The tribunal notes that pasturage licences issued to individual settlers ranged in area from 5000 to more than 30,000

acres. In time no doubt land which yielded traditional forms of mahinga kai might also be adapted, in part at least, to pastoral and other forms of farming, including agricultural cropping.

16.3.3 The claimants' grievances in relation to reserves fall under two main heads. First, that certain land which Ngai Tahu sought to have left in their ownership was included in the various purchases at the insistence of the Crown agents. Secondly, that in each purchase other than Rakiura, insufficient land was set aside for Ngai Tahu as an economic base to provide for their present and future needs. The tribunal has found in each of such purchases that both grievances have been made out by the claimants. The areas in the first category requested and refused by the Crown purchase officers varied in size from in excess of 200,000 acres, in the case of the Kemp purchase and some 100,000 acres in the Kaikoura purchase, down to relatively small areas in Murihiku and some other purchases. The tribunal stresses that it is dependent very largely on records, often sketchy, made at the time by the Crown purchasing agents of reserves expressly requested by Ngai Tahu which they refused to make. But the Crown has not suggested that such notes are complete or exhaustive. Nor, nearly 30 years later in evidence before the Smith-Nairn commission, could we expect Ngai Tahu rangatira who participated in the purchase negotiations to recall all the reserves requested and refused. The tribunal believes that other requests for reserves were made and declined of which we have no record. The likelihood is that these were quite numerous. An indication of values at the time of the Kemp purchase was given by the Crown valuer, Mr Armstrong. He valued an area of some 220,000 acres requested by Ngai Tahu at œ205,000, as at 1848. The present day prairie value of this land was assessed by Mr Armstrong at 370 million dollars.

But it was in the second category that the most serious breaches occurred in seven out of the eight purchases, Rakiura being the sole exception. The following table shows the areas of the eight purchases and the reserves set aside.

Table of Purchase and Reserve Areas

Purchase	Area in acres [1]	Reserves in acres
Otakou	533,700	9615
Kemp (net)	13,551,400 [2]	6359
Banks Peninsula	251,500	3426
Murihiku	7,257,500	4875
North Canterbury	2,137,500	-
Kaikoura	2,817,000	5558
Arahura	6,946,000	6724 [3]

Rakiura 420,000 935 [4]

Total area 33,915,100 37,492

Notes
1 The various purchase areas have been calculated by the Department of Survey and Land Information from boundary information supplied by the tribunal. A simple calculation of all land in the South Island below the northern boundaries of the Arahura and Kaikoura purchases gives a gross area of 34,500,000 acres. The discrepancy between this figure and the aggregate figure of 33,915,100 is probably accounted for by ambiguities in certain purchase boundaries.

2 The gross area of land in the Kemp purchase is 20,497,400 acres, extending to the west coast. But the land in the Arahura purchase subsequently acquired separately has been deducted to give the net figure of 13,551,400 acres.

3 Plus endowment reserves of 3500 acres and 2000 acres to meet surveying costs.

4 Plus an unspecified area of land at the Neck some of which was set aside for half-castes and 21 Titi Islands (area unknown) and an education endowment reserve of 2000 acres.

Ngai Tahu population in the 1840s

16.3.4 In 3.2.2 the tribunal concluded from the evidence of Professor Anderson for the claimants and Professor Pool and Mr Walzl for the Crown that in 1840 the Ngai Tahu population was of the order of 2000 to 3000. Seasonal migration and other factors however may have resulted in an underestimate. No final conclusion can be reached at this stage. The tribunal thinks it reasonable to assume that in the 1840s the Ngai Tahu population would have numbered approximately 3000.

On an assumed population of 3000 Ngai Tahu the 37,492 acres set aside from the eight purchases gives an average of 12.5 acres for each individual. It is not surprising that counsel for the Crown conceded that the reserves set aside for Ngai Tahu were inadequate and that the Crown had failed to meet its Treaty obligations. The tribunal is satisfied that not only were the reserves insufficient, they were so grossly insufficient as to be no more than nominal in character. Most, if not all the Crown purchase agents, well knew that the reserves were insufficient for Ngai Tahu's needs. A moment's thought would have shown them that the lands left with the various Ngai Tahu hapu could not possibly sustain them as tribal communities. It must have been readily apparent that many would be forced to leave the land or, if they sought to remain, they would have a struggle to survive. It must have been equally obvious that Ngai Tahu would have no opportunity to do more than engage in very small scale agricultural production, assuming the land was suited to such activity.

16.3.5 In 1848 when the second and largest purchase took place this resulted in Mantell apportioning minimal reserves of 10 acres or less per person. By this time the Crown representatives well knew that European settlers were taking up extensive

pastoral holdings ranging from tens to hundreds of thousands of acres. The tribunal can only assume that the Crown consciously decided that 10 to 12 acres was sufficient for individual Ngai Tahu but that individual Europeans required vastly more land. It is not surprising that Matiaha Tiramorehu in 1849 was vigorously complaining at the inadequacy of the Moeraki reserve which allowed no scope for running cattle and sheep in any numbers.

To make matters worse the Crown permitted licences for extensive holdings of pastoral runs to be issued to Europeans on Banks Peninsula, and especially in the Akaroa block, North Canterbury and Kaikoura well before the land was purchased from Ngai Tahu. As a consequence the Crown was to set aside no, or at the most, minimal reserves for Ngai Tahu. In doing so the Crown either totally overlooked its Treaty obligations or cynically disregarded them. Whatever the reason, the predictable outcome was that the new settlers prospered and Ngai Tahu were reduced to poverty and despair.

16.3.6 All this occurred as a result of the exercise by the Crown of its Treaty right of pre-emption without any recognition of its reciprocal Treaty obligation to ensure that Ngai Tahu were left with an ample endowment for their present and future needs. The tribunal recalls the New Zealand Company's pre-Treaty policy of vesting in the company one-tenth of the land purchased from Maori to be held by the company in trust for the future benefit of the tribe. Moreover, FitzRoy in 1844 in his waiver proclamation contemplated that tenths would be vested in Crown trustees for Maori and public purposes. New Zealand Company tenths were in Wellington later vested in the Maori beneficiaries. Had the Crown adopted this practice and in addition to land left in Ngai Tahu ownership vested a tenth of all land acquired in trust for Ngai Tahu this would have been greatly to their advantage. In time the land might well have been transferred into Ngai Tahu's legal ownership. This would have resulted in Ngai Tahu receiving some 3.4 million acres in addition to land expressly reserved to them. This would have been a vast improvement on the nominal 37,492 acres reserved to them. For 3000 Ngai Tahu this would, if vested directly in the tribe, have provided the equivalent of 1133 acres per person.

Given that Ngai Tahu undoubtedly owned the land, the vesting in them of an area which amounted to about 1133 acres per person, particularly when compared with the much more extensive runs thought appropriate to the needs of European settlers, could scarcely be regarded as generous. The tribunal cites this merely by way of example and not because we see it as the appropriate measure of the land which should have been left with Ngai Tahu. Ngai Tahu clearly had a need of land which would have been suitable for pastoral or other forms of farming. But Ngai Tahu also had a strong affinity, in some cases of a spiritual nature, to other notable features of the landscape. Prominent is Aoraki (Mount Cook). Their trails throughout their extensive domain, including those over the great mountain range, their lakes and rivers, were all taonga, all greatly prized.

Instead, these people, the tangata whenua, whose homeland it was, were against their will reduced to subsist on a mere 12 acres per person. Their rangatiratanga denied; their future both tribally and individually bleak; their Treaty rights ignored. All this with the knowledge or connivance of successive governors acting on behalf of the Crown.

16.3.7 In the course of our discussion of the Kemp purchase we noted that in 1868 Chief Judge Fenton in the Native Land Court increased Ngai Tahu's reserves from an average of 10 acres per person to 14 acres. This resulted in some 5000 acres of new reserves in Canterbury and Otago (8.10.8) This was done at a time when much of the land in Canterbury, North Canterbury and Kaikoura had been taken up either under pasturage licences or by the acquisition of the freehold of large runs of many thousands of acres for individual settlers. A single pasturage licence would equal or exceed the total area of 5000 acres granted by the court on the representation of Crown officials that an increase from 10 to 14 acres would meet the needs of individual Ngai Tahu. Such a flagrant double standard is explicable only on the basis that the Crown had no serious concern for the rights and well-being of its Treaty partner, in this case the Ngai Tahu people. The Crown simply ignored the Treaty.

We relate in chapters 18 to 22 of this report subsequent efforts of Ngai Tahu to obtain redress for the great wrong done them and the Crown's response. As we will show, it was extremely belated and did little to mitigate the landless or near landless state of so many Ngai Tahu.

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16.4 The Crown Obligation Actively to Protect Maori Treaty Rights

16.4. The Crown Obligation Actively to Protect Maori Treaty Rights

16.4.1 We turn now to this, the third of the relevant Treaty principles which applies to the eight Crown purchases from Ngai Tahu. We recall the words of Sir Robin Cooke in the New Zealand Maori Council case that:

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

As we have earlier held, the duty of protection imposed on the Crown extends not merely to the use of their lands and waters, as noted by Sir Robin Cooke, but to the exercise by the Crown of its Treaty right of pre-emption (4.7.11).

In his formal instructions to Hobson the colonial secretary, Lord Normanby, stressed the need for the Crown to protect Maori interests. Contracts with Maori were to be "fair and equal". This was to be ensured through the appointment by the Crown of an officer who would act on behalf of the governor and who would be "expressly appointed to watch over the interests of the aborigines as their Protector". Lord Normanby went on to suggest that a comparatively small sum would be paid to Maori for their land for reasons which we will return to later in this discussion. He then stressed:

- that all dealings with Maori for their lands should be conducted on principles of sincerity, justice and good faith;

- Maori must not be allowed to enter into any contracts which might, through ignorance or unintentionally, prove injurious to them;

- by way of example, land which would be essential or highly conducive to their own comfort, safety or subsistence should not be purchased from them; and

- Maori should alienate only such land as would not cause them distress or serious inconvenience.

Lord Normanby envisaged that the role of the protector would be to ensure compliance with these instructions. But as events proved there was considerable scope for a conflict in interest in the one person being charged with the duty of purchasing land for the Crown for on-sale to settlers and at the same time protecting Maori interests in the ways stipulated by Lord Normanby. Consequently George Clarke, who

was appointed the first protector in April 1840 requested to be relieved of his land acquisition duties in 1842 and this was approved.

16.4.2 In only one of the eight purchases from Ngai Tahu was a protector appointed. As we have seen, George Clarke Jr assumed this role in the Otakou purchase, while J J Symonds supervised the New Zealand Company purchase on behalf of the Crown. Governor Grey, for reasons of his own, abolished the Protectorate shortly after his arrival. And so in none of the remaining purchases was an official protector involved. Presumably the land purchase officers or commissioners to extinguish native title, as they were commonly called, were expected to fulfil this role also. If so, as our discussion of the various purchases has shown, they failed dismally to do so.

As the tribunal has shown, the Crown, through successive governors and their various purchasing agents, failed to protect Ngai Tahu rangatiratanga over their land and other valued possessions, failed to ensure Ngai Tahu retained land they did not wish to sell, and failed to ensure Ngai Tahu retained ample land for their present and future needs.

16.4.3 The duty of protection also extended to other matters. The tribunal considers that the Crown, in buying land from Ngai Tahu, assumed the burden of ensuring that the implications were properly understood by the sellers, assuming the latter were entitled to sell in the first place. The obligation fell on the Crown to resolve the contradiction between the Crown's duty to protect Maori rangatiratanga over their land and the Crown's right to buy that land if the owners were willing to sell. The evidence shows that when the roles of protector and purchaser were combined in the one individual, as was the case in seven of the eight purchases, the resolution was unlikely to be in Ngai Tahu's favour. To satisfy themselves that Ngai Tahu understood the nature of the transactions they were being invited to enter into, the Crown purchase agents would need to explore several questions. For example, was finality really understood by the Maori? Did they understand that there was no necessary and contractual ongoing relationship entailed in the sale; that payment was not a koha; that the vendor might have no residual rights such as the right to protect (and have access to) wahi tapu; to protect the land from physical and spiritual pollution according to Maori values and the right to conserve the resources of the land for common benefit according to these same values; that the sale did not entail the right to share the land or its fruits with the buyer, or make any further claim on him, or that money was less durable an asset than land and that it should be valued as a means for saving and investment lest it ultimately prove to be of little value.

16.4.4 Before briefly examining the evidence in the light of these observations the tribunal further notes that, in a culture with an oral tradition, the spoken word and manner of its delivery continue to have salience long after the advent of literacy. And so with transactions involving the Maori under the Treaty, what was actually said-or thought to have been said-in negotiations, how and by whom it was said, have always taken precedence over the documentary record. Rangatira have not often read the "fine print", carefully checked deeds against maps, become involved in technical details and so on. Moreover the physical act of signing a document had no cultural precedent and would, in the early days, have had no literal meaning whatever if done in private, away from the marae. By the same token a witness to a signature would have been thought equally strange and irrelevant. For centuries land had been used, conserved and handed over from one generation to the next. With each sale of land

however, and notwithstanding prior discussion, a few individuals by placing their mark on a document broke that continuity for ever. Tribes had always lost land in battle, losing it by selling it was something new.

16.4.5 There remains the question of consent. Before 1865 and the beginning of the Native Land Court, investigations of title, ownership of land and its resources were always liable to be contentious. So if the Crown believed it had obtained the owners' consent to a sale and purchase agreement, that did not absolve it under article 2 of the Treaty from ensuring that the consent of those rangatira entitled to give it on behalf of their beneficiaries had been obtained, and it should have been aware that those silent at a meeting were not necessarily giving silent assent to the agreement.

We have earlier indicated the likelihood that in some respects at least the Crown purchase agent on the one hand and the Maori vendors on the other, came away from the signing of a deed of purchase with different impressions of what had been done and the implications for the future. This was likely to be the case especially with the earlier purchases. But each party was probably unaware that the other had a different impression of the arrangement entered into.

16.4.6 Each of the eight purchases was completed by the signing of a deed of purchase. The first such deed, which related to Otakou, said that the chiefs and men of Ngai Tahu consented "to give up, sell and abandon altogether..." all their claims and title to the land described in the deed. It went on to say they also gave up certain named islands but reserved other places as described in the deed for themselves and their children. Before this deed was signed representatives of Ngai Tahu, the Crown and the New Zealand Company physically traversed the region and identified the land which was to be excepted from the sale for Ngai Tahu. We have noted in our discussion of the Otakou purchase that Symonds, immediately after the purchase, advised Superintendent Richmond that he requested George Clarke, the protector, to explain to Ngai Tahu that in disposing of their land they for ever surrendered their interest and title to the land and that their consent was binding on their children as well as themselves. Symonds further reported that the boundaries were frequently explained to Ngai Tahu by George Clarke, who said Ngai Tahu fully understood the contents of the deed. William Wakefield later reported on 31 August 1844 that Clarke told Ngai Tahu that they were about to part with the land described in the deed which he was about to read to them, and that it would be gone from them and their children for ever, that they must respect the white man's land and that the white man would not touch the land reserved by Ngai Tahu. Wakefield went on to say that Karetai "spoke to the same effect, strongly insisting on each respecting the others rights in order to avoid disputes" (C2:11:57-58). After the deed was signed Tuhawaiki then removed a tapu from a burial site at Koputai and took away the remains for reburial. While no one can be sure at this distance in time what impression all this made on the minds of individual Ngai Tahu, the evidence suggests that in this instance the Crown made reasonable efforts to ensure that Ngai Tahu understood the full implications of the deed. Clarke in 1880 confirmed he went to considerable trouble to ensure this. And one of their leading rangatira appears to have reinforced this understanding when speaking to his people before the deed was signed. But, as we have earlier said, this was the only sale at which an independent protector was present. But having said that, the tribunal observes that even a conscientious protector failed to ensure that Ngai

Tahu retained sufficient land for their future needs. They were able to keep all they sought to retain but this in the event proved inadequate.

In the Kemp purchase which followed four years later, the deed of purchase provided that the chiefs and people surrendered their lands entirely and for ever, on the condition that certain lands were to be reserved, and then stated, as translated by this tribunal, that the bulk of the land was to be set aside for the Pakeha for ever. Later deeds speak of the "entire surrender of the land" (North Canterbury); of agreeing "entirely to give up all those lands which have been negotiated for" to the Queen "as a lasting possession for her or for the Europeans to whom Her Majesty or rather His Excellency the Governor shall consent that it be given", and later, that "all the lands and all other things above enumerated ... have been entirely surrendered to Her Majesty the Queen for ever and ever". After naming the reserves set aside for Ngai Tahu the deed further says, "The only portions for ourselves [Ngai Tahu] are those just named" (Murihiku); of parting with their lands "and for ever transferred unto Victoria Queen of England ... for ever" and later for the Queen to hold "as a lasting possession absolutely for ever and ever" (Arahura). The remaining deeds all contain wording to the same or similar effect (see appendix 2).

16.4.7 The Kemp transaction differed from all the other purchases (except North Canterbury) in that no reserves were set aside prior to the signing of the deed of purchase. Rather, Ngai Tahu were promised that reserves would be set aside and their mahinga kai reserved to them. We have considered at some length in our discussion of this purchase the likely Ngai Tahu expectations of what these promises meant and the failure of the Crown to meet them. No reserves at all were provided in North Canterbury-a clear breach of the Treaty. In six of the eight purchases the reserves (albeit in all cases inadequate) were first discussed and set aside by the Crown purchase agents before the deed of purchase was signed. Unfortunately there is little contemporary evidence of the nature and content of the discussions which took place between the Crown purchase agents and Ngai Tahu rangatira as to the implications for Ngai Tahu of the respective sales. We know that Mantell went to considerable trouble in implementing the Kemp purchase and negotiating the Murihiku purchase to ascertain which chiefs had interests in the various localities. At the same time he was unwilling to meet all their requests to retain land they did not wish to sell. By 1853, the date of the Murihiku purchase, settlement of Europeans in the neighbouring Otakou purchase area was building up. From that point on, as settlers moved onto the Canterbury, Banks Peninsula, North Canterbury and Kaikoura blocks, the implications of the sale of their land to the Crown would have become increasingly obvious to Ngai Tahu. It is not possible in the absence of any detailed evidence to know with any certainty the extent to which Ngai Tahu expectations of the outcome of the various sales differed from those of the Crown agents. Only in the Otakou purchase do we have reasonably explicit contemporary evidence on the point, but this is all from Pakeha sources. The tribunal would be surprised however, if, particularly in the case of the early purchases and especially in relation to continued access to mahinga kai, there were not differing expectations on the part of the Ngai Tahu vendors and the Crown purchasing agents. It may be that with the best will in the world this could not have been avoided. But the Otakou experience would suggest that the presence of the protector George Clarke did go some way at least to ensure that Ngai Tahu appreciated the implications of the sale and the fact that the land sold would be owned and occupied by future European settlers and not them.

The primary obligation of Crown purchase agents was manifestly to the Crown, not to Ngai Tahu. This was evident from their conduct. The tribunal is satisfied that, had a protector been appointed to assist and advise Ngai Tahu on each of the purchases, they would have been more fully alerted to the consequences of the Crown's proposals. It is, for instance, inconceivable that on the major issue of reserves a protector would have acquiesced in the parsimonious attitude of the Crown agents over both the retention of land the vendors wished to keep and the provision of reserves for Ngai Tahu's present and future needs. As we have already indicated, a protector would have counselled them on the need to reserve all their pounamu. He would have warned them of a need to ensure adequate access to mahinga kai. He would have been in a position to check that those who sold were entitled to sell. His presence would have made less likely the making of threats or the exercise of unfair pressure, for example by playing on tribal rivalries. He would have discussed with them the vexed question of price. This last matter needs further consideration by us.

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16.5 The Price Paid

16.5. The Price Paid

16.5.1 To acquire over half the land mass of New Zealand, some 34.5 million acres, the Crown paid Ngai Tahu the sum of œ14,750. The details are as follows:
16.5.2

Purchase Price(œ)	Area in acres
Otakou 2400	533,700
Kemp (net) 2000	13,551,400
Banks Peninsula 650	251,500
Murihiku 2600	7,257,500
North Canterbury 500	2,137,500
Kaikoura 300	2,817,000
Arahura 300	6,946,000
Rakiura 6000	420,000

If we ignore the last purchase of Rakiura (Stewart Island) for œ6000, the remainder, that is all Ngai Tahu land in the South Island, amounting to some 34 million acres, was acquired for œ8750.

16.5.3 While Lord Normanby, in his instructions to Hobson, required the governor to acquire land from the Maori "by fair and equal contracts" through the oversight of a protector, he envisaged that the price to be paid the Maori would "bear an exceedingly small proportion to the price for which the same lands will be resold by the Government to the settlers". The colonial secretary saw no injustice in this. In his view much of the land was of no use to the Maori. In their hands, he said, it possessed scarcely any exchangeable value. He thought much of it might long remain useless even in the hands of the government. Its value in exchange would be first created and then progressively increased by the introduction of settlers and capital from Britain. "In the benefits of that increase the Natives themselves will gradually participate."

Putting aside for the moment the soundness or otherwise of the views expressed by Lord Normanby, the tribunal would stress that such efficacy as they might have depended on the last proposition-that as the value of the land increased as a result of British settlement, the Maori would gradually participate in such increase in value. But this proposition is valid only if, as Lord Normanby insisted, the Crown ensured that the Maori vendors were left with ample land for their own requirements. This did not happen due in part at least to the absence of a protector in all but one of the purchases. And even in the case of Otakou, as we have seen, the reserves left with Ngai Tahu were inadequate for their future livelihood. And so the justification envisaged by Lord Normanby for paying Maori a small price for their land was wholly invalidated by the minimal area of land left in Ngai Tahu's possession.

16.5.4 Professor Ward in his report (T1:14-15) pointed out that British officials frequently argued in justification of the low prices paid to Maori vendors the unimproved land title had little or no value. Only registration of title and the creation of legally recognisable interests in land or improvements to or in the vicinity gave the land its value. However, as Professor Ward demonstrated, it is wrong to say that the land had no value. He instanced the resources used in the hunter-gatherer economy, rights of access, the water and soil as all having a value for those who use them. Nevertheless, as Professor Ward pointed out, it is true that the incidence of title created and supported by land registration do give further value. As does the subdivision of land, the building of roads and bridges, drainage and so on.

This could not happen if Maori were not prepared to sell some of their land:

A more important issue is whether the loss of use-value to the Maori-the ability to maintain a household in whatever degree of security and comfort obtained at the time-was compensated by access to exchange-values likely to achieve at least a comparable standard in a commercial economy relative to the rest of society, not just a continuation of the previous standard. (T1:15)

Professor Ward conceded that it may well not have been feasible for large cash prices to have been paid by the Crown-to have done so might well have proved too much for immigration societies and stopped the whole colonisation process. Given that Ngai Tahu wanted settlement to go ahead and had expectations of sharing the advantages, access to added value from their reserves was important. "But", said Professor Ward, "if reserves were to provide revenue from added-value as well as continued subsistence, they would have to have been substantial and of good quality land". Instead the Crown agents agreed to pay no more than nominal sums, in most cases well below Ngai Tahu expectations and well below the prices paid more northern tribes. If that were not enough, they then conceded minimal reserves of such small dimension that any subsequent added value would do little if anything to ameliorate their condition. It is difficult to believe, had a protector been appointed in each case, that this would have been the outcome.

16.5.5 The tribunal has said enough to demonstrate that Ngai Tahu were very detrimentally affected by the Crown's breach of its Treaty obligation actively to protect Ngai Tahu's Treaty rights. In their single-minded commitment to the purchase of Ngai Tahu's vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai

Tahu's rights as a Treaty partner. It is abundantly clear the odds were weighed so heavily against Ngai Tahu that, in the absence of a competent and committed officer appointed to advise and assist them, they stood no real chance of avoiding tribal disintegration, serious impoverishment and virtual landlessness.

Waitangi Tribunal, Department of Justice, Wellington.

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16.6 The Principle of Partnership

16.6. The Principle of Partnership

16.6.1 The New Zealand Court of Appeal has affirmed that the Treaty signifies a partnership and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith. Underlying all the Crown's Treaty obligations is the concept of the "honour of the Crown".

16.6.2 The tribunal has not found it necessary to make many explicit findings of a lack of good faith on the part of the Crown. Examples will be found in Kemp's purchase (8.9.19), Arahura (13.5.7), Banks Peninsula (9.10.3) and North Canterbury (11.5.5, 11.5.8). But this was not because the instances were few and far between. Much of Mantell's conduct in laying down the reserves in Kemp's purchase; his high-handed and arbitrary approach to the Ports Cooper and Levy purchases on Banks Peninsula and to a lesser extent perhaps to reserves at Murihiku, is difficult if not impossible to reconcile with the duty of the Crown to act towards its Maori partner "reasonably and with the utmost good faith". Hamilton found it expedient to give a false reason for his unwillingness to grant reserves in North Canterbury; James Mackay Jr threatened reliance on the Ngati Toa purchase while he was at the same time denying its validity during the Kaikoura purchase; he resorted to a "false start" to induce agreement on the purchase price. The Crown's actions, in refusing to pay more than a nominal price for land largely settled at North Canterbury and Kaikoura, and in the case of Arahura for which a very substantial rise in value was imminent, reflect badly on the honour of the Crown.

16.6.3 Nor can Governor Grey in particular escape responsibility. He was aware of and endorsed the conduct of those he appointed to purchase or allocate reserves in the Kemp, Banks Peninsula and Murihiku purchases. Governor Browne was privy to the North Canterbury, Kaikoura and Arahura purchases. These two governors were necessarily implicated in the wholesale breaches of the Treaty which occurred during the purchases effected by their duly appointed agents. There is no evidence that either questioned any aspect of any of the transactions which took place on their instructions. On the contrary they expressed satisfaction with the outcome. Had not the Crown after all, for the paltry sum of less than œ15,000 acquired over half of Aotearoa while leaving the tangata whenua with a mere 37,492 acres out of 34.5 million acres? We have seen no evidence that this near total denial of Ngai Tahu's rangatiratanga, their confinement to a handful of totally inadequate reserves and the inevitable tribal disintegration and impoverishment of a proud and loyal tribe caused Her Majesty's governors any concern at all.

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16.7 Other grievances

16.7. Other grievances

This overview would not be complete without a brief reference to the tribunal's findings on three other major grievances. In two of these, namely the boundary disputes as to the extent of the land included in the Kemp and Murihiku purchases, the tribunal found in favour of the Crown. In the third the claimant's grievance was in effect substantiated but on grounds other than those relied on by the claimants. We will refer to each in turn.

The "hole in the middle"

16.7.1 The claimants' maintained that the western boundary of Kemp's purchase followed the "foothill" ranges from Maungatua to Maungatere and did not extend to the West Coast as claimed by the Crown. The tribunal has however found that Ngai Tahu agreed with Kemp to give up a substantial part of the land they owned or in which they had an interest from coast to coast. But this finding is tempered by the further finding that Ngai Tahu did not agree to part with their kainga, their mahinga kai, or the extensive areas required to enable them to adapt to and prosper in the new society which European settlement among them would facilitate. Ngai Tahu expected by this arrangement with Kemp to participate fully in the new economy which the sale to Kemp would make possible. But while settlers prospered the Crown's obligations to Ngai Tahu were not honoured and they were reduced to poverty, distress and landlessness.

The land west of the Waiau

16.7.2 The claimants have said that the land west of the Waiau was wrongfully included in the Murihiku sale. This comprises the extensive area of the southern Fiordlands. After a careful and detailed consideration of all available evidence the tribunal was unable to sustain the claimants' grievance. The weight of evidence supported the Crown's claim that Ngai Tahu agreed to sell from coast to coast. But the tribunal also found that in addition to the Crown failing to reserve to Ngai Tahu ownership of various areas of land, including Rarotoka Island, which they sought to retain, the Crown further failed to ensure that Murihiku Ngai Tahu were left with adequate land for their present and future needs. The tribunal further found that the Crown's agent Mantell, failed to take any steps to consult Ngai Tahu as to the nature, location and extent of hapu hunting and food gathering rights over the tribal territory as part of the essential provision for their present and future needs. As a consequence Ngai Tahu were deprived of reasonable access to their traditional food resources including those west of the Waiau.

The Otakou tenths

16.7.3 The tribunal has not sustained the claimants' contention that FitzRoy's waiver proclamation of 26 March 1844, which provided for tenths, applied to the Otakou purchase. Nor has it upheld the claim that at the time of the purchase either the Crown or the New Zealand Company undertook that tenths would be provided. But the tribunal has found that the failure of the Crown either to make provision for tenths in terms of its then policy or to make other adequate provision for Ngai Tahu was a breach of the Crown's duty under the Treaty to set aside ample land as an economic base for the future. On different grounds then the claimants' grievance is justified.

Waitangi Tribunal, Department of Justice, Wellington.

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Chapter 17

MAHINGA KAI

Toi tu te marae a Tane
Toi tu te marae a Tangaroa
Toi tu te Iwi
If the world of Tane survives
If the marae of Tangaroa survives
The people live on (J10:10)

17.1. Introduction

In this part of the report the tribunal looks at Ngai Tahu's traditional relationship with the natural resources of their tribal territory. In dealing with Kemp's purchase, the tribunal found that the expression "mahinga kai" meant to Ngai Tahu "those places where food was produced or procured" (8.9.12). As an extension of this definition we were told by the claimant Henare Rakiihia Tau that his pukorero explained mahinga kai to him as:

> Nga hua o te whenua
>
> Nga hua o Tane me nga uri
>
> o Tangaroa
>
> This interpreted means the resources of the land, the resources from the bush and forests which includes all birds and animals dependant upon these resources, and the uri o Tangaroa refer to all living things within the waterways which include all water be it lake, river, lagoon or sea water. (J10:5)

The tribunal, in examining the meaning of mahinga kai, also dealt with the lack of provision made under the Kemp purchase to reserve and protect Ngai Tahu rights over mahinga kai. The tribunal found three breaches of the Treaty had occurred (8.9.19–21). We shall later refer to these findings. In addition, the tribunal has looked at mahinga kai in the context of the tribe's relationship with its resources in early pre-contact times and as well the impact of events during the contact period with Europeans 1769–1840 (3.2).

In this section of the report we move on in history to look at the post-1840 period and in so doing will relate the story as given in evidence and submission.

There are two observations we must make: the story is only partly told here and the story is sad. These statements need explanation.

As to the first observation, the tribunal has decided to divide its inquiry and issue separate reports on the major land claims, the sea-fisheries claim and the ancillary claims respectively. The reasons for this decision have been given earlier (1.6.15). Needless to say kai ika and kai moana resources are inextricably linked with kai awa, kai manu, kai roto and kai rakau. The fabric of Ngai Tahu mahinga kai can only be fully produced by interweaving all sources of kai. Also, in reporting separately on the hundred or so ancillary claims of Ngai Tahu, which deal mainly with specific grievances over such matters as loss of reserves, legislative omissions and errors, there will be instances in which mahinga kai will be involved, for example the fishing reserves at Lakes Wanaka and Hawea, Lake Tatawai and Lake Wainono. This report may also be inadequate in that it is difficult to portray in written form the total picture as seen by tribunal members, not only from the comprehensive evidence presented, but also from the on-site inspections of the polluted and depleted mahinga kai areas and the visual impact from inspecting artifacts and other taonga in various museums. Despite these inadequacies, which regrettably are unavoidable and do not allow the tribunal to adopt a holistic approach to all land and sea resources, we shall try hard to keep the overall scene before us.

As to the second point, this narration is sad, not only because it depicts what has happened to Ngai Tahu food resources as a result of settlement but because it also paints a sorry picture for all New Zealanders. When Hana Morgan, at Te Rau Aroha Marae at Awarua, on 20 April 1988, spoke for her marae regarding the depletion of kai moana by pollution and over fishing, none of those present could have remained untouched by her moving and compelling plea. She clearly and frankly explained how Maori had been dispossessed of their mana and rangatiratanga over mahinga kai and predicted that:

> Within twenty years, the sea garden will be bare, just as our land is bereft of the native forests and birds that once abounded. (H13:55)

Hana Morgan's full submission will be reported in the sea fisheries report. It contains a message for all New Zealand.

Ngai Tahu's deeply-felt grievances can be traced back to the failure of the Crown's representatives to provide the tribe with adequate reserves, including specific kai resources. This omission has already been discussed at some length and will be dealt with again later.

We shall also be looking at the impact of settlement on mahinga kai. There can be no doubt that settlement has added to the pain of Ngai Tahu in the deprivation of mahinga kai. But settlement has also brought environmental damage affecting the whole community. In the end, not only will there be a need to find a compromise between the Crown and Ngai Tahu so as to restore mana and rangatiratanga to the tribe and honour to the Crown, but there will also be a need to find a compromise between people and nature for the good of all New Zealand. We hope the observations and findings of this tribunal may guide the parties towards achieving both these goals.

The tribunal held a number of hearings at which the mahinga kai grievances were raised by the claimants and responded to by the Crown. At some of these hearings sea fishery evidence was also tendered by the parties and by the New Zealand Fishing Industry Board and the New Zealand Fishing Industry Association. Over an unbroken 10 day period, 11–20 April 1988, the tribunal dealt specifically with mahinga kai issues, including some sea fishery matters, and travelled extensively over the South Island inspecting mahinga kai areas. The tribunal also had a brief opportunity to make an aerial inspection of traditional trails across the Southern Alps. Evidence was given to the tribunal by kaumatua and by an impressive array of professionals in the fields of archaeology, history, zoology, geography, biology and languages. Visits were also made to the Canterbury Museum, Otago Settlers Museum and Otago Museum. Once again the tribunal must say that the Crown has responded most competently and helpfully in the introduction of historical and other research material which has enabled the tribunal to assess the issues. As the evidence will show, we must all accept some responsibility for the deterioration that has taken place in our environment since people first put their feet on the land. The tribunal sounds this cautionary note early in this chapter of the report and will deal more fully with it at the end. Notwithstanding this caveat, as the evidence unfolded before the tribunal, it became clear that Ngai Tahu have suffered greatly from the adverse effects flowing from land settlement. We shall shortly relate and examine some of the specific grievances.

In the final section of this part we will give our findings. First we will look at the post 1840 relationship between Ngai Tahu and their resources.

17.2. Ngai Tahu and Their Mahinga Kai After 1840

17.2.1 As we have seen in earlier evidence, Ngai Tahu led a highly mobile life. For hundreds of years they pursued a seasonal round of hunting and food gathering over their huge territories. Survival largely depended on hunting and gathering kai. Movement and an understanding of the resources available over a wide territory were crucial for life (J10:99). We have already seen the map locating 3919 archaeological sites (H3:1) and which in effect traced out the entire South Island (figure 3.1). Professor Anderson described the hunter-gatherer economy and how the population dispersed during late spring to autumn and then retreated to long term settlements in winter and early spring. Various sections of the tribe would move to where resources were seasonably abundant, preserve the food and take it back to their more permanent settlements (H1:76–77). We have seen evidence of Ngai Tahu moving from the east and south, utilising resources during inland trails and while journeying to collect pounamu. There was the great annual migration south to the Titi Islands in autumn to obtain mutton bird. We have also seen earlier numerous examples of the fresh-water fishing activities of the tribe. Of one thing there can be no doubt: mahinga kai in its various forms was an integral part of the Maori economy and culture before contact with Europeans. Even after the land purchases, Ngai Tahu continued to gather their traditional food not only from areas near their settlements but also in journeys to far places. Despite the development of pastoral farming by the new settlers many Ngai Tahu continued to rely on their traditional hunting grounds for their existence.

17.2.2 However, European settlement inevitably began to impinge on Ngai Tahu mahinga kai resources. In 1865, some Canterbury farmers moved to stop Ngai Tahu families from trespassing on their land to hunt weka (J48:24).1 Evidence given to Commissioner Mackay in 1891 often stressed the loss of mahinga kai. By the late nineteenth century most sources of mahinga kai in the Otakou block had been destroyed or enclosed by settler occupation. Ngai Tahu fell back on eeling and whitebaiting but these sources of food soon became threatened (F11:51).2

The following extract from the evidence of claimant Rakiihia Tau is quoted in full because it is a graphic illustration of just one Ngai Tahu family in the post World War 2 period:

> I was brought up at Tuahiwi and my father was a seasonal worker with shearing as his main occupation. Because his work was seasonal, there were often periods when he was unemployed. When he was shearing the job would take him away from home and into the foothills and the high country. In his

absence or at times when he was unemployed we depended on what we could catch to feed our family.

Dad and other relatives taught us the ways of catching food at very early ages. The people of Tuahiwi would camp for extended periods on the banks of the Ashley, Waimakariri and the Cam rivers near the sea and spend the days fishing both for personal use, barter or for sale. We hunted for Whitebait, Eels, Salmon, freshwater Crayfish, Flounder, Mussels and Pipis. These were some of the fish caught. If we were lucky we would also get duck and geese eggs. We would cook and eat a lot of this food on the spot and some would be taken back to Tuahiwi for those who remained there.

We routinely fished all the creeks and drains around Tuahiwi for Eels and Flounders. It is important to understand that the Eels, Flounders and Crayfish which were such an important part of our diet flourished in the side streams, drains and lagoons, which were much more important to us than the main rivers. These smaller water bodies are the first to disappear when farmers or Catchment Boards start land drainage or river management works. This is well illustrated by my earlier evidence which shows that all the fishery easements awarded to us last Century now no longer provide access to water.

We would regularly go fishing off the North Canterbury coast line and Banks Peninsula seeking kaimoana (Shellfish) and Kai ika (fin fish). We would keep some of the fish for ourselves and give some to our relatives who would always give us something in return. When I was young we would dry some of the fish we caught so that we had food to eat. In particular, I remember catching and drying Shark and, also, being given dried Shark by relatives who lived on the Coast. As a schoolboy I would take a strip of dried Shark to school for my lunch.

By the time I was a teenager the birds which our people had relied on for food, had largely disappeared so there was not much birding. Map 7 indicates bush in 1860 on Banks Peninsula which in turn identifies forest bird habitat. Today almost all of this forest cover has disappeared. We would catch the odd Kereru (wood pigeon) which could be found in odd pockets of bush in the Waipara area or among the cherry trees at Lowburn. I was grown up before anybody told me that it was illegal to catch the Pigeons. Occasionally Dad would bring Kereru or other birds home for food. I did not know the names of some of the birds he brought, they were just food. An example, my parents, Taua and Poua, made use of various roots as medical remedies. In our wanderings as children to quench our thirst we would eat certain parts of certain flowers. These no longer can be found. I like many other Ngai Tahu have tasted some potent home brews made out of the resources from the bush. However, none of these ever tasted as bad as that Pakeha medicine called castor oil. Suffice to

say, I can understand the preference that many of us have made when having to decide between the two.

It is important to stress that the Kai which we got in this way formed the basis of our diet. It was not a case of catching food to supplement what we could buy, rather it was the other way round; we bought food to supplement what we caught. This practice was unquestioned among my family, it was the way that my parents and their grandparents had always lived.

I was brought up to believe that the Mahinga Kai was all ours. This was such a fundamental belief that it did not have to be stated except to pass it on to our children, or to explain it to the rare politician who bothered to ask us about our attitudes or beliefs. This belief was and is the most important that I have. It was the reason for the way my family lived for several generations and it has played an important part in the way I have lived.

I am now 46 years old. I was brought up to believe that Kemp's Deed gave us ownership of all the Mahinga Kai resources. For that reason I have felt free to hunt and fish wherever I liked. I spent 1 year at Canterbury University studying for a B. Com Degree but gave that up to become a Freezing Worker. Partly that decision was based on the fact that in an Accountant's office I earned 3.7.6 per week whereas, in the Freezing Works I could earn 19.0.0 per week. There was more to it than that though. I realised that living as my father had, I would be able to take jobs that would enable me to be in the right places at the right times to enjoy the pursuit of and the eating of Mahinga Kai.

For the last 28 years I have been a seasonal worker. In the summer and early autumn I would work in the Freezing Works at Canterbury or Bluff. Some evenings and weekends I would go fishing for recreation and for food. From April to the first half of May. I would go mutton birding on the Titi Islands. I would always catch enough to feed my family for the year with enough left over to sell. In the winter I got jobs in forestry work, either bush work or planting trees. This took me out into the countryside where I could catch fish and sometimes birds, which I would eat on the spot and, when there was enough, take some home to my family. This also allowed me to spend a season with my family in South Westland fishing commercially for Whitebait and living off what nature provided.

Living the seasonal way I am repeating the pattern of my father's life, except that he went shearing in the summer whereas I went to the freezing works. In a modified way we have both followed a seasonal cycle around the countryside just as our ancestors did before the Pakeha arrived.

> In recent years the Mahinga Kai has got scarce. Rivers are now managed and their water is extracted for irrigation and used to carry effluent to the sea. The creeks, drains and lagoons have largely dried up, and where they still have water, the fish and eels have largely gone. There is little point in launching a small boat to go fishing off the coast, those fish are gone too. When I go to the Titi Islands I can no longer rely on Paua for food, nearly all the beds have been fished out by large boats in the last ten years.
>
> The Mahinga Kai which was our principal source of food is in the process of disappearing and there does not seem to be anything we can do about it. (J10:21–25)

We shall now look at other evidence and submissions from the people of Ngai Tahu.

Kaikoura

17.2.3 Trevor Hapi Howse told how in his early childhood he was influenced by his grandparents who taught him the traditional way of gathering, preparing, storing and conserving natural resources – skills he still practices today. This witness said his generation, with some possible exceptions, was probably among the last to have been taught the art of survival with the use of traditional methods of conservation.

Mr Howse believed Maori history and oral traditions proved conclusively that coastal waters, rivers, lakes and forest were as important spiritually as they were physically to their well-being as a people (H7:32). A list of mahinga kai resources which were in common use by his Tupuna was put in evidence. He said these food resources were relied on heavily in his early childhood but now, under government legislation, such rights have virtually vanished (H7:32). A second witness, Wiremu Solomon, gave extracts from legends to illustrate the location and abundance of food resources used by Ngati Kuri and their right through whakapapa to these resources. He claimed that most rivers within the Ngati Kuri rohe have been depleted of kai, that kanakana and mountain trout have not been seen in the rivers for years, and that weka and kereru are rare and kaka and kiwi are no longer sighted as a result of the loss of areas of native forest (H7:6). The following is a summary of details of the maps supplied by this witness.

- A map, which is marked confidential, lists key pa sites and also mahinga kai sites. There are approximately 200 place names indicated on this map throughout the Kaikoura district going up as far as Parinui o Whiti (White Bluffs) (H28).

- A further confidential map which lists all the kai manu that were taken in the same area, from Parinui o Whiti, down to the Waiau. It also lists some of the estuarine shellfish (H29).

- Another map which relates mainly to pa sites around the Kaikoura peninsula (H30).

- There is a comprehensive map of rivers and springs in the same area of the Waiau down to the Hurunui. It indicates kai awa for tuna, inanga, pakiki, kakapu and koura (H32).

- A further map lists kai roto throughout the Kaikoura area. It sites all of the particular kai roto by way of a key and the names that are listed are harakeke, raupo, taramea, kiekie, pingao, tikumu. Then it shows the gardens and trees. No date is shown on the map but it was presented as traditional evidence of Ngati Kuri on sources of mahinga kai available on the land (J11).

The tribunal was deeply impressed by the efforts made by Ngati Kuri in the production of this material on mahinga kai.

Canterbury

17.2.4 Rawiri Te Maire Tau of Ngai Tuahuriri claimed that Ngai Tahu of Canterbury sold their land because they believed, among other things, that their mahinga kai would be reserved for their use. However, he said the Crown failed to honour this promise. He identified traditional areas of mahinga kai including a reference to Banks Peninsula which has the Maori name of "Te Pataka a Rakaihautu" as evidence of its reputation as being abundant with resources. Mr Tau asserted that Ngai Tahu of Canterbury were not allocated adequate reserves to support their people by cultivation nor were adequate mahinga kai reserves created. He argued that as a result, Ngai Tahu could not live either within the economy of the Maori or the non-Maori. In addition to this, land was being modified by settlers, and the creation of farms on the plains and run-holdings in the high country led to both lack of access to traditional areas of mahinga kai and the depletion of kai manu and kai aruhe in those areas. He further suggested that areas which were set aside as fishing reserves were unfit for use by as early as 1891 (H6:33).

It is evident that Ngai Tuahuriri, even after the sale of Canterbury, continued to use the waterways. We were told that the Rakahauri (Ashley), Waimakariri and Rua Taniwha (Cam) were three prominent waterways which continued to sustain the tribe. They also relied heavily on the lagoon Tutae Patu from

which large quantities of tuna were taken. We shall see later how settlement ended this lagoon as a resource. A number of witnesses also spoke of Waihou and its importance. Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth) will be dealt with separately.

South Canterbury

17.2.5 We were told by the people of Arowhenua how all the lakes and rivers in the area were once a source of food.

Jack Reihana told of camping for a week or more with his grandmother to catch and preserve eels at Lake Wainono and remembers another old lady bringing home large quantities of dried eels from the Waitarokaoa (H10:2).

William Torepe reviewed past and present availability of mahinga kai from Waitaki to Rakaia (H10:4). He briefly commented on the presence or absence of such kai as tuna, fish, watercress, wild fowl and acclimatised species in the Opihi, Waihi and Temuka Rivers, Milford Lagoon, Hae Hae Te Moana, Kakahu, Lakes Tekapo, Alexandrina (McGregor), Wainono, Benmore and Aviemore, the beach in the vicinity of Pareora River and Waimate Creek. This witness sadly related the dimunition of "Maori kai", which he listed at the beginning of his submission, and how this has affected traditional hospitality to guests on the marae (H10:8).

Kelvin Anglem, who has lived all his life at Arowhenua, spoke of the past abundance of eels in the Opihi and of his many trips made alone or with his grandparents to catch eels which were preserved or bartered. Like other witnesses he recorded the depletion of tuna, whitebait and kanakana (H10:19).

The tribunal was most interested in a thoughtful and sympathetic submission from Murray Bruce, a third generation New Zealander whose great grandfather emigrated from Scotland in 1860 and commenced farming in Cheviot in 1869. Mr Bruce spoke of his family's association with the Maori people of the area. He said that he had studied historical records which indicated the Waihou area once supported 8.3 per cent of the Maori population of the South Island and was a major natural food supply district. He said that the tangata whenua lived permanently at the pa on the terrace above the mouth of the Willowbridge Creek and were able to obtain from the Waihou the following resources: fernroot, cabbage tree, raupo, purau, patiki, hau eels, whitebait, silveries, kokopu, grayling, giant bully, kaka, pigeon, weka, tui, parakeets, pukeko, ducks and teal. He referred to a book by E C Studholme, *Te Waimate*, which said the area was:

a veritable paradise for natives, on account of the wonderful supply of food.3

Mr Bruce stated that use would have been made of the estuary at the mouth of the river and of the nearby 2500 acre Waimate bush which contained totara, matai, miro, broadleaf, kahikatea, rimu, flax, cabbage trees, fernroot and raupo. He was strongly in favour of granting local Maori reserves for access to mahinga kai so that the kaumatua were not strangers on their river (H10:25).

Another witness from Arowhenua, Kelvyn Davis Te Maire, noted that the areas of mahinga kai known to him from childhood. He stressed that the areas were not merely mahinga kai but areas of historical importance to himself and his people (H10:33–34). Of most concern to Mr Te Maire were the streams of Wainono and its tributaries, the Waituna Creek, Hook Stream, Makikihi River, Waihou, and its tributaries the Dead Arm, the Box, Maori Lake and Waimate.

The Waitaki River was also important. Mr Te Maire gave a very detailed account of the fish, fowl and vegetable foods of mahinga kai known to him. Water fowl of several different species were caught without the use of a fire-arm. The swans were cared for by the elders and by his father in a way that one would look after hens. He recalled an elderly cousin remarking to his father about being a nurseryman. He also remembered being sent down to the beachfront, the nesting area, and collecting driftwood and raupo to strengthen the nests, thus stopping eggs and young swans from falling into the water and destroying the young. Whilst this was being done eggs were taken for food, but the young people were told firmly that “when the first bird sat, were not to return”. He complained, “we had that role of Kaitiaki removed by way of regulation and new managers” (H10:33).

He blamed the acclimatisation society for mismanaging the wildlife because they did not care for it the way his people did. He spoke of his affinity with the rivers and lakes, similar to that of his father and of the importance of this area for mahinga kai to the runanga of Waihao (H10:32).

Two further witnesses, Rangimarie Te Maiharoa and Te Ao Hurae Waaka, related past history of the district and how the whole area from the eastern seashore to the main divide was the stamping ground of Arowhenua (H10:47;H47.1). We were told by Rangimarie Te Maiharoa of the reliance of his people on the Waitaki river mouth and the resources such as whitebait, paraki, mullet, kahawai, the eggs of marten and terns, and kaio, which he gathered as a boy. He also spoke of the importance of Lake Wainono and of a visit with his father in 1936–37 when they speared many eels at Parihaka.

During the hearing the claimants produced in evidence a book written by Buddy Mikaere entitled *Te Maiharoa and the Promised Land*. In chapters 7 and 8 Mikaere describes the Maori prophet's heke to, and the settlement at, Omarama in 1877. He relates how the people fed themselves by growing potatoes and vegetables, grazing cattle, pigs and fowls, taming a flock of karoro, and catching weka, putakita, parera, tatoa and whio. Fish were a major item of diet. As the author says:

> The Omarama district had long been known as an eeling centre; the northern end of nearby Lake Hawea was the site of an ancient pa built to protect the eel weir on the lake . . .
>
> Other places in the area had even stronger associations with the past, especially for the descendants of Rakaihautu. Take Karaka, now Ram Island, in the middle of Takapo (Lake Tekapo), was the home of the ancestors of the Arowhenua people. In those days the haumata (snow grass) grew over one and a half metres high, and abounded with weka and succulent kiore (native rats). Such was the reputation of Takapo as a mahika kai that people came from as far away as Kaiapoi, several hundred kilometres to the north, to trade for food. (J48)4

This then was the evidence received by the tribunal from and about the people of Arowhenua.

Otakou

17.2.6 The tribunal received quite detailed traditional information on behalf of the tangata whenua of Otakou on the past available food resources.

Edward Ellison's carefully prepared and well-presented submission, (H12 and H53) not only annotated the various types of kai that were found in the area, but also carefully detailed the way they were procured and processed, where the mahinga kai sites were found and the routes that were traversed to reach them. For example:

> A coastal track from the mouth of the Mataau passes up the coast north to the peninsula passing several villages on the way. On overland journeys sustenance could be got from several types of plants. When travelling through rich pliable soils the fernroot was dug. The best type being crisp enough to break easily when bent. The roots were roasted on a fire, then bruised by a flat stone, the long fibres being drawn out, the remaining substance being pounded to a tough dough then eaten. While travelling on dry open plains or away from the coast the old Maori would often during the season of the tutu fruit (summer)

> pick the ripe berry of the tutu plant, strain the fruit through a bag, this would produce a refreshing juice on a hot day.

It was interesting to note the diverse routes and in particular the special foods of some areas. He spoke of one such mahinga kai:

> There were many Career nesting areas around the cliff faces facing the ocean. It was a favourite pastime to gather the eggs of the Career to supplement the diet. This was a dangerous task as it meant scaling the cliff faces in search of nests. In order to get fresh eggs a regular run of nests would be harvested every other day so that the eggs were no more than two days old. This activity took place from Pukekura at various points to Pikiwhara (Sandymount) up until recent times. (H12:50)

Edward Ellison's submission contained a wealth of information about the ways mahinga kai was processed and preserved. The following account describes the manufacture of poha for preserving titi:

> Four or five poha can be got from a good length of bull kelp. The kelp is koko'd (opened) by pushing the hand through and care is taken not to push in the edges but a fair margin is left to avoid any tendency for edges to split when drying. The sun and wind also koko the bag. Pupuhi (blow it up) when green and hang it up in the wind and sun (not in the rain). It can be blown up with the mouth also or with a pupuhi pipe. A flax coop being round the poha mouth ready to tighten when blowing ceases. The tighter it is blown the better. It usually takes 2–3 days to dry. It is hung up inside for a day then deflated to whakahau (soften it).
>
> Usually laid on the grass Taritari and covered with grass to take the hardness out of it. Water must not be let on it when hard and dry or it will be ruined. When the bag is pliable the edges are trimmed and the bag rolled up for future use. In earlier times the bags were buried in the earth (tapuke covered with earth) to soften them. The bag was then worked until like elastic. The mouths were stretched and the birds rammed in them. Small poha hold 18–20 birds but some large poha hold as many as 110 birds, 40 or 50 was the average . . . In the poha the hard "cord" of kelp where there is no fringe is called taha rakau (wooden edge). Young searchers were [encouraged] to look for this edge. These poha were often traded to the Rakiura Maori for Poha full of titi. (H12:4)

Edward Ellison claimed that very few traditional resources have been available since the turn of the century as most mahinga kai have disappeared. He instanced woodhen, ti root and fern root, and referred to kai moana as an over-exploited resource, affected also by pollution.

Matthew Ellison dealt more fully with the devastating depletion of mahinga kai in the Otakou region (H12). He expressed concern about the pollution of the waterways within the Puketeraki area, claiming that nutrient waste, fertiliser runoff and raw sewerage have rendered the kai moana within the Waikouaiti River and Blueskin Bay inedible. Local bush clearance has led to the disappearance of kai moana and root and berry food, and access by tangata whenua to the remaining bush is impossible. Matthew Ellison claimed that paua beds have been depleted from over-exploitation which the fishing regulations fail to control. He argued that the taking of water, land reclamation and bush clearance have caused the silting and destruction of pipi beds, and the remaining two mussel beds were over-exploited. He also referred to legislation which denied Maori rights to take woodpigeon, weka, and out of season game such as native duck, swan, pukeko and swan eggs. He asserted that as equal partners to the Treaty, the manawhenua of Ngai Tahu should be recognised and that specific areas should come under the control and management of the tangata whenua.

The last witness we refer to from this region was David Marama Miller, a kaumatua and a shareholder of the Purakanui Incorporation (H52). He recorded past hunting and gathering in the Purakanui area from his father's knowledge and from archaeological records. Mr Miller referred mainly to the over-fishing and pollution of mussel, paua and cockle beds, and asks that stringent protection measures be introduced.

Murihiku and Rakiura

17.2.7 At its sitting on Te Rau Aroha marae at Awarua (Bluff), the tribunal heard submission from people of Murihiku and Rakiura. Taare Bradshaw (H13:22) claimed that with the aid of old whakapapa he had identified areas of mahinga kai and in particular the seasonal round of titi, weka kanakana and eel catching. In his submission he referred in great detail t the food resources of Murihiku including the bird life obtained from the forests and the fruits from karaka, kowhai, totara, manuka, koromiko, tupare, teteaweka, ngaio, hinau and other trees. The leaves of the koromiko, manuka, and kokomuka were prescribed for medicinal purposes. He detailed the areas that were used for mahinga kai.

The tribunal was impressed by the knowledge of this witness who had, prior to making his submission and over a long period, spoken to numerous kaumatua and used the knowledge of some of the tupuna who had left behind their work. He detailed the yearly calendar of food gathering as explained to him by three of these people, essential to the well-being of the tribe as a whole.

Kevin O'Connor gave evidence concerning the depletion of kai moana in and around Riverton (H13:37). This witness provided a list of commonly used plants for medicinal purposes (H55). He also referred to pollution and to the silting from bush clearance depleting kai awa in the Waiau. He went on to describe other obstacles impeding the flow of rivers and drains resulting in kai awa being prevented from reaching their breeding grounds.

Mr Harold Ashwell, in addition to documenting the traditional and present use of the Titi Islands, gave a very useful review of mahinga kai within and around Rakiura (H13). He spoke of the profusion of birds in the bush on Rakiura, including penguins, kiwi and kereru, and those nesting on the islands offshore, such as the Titi Islands. He referred to the depletion of this birdlife and to what he described as the "deplorable" destruction by the Department of Internal Affairs of the weka population on Whenua Hou. It was a most useful submission, which described his own experience of traditional activities including mahinga kai expeditions with his grandfather. These activities included the preparation and maintenance of poha, various methods of fishing, uses of plants and animals for medicinal purposes and the construction and use of the wharerau.

Mr Terence Gilroy, known as Paddy Gilroy, in speaking of titi-catching expeditions, again brought to the tribunal's notice the abundance of food resources which were present on the islands in the late 1800s and early 1900s (H13:16). He instanced weka, tui, kaka, kereru, rakuraku, korere, kina, paua, oysters, crayfish and other finned fish and lamented the present-day necessity to take food to the islands. We shall refer to this witness again when we deal with the Titi Islands.

George Newton Te Au gave evidence of his grandparents' access to abundant kai moana, kai ika, kai manu, kai awa and kai roto on Whenua Hou, Rakiura, Murihiku and Ruapuke. He recalled trips to the various islands to gather food and described various methods of catching weka and titi and preserving titi. He observed that these resources have diminished and blamed rats, pollution and over-fishing for the loss. He recommended an extension of the present rahui for at least two miles around the Titi Islands (H56:2).

Arahura

17.2.8 At the hearing in Hokitika on 15 April 1988 the tribunal heard the first evidence on west coast mahinga kai from an archaeologist Mr Ray Hooker (H57). Mr Hooker summarised the evidence of pre-European Maori settlement, occupation and subsistence in the area and augmented his submission with ethnographic material. He pointed out that changes in the coast line and

river mouths had destroyed a large part of the Poutini archaeological record. He also said that dense coastal vegetation also hindered location and identification of archaeological sites. However within these limitations he was of the view that there was evidence of early settlement on the Poutini coast. In indicating there were six favourable economic zones which supported settlement, Mr Hooker confirmed that preferred settlement was coastal, especially near lagoons and swamps. He stated that a wide range of resources from coast to mountain were used but that onshore, inshore and offshore biota were of notable importance within the Maori diet.

17.2.9 The evidence which followed confirmed that Poutini Ngai Tahu still relate strongly to the forest, rivers and sea through their mahinga kai. Evidence was given concerning the past abundance of mahinga kai within the rohe of South Westland people. Gordon McLaren stated that the tupuna lived throughout the land; permanently where resources were especially abundant and replenishable, and nomadically where they were not. We were told:

> The whole of the land from Waitaha to Piopiotahi was clothed in Tane's forest, and few spots would have gone untrodden by our early hunting parties. Unlike other areas of Aotearoa, birds and fish were prolific everywhere. From the forests came the manu – kiwi, kaka, tui, kereru, kakapo, makomako and a host of others; and the hua rakau from the karaka, kotukutuku, moro, matai, rimu, kahikatea, koromiko, hinau, totara, ti, pikopiko, katoke, kurau, mamaku and others.
>
> Other products gathered were kareao for naki, toetoe for tukutuku, pingao, harakeke, kie kie, raupo, kuta for weaving. With manu there was little waste – the flesh was eaten, feathers were used for decoration and the bones were fashioned into fish hooks and spear heads.
>
> Some had dual uses, such as harakeke which also had a medicinal value and an edible nectar, and others were universal in their use, such as the ti – the dried leaves were ideal for paraerae, the fruit was eaten and the roots, when cooked in umu, were a principal source of sugar.
>
> Then there was the puha and watercress – both still taken frequently – the aruhe.
>
> The swamps, lakes and rivers writhed with fish life, especially tuna – once a staple diet – and yielded other food sources such as weka, pukeko and whio . . . Tuna formed a big part of the diet in our tupuna, and hinaki were set all around the Makawhio–Maitahi area up until recent years. They are still taken, but no longer in great numbers. (H8:30–31)

The tribunal was told by Iris Climo, secretary of the Rata Branch of the Maori Women's Welfare League and involved in numerous Maori organisations, that her childhood was spent at Makawhio and that as a child her family virtually lived off the land as there were no roads. Supplies by sea came in every three months.

She spoke of being given her "survival kit" (H8:39). Both men and women knew how to weave kono, kete, korowai, hinaki, snares, and fishing nets. She said:

> We learned how to gather our materials, practising Conservation (although we did not call it that at the time) in taking only as much as we required and returning our scraps to the Source. The Moon was our calendar and we gathered food accordingly especially Kai Moana. We all knew how to kohikohi the birds and cook them in a variety of methods. We learnt how to cook in flax and hot ashes. Medicines using natural resources were also common. We lived as a Whanau looking after each other, taking only as much as we needed and bartering when necessary. Drying and smoking fish for out of season especially Inanga, gathering seagull eggs was also a Whanau event. Hand trawling involved the whole population. In fact fishing was a major occupation.
>
> Living was almost communal, in that so much of what we did and learned were as a group rather than individual.
>
> Everyone participated at Hui, held in the hall and I can remember being put on the mattresses to sleep.
>
> My mother made flax cups to drink from, when we were near streams (H8:39).

Another witness, Kelly Russell Wilson was born at Hunts Beach in 1919 and he spoke of his mahinga kai expeditions in 31 different locations:

> Martins Bay, Big Bay, Browns Refuge, Gorge River, Sand Rock Point, The Hope River, Barn Bay, Cascade, Red Hills, Cascade Plateau, Smoothwater, Jacksons Bay, Niels Beach, Waiatoto, Mussel Rock, Okuro, Waipa Maori Lake, Whakapoi, Abbey Rocks, Paringa, Ohunemaka, Heretaniwha, Makaawhio Bluff, Hunts Beach, Karangaroa, Gilespies, Lake Matheson, Oamaroa, Okarito, Whataroa and Saltwater (H8:21).

He identified the coast and coastal fishing grounds as providing the staple diet of kai moana and spoke of the importance of mana which resulted from the ability to provide sea food on a special occasion.

Traditional accounts of the use of lagoons and bush surrounding the Kowai River and the Arahura river mouth for gathering kai were given by James Mason Russell (H9:42). He said that depletion of inshore fisheries around the Arahura pa is noted to have occurred about 1960. Mr Russell blamed drainage or conversion of wetlands as the single biggest factor in depletion of whitebait because it altered their habitat.

Descriptions were given by this witness of fishing for tuna, mullet, flounder, trout, pateke, parera, putakiki and whitebait as well as watercress gathering and the catching of pukeko, weka, bush pigeons and wild ducks. This evidence was supported by Alan Lester Russell who gave statistics of fish caught some years ago but which now were depleted. He attributed this to the drainage of creeks, rockwalling of river, gold dredge tailings, sewage, and over-fishing.

Before looking at the impact of settlement, we shall deal with three traditional mahinga kai areas of great importance to Ngai Tahu: the Titi Islands, Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth). We shall also deal briefly with two other aspects of importance: Ngai Tahu commercial activities and conservation.

Titi and the Titi Islands

E tangi te Hakuwai
I runga i o Moutere
Whakamataku taku
ana au
Te kai tiaki nga titi
Nga mahinga kai

17.2.10 Ngai Tahu's relationship with the Titi Islands is undoubtedly a most important cultural, social and political facet of Ngai Tahu tribal identity. The group of islands are made up of both Crown islands and beneficial islands. The latter are beneficially owned by Ngai Tahu and collectively administered by those who have whakapapa rights. The individual rights of succession cannot be alienated by will or by any gift or sale. Upon the death of the holder the rights pass down to the children. Although there are regulations in force, these are to protect the resource for the owners. The following assessment of the situation was provided by Rakiihia Tau:

> Our relationship management and administration as Ngai Tahu Whanui of the mutton bird or Titi Islands is perhaps the nearest living example we have to the

meaning of Rangatiratanga to our natural resources or mahinga kai. For example:

1 The decisions are made to the allocation of catching areas or wakawaka, the siting of houses, the welfare of the mutton birders and the protection and rules governing the environment. These decisions are determined by those who possess whakapapa or genealogy rights to our Titi Islands. These decisions are collective decisions.

2 Our social order can be seen. We live in our houses as whanau groups. We work collectively, to ensure good town planning, allocation of wakawaka (birding areas) fairly and equitably, ensuring our provisions are transported and catch returned to our points of departure, as well our collective responsibility for the health of those of our people on the Island. More importantly, to discuss and determine policies for the protection of the environment, rules for catching Titi for the retention of our manu kai and their environment. These are unwritten laws, laws we live by, laws that are taught to learner birders, and for this reason we have maintained our environment and manu kai. From this point each individual is at liberty to exercise his skills in hunting the Titi. The working or dressing of these birds for future use, can be worked individually, by whanau, or a mingling of whanau groups.

All options are working on our Island of Pohowaitai. However, the catch is the property of that individual, or the whanau to do with as he or she determine. The importance of our social order is that all must contribute individually for the well-being of our collective responsibility, the retention of our resources for our future generations. If the individual does not desire to work this is also shown in the results when returning home. No work, no benefit. We were denied our mahinga kai. What could not be denied us was our Whakapapa kupenga o Ngai Tahu Whanui. *Property rights* to our mahinga kai, that is:

"Nga Hua o te Whenua

Nga hua o Tane

me nga uri o Tangaroa"

is a fact, it did exist, it still exists, and the property rights, customs and practices are to be found on our Titi Islands.

Travelling by sea to the Titi Islands, areas were set aside for general tribal use to gather mahinga kai and Titi as well to berth the canoes of old or the boats of today. Puai landing on the Island of Taukihepa (South Cape) is one such landing place. There are many others. This principle I have shown with Map 1.

> Those of our people with the correct whakapapa proceed to where they possess their property rights. On the Island that I take my Titi, Pohowaitai, we determine our wakawaka, that is areas to take. These are identified by cut tracks. Where cut tracks do not exist, string is laid on the ground to ensure no poaching by your relations take place. Our property rights are guarded jealously. The strings and tracks are there to remind us of our responsibility to respect property rights as well as to prevent conflict. These customs that we still maintain on our Titi Island were the same customs applied to all our mahinga kai which are tied together by Te Aka o Tuwhenua as mentioned in my son's evidence. This gives rise to our statements, "we have one foot on land and one foot in the water".
>
> 3 The retention of this mahinga kai resource is the most important value we have. Our conservation measures can only be maintained by recognising these Islands under a collective title, customary Maori land, and not as individual property. (J10:25)

Catching Titi

17.2.11 The importance of the Titi Islands as a past and present mahinga kai for Ngai Tahu was spelt out by many witnesses. Mutton birding was and is an integral part of the life of the people of Te Wai Pounamu and one which has survived through the enterprising skills of the people. People travel from many parts of the South Island and indeed from the North Island to take up their birding rights inherited according to whakapapa.

Those coming from the north and other parts of Te Wai Pounamu would cross over to Ruapuke where they would meet up with the iwi from Bluff before moving on to the outlying islands. On the return journey to Ruapuke they would be met by their whanau from other hapu who had travelled down to hoko for titi. Some would bring pawhara eels, kanakana and other delicacies for this purpose (H13:16).

We were told of the various methods used to catch titi. The season opens on 1 April, known as nanao. The catching of titi is done during daylight hours and the method is to locate the bird in the rua with a stick and then to reach in and pull it out of the rua. In some cases it is necessary to dig because the titi are too far in. When this occurs the hole is repaired by means of a puru, thus ensuring that the rua will be serviceable for the following season, and that the parent bird will return to it. From about 20–28 April a different method of catching titi is used. This was called rama or as it is commonly called now, torching. In the past the old people used bark, shaped like a cone,

with burning fat inside a torch. This method was used by some right up to the late 1940s:

> When I was a child, going with my parents, the poha was still being used but not as much as in my Taua's time. As children we still had to help with the gathering of harakeke (flax) and rimu, but barrels were introduced and the poha slowly vanished. (H13:17)

We were also told of how mutton birding had gradually become a more costly exercise. There was no longer time to gather and prepare harakeke and rimu for poha so that the people had to buy barrels and tins. Stores and provisions were paid for in titi at the end of the season.

> The excess of titi were sold so that our parents could provide us with what we needed eg, our educational needs, health, clothing and a roof over our heads. (H13:18)

Although some witnesses considered that titi numbers had declined and blamed rat infestation, air and sea pollution, we were assured by Mr Harold Ashwell that the annual take of 250,000 titi would be more than compensated for by the annual natural increase from some of the outer islands such as Snares Island which was not used by Maori for mutton birding and has an estimated titi population of 10 million (tape H12:2210).

Application of Treaty principles to the Titi Islands

17.2.12 We have examined the grievance of Rakiura Maori in respect of the Titi Islands and also considered the legislation and regulations governing the administration of the islands (15.6). We also looked at the response of the Crown to the complaint that the tribe had been deprived of the full administration of the islands. The tribunal has earlier found that there was no breach of Treaty principles in the action taken by the Crown to issue regulations governing the administration of this resource. Indeed the Crown argued, and its principal witness Ronald Tindal, then district conservator for the Rakiura district of the Department of Conservation, claimed that rather than breach the Treaty, the Crown had upheld and applied at least three established Treaty principles, namely:

- protection of the food resource;
- benefit to Rakiura Maori and the Crown in safeguarding taonga by mutual action; and

- full consultation with the beneficial owners in introducing regulations and ensuring ongoing protection of the resource.

Not only have the beneficial owners unrestricted right of entry to their islands but they have regulatory protection from trespass or interference with their rights. We agree that this is a perfect application of the view expressed by the President of the Court of Appeal, Sir Robin Cooke, in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664:

> the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

Counsel for the Crown, Mrs Kenderdine, argued that the regulations contained a number of conservation measures and further provided for annual election of a committee of management from the beneficial owners and their spouses. Counsel went on to argue, persuasively as we have earlier seen, that there was no breach of Treaty principle but rather an application of the principles of protection, partnership and consultation, and kawanatanga of the Crown as envisaged in the Treaty.

The tribunal accepts the view that the present arrangement reflects the principle of partnership. It also indicates the possibilities in an exercise of rangatiratanga guaranteed and protected by the Crown. The fact that regulations were drawn up by beneficiaries in the land is a point not to be overlooked in the application of the principles of partnership in resource management.

It is unfortunate other mahinga kai were not regarded or protected in the same way. We shall shortly be looking at two other prime mahinga kai resources in Waihora and Wairewa. The tribunal takes the view that if specific resources such as tuna and kai moana had been set aside by those original Crown negotiators, and protected by reservation and regulation in the same way as the titi, we would not be concerned today in considering this general grievance of Ngai Tahu.

Ownership of the Crown Titi Islands

17.2.13 Before leaving the Titi Islands there was one question that arose from the evidence. There was obviously strong feeling among Ngai Tahu, and not necessarily just Rakiura Ngai Tahu, that the Crown Titi Islands be similarly vested for a beneficial interest in Ngai Tahu. We recall that in addition to the islands reserved for Raikura Maori there are additional islands scattered around Rakiura (Stewart Island). These Crown islands passed into

Crown ownership under the Rakiura purchase deed of 29 June 1864. The islands are more widely distributed than the beneficial islands and are generally reported to be less popular nesting areas of the titi. Both the beneficial islands and the Crown islands are used for catching titi and both sets of islands are subject to the Titi (Mutton Bird) Regulations 1978. The regulations provide, inter alia, that no-one may enter to take titi or their eggs unless that person is a Rakiura Maori or the spouse or widow or widower of a Rakiura Maori. "Rakiura Maori" as defined in the regulations is a member of Ngai Tahu or Ngati Mamoe and a descendant of the original Maori owners of Stewart Island. Whilst Rakiura Maori have unrestricted right of access to the beneficial islands for bird-taking purposes, it is necessary for written consent to be obtained from the Minister of Conservation or the minister's delegate before any person may land upon any Crown island.

Jane Davis gave evidence that when the Native Land Court, in February 1910, determined the persons entitled to titi rights on the beneficial islands, several families were not included in the ownership lists and these families as a result established greater ties with the seemingly unoccupied, unclaimed islands used less frequently by their tupuna, and considered Crown land (E31). Jane Davis called for a return of the Crown islands to the families who have maintained long association with them and claim that her family have rights to Putauhinu through seasonal association since 1930.

Other witnesses, such as Paddy Gilroy (H13:16), Harold Ashwell (L32:63) and George Te Au (E6:5) claimed that the Crown islands were never sold to the Crown and were not the islands "adjacent to the shore" referred to in the purchase deed or alternatively, that these islands belong to Rakiura Maori through long association.

The tribunal has earlier found that there is no evidence the islands were inadvertently sold or that those who took part in the sale were unaware of the inclusion of these islands. Jane Davis has available to her family the provision of section 452 of the Maori Affairs Act 1953 to rectify any error or omission made by the Native Land Court in 1910. It is a fact however that Ngai Tahu have been using the Crown islands for many years – in the case of Jane Davis's family, for something like 60 years. So there has been a continuous and long association between the people and at least some, if not all, of the Crown islands. We can only presume that permission has been applied for and granted to these families.

Conservation values

17.2.14 The tribunal received valuable and important evidence from Mr Ronald Tindal, already referred to earlier. Mr Tindal listed in respect of both the Crown and beneficial islands a number of endangered birds, plants, animals and insects which exist on these islands and described the islands as "the last arks of many endangered species". Mr Tindal emphasised succinctly how these species are not only a taonga for Ngai Tahu but also a treasure of the people of New Zealand and of the earth, "as a large refuge for many species from whom we inherited this world". Mr Tindal's plea in respect of Whenua Hou (Codfish Island) was also raised in his submission dealing with the Titi Islands (P8B).

The tribunal is sympathetic to this entreaty from a person who, by his actions as district conservator, has demonstrated he has the interests of Maori at heart in relation to their traditional food source.

We also note from Mr Tindal's evidence that some of the Crown islands, such as Big Island, have certain birds and insects not present on the beneficial islands although the latter islands do also appear to have a wide range of endangered and rare species. We make this observation because ownership and access by the beneficial owners do not appear to have prevented coordinated control and protection of the endangered species present on both the Crown and beneficial island groups. The tribunal certainly understands the danger involved and recognises the need for a continuing protection regime, but wonders whether ownership of the islands is crucial to this question in the light of existing conservation and management controls. We shall return to this point very shortly but must respond to another argument presented against change of ownership. This appeared not in Mr Tindal's submission concerning the Titi Islands but in an appended background note whose author was not given. This note concludes by saying:

> These islands other than the beneficial islands have been properly paid for and we would be opposed to their return to any other party. However management control of birding (as per Regulations 1978) could be given to the Rakiura Maori people provided that control of access for other values rest with the Department of Conservation for the Crown. These are Islands of international importance. (P8:1:2)

Two points arise from this statement, which appears to be postulating a government position on the Crown islands. First it argues that as the islands were paid for by the Crown they should not be returned. Second, provided control of access for other values remains with the Department of Conservation, birding rights could be given to the Rakiura Maori people.

We do not propose to deal with the first argument at this point. It is inconsequential to the issue and would bear inquiry from a number of points of view including whether sufficient reserves were awarded or whether the purchase price in the deed was an adequate consideration for the land sold. In this connection we point out earlier sales in which the purchase price was a gratuity rather than an ascertained value. The second point however seems to make it clear that there need be no bar to controlled access and issue of titi rights to Rakiura Maori.

The tribunal notes from an answer given by Mr Tindal, when being questioned on Whenua Hou, that he had strong misgivings that change of ownership of that island would threaten effective and permanent control – a matter which was of vital importance nationally and internationally. We have already suggested an alternative for Whenua Hou (15.7.4). It is certainly now a most vital island in conservation management of rare and almost extinct species such as the kakapo.

Future Ownership

17.2.15 Returning to the Crown islands, the tribunal sees no reason for retention of Crown ownership and can see strong grounds for recognition of Ngai Tahu mana by returning beneficial ownership to Rakiura Maori. The tribunal must or course make it clear that it has not found any breach of Treaty principle in the Crown's dealings with Ngai Tahu in 1864. The tribunal therefore has no jurisdiction to make any recommendation under section 6(3) of the Treaty of Waitangi Act 1975. However the tribunal feels that there is considerable merit in the request made by Rakiura Ngai Tahu for beneficial ownership of the Crown islands to be vested in the tribe. The involvement of the tribe in titi gathering expeditions to the islands over a long period with Crown consent, although bestowing no legal rights, recognises a Ngai Tahu need and a government desire to cooperate. We feel the Rakiura people, with limited provision made for them in granted reserves, would warmly respond to the Crown transferring back beneficial ownership in the Crown islands. There would be a continuing need for protection by regulation. We do not intrude further by suggesting the form and method of revesting, except to note that section 437 of the Maori Affairs Act 1953 may be an appropriate vehicle. That particular section may be useful in responding to the request made by Mr Ashwell (H32:63) that the islands be vested in the runanga rather than individuals, while yet allowing provision to be made for existing users.

The tribunal makes no recommendation regarding the transfer of full legal title of either the beneficial or the Crown Titi Islands. That is a matter for the

beneficial owners to consider should they wish to. They may have reasons for leaving legal ownership of the islands in the name of the Crown, who is there really in a trustee position. On the other hand Rakiura Maori may consider that full title to all the islands, both beneficial and Crown islands, should be vested in the persons found to be entitled, leaving the Crown to safeguard the public interest in the protection of endangered species by regulation. The restoration of full ownership to Ngai Tahu would not, in the tribunal's view, be inconsistent with the continued protection of endangered species and if Ngai Tahu seek the legal title to all the Titi Islands the tribunal would support that goal. As a first step in the process the Crown Islands could be put on the same basis as the beneficial islands by vesting beneficial ownership in such persons or bodies as may be nominated by Ngai Tahu. We respectfully draw the minister's attention to our views on this matter.

Waihora (Lake Ellesmere)

17.2.16 In chapter 8 we said that although Waihora fell within the boundaries of the Kemp purchase of 1848, Ngai Tahu would have never contemplated disposing of this most vital mahinga kai (8.7.7). We examined the high-handed actions of Mantell in totally rejecting Ngai Tahu requests for eel reserves. We concluded that it was clear Ngai Tahu did not intend to part with this treasured fishery and recommended that the Crown remedy the situation by vesting ownership of Waihora in Ngai Tahu. We will now look more particularly at this lake and its importance to the tribe as a continuing food source.

Waihora was once known by its more ancient name of Te Kete Ika o Rakaihautu or, at the Wairewa end, as Te Kete Ika o Tutekawa. Now it is more commonly referred to as Lake Ellesmere (H9:39). The lake itself was one of Ngai Tahu's most precious taonga, renowned for the quantity and variety of its fish, bird and other resources. The rights to these resources were shared by many different hapu, with Ngai Tuahuriri having access to the norther reaches, Ngati Ruahikihiki to the southern waters, while the hapu of Banks Peninsula had access to the fishery where the lake reached the bottom of the peninsula's hills. Other Ngai Tahu from more distant regions could call on its resources through the complex network of tribal whakapapa. In the mid-nineteenth century the lake was much larger than it is today. Drainage, reclamation and the more frequent opening of the lake to the sea have lowered its level and reduced its expanse. The foreshores which were once swampy wetlands rich in indigenous fauna, have long since been turned into pasture. Fish once present in abundance, such as tuna and patiki are now scarce. Runoff and pollution are seriously damaging the quality of the water.

Waihora: past and present

17.2.17 The importance of Waihora as a source of food was emphasised by several witnesses. At the time of giving evidence, Morris Te Whiti Love was an investigating official in the surface hydrology section of the North Canterbury Catchment and Regional Water Board. This board was formerly charged to administer Waihora as part of its territory under the Water and Soil Conservation Act 1967. These responsibilities have now passed to the Canterbury Regional Council. Mr Love gave evidence in his personal capacity (H9:20). He explained that Maori spiritual values associated with the lake were not easy to define fully:

> The lake is seen by the Maori as in the form of the Patiki – the flounder with its mouth where the eels are said to enter the lake (Selwyn River) in the early morning, with the outlet at the pito (navel) which is seen traditionally as being somewhere nearer the middle of Kai-Torete Spit, as opposed to the present outlet to the southwest of the lake near Taumutu. (H9:30)

Mr Love said that in the past lake levels were much higher and the spit development may have meant the lake could be opened at a different place than is presently the case.

Mr Love stated that the lake margins were closely settled from early times with the inhabitants of many small villages living on the food from the lake and the surrounding area. The principal food resources were tuna, patiki, piharau, aua and inanga. The lake was opened to the sea by a channel dug through the shingles of the spit in much the same way it is today (except the location of the cut was probably different, and now machines are used). The lake was left to fill to a higher level. One of the reasons for opening the lake was to effect drainage and prevent inundation of the area around Taumutu, although the lake was opened for fisheries purposes as well.

Waihora was also used by Maori for birding. Water birds were gathered in great drives when they were moulting and unable to fly. Many of the foods were dried and stored for winter, including inanga, aua, kanakana, and koura. As well as the food resource, raupo, wiwi and harakeke grew in abundance in the swamps on the lake margin and on the sandy spit where there are large areas of pingao, a native sedge used for traditional crafts. Today with the revival of traditional crafts the demand for these materials has increased but many of the areas where they grew have been changed by stock or other developments.

Mr Love went on to say that Waihora was of prime importance as an eel fishery. This has been recognised by the Pakeha in recent times with 847 tonnes

of eels being taken in 1976: 56 per cent of the national total. Flounder were and are an off-season catch and fishermen switch to flounder fishing when the eel activity reduces in May. He asserted that its use today as a commercial fishery indicates the continuing importance as a food gathering area, although indications show that the lake is declining as a food resource.

Mr Love said that the water quality had traditionally been of serious concern to Maori because of the many Maori values which are sustained by the lake. From the mid-1970s considerable research had been carried out to identify the causes of this problem and the then North Canterbury Catchment Board started to prepare an investigative report on water quality.

Unfortunately the lake is now highly eutrophic: nutrients have run into the water and provide food for various kinds of water plants and algae which flourish and absorb oxygen, making the lake less able to support fish and the micro-organisms on which fish feed.

Further despoliation has occurred from the use of fertiliser on the catchment area feeding the lake. Mr Love considered it difficult to see the condition of the lake improving and stated that any wise management regime could only hold nutrient inputs at their current levels. Although it would incur great cost, Mr Love suggested that significant improvement of water quality would only occur with the removal of all phosphorus, nitrogen and other nutrients found in fertiliser from the entire catchment area of the lake.

Mr Love went on to deal with Wairewa to which we will refer later. He pointed out the similarities between these two lakes. Wairewa is now completely eutrophic with high phosphorous and nitrogen loadings and sometimes the water is lethal to stock and humans. The problem is caused by a blue green algae which appears to flourish in water that is slightly saline, as is the case with both these lakes. In addition to the poor quality of water in the lake, there is a further difficulty in that the weedbeds from the lake were badly damaged in the Wahine storm of 1968 and are not recovering.

Mr Love gave evidence on the effect of the Water and Soil Conservation Act 1967 and on hearings of applications for rights to take water, or to discharge effluent into the lake. He referred to the hearing of an application in 1983 by the Canterbury Frozen Meat Company Ltd to discharge affluent into the lower Waimakariri near Belfast. There was no Maori input into the hearing and it was suggested that the cost of legal representation has contributed to lack of any Maori involvement in such hearings which are proceeding all the time.

In the view of this witness, legislation governing water use rights should provide for the recognition of Maori values at all water right hearings and in all catchment plans and further, that when experts are preparing any reports for hearings, they should be required to consult with relevant Maoir interests and supply their reports to the relevant tribal authorities well in advance of any hearing. This would at least give Maori a better knowledge of what is going on.

The tribunal felt that this was a most helpful statement from a well-informed witness. Mr Love concluded that management of the lake from a Maori viewpoint would involve:

> opening the Lake to enhance the fishery; promotion of the regeneration of the weedbeds; any action that could improve the water quality of the Lake; including the control of bird numbers; control of the land use of the Lake margins and control of the use of the lake or inflow streams as a place to discharge sewage. (H9:31)

17.2.18 Rewi Brown of Waitaha, Ngati Mamoe and Ngai Tahu descent and a farmer at Lakeside, formerly fished the lake until he was prevented from doing so by the review of fishing licences which required him to prove that 80 per cent of his income was derived from fishing.

He gave a submission on behalf of the Taumutu Runanga, asking for the return of the lake. Mr Brown voiced his concern about how the lake had been allowed to deteriorate and the way it had been over-fished without any regard for the future.

Mr Brown claimed that drainage of the lake and over-fishing had led to the disappearance of shellfish beds and depletion of fish. Commercial fishing of eel and the consequent depletion of eel population was of concern. Mr Brown suggested that the lake was once about twice the size it is today and that both Mantell's and Captain Thomas' maps have it extending to the foot Gebbies Pass. He said the resources of the lake, its tributaries and the surrounding area included many varieties of tuna, patiki, herring, pipi, large cockle beds, kanakana, inaka, fresh and sometimes saltwater koura, whitebait and paradise ducks (H9:39). He gave in evidence extracts from a paper prepared by the late Riki Ellison detailing the various species of eels and patiki.

Mr Brown stated that as a result of commercial fishing the lake was almost fished out of eels. Waihora has a Total Allowable Catch (TAC) of 36.5 tonnes divided among 11 fishermen and this witness claimed that no local Maori were involved in the fishing industry in the lake. He said this was

partially due to the fact that Maori traditionally fished seasonally and this did not fit in with the 80 per cent of income provision (H9:39).

Another ex-fisherman excluded from the 80 per cent of income requirement, Donald Brown of Ngai Tahu, said both his father and his grandfather before him had fished the lake. He spoke of his school holidays as a child with his grandparents, uncles and aunts at the lake and of the changes that had occurred since the lake was drained. He said his father had been forced to leave the area because of insufficient reserves and that this had hurt the old people (H9:47).

Mere Teihoka spent her childhood with her family at Taumutu and ate food that was gathered around the area: puha, watercress, eels, herring, flounders, inaka, smelts and whitebait. She recalled that there used to be a large pipi bed in the lake when she was young and that the lake itself was very different from what it is now; much higher, with clear water and a shingle bottom.

She referred in her evidence to taking eels from the Koru, the creek that feeds the lake. Because she has lived at Taumutu all her life Mrs Teihoka has witnessed the change in Waihora and her submission noted the lack of eels, the reduction in size of flounder, the occurrence of slimy water, even trespass notices, all of which mean less access to these once abundant traditional resources. She charged the Crown with being an inefficient caretaker and objected to the lack of attention given to conservation of the resources and ensuring their survival. She gave this precis of what the eel resource once meant to her family:

> When we went eeling some of the pakeha families – The Gullivers, Jock Patterson and Ron Morton used to go with us. Three families, us, the Nutiras and the Martins used to go out together. Jack Te Koa . . . had so many whatas over there, dad here and old Peti over there. The three families used to work together to pawhara them. They were left to dry – covered at night – the moon mustn't get on them at all. Beautiful – they were beautiful (H9:11).

Despite the importance of Waihora as a food resource, no reserves of any kind were created over it to protect its use by Ngai Tahu.

17.2.19 We now look at Ngai Tahu reaction to the lack of reserves generally. Although eel weirs had been requested at the time of the purchase none were reserved. Kemp later acknowledged that there had been discussion of landing places and eel weirs, though he did not understand the reservation of eel weirs to be an exclusive one (T1:138). Mantell by his own account turned down Ngai Tahu's request for eel weirs. We have dealt fully with this in 8.9.13. Mantell was adamant that the rights of the Crown to control the level

of the lake should not be interfered with. As we have earlier seen, not only did Mantell deny the tribe's request to have this right acknowledged, but he also placed the whole issue of European settlement above any reservation of Ngai Tahu's mahinga kai. All that was reserved to Ngai Tahu at the lake were two reserves at Taumutu, one around the kaika including its immediate cultivations – reserve no 43, and another close by enclosing existing cultivations – reserve no 44. Together the reserves totalled 80 acres.

17.2.20 We turn now to look at developments after the purchase. These were discussed in submissions made by a Crown historian Mr Tony Walzl. He referred to changes taking place in the 1860s:

> The market in which Ngai Tahu had been involved began to fail. Pastoralism became the dominant form of farming in the Island. Ngai Tahu, with their inadequate reserves and lack of capital were not able to increase their land holdings. In addition to this, the population rose fairly steadily through this decade putting further strains on the economy. Subsistence food-gathering would have gained increased importance. However this occurred at a time when the European settlement of the countryside began to intensify resulting in decreased access to traditional sites, or the loss of these sites through European land improvement schemes such as drainage. Ngai Tahu began to react and bring claims before the Government.
>
> It was not until the mid-1860s that Ngai Tahu began to complain in a public sense about the loss of certain resources. (P10:69)

Mr Walzl quoted Waruwarutu's letter to the superintendent of Canterbury of 9 September 1865:

> and now the water is being let off by the Pakehas, that is to say by the Government, so as that land may be made a sheep station by the Europeans, and now there is very little (or no) water, it has to be left for two or three years before there is sufficient water to overflow so as to enable us to catch eels; but no, it is being drained off by the Government, so as to be a source of emolument for them. (P10:70)5

The government and Waruwarutu differed as to whether the lake had been drained. No future action then occurred as the Native Land Court had been directed to investigate the claim to Kaitorete Spit and during this hearing several land claims brought the eel fishing question to light. During the hearing, evidence was given on the importance of the lake and spit for Ngai Tahu fishing.

Mr Walzl, in referring to Chief Judge Fenton's judgment, quoted this passage:

> The evidences of occupation by the claimant and his ancestors all indicate that the tribe have always regarded this place as a valuable fishery. And Mr. White clearly proves that they have exercised their rights since the contract of sale. And it is quite consistent with that contract that they should have done so. And, no doubt, in acting under the order of reference, the Court will recognise the fisheries (included in the phrase mahinga kai) as the most highly prized and valuable of all their possessions. (P10:72)6

Fenton obviously recognised the significance of the Waihora fisheries to the Ngai Tahu economy; an understanding he brought to his Kauwaeranga judgment a few years later.

Fenton dismissed the claim against the validity of the Kemp deed but expressed the view that a fishery easement could be made over the whole of the spit without compromising the ownership of the Crown. Despite this assurance and although the court did create a number of fishing reserves, no easement was granted over the spit itself. Mr Walzl went on to examine the extent of the reserves actually awarded by the court and possible reasons for the number not granted or reduced in size. He made the point that the list and location of the easements asked for and given at Canterbury showed that 20 years after the sale of the land, Ngai Tahu were still involved in certain traditional activities such as weka hunting. Mr Walzl said of Ngai Tahu:

> They still knew the places where food could be gathered and it seems that they were still using these places even though some appear to have gone over into European hands. This is an interesting point. An examination of the list also shows that the easements given, even those requested were located close to Ngai Tahu settlement area. This supports the contention noted earlier that had the reserves been of adequate size initially, important food-gathering sources would have been included. (P10:83)

17.2.21 What emerged from this study of Waihora was that there were two economic systems with different priorities over natural resources in conflict with each other. As Ngai Tahu saw the position they had been promised that their rights to their traditional economy, which relied so heavily on mahinga kai, would be reserved for them. On the other hand the Crown was clearly of the view that this economy must not obstruct the demands of land settlement. Even when clear rights to the fishery were recognized in 1868, these were seen to run counter to the requirements of settlement. The agricultural and pastoral economy won the conflict. Ngai Tahu would have well understood that the resources of Waihora should be shared with the settlers. But as far as

this tribunal can ascertain from the evidence submitted to it, Ngai Tahu themselves never agreed or wished to be excluded from the resources of that lake. This happened as a result of Kemp's, Mantell's and other Crown agents' omission in failing to create the specific reserves sought by the tribe.

Indeed, as Crown witness Ronald Little pointed out, as recently as 1979 the Maori Womens Welfare League petitioned the Minister of Fisheries for an exclusive Maori eel reserve in the lake. The request was rejected because of the importance of the area to commercial fishery for eels and the possibility that a precedent would be created. Mr Little confirmed, as did other evidence from Dr Peter Todd, that Waihora is highly eutrophic and its poor water quality has been of concern for 30 years (P16b:8).

17.2.22 It is important at this point to consider the evidence of Professor Walter Clark, vice-president of the North Canterbury Acclimatisation (NCAS) and convener of that society's water resources committee (P16c). His submission was made on behalf of the society which has responsibility under the Wildlife Act 1953 and the Fisheries Act 1983 for the day to day management of the acclimatised fish and wildlife resources in the North Canterbury district. This includes Waihora and Wairewa.

Professor Clark's submission was divided into three main matters, the first of which dealt with "The Maori as a conservationist". The second matter was directed to the non-participation by Maori in conservation matters regarding fish and game. We shall look at these questions later. The third related to Waihora. Professor Clark listed activities undertaken by the society since 1960 concerning the lake. These included objections to the discharge of sewage effluent, appearances before the Planning Tribunal, discussion on walkways, management of lakeside reserves, lake shore erosion and ranger patrol of the lake. Research has also been carried out on weed re-establishment, monitoring trout population in the Selwyn and the recruitment of black swan.

Professor Clark said the society was ready to cooperate with others in promoting a better understanding of the lake and its reserves. In 1980 the society convened a public symposium on Waihora. He concluded by saying the society had championed the cause of Waihora as a biological asset of great worth which it has tried to protect from environmental degradation.

The tribunal acknowledges the effort the society has made in respect of environmental preservation in the lake and indeed in other waterways around Canterbury but notes Ngai Tahu and other evidence which highlighted the substantial deterioration and damage to the waterways. We shall be looking at the work of the acclimatisation societies generally in a later section when

we consider their relationship with tangata whenua and the impact of European-introduced fisheries on Maori mahinga kai.

Tribunal's recommendations

17.2.23 Despite all their requests, petitions, commissions and court hearings, the story is that Ngai Tahu have been completely disregarded over 150 years in respect of their mahinga kai rights to Waihora. A few small reserves were granted for other freshwater fisheries in 1868 but as Mr Walzl concluded:

> Despite the intent, the Land Court easements were unsuccessful. They didn't return all that was asked for and over the next decade and a half were allowed to be destroyed. (P10:97)

For the reasons earlier set out in this report it is only fair that Waihora be handed back and that the tribe be significantly involved in future decision-making concerning the lake (8.7). It is necessary to define with some accuracy what area of the lake is included in this recommendation. The tribunal observes that the question of remedies generally is being held over for direct negotiation between the claimants and Crown consequent upon determination of the issues and findings by this tribunal. The tribunal however firmly considers that Waihora should be returned to Ngai Tahu and wishes to make that view clear. We consider that the land identified as parcels 19 and 22 on map SO17138 and recorded on the accompanying schedule M36 as R4385 Blk 1 Ellsmere SD and Pt R959 Blk Ellesmere SD should be returned to Ngai Tahu. An indication of the extent of this land is given in figure 17.1.

The tribunal leaves the question of the final area to be returned as a matter to be negotiated between the parties. There may need to be compromise reached on both sides because of matters not presently within the knowledge of this tribunal.

17.2.24 We now return to look at what the tribunal means by ownership of the lake which is presently Crown land. As has been shown earlier in this report, Waihora was an important source of mahinga kai to Ngai Tahu. Not only did it provide fish and shellfish, it was also used for birding. The swamps provided raupo and harakeke and the sandy spit produced pingao. The waters of the lake were once clear and the lake bed shingly. Today it is in a sorry plight and the tribunal has some reservations that the return of ownership will of itself restore what has been lost. As we have seen from the evidence of Morris Love as well as Crown witnesses Ronald Little and Dr Peter Todd, both Waihora and Wairewa are in a highly eutrophic state and their poor water quality gives grave concern. Mr Little, as we shall shortly see,

indicated some of the steps that must be taken to restore Wairewa. Mr Love considered that further deterioration of Waihora might be arrested but any improvement could only be effected at substantial cost. There is no advantage in returning ownership if it is not accompanied by significant and committed Crown action to improve the water quality so as to restore the lake as a tribal food resource. The tribunal considers that the Crown has a distinct duty to take an active role in the provision of financial, technical, scientific and management resources to save Waihora. The tribunal offers these following alternatives for consideration by Ngai Tahu and for discussion between the parties in the negotiations to follow this report. There may be others. We recommend that the Crown vest Waihora as an estate in fee simple in Ngai Tahu and transfer ownership of Waihora to Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

- opening the lake to improve the fishery; and

- improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal.

The joint management scheme should bind the Crown to provide the financial and other resources mentioned above.

Alternatively we recommend that the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee holding the legal estate. Regulations for the future control and management of the lake in manner similar to the Titi Island regulations could then be invoked to protect the resource. In both the above alternatives there would be partnership between Ngai Tahu and the Crown.

As trustee the Crown, in consultation with the owners, would be required to manage and provide resources to control the use of the lake. Provision for certain public facilities would no doubt be made by Ngai Tahu.

There is ample provision for ownership determination and also owner representation to be ordered by the Maori Land Court under the Maori Affairs Act 1953. The tribunal leaves the alternative that Ngai Tahu prefer as a matter to be selected by Ngai Tahu and then settled with the Crown.

The claimants stated that a move was afoot to create a wildlife reserve and that the Taumutu people objected. It is time that this lake, which is taonga to Ngai Tahu was returned and attempts made to stem the over-exploitation. Unless drastic remedial action is taken very shortly, another resource will

disappear. Ngai Tahu must be consulted and involved in that action. The tribunal was requested to recommend the cancellation of commercial eel licences for Waihora and indeed in other districts. This question will be addressed in the later report as certain further evidence concerning the lake fisheries has been notified but not yet heard. We shall also deal later with action that needs to be taken over future administration of this lake.

Kaitorete Spit

17.2.25 Kaitorete, or the Ellesmere Spit, is an isthmus consisting of approximately 4860 hectares stretching 24 kilometres at the northern end of Ninety Mile Beach between Banks Peninsula and Taumutu, separating Waihora from the sea.

The spit is important to Ngai Tahu for several reasons in addition to its value for eeling. It provides access to Waihora and is of significant historical and archaeological importance (H9:16). Most of all it has national importance because it contains the largest continuous pingao plantation in the country.

Catherine Brown, Chairperson of the Taumutu Runanga and the Mid-Canterbury Maori Committee, addressed the tribunal on the subject of pingao (H9:14). A member of Te Waipounamu District Maori Council, and the Aotearoa Te Moana Nui a Kiwa weavers, she was concerned that this resource be protected. She quoted Te Aue Davis' submission to the Planning Tribunal regarding pingao:

> Pingao is used extensively all over the country for weaving. The demand for it is greater now than ever before. It is used for weaving kete, whariki, and tuku panels. The decorative tukutuku panels are woven with pingao and kiekie. When used in tukutuku panels it acquires a spiritual dimension, the patterns it fashions tell of the tribal history and legends of the area and its people . . .
>
> Kaitorete has the largest continuous pingao plantation in the country. Apart from Kaitorete, Te Waipounamu has very little pingao. (H9:17)

Catherine Brown also mentioned Riki Ellison's report on the Ellesmere coastal area prepared in response to a Department of Lands and Survey investigation of the area. The report pointed out the scarcity of pingao in the North Island, and the consequent importance of Kaitorete Spit as a national taonga.

17.2.26 A plea for the protection of such an important resource as this should not be disregarded. The tribunal asks that this matter be brought to the notice of the Minister of Conservation with a view to the setting aside of the area

comprising the principal pingao plantation as a local purpose reserve under the Reserves Act 1977.

Although neither the claimants nor the Crown provided the tribunal with factual information on the exact location of the pingao it would appear from a map handed in by Crown counsel, which is colour coded to designate various ownership, that the sand dune area on which the pingao is located is either Crown land, DOC stewardship land, DOC scientific reserves or Landcorp land. It should therefore be possible within the framework of this ownership to find an effective way to protect and even develop the pingao for Ngai Tahu use.

Wairewa (Lake Forsyth)

17.2.27 The tribunal visited this lake on 16 April 1988 and inspected the eel drains at the most southern end. We journeyed around the lake inspecting it from various locations. Upon our arrival we were greeted by several kaumatua and told of the history and importance of the lake to Ngati Irakehu.

Monteiro James Daniel (H:45) said Wairewa was the sanctuary of the tuna and that for generations Ngati Irakehu had looked after and fished this lake. As is the case with Waihora, Wairewa is a coastal lake where access from the sea is blocked by a shingle bar and the lake is opened by digging a channel through to the sea. During the autumn migration, eels congregate in the outlet area. Eel fishing in the lake is restricted to Maori.

Very helpful scientific evidence about the eel fisheries on both Waihora and Wairewa, including details of the species and their habits, was given by a Crown witness Dr Peter Todd. Dr Todd has been employed as a fisheries scientist with MAF for 18 years and is an expert in eel biology. He has been particularly interested in Maori fisheries for eels and lampreys on which he has published papers. As an appendix to his submission, Dr Todd showed a photograph of a fisherman hanging a large number of eels to cure on a drying frame in the traditional method. The photograph was taken in 1948. The tribunal had explained and demonstrated to them, the 10–15 metre long and 1–2 metre wide trenches that were dug into the shingle from the lake and towards the sea. At night the eels move into the trenches and are caught there. Dr Todd's article further explained that certain traditions are still adhered to by the tangata whenua. Eels moving around the mouth of the trench are not caught unless they move into the trench and no-one steps or jumps across the trench during fishing operations. (P16b:appendix 1).

The reason for this action became apparent both from our inspection of the eel trenches at Wairewa, where we saw a number of them side by side, and from the evidence of Trevor Howse (J10:70). Mr Howse explained that a hapu system of ownership based on whakapapa set out the wakawaka or drains of each group and their rights to fish. Mr Howse gave his whakapapa which proved his rights to the use of these wakawaka and provided a map which illustrated where the family drains were located (J36). We were informed that these family wakawaka were "positioned by star-sightings between three tapu drains of Taua-nui, Taua-iti and Taua-toa" (J10:70). The mountain Te Ahu Patiki plays its part in the positioning of these three wakawaka.

There are three reserves around the lake and these will be looked at in our later report on ancillary claims. Suffice to say at this point that although there are these three small reserves around the lake at certain sites, the most important area containing the eel wakawaka is Crown land without any reserve status. Although the iwi has the right to take tuna from the lake, further measures may be needed to ensure consultation takes place over issues that affect eeling, such as water quality and access to the lake bed and the shingle bar which blocks the lake from the sea. It would seem to the tribunal that this is another area which should be investigated so that user rights can be secured to the iwi.

17.2.28 This is more important when we turn back to Dr Todd's evidence and recall that Wairewa is highly eutrophic and has periodic toxic algae blooms during the summer and autumn. The water can become so toxic that over the past 18 years farmers have been warned on three or four occasions to remove stock. Our visit to the lake in question in April gave proof of the deteriorated water quality. On this question Ronald Little had this to say:

> Dr Todd in his evidence describes the environmental problems facing Lake Forsyth. I would like to add that in my estimation the problems facing this lake are as acute, or even more so, than the problems facing Ellesmere. The removal of forests, followed by years of intensive farming have led to Lake Forsyth being overly enriched. The lake warms up considerably in summer due to its relatively shallow nature, and a fair portion of the lower lake levels will be stripped of oxygen. Large scale fish deaths have been reported, and it was surmised (T Eldon, MAFFish, Christchurch), that deaths were caused by wind created tidal action stranding fish in oxygen depleted water. Most serious has been the presence of toxic blue-green algae that have resulted in the death of stock drinking the lake water. That occurrence resulted in many restrictions being imposed on water use. Toxic blue-green algae has caused serious problems in Europe, both to stock and humans, but is still a rare problem in New Zealand. Remedial measures are possible but require catchment wide

> measures. A similar situation arose several years ago in Lake Tutira which lies just north of Napier. The Ministry was involved in a study over several years involving everything from artificially mixing the entire lake to the introduction of algae eating fish from China.
>
> At this time the degradation of Lake Tutira has been stopped based on a total management plan created by the Catchment Board aided by other agencies. The solution lay in the interception and diversion of the nutrient rich incoming water, isolation of most of the lake from stock animals, provision of vegetation buffer strips around the lake to soak up run-off and forest planting on all slopes leading directly to the lake. I fear the Lake Forsyth is in need of a similar approach and perhaps similar remedies. (P16a:3)

17.2.29 The existing Maori fishery in Wairewa is authorised by the Fisheries Act 1983 and more particularly by the Fisheries (South-East Area Commercial Fishing) Regulations 1986 – regulation 11(1) and the Fisheries (South-East Area Amateur Fishing) Regulations 1986 – regulation 7.

Mr Little advised us that the exclusive Maori eeling right over the lake resulted from submission made by the late Joe Karetai in 1961. It was very clear from the evidence of the local people and also Crown witnesses that continuing to allow commercial taking of eels from tributaries and creeks around the lake has had an effect. Mr Little explained that commercial fishing of the tributaries has now stopped because of a general decline in eels but nevertheless he recommended that the tributaries of the lake be included in the regulatory restriction. We consider that is a desirable extension and should be implemented forthwith. The tribunal also agrees with Mr Little that to have an effective input into management control Maori need to have representation on catchment boards, district and regional councils, harbour boards and other local bodies. Certainly there does exist a need for these territorial bodies and societies to consider a Maori perspective. In addition, however, Maori commitment to take an active role in water right applications, town planning hearings etc, is also necessary.

It is easy enough for this tribunal to express the need for Maori representation on all these bodies dealing with conservation and environmental matters. Indeed we were urged by Mr Temm to make a strong statement as to the right that Ngai Tahu have to be consulted on matters that affect them and that Ngai Tahu must also be accorded a decision-making place in the way resources are managed (W1:299).

Strong statements may well be needed but effective implementation is more important. We shall deal with the question of consultation and representation generally at the conclusion of this chapter.

Tribunal finding and recommendations

17.2.30 The tribunal is of the view that the failure of the Crown to set aside eeling reserves to protect this resource at the southern end of the lake is in breach of the Crown's duty to protect Ngai Tahu rangatiratanga under the Treaty. In 1961 as a result of Ngai Tahu representation, an exclusive right to take eels from Wairewa was given to Maori and the lake became the only Maori eeling reserve in the South Island. The Crown have therefore come some distance in recognising the importance of this mahinga kai but this action has not conferred on Ngai Tahu exclusive rights to that eeling resource as it should have. The tribunal finds this omission to provide fishing right for Ngai Tahu is also in breach of Ngai Tahu rangatiratanga under article 2. The tribunal accordingly recommends that the regulations be amended to substitute "Ngai Tahu" for the word "Maori".

The tribunal also recommends that the Crown reserve an area around the southern outlet which will secure the tribe's right to have access to the shingle beds and wakawaka. The present two reserves known as Te Pourua at the outlet end of the lake are not so handily located to the eel-trapping site as was a previous reserve MR1279. This latter reserve according to Crown researcher David Alexander was sold in error and later replaced by the Te Pourua reserves (Q10:12). There should be consultation between the Crown and tribe to ensure Ngai Tahu can continue with this fishery. In addition the tribunal recommends that all commercial eel fishing be prohibited in the waters leading into the lake and the regulations reserving Ngai Tahu rights be amended so as to include these streams.

The longer term problem of water quality also needs to be addressed. It is not an easy matter but measures suggested by Crown witness Ronald Little as undertaken at Lake Tutira (P16a:3) should be considered. If such action is not already underway it would seem that Ngai Tahu, the Department of Conservation, the Canterbury Regional Council and the Ministry of Agriculture and Fisheries should be jointly preparing a management plan. Ngai Tahu should be taking part in such investigations and should be involved in the decision making process. The tribunal considers that similar action is needed for Wairewa. The Crown through its agencies must provide the resources to do this work. These two lakes are treasured resources of Ngai Tahu but as evidence has shown, also have public interest. Therefore it is imperative that the process to save them begins immediately.

Commercial activity of Ngai Tahu since 1840

17.2.31 In other parts of this report dealing with the interaction of Maori and settler we have seen that considerable trading activities took place between Ngai Tahu and the settlers. This matter will also be discussed in chapter 18 when we look at the social and economic position of Ngai Tahu after the purchase. Our discussion here will therefore be brief. At the beginning of the hearing on mahinga kai the tribe spoke about the importance of trade and barter. The claimant Rakiihia Tau said:

> Trade was and still is the base of our culture and our social order, as it is to all cultures. Map 3 [J26] identifies our major trails throughout the South Island to our greenstone deposits. Our culture did not stand still, our ancestors and we the present accept and innovate for progress, the use of technology to provide for a quality of life. For those who believe that our culture remains in a grass skirt era, know not their history or the reasons for the Treaty of Waitangi. There is sufficient evidence recorded by the Europeans as to Trade between us and them. (J10:12)

As the tribunal moved around the South Island we were told by many witnesses of how hapu bartered food with other hapu or sold on the local market. Some examples of this appear in the evidence as follows.

Alan Russell told of catching in one day 500 kerosene tins of whitebait and of railing these and other fish to Christchurch for sale (H8:80). Paddy Gilroy spoke of bartering titi for smoked eel and Iris Climo of bartering various foods (H13:16,H8:39).

As will be seen from other sections of this report the opportunity for Ngai Tahu to continue to barter and sell the food resources available to them was reduced as the resources, and access to them, diminished.

Conservation

17.2.32 The oral traditions of Maori have played a most significant part in handing down from generation to generation an understanding of the need to conserve food resources. During this claim the tribunal heard repeatedly many of the rules that governed the gathering or taking of mahinga kai. Conservation measures included not only just taking sufficient to meet requirements but also procedures to help the creation of further supplies. In some cases procedures were followed to thin out an overpopulated resource. Peter Ruka Korako said:

> It was my grandfather's understanding that all the whanau were training two or perhaps three children per fishing family to the lore of the Marae o Tangaroa. I was one such person along with my brother McNelly Teoti William Ruka. We were taught the ancient rites of seeding the lakes, rocks, river beds and banks and the sea beds, rocks and river mouths . . .
>
> Just an example of some of the practices of our tupuna, if a pipi bed was becoming overpopulated and the kai was not getting "fat" they would bring in a particular whelk and it would soon thin down the beds, eating only the weakest. (J10:74)

This witness gave a detailed account of how the spat would be collected at the time the kai moana released their seeds. The ovid/gravid seeds would be placed in poha, punched with holes and buried in the third and fourth wave line at low tide or placed carefully on rocks or in crevices where the wave pressure would slowly disperse the eggs into the surrounding area (J10:78). These rituals of seeding were accompanied by karakia.

Kelly Wilson from South Westland stated:

> Conservation was also part of Maori culture. Elaborate laws – at times very detailed – governed use of the sea as they did use of the land.
>
> We were made very aware of the rule that was strictly enforced. That in gathering shellfish, a flax Kete would be used no larger than was necessary to provide two meals for the household and one more strictly enforced was the rule that such a Kete should always be carried – never dragged over the mud flats or shellfish beds. To do so would expose other shellfish to the sun or to the ravages of the sea birds that would deplete the resource.
>
> Even when whitebaiting it was the custom in some areas for children to be given the task of separating and throwing back some of the females – easily distinguishable by the dark stripe that keen young eyes could quickly pick out.
>
> It is not remarkable that conservation was so important to our way of life. Protection of the resource is not a new idea, it's no more than common sense readily recognised by any intelligent people. (H8:23)

Rakiihia Tau told of how the seine and trawl nets of the commercial fishermen catch the titi or parent bird. He said:

> This of course causes two sins, the parent bird is lost as well as their young. It is an offence to kill a parent bird on the Titi Island. Punishment is that you are required to eat it. This maintains our customs regarding conservation and

> retention of our resources. I kill mutton birds with my hands. In this way parent birds are easily identified from young birds. (J10:11–12)

Edward Ellison explained how strict tapu was placed on all kai at certain times of the year. He said atua or protective gods were incorporated in the maintenance of the tapu. This was done to avoid over-exploitation (H12:6).

We saw earlier in Trevor Howse's evidence how conservation applied in the taking of eggs and how well the philosophy of conservation and preservation was ingrained in him from his parents and grandparents (H7:30).

James Russell said this:

> In a historically hand to mouth society, it is difficult to consider anything other than a conservation ethic. Wilful pollution or destruction of a waterway or a food resource would probably have an immediate and significantly detrimental effect on the community as a whole. Consequently, an elaborate set of rules, restrictions and guidelines were enforced, often by means of quasi-religious concepts such as "tapu", "rahui", "utu", and "muru" to ensure that such resources were indeed maintained as appropriate for community needs, resource management, or "rakatirataka" or "kaitiakitaka". (H8:51)

Iris Climo said how she learned to practice conservation in taking only as much as was required "and returning our [scraps] to the Source" (H8:39).

17.2.33 There is no doubt that Ngai Tahu adhered to strict rules of conduct in which tapu and rahui played an important role. The need for a preservation and conservation ethic is of great importance to people directly dependent on the limited food resource for their subsistence. But as has already been observed in previous tribunal reports, in the Maori mind concerning the conservation of food resources there is very much a spiritual content. This is no less the case for Ngai Tahu.

We have previously said how the tribunal was impressed with the restraint shown by almost all the witnesses as they spoke of their ancestors, of the trust their ancestors reposed in them to cherish their taonga and hand them on to their children. Their kainga nohonga were situated near and depended upon their mahinga kai. Marae were sited in prime locations for water and food gathering. As person after person outlined the present depleted position and related it to the ill effects of land settlement it was apparent there was a deep feeling of dismay and concern that the trust placed in them as kaitiaki had been thwarted.

17.2.34 Mr Ronald Little, in addition to his evidence on Waihora and Wairewa, (P16a), also described the nature of the South Island during early habitation. He voiced concern at a statement made during the hearing that "Pakehas always exploit – The Maoris always conserve" He accepted that this was a generalised observation but responded that there were "a large body of Pakeha New Zealanders who have as deep and abiding love of the land as do the Maori". He said:

> The reason I raise this rather emotional issue is threefold:
>
> 1 Considerable detrimental environmental alteration has occurred in this country due to human activity and there is considerable potential for more damage to occur.
>
> 2 Past change has been mainly due to the Pakeha settlers, but the Maori must share a major share of the responsibility as well.
>
> 3 Preservation and enhancement of the fishery habitat in the future, will require the combined energies and determination of all people. (P15a:2)

Mr Little proceeded to outline what had happened to New Zealand forests since 800AD and we shall look at that question shortly. This witness sought to make three points. First, that both Maori and Pakeha had contributed to environmental change by destroying forests and by introducing noxious animals and plants. Secondly, that not all actions and introduced things have been bad and some are now vital to the economy base. He referred to sheep, cattle, pasture grasses, trees, grains and the like. Third, he saw the need for legislative reform and for Maori values to be adequately considered when processing water rights (P15a:12).

As part of the evidence presented by the fishing industry we heard from Mr R N Holdaway (S17). His submission has been already referred to (3.2.17). He is presently completing a doctorate in zoology and has undertaken research on extinct indigenous birds of New Zealand. His paper looked at the effects of Polynesian colonisation and resource management practices on the marine and terrestrial fauna and flora of New Zealand. The following is an extract:

> The long and sad record of environmental damage which has accompanied the migrations of Europeans around the globe is well known. Unfortunately, the dramatic effects on island environments resulting from the progressive colonisation of the Pacific Islands, including New Zealand, by Polynesian peoples in the past 3000 to 4000 years are not yet generally appreciated.

The main theme of this submission is that the Polynesian peoples had, throughout the period of their occupation, no more or less claim to have lived in harmony with their environment, or to have a greater environmental or conservation awareness, than do the Europeans who followed them. It is based on published evidence of environmental alteration and deterioration, faunal extinction, and resource depletion in prehistoric and protohistoric New Zealand, especially the South Island . . .

It is not the object of this submission to try and apportion blame for past environmental damage, but to point out that the first priorities of all colonists are for food and shelter and that the need for these necessities overrides other considerations. Resources are exploited in descending order of return for effort; as one resource is depleted, the next is tapped. In island ecosystems, particularly where, as in New Zealand and other Pacific islands, the indigenous animals and plants are extremely sensitive and vulnerable to disturbance, the effects of human colonisation can be devastating. In New Zealand, the resource base was limited by the small range of food sources; plants and birds from the forests, fish, shellfish, and seals from the sea. The history of the Maori people in New Zealand is one of continuous adaptation; adaptation at first to an environment vastly different from the home islands of the tropical South Pacific, then adaptation to the changes in resources and environment through the centuries. The final phase of this adaptation had probably been reached some time before European contact, when the major protein sources were fish and shellfish, supplemented by small bird fowl, and the staple diet was fern root or ti root, varied at least north of Banks Peninsula, by horticultural crops such as kumara.

Many of the changes wrought in prehistory can now only be perceived in outline, from varied, often conflicting, evidence. It is, however, a painful truth that new colonists everywhere have abused their new environment, and only come to terms with the problems of resource management and conservation of resources when there were no alternatives. It is easy to see the mistakes of the past two centuries for they are all around us and many of the changes have been documented; the mistakes of earlier times are much less visible.

The idea of a Golden Age in human affairs, where people lived in harmony with their environment persists: it is a mistaken idea, based on a lack of knowledge of the real effects of human colonisation. The weight of evidence suggests that the earliest colonists exploited the stocks of indigenous vertebrates until most, if not all, were extinct or reduced to remnants of no economic value. Exploitation patterns of marine resources have been more difficult to quantify, but results presented in this submission suggest that the same patterns of overexploitation were present. The marine resource was simply more difficult to overexploit with the available technology.

> Conservation practices which were introduced, such as rahui, were controls placed on resource exploitation after the main environmental damage had occurred and when the alternative to conserving the remaining resources was starvation for individual communities. These restrictions applied only to those essential resources which provided the staples of diet, or clothing, or other raw materials. Other resources such as forests, which were perceived as being inexhaustible and which held fewer resources, were destroyed when the necessity arose.
>
> The burning of large tracts of forest in the early 19th Century for potato cultivation is evidence that the intrinsic value of forests did not transcend desire for a new source of food and exchange. The present attitudes to forest remnants such as the Waitutu block in western Southland or to the Cook's petrel on Codfish Island (Te Au 1988) seem to indicate that the idea of conservation or preservation of a rare resource for its own sake, is not of great importance.
>
> New Zealand was the last major land mass settled by humans. It is now clear that the pattern of exploitation of resources and initiation of major environmental change which can be discerned here had a history stretching back through eastern Polynesia to the islands of Western Polynesia and Melanesia. As well as overexploiting the natural food sources, the colonists altered the environment of each new island by removing the natural vegetation cover to plant crops or for other cultural activities. They also introduced, deliberately or accidentally, animals such as the kiore, or Pacific rat, the dog, pigs, and various lizards (Crombie and Steadman 1986), snails, and plants (Kirch 1982a), all of which had actual or potentially deleterious effects on the environment. (S17:2–4)

Professor Walter Clark, whose background and submission we referred to earlier (17.2.22) canvassed similar material to that given by Mr Holdaway. He said that since human settlement of New Zealand, more than 40 bird species had become extinct and about 20 of these since Europeans arrived. He gave instances of the species lost and attributed it to deforestation during the course of using fire in moa hunting. Professor Clark considered that conservation was in fact a rare notion until very recent times.

17.2.35 The evidence of Mr Holdaway and Professor Clark certainly places a share of the responsibility on Maori for the change in the environment. But those changes took place over a period of 1100 years. Looked at in isolation it is not easy to draw comparable conclusions between what has taken place between the two periods 800–1840 and 1840–1990. In one case we are dealing with a period of 1100 years and in the other a mere 150 years. It must also be remembered that the people who inhabited this country in the pre-contact period had to live off the land. It would have been helpful to have had

before the tribunal a similar analysis of what has taken place over the past 150 years. There is no yardstick by which to measure the relative responsibilities of Maori and Pakeha. Nor does that matter. The cold hard situation is that there are ominous signs we have not yet learned from history. It is not the task of this tribunal however to measure blame for what has happened to our environment and what needs to be done. There are encouraging signs of awareness and desire to act by others. The tribunal's jurisdiction is to determine whether any act or omission of the Crown is inconsistent with the principles of the Treaty. The important line to draw is the one that divides any Crown breach of Treaty principles on the one side from grievances of dissatisfaction that arise out of the process of change in a developing society on the other side. These latter matters will not be matters strictly within the jurisdiction of the tribunal to recommend for remedy. The tribunal considers however that having had those issues placed before it, it may be helpful for the minister to receive a statement of our views. We shall therefore continue to comment on some of these matters and at the end of this chapter will look at the conclusions to be drawn.

We now move on to look more directly at the impact of settlement on Ngai Tahu.

17.3 The Impact of Settlement

Introduction

17.3.1 In chapter 18 we shall be looking at the social and economic condition of Ngai Tahu following the Crown purchases. To some extent therefore there is an overlap with this section which looks at the impact of settlement on mahinga kai. We shall endeavour to restrict the subject matter to mahinga kai and in so doing look at specific matters such as deforestation, clearing and drainage, water use and quality, acclimatisation, lack of access and pollution. As we have already reported, the tribunal has listened to many grievances of Ngai Tahu concerning the loss of their food resources. Most of these arise as a consequence of the development of New Zealand after the arrival of settlers. Some of them are of comparatively recent origin. Many of them will evoke a supporting sigh from other New Zealanders. In the end it will have to be the collective voice of the majority of New Zealanders that will direct change. Here is what one witness said:

> I look at these areas which I have mentioned here in the lakes, the mountains, the rivers, wetland areas, the forests, the estuaries and the sea, with saddened

> heart and misty eyes, at the rape, pillage and destruction of the national assets of this beautiful land of ours.
>
> Our rivers, lakes and wetlands or what is left of them, most of our wetlands have been drained, nearly all of our rivers have been interfered with, or would meddled with be a better phrase to use at this time. I see raw sewerage, dead livestock, and other obnoxious materials, pouring down our waterways out to the open sea, little wonder that these areas of mahi kai are no longer fit for human consumption.
>
> Our forests, practically non-existent, and our native timbers, that is the chips, piled up in mountains along the quay sides of our ports awaiting export to foreign parts. I wonder at the mentality of all this carnage.
>
> Is this the heritage that we of this generation are going to bequeath to our future descendants? Who is responsible?
>
> I ask, where is the legislation that should be protecting these environments, and how good is it? (H13:29)

Several witnesses spoke of how the loss of traditional food resources and lack of land contributed to loss of culture. In a frank analysis of land loss and prejudicial effect on the people of Otakou, Bill Dacker cited this statement given by Hoani Tukao Wira to the 1891 Mackay inquiry:

> The Natives have suffered since 1848 . . . in the loss of their mahinga kai and other privileges. Prior to that they were able to procure all their old descriptions of food. Now the rivers are stocked with trout, and the lagoons and lakes are dried up, their fish killed, and the wekas and other birds destroyed by the progress of civilisation . . . In former times their storehouses were full of food, but they had no use for whatas now. Have to obtain our supplies from the storekeepers now, which causes us to incur debts, as we are unable to maintain ourselves off the land. (F11:65)7

It is true that new foods were available to Ngai Tahu, but as Mr Dacker said, these became:

> a matter of necessity rather than choice and a major measure of wealth in Maori terms was lost. From this loss the cultural bonds that were expressed through the exchange of foods, at hui, tangi and, formerly, kaihaokai, that bound the people to each other and to the land, began to suffer. (F11:66)

We were told by Rakiihia Tau:

> I have tried to keep this evidence objective and unemotional but I would not like to leave the tribunal with the impression that the Mahinga Kai issue is just that. I feel a deep sense of outrage that the promise to preserve our Mahinga Kai has been broken and that what Mahinga Kai is still left is fast disappearing. I am also conscious that those who make the decisions to clear the bush, control river flows, extract water for irrigation and discharge effluent into the rivers, do so with little or no consideration for our feelings or our traditions. To be fair, there are some signs that some of the decision makers, especially the North Canterbury Catchment Board are now prepared to listen to our views. Nevertheless, apart from the Town and Country Planning Act, there is almost no statutory requirement that they do so. (J10:25)

Crown historian Tony Walzl reported that in the years following the Native Land Court grants in 1868 the availability of resources to Ngai Tahu decreased, but there is little evidence available to document this process (P10:85). The Smith–Nairn commission in 1879 opened up the subject and many Ngai Tahu detailed the loss of their food gathering places. Mr Walzl conjectured that by this time Ngai Tahu were generally realising that many of their land-based resources could not be returned and began to concentrate on fishing matters. Mr Walzl referred to Mackay's summary of the position in 1881:

> The increase of civilisation around them, besides curtailing the liberties they formerly enjoyed for fishing and catching birds, has also compelled the adoption of a different and more expensive mode of life . . .
>
> A matter that has inflicted a serious injury on the Natives of late years, and for the most part ruined the value of the fishery easements granted by the Native Land Court, is the action of the Acclimatisation societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using nets for catching the whitebait in season, nor can they catch eels or other Native fish in these streams for fear of transgressing the law. They complain that, although they have a closed season for eels, the Europeans catch them all the year round. In olden times the Natives had control of these matters, but the advent of the Europeans and the settlement of the country changed this state of affairs and destroyed the protection that formerly existed, consequently their mahinga kai (food-producing places) are rendered more worthless every year, and, in addition to this, on going fishing or bird-catching, they are frequently ordered off by the settlers if they happen to have no reserve in the locality. This state of affairs, combined with the injury done to their fisheries by the drainage of the country, inflicts a heavy loss on them annually and plunges them further into debt, or keeps them in a state of privation. All this is very harassing to a people who not long since owned the whole of the territory now occupied by

> another race, and it is not surprising that discontent prevails, or that progress or prosperity is impossible. (P10:85)8

We will now look more specifically at some of those developmental consequences.

Deforestation

> And a like carpet at your feet, in endless gradation of light and shade, the New Zealand bush spreads out in green waves downwards to the edge of the sea.9

> A forest land of dull shade and tangled growth . . . a land of silence and mystery save for the voice of many waters.10

17.3.2 With these two quotations Hemi Te Rakau opened his evidence to the tribunal at Hokitika. Mr Te Rakau is not Maori but has an adopted Maori child. He changed his name because of his child. In a thoughtful submission he stated:

> The plain facts are that without this massive forest presence and protection man would not have survived on Te Tai o Poutini coast.
>
> The sad facts are that in spite of this massive presence, few examples remain of continuous forest from the mountains to the sea.
>
> One fine sample is south of Okarito Lagoon stretching from the sea beach to the hills and valleys of the hinterland.
>
> Another is in the area of Karamea Whakapohi in the north of the district, a superb stretch of continuous growth cover from alpine to marine vegetation, encompassing all stages in between.
>
> All the other thousands and thousands of acres have been destroyed or modified in some form or other by fire, axe, chainsaw or diggers and bulldozers.
>
> The diet of old time Maori would indeed be different today if they sought subsistence living off these denuded and altered lands.
>
> This is not the place, in my view, to record the detailed destruction piece by piece; there are too many. Too many causes; too many reasons; too many cases of individuals; too much greed; too much carelessness.

It is the place, I feel, to reflect calmly, slowly, and peacefully without malice or retribution upon the tremendous loss to Maori traditional ways of this removal of forest cover and all the ecosystems that it once supported – gone forever, how do you place a cost co-efficient formula on that!

The only really obvious and sure fact in this whole episode is the reality that so much is now reduced to so little and with it the traditional ways and rights of a whole people.

I feel that the forests must be viewed not as a piece of real estate for use regardless, but also as a living being itself, living out its lifetime too alongside us, the human content.

Although we know the physical value in cubic metre terms, production yields and recreational throughputs we should take great note and awareness of the spiritual concept of this great life form. Our only advantage is that we are cunning and mobile, but can end up in a desert of depression without spiritual values.

The forests are not there for man's sole use, were not created solely for his benefit. Like the food in the vegetable garden they keep us alive; they produce the very air we breathe and if you destroy the planet's lungs then we are very, very dead.

The destruction of forests destroys the spiritual values of Maori people and those of other races and colours who recognise such things as Wairua. (H36:10)

17.3.3 During the course of evidence given by Mr Ronald Little (P15a:4) showing the adverse effect of deforestation on fisheries, a graph was tabled and is now reproduced in figure 17.2

The line drawings illustrate the changing vegetative cover of New Zealand from the period 800 to 1840 and from 1840 to 1980. The original native forest was reduced by 20 per cent over the first 100 years and by a further 40 per cent between 1840 and 1980. Mr Little went on to examine the damage caused by the consequential land erosion and he outlined the chain of events that follow the need to cope with resultant flooding. Mr Little referred to the straight line engineering concept of river control with the resultant loss by draining of wetlands, lagoons and waterways which were fishery habitats. In answer to the question he posed himself as to why the increased erosion, flood intensity, reduced food availability, reduced cover and an unduly variable habitat for fisheries were allowed to happen, Mr Little said:

> Perhaps the easy answer is that in any developing country with a struggling economy and a rapidly increasing population, an environmental conscience is a bit of a luxury. (P15a:4)

17.3.4 But as the forest disappeared so too did mahinga kai. One witness said this of North Canterbury:

> Today almost all of the forest cover has disappeared. We would catch the odd Kereru (wood pigeon) which could be found in odd pockets of bush in the Waipara area or among the cherry trees at Lowburn. (J10:23)

The tribunal was given a map of Banks Peninsula showing the situation at about 1860 which is entitled "Rahua o te whenua manu kai" (J27). It shows outlined in green, the forest on Banks Peninsula which has been cleared off. The map shows a very large area of the central and north eastern parts of the peninsula which are covered in forest and bush. The map also shows 20 sites of sawmills, which is rather significant.

A consequence of this bush clearance was the loss to Canterbury Maori of the titi; farming destroyed the natural habitat, Ngai Tahu lost another mahinga kai.

Matthew Ellison spoke of the clearance of bush in the Puketeraki area and the loss of birds, berries and root food (H12).

Another witness, Kevin O'Connor, was concerned with the depletion of kai manu in and around Riverton. In general he attributed this to the loss of the areas of bush for timber and land clearance. He said that kaka had become very rare and the only place with weka within close proximity was at Pig Island. This witness also referred to the reckless killing of weka on Whenua Hou and submitted that tangata whenua should have been notified so that the meat, feathers and most importantly the oil which was highly prized for medicinal purposes would not have been wasted (H13:38).

Perhaps once again the needs of settlement prevailed but at a cost to both Maori values and future generations. We now look at the problem Maori faced in retaining access to their mahinga kai.

Loss of access

17.3.5 For some time after settlement began and before pastoral farming got underway, Ngai Tahu continued with their pattern of tribal foraging. Gradually however, land was cleared and livestock was introduced and Maori

began to understand better the European concept of ownership as fences and gates were erected and trespass warnings appeared. Many of the new settlers denied access to Ngai Tahu. Rawiri Te Maire said this to the commission in 1891:

> All former sources of food-supply were cut off. If they went fishing they were threatened to be put in jail, and if they went catching birds they were turned off. The winter was the most suitable time to catch the Weka, and the Maori in olden times used to catch the weka, and . . . set up a rahui to protect the birds. The Europeans will not allow the Natives to kill the woodhens now, as it is said they are useful to kill the young rabbits. The tuis and all other birds are gone, and the roots of the kauru and the fern have been destroyed by fire . . . Wekas and other birds were also preserved, to be used during the period while reserves were protected. The people did not kill the birds out of season in those days, but now the European destroy them at all times. (H6:32)11

Rawiri Te Maire was supported by Tamati Toko who stated:

> Some of us were nearly put in gaol for catching wekas on some of the runs. Donald McFarlane, of Hakataramea, and Mr. Hoare, of Station Peak, turned us off while catching wekas. Put a notice in a newspaper that Natives would not be allowed to catch wekas on their runs; wanted to preserve wekas for game, and to kill the rabbits; but afterwards the wekas were killed on these runs by dogs and poison. Have seen the wekas lying dead on the runs in numbers, but the station-owners would not allow the Natives to kill or catch them; they threatened to shoot us if we went on their land. All our old mahinga kai are destroyed, and we are left without the means of obtaining the food we used formerly to depend on. (H6:32)12

Rawiri Te Maire Tau referred to this evidence in his submission on mahinga kai and emphasised that the situation Tamati Toko described was totally alien to Maori thought and philosophy (H6:32). As a result of this gradual process of being denied access, Ngai Tuahuriri by the turn of the century had given up attempting to catch weka and kai moana except during the shearing season. The high country no longer offered weka and pigeon because the forests had been replaced by farms. We were also told that today high country mahinga kai are virtually nonexistent and those that do exist are protected by legislation.

17.3.6 The issue of restrictive laws and regulations being imposed on Ngai Tahu was raised by several witnesses. Mr Tau claimed Ngai Tuahuriri understood "that much of our birdlife must be retained by using modern equivalents of rahui". He emphasised that the shortage of bird life was caused

"through European destruction", implying the advent of settlement and its effects (H6:33).

There were the same touch of irony in this attitude as that in the Muriwhenua fishing claim when Northern Maori questioned the goodwill values being received by commercial fishermen for ITQs they owned under a quota management scheme set up to deal with a shortage created by the fishermen themselves.

Thus the claimants submitted that access was denied not only by the owners and occupiers of the land but also by legislation. We have already noted that the fishing easements granted in 1868 were ineffective and had disappeared either by drainage, sea encroachment or diversion.

17.3.7 The following details of more recent happenings were contained in Rawiri Tau's submission (H6:33). Evidence was given by Rima Te Ao Tukia Bell, a leading kaumatua of Ngai Tuahuriri, who has since passed away.

> Kua hahaea te ata
> i runga o Rekohu
> tirotiro noa ana
> Poua ma
> Ka ngaro koutou i runga i o Otautahi

She recalled that Ngai Tuahuriri continued to use the Waimakariri during her childhood. However Ngai Tuahuriri stopped using the river as they were being continually fined for catching salmon and a type of eel which was unique to the river. She also recalled using the lagoon Tutae Patu and the river Rua Taniwha (Cam). Tutae Patu and Rua Taniwha were two waterways once in continual use by Ngai Tuahuriri. Mrs Bell elaborated on how, during the summer time after school, all the families would journey to Rua Taniwha to catch eel, trout, wai kakahi and wai koura. The children would remain upon the river until evening and, having obtained their dinner, would return to their homes. The waterways sustained many Ngai Tuahuriri families during the depression. This continual use of the river slowly come to an end as the water quality declined and the once abundant food became virtually non-existent. Today eeling activities on the Rua Taniwha have all but ceased for lack of eels. Any that are caught are not held in high regard as the quality of the food has declined. Wai kakahi and wai koura no longer exist (H6:35).

Tutae Patu is no longer used: the lagoon and surrounding area having been drained. Furthermore the low water quality from farm runoff has meant that tuna is no longer available to Ngai Tuahuriri in sufficient quantities.

W A Taylor in *South Island Maori* recalls how annual competitions were held in Tutae Patu to see who caught the most eel. Large quantities were caught from the lagoon but the practice stopped in the mid-1970s as the quality of the tuna declined (H6:35).

During the hearing the tribunal was told of certain instances in which reserves created for mahinga kai purposes lacked access as they were surrounded by privately owned land. The tribunal has indicated to several witnesses that there is provision in sections 415 and 418 of the Maori Affairs Act 1953 to apply for access to such reserves. In any event in a later volume the tribunal will be examining all these specific complaints.

Acclimatisation

17.3.8 Under this heading we look at the relationship between Maori and settler as each sought to fish in the fresh waters of the South Island and to take wildlife. We should perhaps refer first to the submission of Mr W B Johnson, director of the national executive of the New Zealand Acclimatisation Societies since 1970 (P15b).

His submission stated that these societies, which were formally established throughout the country, were primarily concerned with the creation of self-sustaining populations of introduced fresh water fish and wildlife of interest and benefit to the public. He stated that the general rationale for their activities arose from the perceived unsuitability of the indigenous fauna, both aquatic and terrestrial, to provide food, sport and industry in a manner which settlers desired and were familiar with. He emphasised that whilst the societies were undeniably of European origin, the end result of their endeavours has been egalitarian, and remains so to this day.

We were told that New Zealand is presently divided into 24 districts of which 22 are run by locally elected councils. The societies derive their present statutory origin and role from the Wildlife Act 1953 and the Fisheries Act 1983. We were told that the societies are not user groups in the popular sense, but rather fish and game management agencies of the Crown which are run on a day to day basis by the users and more akin to local government.

In his outline of the societies' work, which includes the employment of rangers, Mr Johnson emphasised the development of their role from species introducers to habitat conservers, habitat protection now being the primary ethos (P15b). He referred to the societies' use of the Water and Soil Amendment Act 1981 (P15b). We have already referred to Professor Clark's submission

(17.2.22) which criticised the "traditional non-participation by Maori in conservation matters" (P16c:1).

17.3.9 The emphasis of the societies has been historically on introduced species, based on European views of what was suitable for food and sport. Herein lies the reason for a divergent view between Maori, who saw the need to retain their own food resource, and the settlers and their descendants who had their own fishing customs to introduce into their new homeland. It is little wonder therefore, that there has been no cooperation between parties with such opposing views. The tribunal is sure that Professor Clark and the societies are motivated by the highest awareness of the need to preserve the quality of waterways. But we think that one of the reasons why there has been no cooperation, is that the activities of the society have been at the expense of the food resources of Ngai Tahu, a point clearly apparent from the evidence produced. This has probably precluded cooperation on matters of common interest because there is a fundamental disagreement between the parties on what constitutes that common interest, Professor Clark's denouncement regarding the lack of Maori conservation ethic and non-participation in conservation matters is capable of being turned just as nicely by Ngai Tahu against settlers and their descendants for lack of conservation ethic and non-participation in conservation of Maori resources. Dealing more specifically with Waihora there is evidence of Maori complaints and grievances. There is also evidence of disregard by the Crown and indeed opposition from the settlers.

17.3.10 Crown witness Ronald Little referred in some detail to the introduction of certain fish species well known to the settlers:

> In the aquatic environment the same range of good and bad introduction exist. Most damaging have been certain aquatic plants such as one of the oxygen weeds that can clog lakes and waterways. A great many aquatic invertebrate animals have gained entry, spread widely and have replaced native species. It is probable that this latter category were all accidental introductions, and largely unknown to most people. Many fish have been introduced successfully, many have been tried and failed. Overall introductions have been successful and now tend to dominate the native species.
>
> The reason for this success was probably that New Zealand was long isolated and as native fishes developed without severe competition or without the presence of major predators they presented little competition to exotica. Native fish fauna was fairly scarce and many ecological niches existed that new entrants could fill. This was especially so as the nature of the rivers, lakes and streams was rapidly altering due to river control and forest removal. Introductions of sporting fishes first occurred as follows:

Brown trout 1867/68 (very successful over both islands, especially in the South);

Tench 1867 (localised occurrence only);

Perch 1868 (widely dispersed in the North Island, a few in the South);

Brook trout 1877 (a few locations only);

Rainbow trout 1878/83 (widely spread, especially in the North Island);

Quinnat salmon 1901–1907 (South island success, but mainly on the southern east coast);

Red Salmon 1902 (land locked stocks in the Waitaki River only);

Atlantic Salmon 1908–1911 (originally successful but now almost gone).

As well there have been various other introductions of varying success, from lake trout confined to Lake Pearson, to large goldfish populations in the Waikato basin. Unfortunately illegal introductions have occurred in recent years such as the rudd and koi carp, final effect of these species is still unknown. The effect these newcomers have had on native species, and especially those species of importance to the Maori, is of interest.

There is no doubt that salmonids and a few others, out-compete native species generally and can seriously affect native invertebrate populations. Eels on the other hand do well in the presence of trout and utilise them for good to some extent. The general consensus of scientific workers is that the decline in native species was due to changing land use rather than from competition from exotic fish.

The one doubtful case is that of the New Zealand grayling, now extinct yet present in large numbers at first European settlement. Allan (1949) did not consider the primary cause to be exotic fishes but rather altering land use. McDowall (1868) believed that the spread of trout and human exploitation also played a part.

The advantages of some introductions are also great. The biomass and availability of trout and salmon are very high today and present a valuable food source previously unavailable. It is true that licences are required to fish for trout or salmon yet they represent resources additional to those originally present and monies from licence purchase are used for fisheries management. (P15a:8–9)

Although Mr Little's views above would seem to indicate that eels and trout are compatible river residents, there was some evidence that the introduction of trout and salmon had some effect on eel populations, particularly at the elver stage of upstream spring migrations (T4a:47). The reverse may probably be said of the eels' propensity to take fingerling trout and thus again we see an area of possible conflict in the interests of Ngai Tahu and the acclimatisation societies. We have already seen the feeling generated by the prosecution of Ngai Tahu fishermen in the rivers and waterways. No doubt many of those prosecutions have been brought by rangers performing their inspection duties.

The Maori koaro or mountain trout was commonly found inland in mountain streams and the main upland alpine lakes. Koara populations have declined as a result of habitat loss, but in addition many lake populations have declined by the predation of the introduced trout (T4a:50). Maori smelt, known alternatively as parohe, paraki (parariki), pipiki, tikihemi and inangi or maneanea, are prized as a food, yet these too have suffered through the attentions of trout (T4a:53). There are also other freshwater species that were affected by the introduction of trout such as grayling and koura.

17.3.11 How did Ngai Tahu react? Here is one claimant's view:

> When the European came he brought among other things sheep, gorse, stoats, wheat, fruit trees and trout. With the Pakeha Trout came his laws.
>
> They were placed in our waterways, our garden, Te Marae o Tangaroa. For me to catch a trout, I have to pay a licence for this privilege even though it is destroying my garden. It is an offence according to the laws of this land to take property that belongs to another. I believe this to be a just law, it is why our ancestors signed the Treaty. Now, if you are Maori, and you have property, should not the same law apply? Should not the person who put the Trout in our garden pay rental for this privilege. Should not those who take from our garden obtain permission also, and if required pay for this privilege. (J10:10)

The tribunal was told by Ngai Tuahuriri that they had always utilised their area in a conservative manner. They resented being fined for taking more than the limit of kai awa and kai moana when their food was intended for distribution over a wide family base. Many families survived the depression years by the distribution of kai awa and kai moana according to custom. An old saying of the tribe was "Silver and Gold have we none, but what we have we will share" (H6:23).

We referred earlier to the evidence of Kelvyn Te Maire who was critical of the management of water fowl by the acclimatisation society (H10:33).

Kelvin Anglem spoke of the shortage of eels in the Opihi River which once supplied in one night their whole winter's supply. He told us of eel drives designed to protect young trout, when hundreds of eels were slashed with lengths of hoop iron and allowed to flood down the river or left to rot on the banks (H10:23).

The following was reported to the Mackay commission in 1891:

> The Natives complain that they are now debarred from eeling in the Taieri River in consequence of its being stocked with imported fish and they are badly off for a fishing-place. They used to do eeling at a lagoon near the Waipouri Lake but were turned away from there, by surrounding European land owners and have nowhere to go now. They are very desirous that the lagoon should be secured as a fishing-place for them. (F11:52)13

Finally we refer once again to an extract from Mackay in 1881, incorporated in Crown historian Tony Walzl's evidence:

> A matter that has inflicted a serious injury on the Natives of late years, and for the most part ruined the value of the fishery easements granted by the Native Land Court, is the action of the Acclimatisation societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using nets for catching the whitebait in season, [n] or can they catch eels or other native fish in these streams for fear of transgressing the law. (M14:85a)14

17.3.12 May we therefore refer back to Professor Clark's criticism of lack of Maori involvement in fish and game management (P16c:1) and suggest that he has perhaps not understood how the activities of acclimatisation societies may have been anathema to Maori. Not only were the introduced fish seen as decimating the indigenous species but the accompanying legislation, regulations and trespass notices greatly restricted the centuries old access to the waterways. That the Ngai Tahu Trust Board in 1986 invited the National Council of Acclimatisation Societies (NCAS) to meet with them to discuss Waihora was a clear indication that Ngai Tahu accepted a need to consult with others. Time did not permit NCAS to attend and the society was concerned at the suggestion raised as to "mismanagement in our recent past". Perhaps the society may have taken an unduly defensive reference from the word "mismanagement" No doubt discussion around a table would have helped everybody.

Our trout and salmon recreational fisheries are an important part of this country's resources and they are well protected. The tribunal however, considers

it important that consultation takes place with Ngai Tahu regarding decisions which affect their mahinga kai.

Although there may be marked differences of view, Ngai Tahu should be part of the policy-making process. They have strong grounds for their grievance that they have lost much of their mahinga kai and that what they do have left is certainly not well safe-guarded.

Water supply

17.3.13 The tribunal journeyed up through inland Canterbury from Timaru through Fairlie to Lake Tekapo and across to Lake Pukaki and Lake Ohau, thence to Twizel, Te Ao Marama (Omarama) – the place of Te Maiharoa's settlement – down past Lakes Benmore, Aviemore and Waitaki and on to Oamaru. We were each presented with a brochure produced on behalf of Ministry of Works and Electricorp explaining how this network of lakes had become one of the country's major sources of electricity. A system of man-made canals was constructed to ensure maximum utilisation of every drop of water.

Neither Maori nor settler could surely have contemplated in the last century what development would take place with these lakes.

Evidence from Mr J P Robinson, Hydro Group Manager of Electricorp was presented by Mr M France (Q16). A map of all power stations in the South Island was produced. The evidence explained how the corporation was committed to ensuring that the clean pure water used for power generation remained in that state after use. Emphasis was laid on the recreational uses created by artificial lakes and the need for strict observance of environmental principles. Mr Robinson stated that Electricorp welcomed full consultation with Ngai Tahu on the issue of water right renewals. A full explanation in very clear terms was given at the Waitaki generating system and its main features.

Proposals for lake levels and recreational pursuits were also explained. Reference was made to the Opihi River and to a public statement that if the transfer of water to augment the Opihi River was genuinely and clearly in the overall public interest, it would not be opposed by the corporation. Further evidence was given of measures taken to avoid pollution at camping sites by the installation of removable tanks.

It was apparent the corporation was anxious to avoid any human pollution of water. We were particularly pleased that these firm assurances were given

and that the corporation looked forward to a better process of consultation with Ngai Tahu.

17.3.14 The tribunal inspected the Opihi River having heard submissions from William Torepe about the lack of water in this important mahinga kai of the Arowhenua people (H10:2). It was very evident that there is a lack of water in this river. Mr Torepe attributed this to the issue of permits by the Regional Water Board to allow the Timaru City Council to draw off water for domestic supply. Permits have also been issued to farmers for irrigation of farmlands. Apparently this drains off the lower Opihi River which is dry for at least three months of the summer with the consequent effect on the food resources.

Mr P M Sagar, a fishery scientist with MAF, was charged with researching the effects of irrigation, hydro electric development and other water management practices on the freshwater environment (P16d).

The report's purpose was to provide us with information regarding the potential effects on fish of increasing the flows of the Opihi River. At the same time Mr Sagar explained to us the effects of the current low flows on the fish in the river. This river has been affected by interruption of its flow since about 1936, when the Levels Plain Irrigation Scheme began operation. These interruptions have created a number of problems for fish stocks which were explained in detail to us. This evidence confirmed what was evident to us from visual inspection.

Mr Sagar recommended there should be modest increases in the flow of the Opihi which would improve the fisheries values of the river, but he said some caution was necessary with respect to the input of glacial flour (silts) if the river was to be augmented by water from Lake Tekapo. He said that the Opihi River is clear and contains no silts and that moderate to low silt loads could have a significant and deleterious impact. For this reason the river flow should fluctuate.

Mr Sagar believed that changes in land use within the catchment of flood protection works had all contributed to modifying the character of the river by changing the flow pattern and substrates in the river. Obviously the solution is not an easy one.

There can be no doubt that the extraction of water from rivers for irrigation, power generation, domestic demand, factory use and stock watering have resulted in dramatic reduction to a great many waters.

Mr Little stated that not only does the water loss reduce fisheries habitat, migration routes and cover, but it results in changes in temperature, increased weed growth and even destruction of the river (P15a:10). Water intakes at the dams also affect fish and invertebrate fauna as well as creating barriers for fish movement.

Many early dams have inadequate protection for fish although this is being provided for in recent constructions (P15a:10). The evidence we heard from Electricorp about the creation of new opportunities is unfortunately offset by the loss of traditional fisheries in rivers and streams. The demands on the water supply for so many uses, coupled with river alignment and the drainage of creeks and swamps, have all adversely affected Ngai Tahu's access to mahinga kai. It has also contributed to a much more serious consequence – the problem of pollution.

Pollution

17.3.15 There should be little need for this tribunal to awaken any New Zealand conscience on this issue. Wherever we went around Te Wai Pounamu this subject came before us as witness after witness recounted the sad effect of pollution on mahinga kai. Nor is it just a problem for Ngai Tahu. We went to several sites to see evidence of what we were being told. As good a summary as any was provided by Kelvin Anglem of Arowhenua as he indicated the factors such as sewerage disposal, wool scour effluent, dairy factory discharge, aerial spraying and topdressing, farm waste and irrigation diversion which had all succeeded in reducing the once proud Opihi and its estuary from an important breeding and feeding ground for migratory birds and fish into something unfit for humans and animals to swim in. Mr Anglem was strongly moved as he concluded his evidence:

> I am glad my Tupuna cannot stand on the banks of the Opihi and see what I have stood back and allowed to happen to their river. (H10:24)

We were given many instances covering the whole tribal area of Ngai Tahu and the whole range of human activity both past and current. The following table provides a few examples of these complaints from different parts of Ngai Tahu's territory.

Reference	Nature of Activity	Effect
H8:114 H8:43	Gold mining on west coast.	Destruction of eel habitat.
H13:2	City sewerage and rubbish dump, wool scouring, paper mill, freezing works.	Destruction of kai moana
H11.2	Nutrients from hospital and sewerage.	Pollution of cockle bed
H13:39	Sewerage discharge. Discharge from freezing works, paper mills, hide tannery.	Destruction of kelp and kai moana
H6:22	Wastage from forest mill debarking plant, piggery effluent.	Pollution of water
C13	Discharge of industrial wastes, sewerage discharge, agricultural waste, textile mill.	Pollution of kai moana

17.3.16 We referred earlier to evidence given by Mr W Torepe (17.2.5). This witness said that dirty and greasy effluent is also discharged into the Waihi River at Winchester (H10:2). He claimed that the majority of streams and creeks within Canterbury, notably those mentioned in his submission, are now just flood channels. The supply of fish in the Opihi River is now depleted as a result of water reduction.

Mr Torepe also referred to the effect of heavy land stocking around Lakes Tekapo, Alexandrina and McGregor, for which the Maori names are Takapo, Taka Moana and Whaka Ruku Moana respectively. He claimed also that wild fowl droppings at Lake Wainono had made the water quality suspect. The beach in the vicinity of the Pareora River may be polluted by freezing works discharge of untreated remains.

The witness tabled a report from the water resources manager of the South Canterbury Regional Water Board (H49). This report is dated 8 April 1988 and was supplied to Mr Torepe. It is a report on water quality concerning the Waihou River, Lake Wainono, Opihi River, Temuka River, Orari River, Rangitata River and the coastal zone. Of importance in this document is the problem of eutrophication within the Waihi–Temuka River system, notably in the lower Orari River. It is stated that eutrophication results mainly from the introduction of nitrogen and phosphorus. The application of fertiliser on farmland is considered the major source of nitrogen and is therefore regarded as difficult to regulate. Domestic sewerage is believed to be the major source of phosphorous. It is proposed that upgrading the oxidation ponds at the Geraldine and Temuka treatment plants will greatly reduce phosphorous levels. Any tertiary treatment, such as the discharge of effluent from oxidisation ponds into the specially constructed wetland area would be of immense benefit. These areas, comprised of raupo or other species, would successfully retain the effluent for a period of up to 10 days and strip if of nutrients. It is felt that little would be gained in regulating the effluent at the two

woolscouring plants within the Waihi/Temuka River system because although detergents used in woolscouring increase phosphorous levels, it is only the rinse water which is legally allowed to be discharged and this has low nutrient loadings. However, the heavy liquors produced, if illegally discharged, would greatly increase the phosphorous loading. The policing of woolscouring discharge is felt to be a possible problem.

17.3.17 It is clear from the Regional Water Board's report that there are certainly serious water quality problems that are likely to arise in the Temuka River and indeed in other rivers in the future. There is no doubt in the tribunal's mind after viewing the scene in the lower Opihi River, that diverse sources of nutrients from adjacent farmland and the shortage of water in the river generally have changed the structure of this river with a serious effect on the mahinga kai qualities.

There is no doubt that the South Canterbury Catchment and Regional Water Board is aware of the problem but it is also apparent that the sources of the problem are difficult to regulate against. The board reported that policing the activities of the two woolscourers that discharge into the river system will continue to be a problem since the board has neither the staff nor equipment to continuously monitor the quality of the effluent.

The tribunal considers that this is just one of the many areas of the South Island where pollution of various kinds have affected water quality and mahinga kai. The effect of it all is that the tuna have been reduced, the kanakana have become extinct and whitebait have been depleted by the destruction of breeding grounds due to river works.

17.3.18 Although British colonisation has taken its toll on land based resources it was not surprising that most of the current pollution complaints were directed at fisheries. For many years following European settlement Ngai Tahu had reasonable access to tuna and other kai moana, which were regarded by the newcomers and indeed down through two or three generations of their descendants, as unacceptable to their palate. Recently a change in the eating habits of New Zealanders has occurred. Smoked eel and other kai moana such as paua, mussels and pipi are now considered delicacies. The entrepreneurs who saw potential export markets in these foods have contributed to depleted resources of Maori traditional food. Faced with the effects of both pollution and exploitation, it is not surprising that Ngai Tahu grieve over their difficulty in offering their traditional kai at tribal hui.

We have not felt it necessary under this topic to refer to the spiritual significance that is attached to water. The tribunal, in earlier reports dealing with the Manukau Harbour, Kaituna River and the Mangonui Sewerage Report

and Motunui Waitara, has dealt with the spiritual aspect as well as the biological base which is part of the strong cultural attitude towards water quality. We can report that several witnesses raised this matter with us and their submissions were well understood by the tribunal.

17.3.19 In conclusion on this particular question, counsel for the Crown suggested that present day pollution did not exist until comparatively recently and is not a problem endured peculiarly by Ngai Tahu. Counsel submitted there were limits to what any government could have done and can do about it. It was submitted that programmes for the eradication of pollution were being put in place and that more are needed but these are costly and could have economic side effects for Maori as for the public generally. The tribunal does not agree that pollution is of recent origin. Pollution of Maori food resources can be traced back to early settlements, as for example in the gold mining activities in the Westland rivers (H8:14). A Crown witness, Mr Rob Cooper, said the most notable early pollution was caused by the sawmilling industry (P12:9). He stated that sawdust in waterways was quite common last century.

We do agree that there has been a change in the extent of pollution as development has taken place. We acknowledge there is a much more active interest being taken in anti-pollution measures and the maintenance of water quality. In this section we are simply assessing that pollution along with other contributing factors affected Ngai Tahu mahinga kai.

In our view the evidence shows that pollution has certainly damaged the food resource.

17.4 Ngai Tahu Grievances and the Crown's Response

Statement of grievances

17.4.1 In the previous section we looked at the impact of settlement on Ngai Tahu and examined the various grievances expressed by a number of witnesses. We now record the general mahinga kai grievance as stated by the claimants:

> According to the Treaty of Waitangi and later specifically confirmed by the Kemp Deed the Ngai Tahu people were guaranteed "the full, exclusive and undisturbed possession" of their *kainga* and their *mahinga kai*, but the acts and omissions of the Crown and agents of the Crown have in fact dispossessed

> Ngai Tahu of their *mahinga kai*. Ngai Tahu have thus been deprived of a major economic and sustaining resource in their *mahinga kai*. (W6)

As can be seen from this statement, the mahinga kai claim was based upon the duty owed by the Crown under article 2 of the Treaty and, in the case of the Kemp purchase, on the contractual terms of the deed.

From this very general statement of the claim the claimants developed five heads of grievance. They were as follows:

> 1. That the Crown has failed to ensure the adequate protection of the natural resources of Banks Peninsula; that it has allowed the wholesale destruction of the forests and other natural vegetation to the detriment of native fauna, water quality and soil conservation, and that the resulting siltation of stream beds and tidal waters has been to the detriment of fish and birdlife; that the Crown has allowed excessive pollution of Wairewa (Lake Forsyth) so that this great inland fishery and eel resource is now almost extinguished; and that it has allowed the depletion of kaimoana in the bays, harbours and coasts through pollution and excessive exploitation. (W3:3)
>
> 2. That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemps Purchase, in particular—
>
> (a) Ample reserves for their present and future benefit were not provided; and
>
> (b) Their numerous mahinga kai were not reserved and protected for their use. (W4:2)
>
> 3. The denial of access to certain mahinga kai accentuated the effects of landlessness. (W6: mahinga kai)
>
> 4. The drainage of swamps and lakes, the felling of bush, the conversion of land to agricultural use, and the introduction of acclimatised species destroyed or reduced the value of mahinga kai. (W6: mahinga kai)
>
> 5. The Tribe has been denied effective participation in resource management and conservation, such as administration of protected areas and of waterways. It also, on a smaller scale, has meant that such Tribal rights as those to the bones of stranded whales have been ignored. There has been no attention paid to the preservation of resources of special tribal significance, such as pikao. (W6: mahinga kai)

17.4.2 Counsel for the claimants made the following points in relation to mahinga kai, which we have summarised from his extensive closing address (W1):

- Ngai Tahu have always asserted that the term mahinga kai means "a place where food is gathered";

- Governor Grey had full knowledge of the importance of a wide range of hunting and gathering areas to Maori and that a sudden reduction to a cultivating economy would involve hardship and loss;

- Grey, Eyre and Mantell applied a policy to leave Ngai Tahu with as little land as possible so that they would be encouraged to take up work for the settlers;

- mahinga kai was a necessity of life to Ngai Tahu. In 1880 there were or had been 2000–3000 places where good was gathered in seasonal activity and in some cases over long distances;

- Waihora and Wairewa were important lakes and Kaitorete contained the largest pingao plantation in the country. These lakes were polluted and over exploited by commercial fishing;

- there has been large scale pollution of food resources everywhere and settlement has destroyed, and affected access to, mahinga kai. Ngai Tahu has lost access to the food resources as well as protection of that resource;

- there has been no consultation with Ngai Tahu over drainage, irrigation and reclamation, and decisions of central government and local authorities entirely lack a Maori dimension;

- mahinga kai still has immense cultural significance to the iwi in the gathering and sharing of food. There is still a need not only for food resources, but for natural dyes and fibres and wood for carving; and

- the fresh water and sea fisheries are of great importance.

The Crown's response

17.4.3 In her opening submission on mahinga kai (P9a) Crown counsel, Mrs Kenderdine, looked at the land purchase deeds in trying to ascertain the details of what Ngai Tahu sold. She noted that the only deed to which any reservation of mahinga kai was made was in Kemp's deed.

Mrs Kenderdine endorsed Tipene O'Regan's statement that:

> The key point is, of course, that if there is a duty to protect then the person charged with that duty should be able to state the nature, shape and the extent of what he is charged with the care of. (H17:2.6)

Crown counsel went on to say that in a great many instances the Crown did not understand the nature, shape and extent of what it was charged to protect for the simple reason that the tribe itself had varying definitions of mahinga kai and was in the process of great change.

Crown counsel suggested that a valid approach was to look at reserves which were asked for and not given and assess the significance of those areas to the preservation of traditional resources where those requests were realistic and reasonable.

The Crown agreed that Ngai Tahu were in competition with the settlers and were increasingly prejudiced by the settlers' activities, in particular by drainage and by denial of access to water ways. The Crown said that this produced complaints which led, in 1868, to the determination of the Native Land Court, presided over by Chief Judge Fenton, which made awards of so-called fishery easements to meet the need which had arisen, thereby attempting to fill a gap which had appeared in the Mantell reserves.

Mrs Kenderdine referred to the fishery easements made by the court. It was contended that the creation of the fishing easements, which in most cases were implemented by the grant of reserves adjacent to lakes and rivers, was in fulfilment of the Crown's duty under the Treaty of Waitangi to meet the need of Ngai Tahu arising as a consequence of European settlements following the sale of lands. The Crown therefore argued that through the Native Land Court in 1868, a remedy appropriate to the circumstance was granted.

Mrs Kenderdine stated that the passing of the Water and Soil Conservation Act 1967 was in response to the nationwide modern problem that there was not enough water available for all users and that the system of control or rationing had been necessary. She also submitted that as yet there had been no judicial consideration of the position of aboriginal titles rights or Treaty rights apart from *Huakina Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

Omission of mahinga kai from deeds of purchase

17.4.4 Crown counsel went to considerable trouble to analyse all the purchase deeds. Kemp's deed is the only one that mentions mahinga kai. Mrs Kenderdine submitted that the Crown would expect to take the land unencumbered and without attached aboriginal rights.

The important question that then arises is whether in all the purchase deeds other than Kemp's, Ngai Tahu not only agreed to part with their lands but also with their mahinga kai.

Elsewhere in this report and in other reports of the tribunal there are references to Lord Normanby's clear injunction that Crown representatives were not to purchase any lands, "the retention of which by Maori would be essential, or highly conducive to their own comfort, safety or subsistence" (A8:I:15).15

In the light of knowledge by Crown officials that Ngai Tahu needed access to these resources there was an obligation on their shoulders to make adequate provision for these needs.

Only in the Rakiura purchase, relative to the taking of titi, and in the Kaikoura deed, where a reserve was set aside as suitable for traditional needs, were Ngai Tahu interests recognised. To the extent therefore that the deeds of purchase did not set aside specific mahinga kai reserves or provide adequate lands to ensure Ngai Tahu had access to their traditional resources the Crown negotiators were in breach of the Treaty. The tribunal does not accept that in entering into the various purchase deeds Ngai Tahu were doing so on the understanding they were thereby surrendering all future access to traditional food resources which they needed for subsistence and trade. The evidence which this tribunal has heard clearly shows that the tribe continued to exercise its mahinga kai rights after the respective sales and in most cases relied on those resources to live.

Crown's closing submission on mahinga kai

17.4.5 The Crown addressed two issues in closing submissions (X3:28–72). The first inquired into the meaning of the words "mahinga kai" as used in the Kemp deed.

It was important to the Crown's argument to limit the definition of the term "mahinga kai" to mean "cultivations" because if that meaning was fixed, the Crown was only thereafter required to reserve and protect cultivations. In

chapter 8 the tribunal found against that limited use of the term and interpreted those words as meaning "those places where food was produced or procured by them" (8.9.12).

As an alternative the Crown argued that if the tribunal applied the wider definition, the evidence showed that post-1848 Ngai Tahu continued to have user access for some time and that as indicated by the claimants' witness, Professor Anderson, Ngai Tahu's traditional economy would have disappeared by the late nineteenth century (X3:41). Crown counsel was seeking to establish that Ngai Tahu had abandoned voluntarily their traditional mahinga kai.

We cannot accept this alternative argument, and we doubt that Professor Anderson would agree to that interpretation of his statement. We believe he was inferring that the consequences of settlement would be to effectively remove access by Ngai Tahu to their food resource. We have seen in the previous section how that in fact did occur. It was not a matter of choice.

17.4.6 In the second issue addressed in closing submissions, Crown counsel examined the Crown's general responsibility under the Treaty to ensure Ngai Tahu were left with an adequate resource base from which their society and economy could be sustained and developed.

Mrs Kenderdine made the following points:

- the claimants had not given full weight to the words "so long as it is their wish and desire to retain the same in their possession" in article 2 of the Treaty;

- the term "resources" must be seen in relative terms. Ngai Tahu habits changed after settlement. They adopted some European foodstuffs and had abandoned or were in the course of abandoning mahinga kai;

- The Crown's obligation to preserve and protect applied only to those resources which Ngai Tahu had used in the years immediately preceding the purchase and which they wished to continue using, ie, those which they did not wish to abandon;

- the claimants have wrongfully sought to protect resources once used but now discarded. This approach denies the dynamics of history and the subtleties of human interaction;

- the claimants' food gathering activities over 1840–49, from evidence supplied by their witness Dr Anderson, were limited to gardening and eeling;

- Ngai Tahu had moved into the European resources and technologies and were using these in place of other traditional vegetables such as fern root. Alternations had taken place in Ngai Tahu lifestyle;

- there was little real knowledge or evidence of Ngai Tahu economy in the 1840s; and

- an analysis of each sale reveals Ngai Tahu awareness and involvement with the European economy and Ngai Tahu had abandoned all but the most important traditional resources.

The thrust of the Crown's argument therefore was that Ngai Tahu had abandoned their traditional resources and had moved voluntarily into the changing society and economy with its new food resources. Presumably therefore there was no ongoing responsibility or need on the Crown's part to protect old food resources and there could be no breach of Treaty principles.

This argument is founded on the notion that Ngai Tahu at the time of signing the agreement could foresee the future and were prepared to relinquish their mahinga kai – apart from the most important resources – in anticipation of other benefits to come from European settlement.

The evidence shows clearly that Ngai Tahu had no such perception or desire. It is of course correct that Ngai Tahu moved to adopt the introduced resources, but they continued their traditional food gathering and relied on it for sustenance. By 1868 however, pressure was coming on the food resources particularly those near to settlement (P10:96). Ngai Tahu did not abandon their own resources, rather they were shut out from those resources by the impact of settlement and were compelled to adopt a different, more expensive life style. We have also dealt with this Crown submission in chapter 3 (3.3.10–13).

By the end of the nineteenth century Ngai Tahu had lost most of their inland and forest resources and their fisheries were under threat. Their relinquishment of mahinga kai was not the result of any deliberate decision by the tribe but directly due to the inadequacy of reserves and exclusion by the needs of settlement. There is no evidence that they willingly parted with their rights and considerable evidence that they wished to retain them.

17.5 The Tribunal's Conclusions

Reasonable expectations of the parties at the time of sale

17.5.1 It may be useful at this point to assess what reasonable expectations and attitudes Ngai Tahu and the Crown respectively would have had when the purchase deeds were signed in Te Wai Pounamu. We draw these attitudes from the evidence and will then look at them in relation to the Treaty principles.

Looking first at Ngai Tahu we consider these factors would have been important to them:

- retention of rangatiratanga over the resource in the form of specific and adequate reserves;

- protection of the resource by the Crown and consultation with the Crown in matters concerning preservation of the resource;

- sharing of their food resources with the new settlers; and

- sharing the settlers' resources with Ngai Tahu.

We consider the Crown may have had in mind:

- that Ngai Tahu should have access to their mahinga kai as long as that access was not an interference with the occupational rights of the settlers; and

- that some reserves should be set aside for mahinga kai but that in time Ngai Tahu would take up pastoral farming and commercial activities which would with intermarriage lead to assimilation of Maori and (by) European.

Bearing these considerations in mind we must now look at what happened to these expectations and measure these consequences against the Treaty itself.

Grievance no 2: loss of rangatiratanga

17.5.2 In earlier parts of this report we examined very fully the duty of the Crown under article 2 to ensure that Maori were left sufficient land for their present and future needs. The retention of sufficient land for mahinga kai purposes is therefore an important corollary of that principle. It was incumbent

on the Crown to set aside specific reserves to protect those rights. As we see the position, it was not only necessary for the Crown to protect the principal food resource areas, it was also the duty of the Crown to provide the tribe with extensive land so that it could adapt itself to the new pastoral and agricultural economy. This new economy brought with it the new resources that were in time to replace some of the traditional mahinga kai. To take part in this process Ngai Tahu had to have reserved to them substantial areas of land which could be developed and farmed. We described this process and principle in detail in 10.7.12 when dealing with the Murihiku sale. It has been conceded by the Crown that inadequate reserves were granted by the Crown and Ngai Tahu were also gradually denied access to food resources (X3:72).

The Crown suggested that perhaps these inadequate reserves were explainable by the Crown's prediction that Ngai Tahu would disappear as a tribe through intermarriage and assimilation and that the tribe was also numerically small. The evidence presented to this tribunal certainly suggests these may have been pertinent matters in the mind of Governor Grey and his negotiators. But these persons also knew that Ngai Tahu travelled far and wide in their gathering of kai. Not only were they wrong in their prediction about the disappearance of the tribe, they were also wrong in applying that belief by reducing the size of reserves. They were acting quite contrary to the policy laid down so clearly by Lord Normandy and article 2 of the Treaty. As we stated when dealing with Waihora, the lack of an adequate land base to enable Ngai Tahu to develop as farmers and commercial people, left Ngai Tahu as a disintegrated tribe without any power to take a visible part in the political economy of the nation. This lack of reserves – the landlessness of Ngai Tahu – was also the reason they were not heard properly on further loss of their mahinga kai as settlement developed. In the end, Ngai Tahu finished up with major loss of their mahinga kai and virtually no land. The inadequacy of reserves left Ngai Tahu on a most unequal footing to compete in the growing economy. As Mr Walzl pointed out, Ngai Tahu by 1891 held their land in a confused jumble of `legal' holdings, few of which were of use to the individual. The Crown suggested that the fishery reserves set aside by Chief Judge Fenton following the 1868 hearings were in fulfilment of the Crown's Treaty obligations. We have seen that despite Judge Fenton's emphasis on the importance of Waihora, not one fishery reserve was created over the lake. As to the other reserves, the Crown's own witness informed the tribunal that these had been destroyed over the next 15 years (P10:97). In 1879 the Smith–Nairn commission in respect of the Kemp purchase reported as follows:

> The evidence before us shows that lands which, by the terms of the Ngaitahu deed should have been expected, have been Crown-granted to European settlers; that reserves that were promised which have never been made; and that

> eel preserves, kauru groves, and other sources of food supply, which, under the term "mahinga kai", were not to be interfered with, have been destroyed. In many ways the terms of contract have been violated. To restore is impossible. (M14:88)16

With the loss of their land and food resources, Ngai Tahu faced extinction as a tribal people. Individualisation of title after the Native Lands Act 1865 contributed greatly to the disintegration of their political system and brought extinction even closer. Ngai Tahu were victims of settlement because it appears it was not intended by the Crown's agents that they should have ever have a stake in it.

17.5.3 Put another way, the Crown has failed primarily in its duty to set aside a sufficient endowment for Ngai Tahu in the form of land so as to allow Ngai Tahu not only reasonable access to mahinga kai but also an economic base to meet the new and changing economy. We consider there has been a breach of article 2 accordingly. Ngai Tahu were detrimentally affected by this breach.

Grievances nos 1, 3, 4 and 5: protection of resources and resource management

17.5.4 These remaining four grievances mainly relate to the Crown's failure to protect mahinga kai resources during the continuing process of the developing economy of Te Wai Pounamu after settlement. There is an overlapping in some cases.

The tribunal believes that these grievances derive to a large extent from the Crown's failure to create adequate reserves for Ngai Tahu. Our finding that there has been a breach of Treaty principle on this latter question, therefore, is a partial answer to complaints that later actions or omissions of the Crown such as drainage of swamps, deforestation, water quality control may not have affected Ngai Tahu so badly if the tribe had been given sufficient reserves of its own. However there are issues such as pollution and the introduction of new species that need to be looked at in relation to the Treaty principle regarding the duty to consult referred to in chapter 4, The claimants urged on us the need for a strong statement by the tribunal as to the right that Ngai Tahu have to be consulted on decisions being made by central and local government on resource management and conservation. That request was made by Mr Temm, perhaps in philosophical acknowledgement that there was more to be gained in looking forward to better things than in looking back at past failures.

We have examined in some detail how Ngai Tahu have been affected by the impact of New Zealand's developing society and there is no doubt that the many things of which the tribe complain are completely accurate. As stated by one witness, it seems to be a universal evil of colonisation that the environment suffers as a result. And it seems axiomatic that remedies come too late and are only considered when the evil has taken place. Development is not always bad and many good things flow from it that are of great communal benefit, but they may have harmful effects to a minority.

It is an easy matter to lay blame generally but it is not always easy to apportion that blame with exactitude or to get agreement that the damage complained of is worse than the benefit obtained. Ngai Tahu have suffered the destruction of their traditional food resources from all that has flowed from New Zealand's developing economy. They have much to complain about. There is certainly a need for better consultative processes to be put in place as Mr Temm so strongly stressed.

We shall come back to that important question shortly. Our present difficulty relates to the rather general nature of the four remaining grievances. The extent of the damage caused to mahinga kai by settlement was made abundantly clear in submissions and evidence and by the inspections of the tribunal. We have no problem in reaching a conclusion on that issue. It is much more difficulty however, to reach a finding that the loss of mahinga kai can be attributed solely to the Crown as a breach of its duty to protect under the Treaty. In many cases the acts or omissions have occurred as the result of individual or group activities; be they farmers, foresters, fishers, miners, contractors and indeed the whole spectrum of society including citizens, local authorities, commercial and industrial firms. We are not dealing with a single cause and effect situation as might well be the case in other specific claims such as sewerage discharge into a particular river or inshore fishery. The tribunal is charged under the Act to determine whether any particular policy or practice, act or omission is that of the Crown.

17.5.5 Most of the evidence clearly showed the harmful effects of a developing society but in many cases there have been several contributory causes, some of which may have been within existing laws and some not. What the claimants have sought to express is that governments have exercised insufficient restraint in their policies over 150 years to prevent the total disaster which has occurred to Ngai Tahu traditional food resources. That might appear to be a simple issue to respond to but it is a much more difficult matter to position that allegation within the jurisdiction given to this tribunal by section 6 of the Treaty of Waitangi Act 1975. This tribunal is required to identify with some precision the particular acts or omissions which have prejudiced Maori and which infringe the Treaty. We have no doubt that the

claimants, if put to that exacting and detailed task, may well be able to perform it in relation to many of their claims. What they have chosen to do in this huge claim is to present a general picture of how Ngai Tahu have suffered serious harm as the combined result of many different causes over which they had no control. If the tribunal had been required to examine in detail each of the contributory causes outlined by many witnesses we would never have finished this inquiry. When we later report on ancillary grievances we will be dealing with a number of specific matters which allege violation of Treaty principles. These will be examined individually but there has been a wealth of general material given by witnesses concerning mahinga kai outside specific claims advanced by the claimants. We find it difficult therefore to determine that each of the general grievances nos 1 and 3–5 inclusive are sustainable as specific breaches of the Treaty. We do however agree that the matters set out in these four general statements, when taken together with the clear breach of article 2 as found by this tribunal, add more weight to our finding that Ngai Tahu mana and rangatiratanga in respect of their mahinga kai were improperly disregarded by the Crown.

17.5.6 What Ngai Tahu are further saying is that the tribe was not consulted and did not effectively participate in policy decisions. All this has contributed to the decline of their food resource. Furthermore, they wish to be consulted in the future.

This tribunal has no difficulty with these two questions. We believe that Ngai Tahu were not consulted and did not effectively bring a Maori perspective to many issues. We say that the reason for this is that they ere effectively deprived of their mahinga kai and denied an economic land base by the Crown's failure to endow them with specific and adequate reserves. This affected their opportunity to present a tribal view, a position not helped by the individualisation of title from 1865 on. That Ngai Tahu have spent more than 100 years fighting for the recovery of their rights has been due to their wairua and the tenacity of a relatively small number of people.

As we have earlier found, Ngai Tahu were wrongly deprived of their rangatiratanga and their mana. This was the breach of Treaty principles that denied them participation and consultation on policy decisions over those crucial years following the purchases.

17.6 Findings and Recommendations

17.6.1 The claimants alleged in their general claim that the Crown dispossessed Ngai Tahu of their mahinga kai and this was a breach of article 2 of the Treaty.

- We find that the grievance is made out to the extent that:

  (a) The Crown failed to make specific reserves to protect and preserve Ngai Tahu's mahinga kai; and

  (b) the Crown failed to provide sufficient reserves to allow Ngai Tahu to participate in the developing economy.

As a result Ngai Tahu were deprived of their rangatiratanga as guaranteed to them by article 2 of the Treaty.

- We confirm our findings in respect of grievance no 2, as given in relation to the Kemp purchase (8.9.18–21), and in particular:

  (a) We find that the Crown failed to preserve Ngai Tahu rights to the food resources of Waihora, as required by the terms of the Kemp purchase, and thereby acted in breach of article 2 of the Treaty principle of good faith.

  (b) We find that the Crown failed, as required under article 2 of the Treaty, to set aside specific reserves so as to protect Ngai Tahu's right of access to their eel resources at Wairewa.

  (c) We find that the Crown failed to protect Ngai Tahu rangatiratanga under article 2 in that it granted eeling rights at Wairewa to Maori instead of to Ngai Tahu.

- We find that the grievances numbered 1,3,4 and 5 as set out in 17.4.1 are not sustainable as breaches of the Treaty for the reasons set out in 17.5.5.

Tribunal recommendations

The tribunal makes the following recommendations pursuant to section 6(3) of the Act.

Waihora (Lake Ellesmere)

17.6.2 At the option of the claimants:

EITHER

That the Crown vest Waihora for an estate in fee simple in Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

(a) controlling the opening of the lake to improve the fishery

(b) improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal. The joint management scheme binding the Crown to provide financial, technical, scientific and management resources;

OR

That the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee. The Crown then, in consultation with the beneficial owners, to make regulations for the future control and management of the lake in manner similar to the Titi Islands regulations and to provide the resources of the kind mentioned in the first alternative to improve the fishery and water quality.

Wairewa (Lake Forsyth)

17.6.3

(a) That the existing fisheries regulations giving Maori exclusive eel fishing rights over Wairewa be amended to substitute "Ngai Tahu" for "Maori" so as to return the rights to the tribe.

(b) That the same regulations be amended to give Ngai Tahu exclusive rights to fish the waters leading into the lake and to cancel any other existing licences.

(c) That an area of land be reserved around the eel trenches at the southern outlet which will secure Ngai Tahu rights of access.

(d) That a management plan be prepared, involving Ngai Tahu as part of the decision-making process along with the Department of Conservation,

Regional Authority, Ministry of Agriculture and Fisheries, for the improvement of the water quality with the Crown providing the same resources as recommended in respect of Lake Waihora.

Other recommendations

17.6.4 That beneficial ownership of the Crown Titi Islands be vested in such persons or bodies as may be nominated by Ngai Tahu and be subject to similar management regime as the beneficial Titi Islands.

17.6.5 That the question of reserving the pingao plantation of Ngai Tahu on Kaitorete Spit be brought to the notice of the Minister of Conservation for consideration and action.

Future consultation

17.6.6 During the hearing a number of proposals were made to improve Maori representation and to ensure better consultation with the iwi on resource management and control. In chapter 4 dealing with principles of the Treaty we referred to the views of the Court of Appeal in its 1987 decision concerning the New Zealand Maori Council on this question of consultation. In particular the observations of Sir Ivor Richardson suggest that in many cases where there seemed to be Treaty implications it may be necessary to have extensive consultation and cooperation in order to make informed decisions. This tribunal has suggested that planning and environmental matters may be notable examples. There are signs at last that central and local government have become aware of the need to involve Maori in these environmental matters and to have a Maori perspective.

The tribunal received a number of proposals from both Maori and Crown witnesses emphasising the need of improvement in the consultation process. We believe that need is now well documented and perhaps it is unnecessary for this tribunal to draw the matter to the minister's attention. We had a helpful submission from the former Director-General of Conservation, Mr Ken Piddington, assuring the tribunal that his department was very much aware of Treaty obligations and the need for Maori involvement. Mr Piddington gave details of procedures his department was putting in place and he emphasised the need to maintain regular working contact with the Ngai Tahu Trust Board.

As we see it, if the process of consultation is to be an effective one, it must be written into the various statutes and certain basic commitments made in

those Acts on the status of such important matters as water and air purity. Many of the submissions made to us addressed kai moana and these will be covered in our later report.

We propose to include in this section some of the recommendations which have particular significance for mahinga kai and then finally to express some basic problems that need to be addressed.

Some other measures sought by claimants

17.6.7

(a) That areas of pingao, kuta, harakeke and totara should be set aside for the exclusive use of Ngai Tahu (H8:33).

(b) That the present system of planting the wrong types of trees and plants in the rivers be changed to the planting of raupo and other species that would return the old ecosystem (H10:29).

(c) That water boards strictly enforce the grant of any water rights (H6:36).

We make no recommendations concerning the above matters but simply wish to record them and bring them to notice.

As stated we received a large number of proposals relating to representation on regional boards. We consider the following matters are material to effective representation.

A Maori perspective in environmental matters

17.6.8 Substantial changes to our law are required to ensure that Maori have an effective say in environmental matters.

The Resource Management Bill which has been introduced into Parliament provides an opportunity for change but other statutes, regulations and procedures must also be changed. We see a need for remedial action in these four fields and make the following recommendations:

(a) amendment to statutes to ensure that Maori values are made part of the criteria of assessment before the tribunal or authority involved;

(b) proper and effective consultation with Maori before action is taken by legislation or decision by any tribunal or authority;

(c) representation of Maori on territorial authorities and national bodies; and

(d) representation of Maori before tribunals and authorities making planning and environment changes.

17.6.9 Looking first at statutes where law is created the tribunal considers it necessary that those persons drafting new law should be required by statute to assess the impact of the proposed law on Maori and include within it criteria that will ensure a Maori perspective is sought and given. This mandatory requirement could be inserted into the Law Reform Act or the Constitution Act and would act as a safeguard in the introduction of all legislation.

There is no doubt that further amendments are needed to existing legislation to ensure that there is statutory recognition of Maori values. Such recognition should occur not only in environmental and public works matters but also in social legislation such as health and education. It extends across a broad range of statute law to include procedural legislation such as the Coroners Act 1988 and the Adoption Act 1955.

17.6.10 Perhaps the most significant area for change is in the consultative field. Consultation in Maori terms involves the well-being of the tribe. Local and central government need to recognise that Maori expect to discuss proposals that affect them in their traditional way on the marae. If our Pakeha leaders are diffident about going on to marae then meetings should at least be held in circumstances more akin to marae protocol. There must be recognition of the tribal framework and of the importance of issues being orally examined by Maori. Consultation in a Maori context is far, far more important to Maori than representation on Pakeha organisations. In some instances, Maori people serving on national and territorial bodies, even tribunals, may deliberately refrain from commenting on an important issue because that may be an intrusion on the mana of another hapu or iwi. On the other hand, explanation, examination and discussion on tribal marae will be much more likely to lead to an informed and acceptable decision. In the respectful view of this tribunal there must be a much greater effort to take proposals to the people on marae.

In addition to marae hui, tribal authorities must be given the opportunity to consider the various reports that are presented to territorial bodies well in advance of any hearing of the issues, and a right of hearing if requested. This question of consultation with iwi was examined in some detail by the Waitangi Tribunal in the *Mangonui Sewerage Report* (1988). The tribunal in that report (6.3) commented on the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and protect tribal interests.

In this claim Ngai Tahu have very substantial interests and the Treaty requires the recognition and protection of their rights. Consultation is not a one party process, and as the tribunal stated in the *Mangonui Sewerage Report* (1988), tribal institutions should provide a means whereby local and central government and private interests can confer with the tribe. It is the Crown's responsibility to remedy its past failures and ensure resources are provided to involve Ngai Tahu in future consultation processes. There has to be a positive and substantial Crown commitment of resources.

17.6.11 As earlier stated consultation is perhaps the most important way to ensure Maori have input into decision making processes. To a lesser extent, but important as part of the total framework, Maori must be represented on national and local bodies if the partnership principle is to be meaningful. There remains a lot to be done in this area. The formation of the national congress of iwi shows that Maori are conscious of the need for a united central body yet respecting the mana of each of its constituent tribes. Government has expressed a will to provide resources for iwi. It remains to be seen whether these procedural first steps will develop into a stronger stride forward. The tribunal has no magical answer to the problem of ensuring effective representation of Maori interests. There is certainly an awareness of the need. Possibly the answer to better Maori representation on various bodies may come from better consultation and statutory recognition of a Maori perspective.

17.6.12 To conclude this examination of how Maori views can be brought to notice the tribunal emphasises the need for the Crown to provide adequate resources to ensure Maori are represented before planning and environmental authorities.

Hearings before tribunals and committees often involve complex matters of scientific and legal content. Maori should have access to legal aid in order to be represented by counsel and thus be effectively heard. We are aware that there is a Legal Services Bill currently before Parliament. We note that no provision has been made for legally aided representation of iwi, as iwi, before environmental and planning tribunals.

17.7 Future Protection of Ngai Tahu's Mahinga Kai – the Doctrine of Aboriginal Title

17.7.1 Apart from submissions directed by the claimants to the important question of consultation and representation, the tribunal has not received from Ngai Tahu any specific recommendations aimed towards future

protection and preservation of mahinga kai. The claimants submitted that mahinga kai still has immense cultural significance to Ngai Tahu particularly in the gathering and sharing of it. Counsel told us there is still a need not only for food resources but for natural dyes and fibres and wood for carving. The question of remedies remains to be negotiated between Ngai Tahu and the Crown and opportunity will then no doubt be taken to look at some specifics. Obviously the fresh water and sea fisheries remain very much to the fore with Ngai Tahu. We have in this chapter looked at several important fresh water fisheries such as Waihora and Wairewa and rivers such as the Opihi.

We have seen it desirable to recommend certain action in respect of Waihora and Wairewa. We will look quite extensively at the important sea fisheries in a later report and will also consider in a further later report on ancillary claims, specific claims in respect of other mahinga kai grievances such as Lakes Hawea, Tatawai and Wainono. Before we leave this chapter however it would be helpful to the parties to have the tribunal's preliminary views on the availability of existing law which might provide a frame work for remedial changes.

17.7.2 Although settlement of Te Wai Pounamu effectively cut off Ngai Tahu's access to their mahinga kai, nevertheless, as Mr Temm and several witnesses put to the tribunal, the tribe still continues to forage for their flora and still collects herbs for medicinal purposes as well as pingao, kuta and harakeke for traditional weaving and decorative art. Trees of the forests such as totara are important for carving. There are other mahinga kai resources which Ngai Tahu continue to gather such as puha and watercress. During the course of the Waitangi Tribunal hearing of the Kaituna River grievance a comprehensive legal submission was made by Dr Paul McHugh, a Fellow of Sidney Sussex College, Cambridge. This submission was favourably received by the tribunal even though its chairperson, Chief Judge Durie, said the tribunal would not make any finding on it as the tribunal already had sufficiently wide powers under its existing jurisdiction to deal with the Kaituna issues. We agree with the view of the learned chief judge that the statutory authority of the Waitangi Tribunal is to determine whether any act or omission of the Crown is inconsistent with Treaty principles. That is our guiding jurisdiction. However, since the Kaituna decision, Dr McHugh has published a number of articles on aboriginal title and one published in the *Victoria University Law Review* (1986) 16, 313 entitled *Aboriginal Servitudes and the Land Transfer Act* raises a relevant and possible procedure for the registration of aboriginal servitudes ie, mahinga kai rights against the Land Transfer Title. Aboriginal title was defined in *Calder v Attorney-General of British Columbia* 1973 SCR 313 as:

> a legal right derived from the Indians historic occupation and possession of their tribal lands.

In his article Dr McHugh says that the traditional rights of collecting certain herbs and selection of flax for traditional decorations honouring ancestors are governed by customary law. The rights stem from ancestral ownership and usage and where it can be shown that the aboriginal owners of a particular territory have not by sale, cession or abandonment, relinquished their non-territorial aboriginal title over that land, the aboriginal servitudes will be unaffected by transactions in relation to the Pakeha or Crown derived title. Dr McHugh looks at matters relating to the indefeasibility of the land transfer title and suggests that although certain aboriginal servitudes may be enforceable and registrable against the title of a registered proprietor as omitted easements under section 62(b) of the Land Transfer Act 1952 nevertheless, Parliament should consider amending the Act so as to make the title of the registered proprietor subject to those subsisting traditional incidents of Maori tenure. Dr McHugh suggests registrability could be granted by an order of the Maori Land Court following an investigation of a claim to an aboriginal servitude.

17.7.3 This tribunal does not make any recommendations for such a legislative change as proposed by Dr McHugh. It will be interesting to see if this question becomes subject to judicial scrutiny. There are several tests which obviously must be met to first establish the validity of the claimed customary servitude. It is difficult to perceive that our legislature would move to set up a procedure of registering mahinga kai customary rights against privately owned land. On the other hand Parliament may be prepared to come some way in protecting Maori customary rights by providing for the registration of certain defined mahinga kai rights against Crown or state-owned enterprise land. We make no recommendation but draw this to notice. The matter may yet come before our courts.

There are several statutory provisions available for the designation and reservation of Maori freehold land, general land and Crown land. These might well be used to protect specific mahinga kai. Sections 439 and 439A of the Maori Affairs Act 1953 cover a wide field of reservation. Fishery management areas can be created under the Fisheries Act 1983. The Maori Fisheries Act 1989 provides procedures for establishment of taiapure fishery reserves. The Reserves Act 1977 contains provisions for various types of reserves and uses thereof. Within the umbrella provided by these statutes there should be sufficient shelter to protect and develop mahinga kai. Manatu Maori should be used by iwi and hapu to determine specific resources that need development and protection.

The tribunal expresses the hope that Crown agencies will meet with Ngai Tahu and evolve procedures not only in joint management of mahinga kai resources but also in preserving and developing the precious little that remains.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.1 Introduction

Chapter 18

TE AO HOU: THE NEW WORLD

18.1. Introduction

Te Ao Hou was described to us as the new world, the world after the adoption of Christianity and following the Treaty, and after the loss of the tribe's lands. Ngai Tahu's place in this world was outlined to us, as it related to the people of Otakou, in the evidence of Mr Bill Dacker. We have already had some extensive glimpses of Te Ao Hou in our discussion of the evidence so far. In our examination of Ngai Tahu's Kemp purchase claims we have reviewed the tribe's struggle to have their claims acknowledged over many decades following the purchase itself. As part of this, we have looked at how Ngai Tahu appealed to the Crown to have their rights to North Canterbury accepted, and their various appeals for more land to be reserved, including those heard by the Native Land Court in 1868. Other inquiries, such as the Smith-Nairn inquiry in 1879-80, have also been examined. In the Otakou claim we have reviewed Grey's actions in setting aside the Princes Street reserve in 1853 and the various court cases and negotiations which followed this in the 1860s and 1870s. Some of the Crown's attempts to deal with the problems faced by the tribe have also been introduced. These include the provision of "half-caste" grants from the 1860s and land for "landless natives" at the turn of the century. On the West Coast, we have followed the history of the Maori reserves set aside as part of the Arahura purchase, and the process whereby many of these reserves became lost to the tribe through the provision of perpetual leases. In the mahinga kai section of the report, we have shown how settlement brought a halt to many of Ngai Tahu's food gathering practices, through over-exploitation, competing resource use, pollution and by restricted access. In assessing the Crown's failure to ensure that adequate reserves were made available for Ngai Tahu's present and future needs, it has also been necessary to explore the tribe's position in the years after the sales themselves.

There are still major concerns voiced by the claimants which need to be examined in this period, the times referred to by Professor Ward's report as the "aftermath of the purchases" (T1 chapter 11). The claim for "schools and hospitals" is one of these concerns. Ngai Tahu have complained on numerous occasions that their understanding of the terms of a number of the purchases, particularly the Kemp and Murihiku purchases, included the provision of educational and health services. We shall examine that claim in some detail, to determine what was promised by the Crown's agents at the time of the sales and what attempts the Crown may have made to provide such services for the tribe. Schools and hospitals became linked to a series of commissions of inquiry leading to the provision of "lands for landless natives" early this century. This occurred because, as we shall see, in the late nineteenth

century Ngai Tahu's claims for such services became interwoven with their demands for a final settlement of their claims as a whole.

Before moving on to these aspects of the claim, we pause to take a consolidated view of Ngai Tahu's place in Te Ao Hou. We will examine Ngai Tahu's place in the new settler economy, their attempts to gain recognition of their claims and their relationship with the Crown following the purchases.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.2 Ngai Tahu and the Crown After the Purchases

18.2. Ngai Tahu and the Crown After the Purchases

18.2.1 Mr Dacker's evidence concentrated on Otakou Ngai Tahu and on the failure of the Crown to provide sufficient reserves as part of the Otakou settlement. Much of this discussion is relevant to the condition of the tribe in other areas as well. Mr Dacker argued that a failure to adequately reserve sufficient lands for Maori made it impossible for Ngai Tahu to realise the promises they saw in the agriculture and commerce that Europeans had brought into their territory. Instead of thriving in Te Ao Hou, Mr Dacker found most Ngai Tahu left on the edges of the new society, often relegated to real poverty:

The loss of land and the loss of traditional resources deprived the people of an economic base for their communities which eventually forced more and more of them to migrate to where there was work. Once the strength of the communities was broken in this way, the people were exposed increasingly to the predominantly negative European attitudes to the Maori and Maori culture. Hence the loss of economic strength flowed through into loss of culture. (F11:4-5)

18.2.2 The Crown responded to Mr Dacker's paper with the evidence of Mr Tony Walzl (Q8). Mr Walzl examined the economic position of the tribe, not just in relation to the situation in the Otakou block, but throughout Otago, Canterbury and Southland. His evidence was detailed and comprehensive. He reviewed the condition of the reserves in the 1840s and 1850s, surveyed the quality of reserves in the various areas, and detailed Ngai Tahu attempts to increase the effectiveness of their reserves through appeals to have their areas increased and through individualised title. His conclusions differ little from those of Mr Dacker. Despite evidence that Ngai Tahu wished to "partake in the 'new order'", Mr Walzl concluded that Ngai Tahu found it impossible to compete because of "the lack of resources which resulted after the purchases" (Q8:64).

Both Mr Dacker and Mr Walzl were agreed that the failure to leave Ngai Tahu with anything like adequate land for their needs in Te Ao Hou was at the heart of their relegation to the margins of that new world. It is a conclusion we have reiterated many times in this report. In the years which followed the purchases, Ngai Tahu made numerous attempts to have their claims recognised, and in turn the Crown responded to these claims in one way or another. To understand why these grievances have not been resolved and are still before this tribunal we have to explore something of this troubled history of protest and response.

The tribe's relationship with the Crown

18.2.3 Ngai Tahu and the Crown had differing views on their relationship with each other after the purchases. The tribe appears to have seen the purchase agreements as recognition of their rangatiratanga. As Mr Dacker's evidence shows, despite the disregard shown them by the Crown, Ngai Tahu remained loyal to their Treaty partner. Time and time again Ngai Tahu declared their loyalty to Queen Victoria, their confidence in the law and their faith in Christianity. Throughout the 1850s and 1860s tribal leaders continued to place their faith in the fairness and justice of the governors and their representatives, and to persist in the hope that their requests to government would be met. Mr Dacker provides many instances of this loyalty.

In 1860, when all but Stewart Island and Ruapuke had passed to the Crown, Matenga Taiaroa attended the Kohimarama conference. This great council of chiefs was called by Governor Thomas Gore Browne to strengthen Maori adherence to the government, at a time when this was threatened by the events in Taranaki and by the formation of the King Movement. There can be little doubt of Taiaroa's views. He told the governor that he had no opinion about Taranaki, but that his island belonged to the Queen (F11:6-7).{FNREF|0-86472-060-2|18.2.3|1} A few months later, with the prospect of further unrest in the north spreading uncertainty even as far south as Dunedin, Ngai Tahu chiefs again spelt out their commitment to the Queen and her laws. Matiaha Tiramorehu explained that:

It is some time since our union to the Queen has been made known to the most distinguished people of England, therefore I repeat God is our dwelling place, the Queen our parent, and the Governor the father of New Zealand. (F11:8){FNREF|0-86472-060-2|18.2.3|2}

His sentiments were repeated by Natanahira Waruwarutu, Merekihereka Hape and Rawiri Mamaru. Mr Dacker commented of Ngai Tahu that:

They saw themselves as a brother people to the European under the cloak of the Queen. They strove to make their mana strong within her Empire. They aspired to acquire the benefits of the new technology and the material culture that membership of that empire gave them access to. The adoption of Christianity and the signing of the Treaty sealed, with their spiritual and physical loyalty, a future within that empire. (F11:5)

This sense of brotherhood, of kinship, with the European under the Queen permeated the attitudes of Ngai Tahu in the period immediately after the purchases. In dealing with governors for the purchase of their lands, the chiefs appear to have expected that the relationship would continue, in a spirit of friendship and mutual concern.

18.2.4 For Ngai Tahu, active and vital participation in the affairs of the new world meant engaging in a personal relationship with the governor, as the Queen's representative, through ongoing personal contact. The mana of both parties to the deeds demanded no less. This is most clearly illustrated in the letters Ngai Tahu wrote to the governor. Ms Jenny Murray examined many records of Ngai Tahu's correspondence with various governors and Crown agents from the middle decades of the nineteenth century (T13). Her research shows that many Ngai Tahu were engaged in a continuing correspondence with the central and then the provincial governments. Dozens of letters were sent by Ngai Tahu. Unfortunately many have long since been

lost in fires which have ravaged the files of the Native Affairs Department and its successors. However, we still have the departmental registers which show us something of the subject matter and authorship of this correspondence. Many letters were published by various parliamentary inquiries and many of these have already been discussed in the course of this report. A few, such as Tiramorehu's letters to the governor in 1849, were even published in newspapers at the time.

The letters display a wide range of concerns. Some writers complain, others make requests (often of a relatively trivial nature) while a few do little more than pass the time of day. Matiaha Tiramorehu was one of the most vociferous of letter writers and he corresponded with a number of governors over several decades. His protests over the Kaiapoi boundary are well known, but among his other letters are a request for a reserve at Wakatipu, a complaint about European use of poisons (T12:22){FNREF|0-86472-060-2|18.2.4|3}, and concerns over the provision of lands for half-castes (T12:23){FNREF|0-86472-060-2|18.2.4|4}.

There were letters about mining, about reserves, about squatters or encroachments and roading, about stock, and about payments for a wide range of places. Books, schools and flags were all subjects of communications. In some cases copies were requested of Te Karere Maori (The Maori Messenger), or of Ko Nga Ture o Ingarangi, a digest of the laws of England, prepared by Sir William Martin.

Characteristic of the more political Ngai Tahu letters are those of Tikao, written in 1850 to press the claim to the area north of Kaiapoi. The first of these letters asserted Ngai Tahu rights to a list of places up to the Wairau, and explained who should be paid for those rights.{FNREF|0-86472-060-2|18.2.4|5} Later letters discussed a site at Pigeon Bay, promised by the governor as a Maori reserve and complained of problems caused by Europeans in the bay. Tikao asked the governor to come in person to resolve these difficulties. If this was impossible, he was expected to write a reply and to have the offending Pakeha removed (T2:27-29).{FNREF|0-86472-060-2|18.2.4|6}

18.2.5 Vice-regal visits were attended by Maori and time was taken to address the governor in terms that stressed the tribe's loyalty while at the same time raising matters of concern. During a visit to Canterbury in 1852, Grey met with many Ngai Tahu concerned about their boundary with Ngati Toa, and some were entertained on board the government brig (T2: 68).{FNREF|0-86472-060-2|18.2.5|7} In 1856, Ngai Tahu welcomed the new governor, Thomas Gore Browne, at Lyttelton, where Paora Tau again voiced their concerns about the recognition of Ngati Toa's rights north of Kaiapoi (T2:62).{FNREF|0-86472-060-2|18.2.5|8} The laying of the foundation stone for St Stephen's Church at Tuahiwi, in 1867, was done by Grey himself. He attended a meeting of the runanga at Tuahiwi and received several petitions. Grey agreed there and then to some of the runanga's requests and promised to respond to others (T2:124-6).{FNREF|0-86472-060-2|18.2.5|9}

Professor Ward concluded that despite little familiarity with the ways of European government, rangatira showed a determination to participate in the new political order.

They were inexperienced too in the new categories of state power, but they showed a considerable determination to engage with these. In that context, meetings between the high ranking people of both cultures were valued. Agreements with the Governor were of special significance-but governors were not always men of honour. (T1:7)

As Professor Ward commented, Ngai Tahu attempts to gain a voice in the political world of the colony were very dependent on this personal relationship with the Crown's representatives. Unlike these representatives, however, tribal leaders placed less credence in this period on the written evidence of an agreement than on oral commitments made person to person, rangatira to rangatira.

The Crown's view of its obligations to Ngai Tahu

18.2.6 Ngai Tahu may have seen the purchases as opening the way for a fraternal association between themselves and the Crown in the new Otago and Canterbury settlements, but the Crown's understanding of the sale agreements was much narrower. The Crown had been concerned to "extinguish native title". The result would leave Maori on fixed reserves, leaving to the settlers the business of developing the country, unhindered by Maori concerns.

Without an effective share in the new economy Ngai Tahu were unable to assert their concerns on government. The government relegated its relationship with the tribe to that of social welfare. This was at a time when the policies of laissez-faire ruled any debate over social economy, and the poor were expected to look after themselves by their own individual effort. Money for Maori purposes was spent grudgingly by the settler politicians, who in the 1850s conveniently forgot that Maori provided the majority of the country's customs revenue (T1:404). Assigning Maori concerns to those of social welfare was in the nineteenth century the very next thing to real neglect.

18.2.7 Letter writing and the occasional vice-regal visit show that Ngai Tahu had some access to government, but this should not be allowed to disguise the tribe's isolation from the every day administrative institutions of government. At a local level, Ngai Tahu had few Europeans they could turn to who had fluency in Maori and who were sympathetic to their interests. While Walter Mantell was commissioner of Crown lands at Dunedin in the early 1850s, there was at least one Crown official who could be approached. The resident magistrate, Chetham Strode, was also sympathetic to Maori interests (M14:28). In Canterbury, there was almost no one to mediate between them and the provincial government. W J W Hamilton, the customs officer at Lyttelton, was often called upon to deal with Maori issues. Although he completed the Banks Peninsula purchase and negotiated a settlement over North Canterbury, he was never confident of his fluency or appreciation of Maori concerns. There was only limited missionary assistance. The Reverend Johann Wohlers on Ruapuke appears to have taken little interest in Ngai Tahu's claims against the Crown. It was not until 1859 that Ngai Tuahuriri had a missionary presence in James Stack. In 1888, Alexander Mackay lamented the lack of a protector to look after the tribe's interests as settlement continued.

Owing to the non-appointment of an official protector for the Natives in the South, as was promised them at the cession of their land, these people have suffered a serious

loss, for, had any person been clothed with the necessary authority to look after their welfare in the early days, a great deal of the irreparable neglect they have suffered from the non-fulfilment of the promises made them at the cession of their lands would probably not have occurred. (A9:9:65){FNREF|0-86472-060-2|18.2.7|10}

Those measures that were taken, the construction of hostels in Lyttelton and Dunedin, the appointment of medical officers and the limited provision of school books, were isolated and not given continuing support.

The Crown's endowment policy

18.2.8 The Crown did, however, have a policy to use the funds provided from the sale of lands bought from Maori for Maori purposes. We have seen how this was spent in maintaining the office of the protectors. It may well be asked why profits from the sale of lands in Canterbury and Otago were not in some way returned to Ngai Tahu, providing an endowment to ensure their integration with the new economy. Walter Mantell asked the same question in 1854 when he complained that there should have been œ5000 available for this purpose (M15:114).{FNREF|0-86472-060-2|18.2.8|11}

The kinds of benefits which could have been provided to Maori other than the purchase price after they sold their lands could be listed as followed:

- added value to the lands remaining;

- provision in the deed for further payments or reservations once the land had been granted to settlers;

- the later provision of social services as part of the agreement; and

- the use of a proportion from the sale of Crown lands for Maori purposes.

As we have already seen, the belief that Maori would benefit from the added value that settlement would give their remaining lands was an essential part of the way the Crown justified its actions in paying only token amounts in its land purchases from Maori. In every purchase from Ngai Tahu this programme of endowment through reserved lands failed miserably to preserve anything like sufficient land so that the tribe could prosper in the new world.

In other sales in this period, such as some of those already discussed in the Orakei Report (1987), provision was made in the deeds for a proportion of the ongoing proceeds of sale to be used for the sellers' benefit. This too did not apply for Ngai Tahu. The Arahura deed allowed for land to be reserved to be later sold to pay for surveys, and the Rakiura deed allowed for land to be set aside as an education endowment (see appendix 2). The Kemp deed had the potential to allow further land to be set aside as the land was surveyed, until Mantell narrowly defined the terms of the deed when selecting the reserves. However, none of these deeds provided for the proceeds of sale to be used for Maori purposes. To some extent this omission flowed from the Crown's granting of the land to the New Zealand Company. We have seen how the provision for these grants was covered by the 1840 agreement between the New Zealand Company and the Crown (6.4.3). By this agreement the government

determined what was a sufficient endowment to set aside for Maori in granting lands to the New Zealand Company. In the Otago purchase the Crown agents allowed for the possibility of further reserves being set aside, but this was not done by FitzRoy or by Grey when the land was surveyed and allocated to settlers.

The claim that Ngai Tahu were induced to part with their lands through promises made by Mantell, in particular, that the tribe would be provided with schools and hospitals, will be examined in more detail in a subsequent section.

18.2.9 After all this, there still remains Lord John Russell's 1841 instructions to Hobson to ensure that there was a fund for Maori purposes which consisted of not less than 15 per cent and not more than 20 per cent of the revenue from the sale of Crown lands. It was this fund which paid the costs of the protectors until they were abolished by Grey in 1846. With all other avenues for gaining a material advantage from the sale exhausted, there only remains the provision of the 15 to 20 per cent fund.

Professor Ward discussed these provisions in an appendix to his main report. He argued that difficulties in getting the Legislative Councils of New Ulster and New Munster to provide funds for Maori purposes convinced Grey that some provision should be made from the civil list (T1:401). Earl Grey hoped to provide the local government with wide authority over the raising of revenue in the 1846 constitution. But as Professor Ward pointed out, he also recognised that it would be an injustice for Maori not to be specifically provided for, since they would be for some time without a voice in the new legislatures, even though they were major contributors to the colony's revenue. In mid-1851, Governor Grey suggested that the new constitution should allow for a fixed sum of œ7000 for Maori purposes, then 10 per cent of the colony's total revenue. One thousand pounds of this was to be destined for the South Island (T2:145-147).{FNREF|0-86472-060-2|18.2.9|12} The Otago Witness complained that the measure was an unwarranted extravagance in the Maori favour:

First, about 100 natives have to be paid for the land, then native reserves are made for them. This would have been very well, had the matter stopped here; but œ7000 of the general revenue is to be set aside for native purposes. (T1:238){FNREF|0-86472-060-2|18.2.9|13}

Expenditure of this money was determined not by need, but by the political practicalities of the government of the day. More populous tribes, resisting the sale of their lands and opposing government policy, received more assistance than a loyal tribe whose lands had already passed from them.

18.2.10 The fund was to be used for hospitals and schools (for European use as well as Maori), for resident magistrates, Maori police and magistrates, for presents to chiefs and for other purposes "as may tend to promote the prosperity and happiness of the native race, and their advancement in Christianity and civilisation" (T2:146).{FNREF|0-86472-060-2|18.2.10|14} However, the governor's proposal did not necessarily envisage this measure as a replacement for a percentage of land sale revenue. He informed the colonial secretary that:

In naming the sum that will be required for native purposes, I have supposed that, as under Lord John Russell's original instructions, the Governor-in-Chief would still, if a

necessity for his doing so should arise, be authorised to apply 15 per cent. of the land fund to such purposes; and that the General Government alone would have the power of treating with the natives for the purchase of their lands. (T2:146-147){FNREF|0-86472-060-2|18.2.10|15}

We note here that although the provision for using money from the land fund was still alive in 1852, Lord Russell's insistence that this be done had been replaced with Grey's understanding that drawing on this revenue would be at the governor's discretion.

Earl Grey's response was to accept the principle of a Maori revenue to be split between the provincial areas, but rather than setting the maximum amount he preferred a fixed proportion of the customs revenue to be set aside. Despite this, clause 78 of the constitution set aside a specific œ7000 for Maori purposes (T2:149).{FNREF|0-86472-060-2|18.2.10|16} The debts of the New Zealand Company had also been taken over by the colony, and these too were a 25 per cent charge against the land fund. Commissioners of Crown lands were informed about both funds in 1854. It was in reply to one of these circulars that Mantell raised the issue of the œ5000 for South Island Maori purposes. However, Professor Ward found that these requests were met in general by "bewildered incomprehension" (T1:403-404). Governor Browne hoped that New Zealand representatives would not begrudge expenditure on Maori, particularly given their contribution to the colony's revenue. He was wrong. As Professor Ward commented, the new legislatures of the 1850s ignored the justice of the situation and attempted to make all expenditure for Maori a charge on the civil list. Only the threat of war prompted the New Zealand Parliament to vote increased funds for Maori use. Although it would appear that the use of money from the sale of Crown lands was not directly done away with, following the adoption of the 1852 constitution, the practice clearly went into disuse.

18.2.11 Professor Ward's discussion of the topic prompted the Crown to prepare a late report on the whole issue. Mr David Armstrong provided an overview of the Crown's policy with regard to endowments in the period between 1840 and 1860 (X6). This was followed by a commentary by Mr Tony Walzl on how this policy related to the Ngai Tahu purchases. The papers were accompanied by a series of tables which provided considerable detail about the general finances of the colony during this period and the amount of money allocated and spent on specifically Maori purposes.

Mr Armstrong fleshed out many of the events described by Professor Ward, outlining how the protectors used up much of the funds available. He also explained how the policy became refined during the 1840s and how Grey decided to abolish the Protectorate Department, arguing that the salaries of the protectors had devoured all the funds available, and that there was nothing to show for the expenditure in the way of a single school or hospital (X6:37-38).{FNREF|0-86472-060-2|18.2.11|17} Mr Armstrong then demonstrated that the Crown's arrangements with the New Zealand Company had removed the land fund for the company area from the Crown's control. In March 1849 Grey complained that the company was using the land revenue to purchase Maori lands (with the sanction of the colonial secretary) and as a result these funds were not accessible to the government.

Moreover the land fund of the Colony of New Ulster is in point of fact made liable for any engagements which the New Zealand Company may through their agents enter into, and the Secretary of State has recently sanctioned the expenditure of a portion of the land fund of this Province for the purpose of defraying the expenses of the purchase of a certain tract of land which the New Zealand Company are anxious to acquire in New Munster.

It thus appears that the whole of that source of Revenue from which payments on account of the natives are provided from which the expenses of roads and Public improvements should be defrayed, which should be charged with the cost of the Survey Department and with the sums which are expended in the purchase of lands from the natives are removed from the control of the Legislative and Executive Government of New Munster... (X6:54-55){FNREF|0-86472-060-2|18.2.11|18}

Once the New Zealand Company's estates had been transferred to the Crown, following the company's inability to sell sufficient land, then the Crown was again in control of all the revenue from land sales.

Mr Armstrong also confirmed Professor Ward's argument that Grey did not see the statutory allocation of œ7000 in the civil list as replacing, as least in principle, the responsibility to use 15 per cent of the land fund for Maori use (X6:24-25).{FNREF|0-86472-060-2|18.2.11|19} In addition, Mr Armstrong demonstrated that this was the result of some confusion at the time, with the auditor general, Charles Knight, questioning the governor's authority to use the land revenue in this manner. Grey's reply, giving the reasons for the continuation of the policy, is instructive for the light it throws not only on the issue of endowment, but on Grey's negotiations with Maori for the purchase of their land.

...I have to acquaint you that as the natives have been given to understand, on many occasions, on disposing of their land, that the proportion of the land fund above alluded to 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 ... (X6:26){FNREF|0-86472-060-2|18.2.11|20}

To summarise Grey's position, it was intended that:

- œ7000 would be provided through the civil list for Maori purposes;

- 15 per cent of the revenue from land sales would also be available for such purposes;

- payments from the land fund had been promised Maori at the time of land purchases;

- these payments were to be regarded by Maori as part of the price of the land; and

- the discretion on whether 15 per cent of the land revenue could be spent on Maori purposes rested with the governor.

18.2.12 Whatever Grey's intent, it would appear that the policy went into abeyance after his departure at the end of 1853. While Robert Henry Wynyard was acting governor until September 1855, some confusion over the issue was apparent. But after Governor Browne's arrival the policy appears to have been completely suspended. The new governor saw the civil list as being supplemented by the ordinary revenue of government, not by any particular provision from the land revenue. Only where there were provisions in actual deeds was money provided from this source for Maori needs. In 1859, when the Crown's land purchase policy was blocked by widespread Maori determination not to sell land, Browne did suggest that up to three tenths of the blocks purchased be provided for reserves for Maori use and for future endowments (X6:31).{FNREF|0-86472-060-2|18.2.12|21}

The Crown historians then went on to suggest that for a number of reasons it was unlikely that the Crown agents would have made promises over such issues as schools and hospitals: at the time, land revenue was under the control of the New Zealand Company, the tribe was very small and their domain large, and Grey was engaging in a "personalised" Maori policy (X6:36-37). For reasons which will become apparent in our later discussion of the schools and hospitals claim we find this argument unconvincing (19.3.2).

18.2.13 The financial difficulties which beset government in the 1840s meant that even if 15 to 20 per cent of the land fund had been allocated for Maori purposes there would still not have been a large amount of money available. Only in 1840 and 1841 was a substantial quantity of money available, and this was due to high profits achieved from the sale of lands in Auckland. Between 1844 and 1847 inclusive the total land revenue was little more than œ1000 per anum. This began to rise in the late 1840s, but was still only œ13,477 in 1852 (X6:appendix 2:table 1). When the actual costs of land acquisition are taken into account the fund was in deficit in all years between 1840 and 1850, with the exception of 1841 (X6:appendix 2:table 2).

An additional table shows just how limited the central government's commitment to expenditure on Ngai Tahu was during this period. Although figures are far from complete, they suggest expenditure directly on Ngai Tahu of œ4 in 1850, œ10 in 1851 and œ17 in 1852. Only in the year 1859-60 was a significant sum spent on the tribe, with œ1058 being of direct benefit to Ngai Tahu (X6:appendix 2:table 5). Ngai Tahu could be said to have benefited from other areas of expenditure, such as money spent on medical services and on resident magistrates. However all of this could in many ways be offset by the government's direct encouragement of settlement, from which, as we have seen, Ngai Tahu received little benefit after the first few years.

18.2.14 Grey argued that he could provide "substantial and lasting benefits" (X6:17){FNREF|0-86472-060-2|18.2.14|22}, by using the fund directly. We have seen how as a consequence, the absence of an officer to advise Ngai Tahu on their rights under the Treaty clearly prejudiced the tribe in their dealings with the Crown over land. It would also appear that in the uncertainty over constitutional issues between the late 1840s and the mid-1850s the issue of the use of revenue from Crown land sales was allowed to fade from the Crown's consciousness. We wonder whether this would have been the case if the Protectorate Department had still existed. Given that Ngai Tahu were left with so little land following the purchases, the commitment of a percentage of revenue from the sale of lands from within their takiwa would have

allowed for some amelioration of their condition. It does have to be recognised that the policy of the time was not specifically directed to the actual tribes which had sold their lands, but to all Maori and even to the European poor as well. However had such a policy continued in the 1850s it could have been expected that a larger proportion of the revenue could have provided some assistance in the new economy. This option must be seen as a second choice. Without land, and land in substantial quantities, it was impossible for Ngai Tahu to continue to exercise their rangatiratanga. Nor would revenue from land sales alone have been enough to reinstate Ngai Tahu's rangatiratanga. However, yet another opportunity to ensure that the tribe had some of the resources necessary to participate in the new world was let slip.

We shall examine the Crown's policy towards the tribe in more detail as it develops towards the end of the century in our discussion of the claim for schools and hospitals.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.2 Ngai Tahu and the Crown After the Purchases

18.2. Ngai Tahu and the Crown After the Purchases

18.2.1 Mr Dacker's evidence concentrated on Otakou Ngai Tahu and on the failure of the Crown to provide sufficient reserves as part of the Otakou settlement. Much of this discussion is relevant to the condition of the tribe in other areas as well. Mr Dacker argued that a failure to adequately reserve sufficient lands for Maori made it impossible for Ngai Tahu to realise the promises they saw in the agriculture and commerce that Europeans had brought into their territory. Instead of thriving in Te Ao Hou, Mr Dacker found most Ngai Tahu left on the edges of the new society, often relegated to real poverty:

The loss of land and the loss of traditional resources deprived the people of an economic base for their communities which eventually forced more and more of them to migrate to where there was work. Once the strength of the communities was broken in this way, the people were exposed increasingly to the predominantly negative European attitudes to the Maori and Maori culture. Hence the loss of economic strength flowed through into loss of culture. (F11:4-5)

18.2.2 The Crown responded to Mr Dacker's paper with the evidence of Mr Tony Walzl (Q8). Mr Walzl examined the economic position of the tribe, not just in relation to the situation in the Otakou block, but throughout Otago, Canterbury and Southland. His evidence was detailed and comprehensive. He reviewed the condition of the reserves in the 1840s and 1850s, surveyed the quality of reserves in the various areas, and detailed Ngai Tahu attempts to increase the effectiveness of their reserves through appeals to have their areas increased and through individualised title. His conclusions differ little from those of Mr Dacker. Despite evidence that Ngai Tahu wished to "partake in the 'new order'", Mr Walzl concluded that Ngai Tahu found it impossible to compete because of "the lack of resources which resulted after the purchases" (Q8:64).

Both Mr Dacker and Mr Walzl were agreed that the failure to leave Ngai Tahu with anything like adequate land for their needs in Te Ao Hou was at the heart of their relegation to the margins of that new world. It is a conclusion we have reiterated many times in this report. In the years which followed the purchases, Ngai Tahu made numerous attempts to have their claims recognised, and in turn the Crown responded to these claims in one way or another. To understand why these grievances have not been resolved and are still before this tribunal we have to explore something of this troubled history of protest and response.

The tribe's relationship with the Crown

18.2.3 Ngai Tahu and the Crown had differing views on their relationship with each other after the purchases. The tribe appears to have seen the purchase agreements as recognition of their rangatiratanga. As Mr Dacker's evidence shows, despite the disregard shown them by the Crown, Ngai Tahu remained loyal to their Treaty partner. Time and time again Ngai Tahu declared their loyalty to Queen Victoria, their confidence in the law and their faith in Christianity. Throughout the 1850s and 1860s tribal leaders continued to place their faith in the fairness and justice of the governors and their representatives, and to persist in the hope that their requests to government would be met. Mr Dacker provides many instances of this loyalty.

In 1860, when all but Stewart Island and Ruapuke had passed to the Crown, Matenga Taiaroa attended the Kohimarama conference. This great council of chiefs was called by Governor Thomas Gore Browne to strengthen Maori adherence to the government, at a time when this was threatened by the events in Taranaki and by the formation of the King Movement. There can be little doubt of Taiaroa's views. He told the governor that he had no opinion about Taranaki, but that his island belonged to the Queen (F11:6-7).{FNREF|0-86472-060-2|18.2.3|1} A few months later, with the prospect of further unrest in the north spreading uncertainty even as far south as Dunedin, Ngai Tahu chiefs again spelt out their commitment to the Queen and her laws. Matiaha Tiramorehu explained that:

It is some time since our union to the Queen has been made known to the most distinguished people of England, therefore I repeat God is our dwelling place, the Queen our parent, and the Governor the father of New Zealand. (F11:8){FNREF|0-86472-060-2|18.2.3|2}

His sentiments were repeated by Natanahira Waruwarutu, Merekihereka Hape and Rawiri Mamaru. Mr Dacker commented of Ngai Tahu that:

They saw themselves as a brother people to the European under the cloak of the Queen. They strove to make their mana strong within her Empire. They aspired to acquire the benefits of the new technology and the material culture that membership of that empire gave them access to. The adoption of Christianity and the signing of the Treaty sealed, with their spiritual and physical loyalty, a future within that empire. (F11:5)

This sense of brotherhood, of kinship, with the European under the Queen permeated the attitudes of Ngai Tahu in the period immediately after the purchases. In dealing with governors for the purchase of their lands, the chiefs appear to have expected that the relationship would continue, in a spirit of friendship and mutual concern.

18.2.4 For Ngai Tahu, active and vital participation in the affairs of the new world meant engaging in a personal relationship with the governor, as the Queen's representative, through ongoing personal contact. The mana of both parties to the deeds demanded no less. This is most clearly illustrated in the letters Ngai Tahu wrote to the governor. Ms Jenny Murray examined many records of Ngai Tahu's correspondence with various governors and Crown agents from the middle decades of the nineteenth century (T13). Her research shows that many Ngai Tahu were engaged in a continuing correspondence with the central and then the provincial governments. Dozens of letters were sent by Ngai Tahu. Unfortunately many have long since been

lost in fires which have ravaged the files of the Native Affairs Department and its successors. However, we still have the departmental registers which show us something of the subject matter and authorship of this correspondence. Many letters were published by various parliamentary inquiries and many of these have already been discussed in the course of this report. A few, such as Tiramorehu's letters to the governor in 1849, were even published in newspapers at the time.

The letters display a wide range of concerns. Some writers complain, others make requests (often of a relatively trivial nature) while a few do little more than pass the time of day. Matiaha Tiramorehu was one of the most vociferous of letter writers and he corresponded with a number of governors over several decades. His protests over the Kaiapoi boundary are well known, but among his other letters are a request for a reserve at Wakatipu, a complaint about European use of poisons (T12:22){FNREF|0-86472-060-2|18.2.4|3}, and concerns over the provision of lands for half-castes (T12:23){FNREF|0-86472-060-2|18.2.4|4}.

There were letters about mining, about reserves, about squatters or encroachments and roading, about stock, and about payments for a wide range of places. Books, schools and flags were all subjects of communications. In some cases copies were requested of Te Karere Maori (The Maori Messenger), or of Ko Nga Ture o Ingarangi, a digest of the laws of England, prepared by Sir William Martin.

Characteristic of the more political Ngai Tahu letters are those of Tikao, written in 1850 to press the claim to the area north of Kaiapoi. The first of these letters asserted Ngai Tahu rights to a list of places up to the Wairau, and explained who should be paid for those rights.{FNREF|0-86472-060-2|18.2.4|5} Later letters discussed a site at Pigeon Bay, promised by the governor as a Maori reserve and complained of problems caused by Europeans in the bay. Tikao asked the governor to come in person to resolve these difficulties. If this was impossible, he was expected to write a reply and to have the offending Pakeha removed (T2:27-29).{FNREF|0-86472-060-2|18.2.4|6}

18.2.5 Vice-regal visits were attended by Maori and time was taken to address the governor in terms that stressed the tribe's loyalty while at the same time raising matters of concern. During a visit to Canterbury in 1852, Grey met with many Ngai Tahu concerned about their boundary with Ngati Toa, and some were entertained on board the government brig (T2: 68).{FNREF|0-86472-060-2|18.2.5|7} In 1856, Ngai Tahu welcomed the new governor, Thomas Gore Browne, at Lyttelton, where Paora Tau again voiced their concerns about the recognition of Ngati Toa's rights north of Kaiapoi (T2:62).{FNREF|0-86472-060-2|18.2.5|8} The laying of the foundation stone for St Stephen's Church at Tuahiwi, in 1867, was done by Grey himself. He attended a meeting of the runanga at Tuahiwi and received several petitions. Grey agreed there and then to some of the runanga's requests and promised to respond to others (T2:124-6).{FNREF|0-86472-060-2|18.2.5|9}

Professor Ward concluded that despite little familiarity with the ways of European government, rangatira showed a determination to participate in the new political order.

They were inexperienced too in the new categories of state power, but they showed a considerable determination to engage with these. In that context, meetings between the high ranking people of both cultures were valued. Agreements with the Governor were of special significance-but governors were not always men of honour. (T1:7)

As Professor Ward commented, Ngai Tahu attempts to gain a voice in the political world of the colony were very dependent on this personal relationship with the Crown's representatives. Unlike these representatives, however, tribal leaders placed less credence in this period on the written evidence of an agreement than on oral commitments made person to person, rangatira to rangatira.

The Crown's view of its obligations to Ngai Tahu

18.2.6 Ngai Tahu may have seen the purchases as opening the way for a fraternal association between themselves and the Crown in the new Otago and Canterbury settlements, but the Crown's understanding of the sale agreements was much narrower. The Crown had been concerned to "extinguish native title". The result would leave Maori on fixed reserves, leaving to the settlers the business of developing the country, unhindered by Maori concerns.

Without an effective share in the new economy Ngai Tahu were unable to assert their concerns on government. The government relegated its relationship with the tribe to that of social welfare. This was at a time when the policies of laissez-faire ruled any debate over social economy, and the poor were expected to look after themselves by their own individual effort. Money for Maori purposes was spent grudgingly by the settler politicians, who in the 1850s conveniently forgot that Maori provided the majority of the country's customs revenue (T1:404). Assigning Maori concerns to those of social welfare was in the nineteenth century the very next thing to real neglect.

18.2.7 Letter writing and the occasional vice-regal visit show that Ngai Tahu had some access to government, but this should not be allowed to disguise the tribe's isolation from the every day administrative institutions of government. At a local level, Ngai Tahu had few Europeans they could turn to who had fluency in Maori and who were sympathetic to their interests. While Walter Mantell was commissioner of Crown lands at Dunedin in the early 1850s, there was at least one Crown official who could be approached. The resident magistrate, Chetham Strode, was also sympathetic to Maori interests (M14:28). In Canterbury, there was almost no one to mediate between them and the provincial government. W J W Hamilton, the customs officer at Lyttelton, was often called upon to deal with Maori issues. Although he completed the Banks Peninsula purchase and negotiated a settlement over North Canterbury, he was never confident of his fluency or appreciation of Maori concerns. There was only limited missionary assistance. The Reverend Johann Wohlers on Ruapuke appears to have taken little interest in Ngai Tahu's claims against the Crown. It was not until 1859 that Ngai Tuahuriri had a missionary presence in James Stack. In 1888, Alexander Mackay lamented the lack of a protector to look after the tribe's interests as settlement continued.

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Those measures that were taken, the construction of hostels in Lyttelton and Dunedin, the appointment of medical officers and the limited provision of school books, were isolated and not given continuing support.

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In other sales in this period, such as some of those already discussed in the Orakei Report (1987), provision was made in the deeds for a proportion of the ongoing proceeds of sale to be used for the sellers' benefit. This too did not apply for Ngai Tahu. The Arahura deed allowed for land to be reserved to be later sold to pay for surveys, and the Rakiura deed allowed for land to be set aside as an education endowment (see appendix 2). The Kemp deed had the potential to allow further land to be set aside as the land was surveyed, until Mantell narrowly defined the terms of the deed when selecting the reserves. However, none of these deeds provided for the proceeds of sale to be used for Maori purposes. To some extent this omission flowed from the Crown's granting of the land to the New Zealand Company. We have seen how the provision for these grants was covered by the 1840 agreement between the New Zealand Company and the Crown (6.4.3). By this agreement the government

determined what was a sufficient endowment to set aside for Maori in granting lands to the New Zealand Company. In the Otago purchase the Crown agents allowed for the possibility of further reserves being set aside, but this was not done by FitzRoy or by Grey when the land was surveyed and allocated to settlers.

The claim that Ngai Tahu were induced to part with their lands through promises made by Mantell, in particular, that the tribe would be provided with schools and hospitals, will be examined in more detail in a subsequent section.

18.2.9 After all this, there still remains Lord John Russell's 1841 instructions to Hobson to ensure that there was a fund for Maori purposes which consisted of not less than 15 per cent and not more than 20 per cent of the revenue from the sale of Crown lands. It was this fund which paid the costs of the protectors until they were abolished by Grey in 1846. With all other avenues for gaining a material advantage from the sale exhausted, there only remains the provision of the 15 to 20 per cent fund.

Professor Ward discussed these provisions in an appendix to his main report. He argued that difficulties in getting the Legislative Councils of New Ulster and New Munster to provide funds for Maori purposes convinced Grey that some provision should be made from the civil list (T1:401). Earl Grey hoped to provide the local government with wide authority over the raising of revenue in the 1846 constitution. But as Professor Ward pointed out, he also recognised that it would be an injustice for Maori not to be specifically provided for, since they would be for some time without a voice in the new legislatures, even though they were major contributors to the colony's revenue. In mid-1851, Governor Grey suggested that the new constitution should allow for a fixed sum of œ7000 for Maori purposes, then 10 per cent of the colony's total revenue. One thousand pounds of this was to be destined for the South Island (T2:145-147).{FNREF|0-86472-060-2|18.2.9|12} The Otago Witness complained that the measure was an unwarranted extravagance in the Maori favour:

First, about 100 natives have to be paid for the land, then native reserves are made for them. This would have been very well, had the matter stopped here; but œ7000 of the general revenue is to be set aside for native purposes. (T1:238){FNREF|0-86472-060-2|18.2.9|13}

Expenditure of this money was determined not by need, but by the political practicalities of the government of the day. More populous tribes, resisting the sale of their lands and opposing government policy, received more assistance than a loyal tribe whose lands had already passed from them.

18.2.10 The fund was to be used for hospitals and schools (for European use as well as Maori), for resident magistrates, Maori police and magistrates, for presents to chiefs and for other purposes "as may tend to promote the prosperity and happiness of the native race, and their advancement in Christianity and civilisation" (T2:146).{FNREF|0-86472-060-2|18.2.10|14} However, the governor's proposal did not necessarily envisage this measure as a replacement for a percentage of land sale revenue. He informed the colonial secretary that:

In naming the sum that will be required for native purposes, I have supposed that, as under Lord John Russell's original instructions, the Governor-in-Chief would still, if a

necessity for his doing so should arise, be authorised to apply 15 per cent. of the land fund to such purposes; and that the General Government alone would have the power of treating with the natives for the purchase of their lands. (T2:146-147){FNREF|0-86472-060-2|18.2.10|15}

We note here that although the provision for using money from the land fund was still alive in 1852, Lord Russell's insistence that this be done had been replaced with Grey's understanding that drawing on this revenue would be at the governor's discretion.

Earl Grey's response was to accept the principle of a Maori revenue to be split between the provincial areas, but rather than setting the maximum amount he preferred a fixed proportion of the customs revenue to be set aside. Despite this, clause 78 of the constitution set aside a specific œ7000 for Maori purposes (T2:149).{FNREF|0-86472-060-2|18.2.10|16} The debts of the New Zealand Company had also been taken over by the colony, and these too were a 25 per cent charge against the land fund. Commissioners of Crown lands were informed about both funds in 1854. It was in reply to one of these circulars that Mantell raised the issue of the œ5000 for South Island Maori purposes. However, Professor Ward found that these requests were met in general by "bewildered incomprehension" (T1:403-404). Governor Browne hoped that New Zealand representatives would not begrudge expenditure on Maori, particularly given their contribution to the colony's revenue. He was wrong. As Professor Ward commented, the new legislatures of the 1850s ignored the justice of the situation and attempted to make all expenditure for Maori a charge on the civil list. Only the threat of war prompted the New Zealand Parliament to vote increased funds for Maori use. Although it would appear that the use of money from the sale of Crown lands was not directly done away with, following the adoption of the 1852 constitution, the practice clearly went into disuse.

18.2.11 Professor Ward's discussion of the topic prompted the Crown to prepare a late report on the whole issue. Mr David Armstrong provided an overview of the Crown's policy with regard to endowments in the period between 1840 and 1860 (X6). This was followed by a commentary by Mr Tony Walzl on how this policy related to the Ngai Tahu purchases. The papers were accompanied by a series of tables which provided considerable detail about the general finances of the colony during this period and the amount of money allocated and spent on specifically Maori purposes.

Mr Armstrong fleshed out many of the events described by Professor Ward, outlining how the protectors used up much of the funds available. He also explained how the policy became refined during the 1840s and how Grey decided to abolish the Protectorate Department, arguing that the salaries of the protectors had devoured all the funds available, and that there was nothing to show for the expenditure in the way of a single school or hospital (X6:37-38).{FNREF|0-86472-060-2|18.2.11|17} Mr Armstrong then demonstrated that the Crown's arrangements with the New Zealand Company had removed the land fund for the company area from the Crown's control. In March 1849 Grey complained that the company was using the land revenue to purchase Maori lands (with the sanction of the colonial secretary) and as a result these funds were not accessible to the government.

Moreover the land fund of the Colony of New Ulster is in point of fact made liable for any engagements which the New Zealand Company may through their agents enter into, and the Secretary of State has recently sanctioned the expenditure of a portion of the land fund of this Province for the purpose of defraying the expenses of the purchase of a certain tract of land which the New Zealand Company are anxious to acquire in New Munster.

It thus appears that the whole of that source of Revenue from which payments on account of the natives are provided from which the expenses of roads and Public improvements should be defrayed, which should be charged with the cost of the Survey Department and with the sums which are expended in the purchase of lands from the natives are removed from the control of the Legislative and Executive Government of New Munster... (X6:54-55){FNREF|0-86472-060-2|18.2.11|18}

Once the New Zealand Company's estates had been transferred to the Crown, following the company's inability to sell sufficient land, then the Crown was again in control of all the revenue from land sales.

Mr Armstrong also confirmed Professor Ward's argument that Grey did not see the statutory allocation of œ7000 in the civil list as replacing, as least in principle, the responsibility to use 15 per cent of the land fund for Maori use (X6:24-25).{FNREF|0-86472-060-2|18.2.11|19} In addition, Mr Armstrong demonstrated that this was the result of some confusion at the time, with the auditor general, Charles Knight, questioning the governor's authority to use the land revenue in this manner. Grey's reply, giving the reasons for the continuation of the policy, is instructive for the light it throws not only on the issue of endowment, but on Grey's negotiations with Maori for the purchase of their land.

...I have to acquaint you that as the natives have been given to understand, on many occasions, on disposing of their land, that the proportion of the land fund above alluded to 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 ... (X6:26){FNREF|0-86472-060-2|18.2.11|20}

To summarise Grey's position, it was intended that:

- œ7000 would be provided through the civil list for Maori purposes;

- 15 per cent of the revenue from land sales would also be available for such purposes;

- payments from the land fund had been promised Maori at the time of land purchases;

- these payments were to be regarded by Maori as part of the price of the land; and

- the discretion on whether 15 per cent of the land revenue could be spent on Maori purposes rested with the governor.

18.2.12 Whatever Grey's intent, it would appear that the policy went into abeyance after his departure at the end of 1853. While Robert Henry Wynyard was acting governor until September 1855, some confusion over the issue was apparent. But after Governor Browne's arrival the policy appears to have been completely suspended. The new governor saw the civil list as being supplemented by the ordinary revenue of government, not by any particular provision from the land revenue. Only where there were provisions in actual deeds was money provided from this source for Maori needs. In 1859, when the Crown's land purchase policy was blocked by widespread Maori determination not to sell land, Browne did suggest that up to three tenths of the blocks purchased be provided for reserves for Maori use and for future endowments (X6:31).{FNREF|0-86472-060-2|18.2.12|21}

The Crown historians then went on to suggest that for a number of reasons it was unlikely that the Crown agents would have made promises over such issues as schools and hospitals: at the time, land revenue was under the control of the New Zealand Company, the tribe was very small and their domain large, and Grey was engaging in a "personalised" Maori policy (X6:36-37). For reasons which will become apparent in our later discussion of the schools and hospitals claim we find this argument unconvincing (19.3.2).

18.2.13 The financial difficulties which beset government in the 1840s meant that even if 15 to 20 per cent of the land fund had been allocated for Maori purposes there would still not have been a large amount of money available. Only in 1840 and 1841 was a substantial quantity of money available, and this was due to high profits achieved from the sale of lands in Auckland. Between 1844 and 1847 inclusive the total land revenue was little more than œ1000 per anum. This began to rise in the late 1840s, but was still only œ13,477 in 1852 (X6:appendix 2:table 1). When the actual costs of land acquisition are taken into account the fund was in deficit in all years between 1840 and 1850, with the exception of 1841 (X6:appendix 2:table 2).

An additional table shows just how limited the central government's commitment to expenditure on Ngai Tahu was during this period. Although figures are far from complete, they suggest expenditure directly on Ngai Tahu of œ4 in 1850, œ10 in 1851 and œ17 in 1852. Only in the year 1859-60 was a significant sum spent on the tribe, with œ1058 being of direct benefit to Ngai Tahu (X6:appendix 2:table 5). Ngai Tahu could be said to have benefited from other areas of expenditure, such as money spent on medical services and on resident magistrates. However all of this could in many ways be offset by the government's direct encouragement of settlement, from which, as we have seen, Ngai Tahu received little benefit after the first few years.

18.2.14 Grey argued that he could provide "substantial and lasting benefits" (X6:17){FNREF|0-86472-060-2|18.2.14|22}, by using the fund directly. We have seen how as a consequence, the absence of an officer to advise Ngai Tahu on their rights under the Treaty clearly prejudiced the tribe in their dealings with the Crown over land. It would also appear that in the uncertainty over constitutional issues between the late 1840s and the mid-1850s the issue of the use of revenue from Crown land sales was allowed to fade from the Crown's consciousness. We wonder whether this would have been the case if the Protectorate Department had still existed. Given that Ngai Tahu were left with so little land following the purchases, the commitment of a percentage of revenue from the sale of lands from within their takiwa would have

allowed for some amelioration of their condition. It does have to be recognised that the policy of the time was not specifically directed to the actual tribes which had sold their lands, but to all Maori and even to the European poor as well. However had such a policy continued in the 1850s it could have been expected that a larger proportion of the revenue could have provided some assistance in the new economy. This option must be seen as a second choice. Without land, and land in substantial quantities, it was impossible for Ngai Tahu to continue to exercise their rangatiratanga. Nor would revenue from land sales alone have been enough to reinstate Ngai Tahu's rangatiratanga. However, yet another opportunity to ensure that the tribe had some of the resources necessary to participate in the new world was let slip.

We shall examine the Crown's policy towards the tribe in more detail as it develops towards the end of the century in our discussion of the claim for schools and hospitals.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.3 The Displacement of Ngai Tahu Following Settlement

18.3. The Displacement of Ngai Tahu Following Settlement

18.3.1 The arrival of the Otago and Canterbury settlers marked a watershed between the period when Ngai Tahu had largely assimilated those visitors to their territory, and the time when the tribe was displaced by the sheer scale of immigration. There was a period of adjustment when the new Pakeha communities were not self-sufficient in foods and other necessities, when the newly arrived settlers welcomed fresh vegetables, fish, firewood, pigs and other commodities. Ngai Tahu responded to this market by planting their reserves in crops and acquiring livestock. Some built European styled dwellings. Maori labour, too, provided a cash income. In the early days, Maori vessels carried cargo and Maori ferrymen took passengers across the island's rivers.

However, settlements soon developed their own agricultural self-sufficiency and Maori were pushed to the edges of the European society. This happened quite quickly. By the mid 1850s, Ngai Tahu of Tuahiwi were but occasional visitors to Christchurch. Nonetheless they appeared to be holding their own economically, aided by the sale of timber from the Tuahiwi reserve. They were seen by the settlers as keeping to themselves and their affairs were of little interest to the vast majority of Europeans. In 1856 Commissioner Hamilton, while discussing the Akaroa purchase with Ngai Tahu, applauded Ngai Tahu's prosperity:

the 600 or 700 Maories residing in this Province are possessed of considerable property in cultivated land and stock. That they are industrious, and no doubt contribute a very fair share towards the general prosperity and towards the public revenues. I might instance their energy towards the production of a valuable but long neglected article of export, whale-bone and oil, of which they have this year sold œ2,000 worth. Their fishing station at Ikuraki they have fitted out on their own responsibility with the assistance of the late owner. It is confidently stated, that next season this station will produce 100 tons of oil, worth (at œ40,) œ4,000. (M15:42){FNREF|0-86472-060-2|18.3.1|23}

For the moment, the deficiencies in the amount of land left Maori were disguised by the small number of settlers and by the immigrants' need to acquire Maori produce until they were themselves established.

18.3.2 At Otago, Ngai Tahu continued to trade with the Dunedin settlers through the 1850s, but there is strong evidence that their presence in the town was far from welcomed. In 1850, Grey promised to establish a hospital for them, and Chetham Strode, the resident magistrate, organised the building of the hospital and the appointment of a surgeon (O20:49-50). Both these measures were bitterly opposed by

the Otago settlers when they were required to fund them, following the creation of the Otago province. Ngai Tahu soon felt they were not welcome in the town. Matiaha Tiramorehu complained that the settlers' leaders remained ignorant of Maori and their concerns:

We have not been pleased with Captain Cargill, with McAndrew's set, with all the men of Scotland. Though seven years have passed they do not know anything of us, nothing at all of the Maori from Murihiku to Waitaki. There is but one white man whose house we enter, the Magistrate Chetham (Strode) is the only one, he speaks to us and we speak to him. (M14:28){FNREF|0-86472-060-2|18.3.2|24}

A lack of confidence in the hospital led to a petition that Dr Robert Williams be appointed as a special medical officer for Ngai Tahu and another hospital be built specially for Maori use (T1:239).{FNREF|0-86472-060-2|18.3.2|25} The Princes Street hostelry, so eagerly sought by Ngai Tahu in the early 1850s was little used in the 1860s.

18.3.3 The west coast remained all but unvisited by Europeans until the 1860s, when the gold rushes brought diggers swarming over the whole area, creating new towns almost overnight up and down the coast. Ngai Tahu were quickly overwhelmed numerically, there being no more than about a hundred of the tribe to begin with. However, continued Maori ownership of the valuable Mawhera reserve gave Poutini Ngai Tahu a substantial stake in the new town of Greymouth. Despite this, most of the tribe withdrew from Greymouth to Arahura in 1869 (T1:307). Although mining affected all of the coast, its disruption was short lived, and for Ngai Tahu in South Westland, the old lifestyle was maintained until well into the twentieth century.

18.3.4 Kaikoura and Murihiku were also less disrupted by settlement than the communities of Canterbury and Otago. Natural resources could still be obtained from the sea, although much of the land was allocated as runs. The influx of Europeans occurred more gradually and there was less drainage of swamps and industrial pollution of mahinga kai.

The reserves in the 1850s

18.3.5 Surveys of the reserves in Canterbury, Otago and Southland, discussed by Mr Walzl, show that in many cases the reserves were of good quality. These surveys were taken at different times between the 1850s and the 1890s. In Otago the Otakou Heads reserve was described as "fine agricultural land", while the Taieri and Molyneux reserves were respectively described as "second class" and "suitable only for pasture" (Q8:12).{FNREF|0-86472-060-2|18.3.5|26} The Tuahiwi reserve was depicted as having "rich arable soil" by Stack as late as 1880 (M15:23).{FNREF|0-86472-060-2|18.3.5|27} Initially it also had good timber, one of the few areas on the plains well endowed with bush. In 1861 the reserve was valued by Walter Buller at œ45,400 (M15:19).{FNREF|0-86472-060-2|18.3.5|28} The reserves Mantell made at Moeraki, Waikouaiti, Kaiapoi and Arowhenua were also described as good quality agricultural land. Those on Banks Peninsula were of poorer quality. Less information was provided on the Murihiku reserves but these appear not to have been as valuable as those in Canterbury.

In the early 1840s there had been considerable agricultural activity at Otakou and large cultivations of potatoes were recorded by Dubouzet in 1840 and Shortland in 1844 (H1:21).{FNREF|0-86472-060-2|18.3.5|29} By the early 1850s Mantell recorded that there were no stock or cultivations on the peninsula (O16:28).{FNREF|0-86472-060-2|18.3.5|30} Otakou Maori were still trading with the Otago settlers, but their produce appears to have come more from the sea than from the land (Q8:19-20).

Matiaha Tiramorehu complained of the limited size of the Moeraki reserve in 1849, only a year after the reserve had been marked out. He cited the need for land for potatoes, wheat and pigs. Perhaps more importantly, given the changes that were occurring in the economy of the time, he asked for more land so that cattle and sheep could be run (M15: 26-27).{FNREF|0-86472-060-2|18.3.5|31}

18.3.6 The rapid development of a new pastoral economy was the most dramatic feature of New Zealand's economic growth in the 1850s. The Wakefield scheme had aimed at achieving a high population density by selling land at œ2 per acre and limiting allotments to 100 rural acres. But this proved completely inadequate for farming sheep. During the mid-1840s as sheep farming became profitable, European run holders gained access to very large areas of land, extending from tens to hundreds of thousands of acres. Frederick Weld and Charles Clifford, for example, leased the Flaxbourne run from Ngai Toa in 1847, and later received a depasturage license from the government (T1:268).{FNREF|0-86472-060-2|18.3.6|32} By the middle of the 1850s, very substantial areas of the Kemp block were being occupied by pastoralists, most on very large runs (M5). This development only accentuated the gap between Ngai Tahu's small subsistence holdings and the massive estates of individual Europeans.

18.3.7 Not only did sheep farming require large amounts of land, it also required capital. The purchase of stock was expensive and put investment in pastoralism beyond the ordinary immigrant. For Ngai Tahu, without capital and without sufficient land, pastoralism was an impossibility. Mr Walzl commented that by 1854 even Mantell had to "admit the difficulties inherent in gaining entrance" into the European economy (Q8:29). Mantell described the state of the reserves and the difficulties Ngai Tahu were having in acquiring stock.

Their gardens are generally well kept-the usual crops being potatoes and wheat & to these they have lately added oats for their numerous horses, and tobacco: the latter thriving well even in Ruapuke .... They have for some time owned a few head of horned cattle, these have now increased to a considerable number, and since the extravagant rise in the price of horses they prefer purchasing the cheaper and more useful Stock. A few of the more civilized have resolved to invest in sheep but the price of that description of stock is now too high for their means. (M15:74-75){FNREF|0-86472-060-2|18.3.7|33}

Mantell went on to note that one family had saved œ200 to invest in sheep and he suggested that individual Ngai Tahu be allowed to purchase smaller sections than those usually laid off, as they were unlikely to be able to individually purchase the standard 80 acre sections. Professor Ward's report suggested that Mantell hoped that in restricting the size of Ngai Tahu's reserves, those Maori with the most individual

initiative, as he saw them, would be able to acquire land on European terms. It is clear that without capital or land, this was impossible, even if Maori were prepared to abandoned their tribal ownership of lands, and this appears doubtful.

The accounts of the use of the reserves by Mr Dacker and Mr Walzl also confirmed that the period immediately after the sales was a time of comparative prosperity. East coast Ngai Tahu were able to take advantage of the needs of the new immigrant communities in Canterbury and Otago. However, Ngai Tahu's trade was not just based on agriculture on the reserves. In Otago, agricultural use of the reserve at the heads appears to have declined, compared with the 1830s, but in Canterbury there was a thriving Maori agriculture in the early 1850s (Q8:24-39). This suggests that Ngai Tahu were also relying on their mahinga kai, and in particular their fisheries, to provide them with commodities for trade with the settlers.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.4 The Economic Decline of Ngai Tahu

18.4. The Economic Decline of Ngai Tahu

18.4.1 Approving descriptions of Ngai Tahu's social and economic condition in the 1850s gave way to pessimistic and negative accounts in the mid-1860s. A report by H T Clarke from Murihiku set the tone for much of what was to follow:

I much regret that it is not in my power to give any very flattering account of the Kaitahu tribes. I have visited some of their Kaikas, and conversed with some of their principal men, and I can only say, that as a rule, they are in a most unsatisfactory condition. Taking them as a people, they are the most inert and listless I ever met. Whether this arises from the frequent use of ardent spirits, to which the Natives are much addicted..., or to the almost total neglect of their welfare by the Government I am not prepared to say; perhaps to both. (M15:57){FNREF|0-86472-060-2|18.4.1|34}

Two years later, Alexander Mackay also toured the southern reserves. Apart from Waikouaiti, where there was evidence of good cultivations, some sheep, cattle and horses, and a stable community, his general prognosis for the tribe was bleak. He estimated little more than a dozen acres under cultivation in any of the settlements, and saw their "gradual extinction as a people" as only a matter of time (A8:II:152).{FNREF|0-86472-060-2|18.4.1|35} Similar reports continued on to the end of the century.

Demographically overwhelmed

18.4.2 Demographic displacement was also at the core of Ngai Tahu's cultural marginalisation. In 1851 there were 2832 Europeans in Canterbury. By 1856 this had risen to 6160 and by 1861 this figure had more than doubled to 16,048.{FNREF|0-86472-060-2|18.4.2|36} With the gold rushes, the population had risen dramatically and by the time of the Smith-Nairn commission in 1879-80, Stephen Eldred-Grigg commented that something like 77,000 immigrants had entered the province.{FNREF|0-86472-060-2|18.4.2|37} While Ngai Tahu were no longer declining in numbers, they were in no position to maintain their own against such an influx. Mr Walzl and Professor Pool have examined late nineteenth century censuses. They have demonstrated that the Ngai Tahu population (roughly identified as the Maori population of Canterbury, Otago, Westland and Southland) was growing throughout the 1860s and 1870s. Although there may have been a slight decline in the 1880s, the upward movement continued in the 1890s (O15:31). But total numbers of Maori in the four most southern provinces totalled only 1716 in 1874, 1947 in 1881 and 2109 in 1896 (O43). At a time when the European population was increasing by the thousands every year, Ngai Tahu's demographic turn around went unnoticed. The common European view was still that the Maori were dying out. However an

increasing Ngai Tahu population put real pressure on reserves, that were less than sufficient for the smaller communities that existed at the time they were made, let alone for Ngai Tahu's expanding numbers.

Restrictions to mahinga kai

18.4.3 We have seen in the mahinga kai section of this report just how dramatically settlement reduced Ngai Tahu's access to their mahinga kai and other natural resources. While settlement was small scale and the European population limited, the impact of the purchases on the tribe's food gathering enterprises was limited. Ngai Tahu were still able to hunt pigs and birds and take fish across much of their previous domain. However some food gathering activities were curtailed quite soon after European occupancy. It was noted by James Stack that the processing of ti had ceased by the time he arrived in 1859, a consequence of the burning off of runs for pasture (P11:272).{FNREF|0-86472-060-2|18.4.3|38} Edible fern root met the same fate.

Confinement on the reserves completely changed Maori ability to participate in the rearing of stock. Prior to the purchases Maori animals, particularly pigs, had been allowed to run freely at some distance from cultivations (F11:20).{FNREF|0-86472-060-2|18.4.3|39} Once Ngai Tahu were restricted to the reserves, there was no space to run animals, and crops needed fences to keep out both their own animals and those of their Pakeha neighbours. Disputes over damage caused by straying stock were commonplace (A8:II:138).{FNREF|0-86472-060-2|18.4.3|40} Mr Dacker suggested that the cost of fencing led to land being leased (F11:22). Maori agriculture was also land intensive, breaking in each area, planting it for a few seasons, and then when the land was exhausted, shifting to a new location. On the reserves, this was impossible.

Pastoralism, rapid population growth and the carving up of the country into farms increased competition over land use in which Ngai Tahu were inevitably the losers. Swamps were drained, streams polluted by timber milling and bush felled. As early as the mid-1860s Ngai Tahu were beginning to claim that their traditional food gathering places in Canterbury and Banks Peninsula had been badly affected by settlement.

Individualisation of title

18.4.4 As problems with the size of the reserves became exacerbated, new solutions were sought. Although individualisation was the major policy goal of successive governments in their dealings with Maori, there were pressures within Ngai Tahu which suggested that some form of individual title within the reserves may be a solution to some of their problems. Mr Dacker argued that confinement on the reserves had undermined the traditional tribal political structures which had in the past resolved disputes between different sections of the tribe. With competition for land confined to the meagre reserves, Mr Dacker argued that traditional means of allocating land for the use of individuals and whanau broke down. Mr Dacker suggested that:

The subdivision of their land into individual holdings was seen by many as a way to free their lands from the problems of communal ownership when participating in an economy that was structured around private ownership and the payment of wages to individuals. (F11:26)

However, Ngai Tahu did not necessarily see subdivision in completely European terms. Otago Maori sought to divide the land among whanau and hapu, in a manner consistent with the customary allocation of land use (F11:29-32).

18.4.5 The subdivision of the Kaiapoi reserve in 1860 was discussed by Mr Walzl (M14:33-57). Although the task of partitioning the reserve was given to Walter Buller, the allocation of land was done by the Kaiapoi runanga. Buller had been sent down to Canterbury in November 1859 to examine the situation of the Maori reserves, in anticipation of a visit by Governor Browne early the following year. He found the situation at Kaiapoi highly receptive to individualisation and discussed the matter at some length with the runanga. Browne detected real enthusiasm for the proposal when he arrived, and he reported to the colonial secretary that:

At every Maori settlement which I visited the same request was preferred, viz.; that I would make their lands individualised and reconveyed to them under crown grants. (M15:86){FNREF|0-86472-060-2|18.4.5|41}

Included in his report was the translation of an address by Ngai Tahu chiefs at Port Cooper, made to the governor on 6 January 1860.

Here is another subject for us to speak of, O Governor. The voice of all the people is that our Land Reserves in various places be subdivided, so that each may have his own portion. We ask you to give to each man a title in writing to his own allotment; but we leave the matter in your hands O Governor. Our reason for urging the subdivision of our lands is, that our difficulties and quarrels may cease, that we may live peaceably, and that Christianity and good works may thrive amongst us. (M15:87){FNREF|0-86472-060-2|18.4.5|42}

Allocation of the reserve lands took until May 1860, with land being divided into family lots of 14 acres, and the bush separately divided. Buller insisted on land being made available for Ngai Tuahuriri then living at Moeraki, because Mantell had promised as much in 1848. Although land was allocated for individuals this was still done along whanau and hapu lines. Requests for the individualisation of a number of other Ngai Tahu reserves followed.

Maori enthusiasm for the measure did not last, as major difficulties were encountered. The whole process was very slow. It took six years for the titles to be awarded for Tuahiwi, by which time Maori had become frustrated with the delays and unsure of the benefits. By 1866, Ngai Tuahuriri were complaining that their old customary title may have served them better than new titles undelivered (M15:145g-145k).{FNREF|0-86472-060-2|18.4.5|43} Mr Walzl also pointed out that individualisation actually made less land available to each family. The cost of survey had also been borne by the owners themselves.

18.4.6 More seriously perhaps, Mr Walzl considered the implications of the ongoing partition of Ngai Tahu reserves on the overall economic and social condition of the tribe. Once reserves were partitioned among a number of owners and these interests further divided by succession, ownership became highly fragmented. Mr Walzl cited the condition of the Onuku reserve as typical of those discussed by Alexander Mackay in his 1891 report. This showed the reserve to be divided into 42 different

interests ranging from just over an acre up to 26 acres, with more than half of these interests less than 10 acres (Q8:61). In many cases individual Maori were left with several interests in a number of different reserves, none of which was sufficient on its own to support them or their families.

Individualisation of reserves was not imposed on the tribe, and, when implemented, was done with general consent and with the active involvement of the runanga concerned. However, the whole exercise proved far from beneficial to the tribe because of the paucity of land available. What immediate benefits there may have been were dissipated by Crown delay. At the same time that Buller was attempting to place Ngai Tahu families into 14 acre allotments, the blocks thought sufficient for European use were being extended from between 50 to 200 acres per family (O15:11-12). Individual ownership had been advanced as a panacea for Maori development by official after official. With so little land to begin with, the merits and demerits of the policy are largely irrelevant to this central problem of landlessness. Buller divided Ngai Tuahuriri's few "loaves and fishes" amongst them, and afterwards there were even some lands left over. But there had been no miracle, and Mantell's measly 10 acres per head had in effect been reduced to 14 acres per family.

The climate changes: the 1860s and 1870s

18.4.7 The late 1860s marked a turning point, and Mr Walzl identified the 1870s as a period of dramatic change in the tribe's position:

Having relied on European advice, and having tried experiments such as individualisation and leasing, Ngai Tahu, found themselves no better off. By the 1870's they were beginning to organise themselves in order to arrest this development. (M14:76-77)

Up until the mid-1860s Ngai Tahu's claims had been very specific. The claim to the lands north of Kaiapoi pa had been the largest and most persistently argued claim. Beneath these were a series of smaller requests of government, particularly as they applied to land. Matiaha Tiramorehu's request for an extension of the Moeraki reserve and the increase made to the Waikouaiti reserve are illustrative of these claims. Despite the tribe's lack of experience in the ways of the European government, these claims met with some success. Additional land was granted at Waikouaiti, despite Mantell's protests (M14:10).{FNREF|0-86472-060-2|18.4.7|44} The North Canterbury and Kaiapoi purchases and the payment of œ200 to Tiramorehu for lands north of Kaiapoi were a recognition of Ngai Tahu's long fought campaign to have the rights recognised to the northern part of their takiwa (A8:II:75-79).{FNREF|0-86472-060-2|18.4.7|45} These rights had been partially recognised by Grey and Kemp and then denied by Mantell. Mantell and Grey provided the reserves at Princes St and Port Chalmers, although imperfectly, and a hostelry was also established in Lyttelton (A8:II:121-122).{FNREF|0-86472-060-2|18.4.7|46} Requests for other reserves were also met positively (A8:II:117-120).{FNREF|0-86472-060-2|18.4.7|47}

18.4.8 By the late 1860s there was some recognition that Ngai Tahu had been short changed by the purchase process. William Gisborne, the colonial secretary, commented, in response to a request for a specific reserve at Taumutu, that the Ngai

Tahu deed had promised the tribe adequate reserves, and that if that was not now the case then further reserves should be made:

At the time of the original purchase the Natives were promised that ample reserves would be made for them, and the Government is anxious that in any case where the reserves may have subsequently proved inadequate or unfit for occupation, the promise should be carried out, as is proposed in this instance by granting an additional piece of land. (A8:II:120){FNREF|0-86472-060-2|18.4.8|48}

Grey, too, in 1867 was met with a series of petitions, to which he responded positively. It was as a result of this realisation that the Native Land Court was given the powers to examine the Kemp deed under an order of reference in 1868. We have already encountered the actions of this court in our discussion of one of the Kemp grievances (8.10.9). The court rejected the claim of Mr Cowlishaw, Ngai Tahu's counsel, that the deed was in fact invalid. Chief Judge Fenton determined that the terms of the deed had not been fulfilled. He ruled that by increasing the amount of land reserved to the tribe to 14 acres per head, the tribe could be seen to have been provided with sufficient land for their present and future needs.

18.4.9 At the same time Ngai Tahu were awarded a number of additional fisheries reserves and easements. This was a consequence of the court's finding on the reservation of "mahinga kai" in the Kemp deed. In defining the reserves due Ngai Tahu under this provision Chief Judge Fenton concluded:

The Court gives its opinion that Mahinga kai does not include Weka preserves, or any hunting rights, but local and fixed works and operations. Under the reservation clause of the contract, we are prepared to make order for the pieces of land and easements which have been agreed to by the Crown. (P11:402){FNREF|0-86472-060-2|18.4.9|49}

The reserves made in 1868 demonstrate the narrowness of this definition of "mahinga kai". Fenton considered including an easement over Kaitorete to allow Ngai Tahu to build eel drains, but this does not appear to have been implemented in any way. Additional reserves were, however, awarded in Canterbury, many with fisheries potential (P10:82). Ngai Tahu also requested more reserves which were not granted, including five on Banks Peninsula (P10:80-83). Most of these were fishing reserves, but a 50 acre block on the Opihi River was for weka. In May 1868 at Dunedin, the court made similar easements and awards. Awards were made for Waikouaiti, Purakaunui and Papakaiao. A hundred acre block was also set aside at Lake Hawea.

18.4.10 The court decisions of 1868, and the apparent finality of the terms of the Ngaitahu Validation Act 1868 as it applied to the granting of reserves, left Ngai Tahu even more frustrated by the failure of the Crown to recognise their grievances. Professor Ward's report commented on Ngai Tahu reaction to the court's rulings:

The finality of the 1868 allocations was pressed home to the tribe. To share in the new reserves Maori were required to sign a document releasing the Crown from the relevant clauses of Kemp's deed. Where up to 1868 Ngai Tahu had been able to look forward to and make application for further reserves under the terms of the deed, after

1868 the Crown considered that its obligations had been effectively discharged and the tribe was forced to face the reality of survival on the reserves. (T1:357)

The report went on to quote Stack's 1871 warning to the government about the consequences should the Crown continue to ignore the tribe's grievances.

They now find themselves placed in a situation they never contemplated when disposing of their land for the purposes of colonisation and consider themselves the victims of deception and boldly charge the government with having purposely misled them. They are bequeathing to their children a legacy of wrongs for which they charge them to seek redress-this will serve to perpetuate the spirit of discontent which has for some time prevailed. (T1:357){FNREF|0-86472-060-2|18.4.10|50}

Sympathetic reports of Ngai Tahu's declining situation, and Grey's apparent willingness to deal with their grievances may have heightened Ngai Tahu expectations that their tribal mana would be restored to them. The result was worse than discouraging. Awarding additional land, increasing the tribal allocation within the Kemp block to 14 acres per head, did little to arrest the tribe's landlessness at a time of population growth and rapid increase in settlement. The Native Land Court's definition of the terms of the deed were still at enormous variance with the promises of extensive quantities of land which Kemp had made them.

18.4.11 The claim, Te Kerema, became an increasing focus for the political and economic direction of the tribe. Advancing the Princes Street claim taught the tribe's leaders new skills in the promotion of their grievances. New strategies were required for new political circumstances. H K Taiaroa was elected to the House of Representatives in 1871, and began a persistent campaign to bring Ngai Tahu's plight before Parliament. For over 30 years he pushed Ngai Tahu's interests in both the House of Representatives and the Legislative Council.

While Taiaroa pursued a new course in the committee rooms of Parliament, other leaders took more traditional paths in asserting the tribe's claims. Te Maiharoa led a heke to Omarama in the winter of 1877. He and his community were claiming the land they believed should have been reserved to them from the Kemp purchase. The community lived off the land and faced the harsh privations of winter and the hostility of the neighbouring land owners. In his book on Te Maiharoa, Buddy Mikaere shows how the land owners of the district successfully combined to have Te Maiharoa and his community removed from Aomarama in 1879 (J48).{FNREF|0-86472-060-2|18.4.11|51} At the time of this eviction, the Smith-Nairn commission was beginning to examine the tribe's various claims against the Crown. The failure of Te Maiharoa's attempts to assert ownership through traditional means gave more strength to Taiaroa's campaign to have the tribe's rights recognised through the parliamentary process.

18.4.12 Meanwhile the condition of the tribe continued to deteriorate through the hard times of the 1880s. Any benefit from these additional reserves was soon eroded away. The process of settlement and development continued after the 1860s, as did the increase in the tribe's numbers. The limited value of these additional reserves was particularly well illustrated by the later history of the fisheries easements allocated by Chief Judge Fenton in 1868. Through further drainage and competition with European

agricultural activities these had become largely useless for their original purpose by 1881 (M15:152).{FNREF|0-86472-060-2|18.4.12|52} At that time the extent to which settlement was interfering with the Ngai Tahu economy was clear, as was the inability of the tribe to make any economic gain out of the reserves granted to them in 1868 (M15:16). As Ngai Tahu's economic life became more and more restricted to the reserves by settlement, their condition worsened. Economic depression in the 1880s further accentuated their disadvantage, making it even more difficult for Maori to gain employment.

18.4.13 In the 1870s and 1880s government inaction, exacerbated by the continuing displacement of Maori from their mahinga kai, fuelled bitterness and hostility among many of the new generation of tribal leaders. The demands for redress became increasingly more urgent. To Europeans it may have seemed that the requests for compensation and restoration of the tribal estate became less compromising and more extensive. However all of this did not shake the ultimate loyalty of the tribe to the Crown. H K Taiaroa articulated the various claims of the tribe to government, but remained steadfastly loyal to the Queen. His tombstone bears the following inscription:

Ka Nui Te Pai Ana Mo Nga Tangata Maori Me Tona Atawhai Ki Te Rangatira O Te Kuini

Great is the good of his work for the Maori people with his fostering of the authority of the Queen (F11:6)

In 1885, at the opening of a hall at Wairewa, he had offered Ngai Tahu's assistance to Great Britain should war break out with Russia (F11:11).{FNREF|0-86472-060-2|18.4.13|53} The offer was typical of Ngai Tahu commitment to the Crown and to the European world. With other Ngai Tahu parliamentarians, Taiaroa used the law and the representative system to press the tribe's grievances. Despite the increasing sense of loss felt by Ngai Tahu, Parliament and the courts were seen as the only way of achieving a just settlement. The tribe pursued its goals in a spirit of protest and cooperation.

Ngai Tahu Land Report

18 Te Ao Hou: The New World

18.5 Conclusion

18.5. Conclusion

We have outlined something of the tribe's position in the nineteenth century. In this period, Ngai Tahu were forced to respond to the changes brought about by contact with western technological society and by the development of a modern agrarian economy in their midst. Ngai Tahu's ability to cope with this change was severely checked by the Crown's failure to ensure that the tribe had a sizable stake in Te Ao Hou, the new world. Without that stake, Ngai Tahu were forced to deal with an alien culture stripped of the resources to ensure their survival.

The Reverend Stack summed up the dispirited state Ngai Tahu had reached by the end of the 1880s:

Most of the old chiefs are now dead, their last years so many of them having been embittered by the want of the common necessaries of life, such as food, clothing, and firing, of which they were deprived by those who took away their native sources of wealth, and failed to supply them with the European equivalent which they had agreed to give in exchange. (M14:95){FNREF|0-86472-060-2|18.5|54}

We have looked at the way Ngai Tahu responded to their predicament, through direct approaches to the governor, through petitions and in the Native Land Court. We now turn to examine some specific elements of the Ngai Tahu claim, as it emerged in the latter decades of the nineteenth century, namely the claim to "schools and hospitals" and the various committees of inquiry which examined Ngai Tahu's claims in the late nineteenth century leading to the provision of "lands for landless natives" and to twentieth century attempts to find a settlement to some of these grievances.

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Ngai Tahu Land Report

19 Schools and Hospitals

19.1 Introduction

19.1. Introduction

The claimants' grievances in respect of the Murihiku purchase include a complaint that:

The Crown failed to provide schools and hospitals at each Ngai Tahu village which provision was part of the price agreed upon by the Crown. (W6)

Claimants' counsel confined his submission on the question of schools and hospitals to the Murihiku purchase. There is, however, clear evidence that when Walter Mantell was setting aside reserves following the Kemp purchase, he made promises to Ngai Tahu that the government would provide schools, hospitals and other assistance. We will discuss these promises as well as those made by Mantell during his negotiations for the purchase of the Murihiku land.

Probably the clearest description of the promises are to be found in the evidence of Mantell and various Ngai Tahu chiefs before the Smith-Nairn commission. At this point we will quote from the evidence of one chief only, Natanahira Waruwarutu, who in discussing the negotiations with Mantell following the Kemp purchase, said:

After a considerable argument Mr. Mantell spoke about schools and hospitals, and the large amount of money, as a final payment, and the looking after the Maoris by the Govt. (R7:app 3:48){FNREF|0-86472-060-2|19.1|1}

Other Ngai Tahu witnesses gave similar evidence.

At the same hearings Mantell testified as to the promises he made while setting aside reserves following the Kemp purchase. He explained that following receipt of his instructions of 2 August 1848, he thought it necessary to obtain further instructions from Lieutenant-Governor Eyre. This was because of misgivings he had about his ability to persuade Ngai Tahu to sign a fresh deed, given that they had sold 20 million acres for only œ2000 and Mantell was left with only œ1500 to distribute. He thought it desirable that he should be authorised to offer a further inducement as he feared that otherwise he would find it extremely difficult to complete the negotiations. And so he saw Eyre who told him:

that I must distinctly point out to the natives that the main consideration which they would receive for their lands was, after all, not the small amount of money which was then to be given to them by the Govt., but would consist in the enhanced value of the reserves which should be made for them; in the schools which the Govt. would have instituted for the instruction of themselves and their children, in the hospitals which

would be instituted for the care of their sick and in the appointment of officers to look after their interests. (R7:appendix 3:37){FNREF|0-86472-060-2|19.1|2}

Having received this assurance Mantell proceeded on his mission:

and whenever difficulties arose on the part of the natives, and objections were raised, I made and constantly repeated to them this assurance of the Lieut-Governor. It was my belief at the time that had I not had it in my power to give them this assurance, I could not have got their assent to the Cession of the land. (R7:appendix 3:38){FNREF|0-86472-060-2|19.1|3}

Mantell, when asked whether there was to be a school at every kainga, replied that nothing definite was ever said. When pressed on the point he agreed that the Ngai Tahu would have been left with the hope of a school in "every kainga of reasonable size" (R7:appendix 3:45).{FNREF|0-86472-060-2|19.1|4} As to hospitals Mantell said:

My own idea of the matter was, that some 3 or 4 hospitals might be established in the whole length of the country, but that medical attendants would be appointed who would visit the districts lying between the hospitals. (R7:appendix 3:45-46){FNREF|0-86472-060-2|19.1|5}

As will be seen, Murihiku chiefs gave similar evidence of promises by Mantell during the 1852 Murihiku purchase.

Ngai Tahu Land Report

19 Schools and Hospitals

19.2 The History of the Promises

19.2. The History of the Promises

19.2.1 Mr Tony Walzl, an historian called by the Crown, gave detailed evidence covering all aspects of the promises. He drew our attention to the apparent absence of any record of Mantell's interview with Eyre, or of any written instructions in respect of his negotiations in either the Kemp or Murihiku transactions. However, Mr Walzl reminded us that Mantell's instructions gave him a discretionary authority which may well have been wide enough to encompass the promises which he made. Mantell was instructed that:

Should any unforseen difficulties arise not anticipated or provided for the Lt. Governor feels assured he may with confidence commit to you a discretionary power to act as upon a mature consideration of all the circumstances you may deem best, requesting only that in such occasions you will keep in view the objects & intentions of your Mission. (M3:100-101){FNREF|0-86472-060-2|19.2.1|6}

Nor was Mr Walzl able to discover any contemporary note or record by Mantell in correspondence or his personal papers touching on the promises he was later to testify he had made. Mr Walzl also remarked on the absence of any reference to the Crown's failure to implement the promises in a wide-ranging report which Mantell, then commissioner of Crown lands, Otago, made to the colonial secretary on 18 March 1856, on the condition of Ngai Tahu in Otago and Murihiku (M15:66-81).{FNREF|0-86472-060-2|19.2.1|7}

The tribunal has no reason to doubt that Mantell did receive the instructions referred to from Eyre. His apprehension as to the difficulties he might meet seem to us entirely reasonable. Moreover, as will be seen, Eyre's instructions were in accord with current policy. Nor, as we will later indicate, are we in any doubt that Mantell did make the promises to which he later referred.

The first written reference to any such promises is a personal letter from Mantell to J J Symonds of 21 August 1855. In this letter Mantell commented that:

Now in making purchases from the natives I ever represented to them that though the money payment might be small, their chief recompense would lie in the kindness of the Govt. towards them, the erection & maintenance of schools & hospitals for their benefit & so on-you know it all. (G2:409){FNREF|0-86472-060-2|19.2.1|8}

Mantell's correspondence with the British colonial secretary

19.2.2 In 1855 Mantell obtained leave from his position of commissioner of Crown lands, Otago, and by February 1856 was residing in London. On 5 July of that year he placed on record his concern that his promises as to the provision of schools and hospitals and other assistance for Ngai Tahu had not been fulfilled. He took the bold, and possibly unprecedented step for an official employed by a colonial government, of writing direct to the secretary of state for the colonies in the British government. Several letters ensued between the Colonial Office and Mantell before the colonial secretary, W Labouchere, in September 1856, dispatched a copy of all the correspondence to Governor Browne for a report from New Zealand on the issues raised by Mantell (A8:II:81-88).{FNREF|0-86472-060-2|19.2.2|9} In his letter of 5 July 1856 Mantell claimed that by promising more valuable recompense in schools and hospitals and in "constant solicitude" for Ngai Tahu's welfare and general protection on the part of the Imperial government, he procured the cession of some 30 million acres of land for small cash payments. He accused the colonial government in New Zealand of neglecting to fulfill these promises and referred to the small sums expended on schools and hospitals. He documented the refusal of the colonial government to replace worn out books used by the Reverend Wohler's mission station on Ruapuke Island (A8:II:82).{FNREF|0-86472-060-2|19.2.2|10} He claimed to be writing to the colonial secretary:

at the request of the Chief and sub-ordinate Chiefs of the united tribes ... for in the Local Government they have long ceased to repose confidence. (A8:II:83){FNREF|0-86472-060-2|19.2.2|11}

The colonial secretary wished to know Mantell's authority for making the promises and whether he had officially raised the matter with the New Zealand government.

In response to the first question Mantell advised:

That, in my written instructions, no specific authority is given, and that it was not only unnecessary, but even inexpedient, that such specific authority should have been inserted, is, I conceive, sufficiently clear. (A8:II:84){FNREF|0-86472-060-2|19.2.2|12}

However, he amplified this statement by saying that he had no reason to believe that his immediate superiors differed from him on this point and that a written record of them:

might tend to perpetuate a distinction between the races, which, at the time that these purchases of land were made, by me it seemed to be the desire of the Imperial Government to abrogate. (A8:II:84){FNREF|0-86472-060-2|19.2.2|13}

Mantell gave a further reason for the absence of a written record of the promises:

Had I myself been justified in entertaining any fear that the Government would fail in fulfilling promises (verbally given on authority, only verbal for reasons which I considered valid), I should not have hesitated to insert them in the text of those Deeds of Cession which I drew. But Sir George Grey, during whose Government all of my purchases were made, seldom, to the best of my recollection, refused any reasonable

request on behalf of these Natives, nor had I ground for believing that his successor would be less just.

I have received three sets of instructions to purchase lands, of which the last two refer for details to the first which contains nothing more definite on the point now under comment than directions to induce the Natives to accede to my views, or to get, or win their consent. (A8:II:84){FNREF|0-86472-060-2|19.2.2|14}

Mantell then enlarged on his instructions from Eyre:

Lieutenant-Governor Eyre, who directed those (the first) instructions to be written, impressed upon me the propriety of placing before the Natives the prospect of the great future advantages which the cession of their lands would bring them in schools, hospitals, and the paternal care of Her Majesty's Government, and, as I have before said, I found these promises of great use in my endeavours to break down their strong and most justifiable opposition to my first commission, and in facilitating the acquisition of my later purchases, adding to the Crown lands an area nearly as large as England. (A8:II:84){FNREF|0-86472-060-2|19.2.2|15}

In response to the colonial secretary's second question as to whether he had officially raised the matters with the New Zealand government Mantell said:

...I have the honour to state that I brought the subject under the notice of Colonel Wynyard, at Auckland, on the 19th May, 1855, at an interview which His Excellency accorded to enable me to avoid a correspondence, and at which, by his direction, the Native Secretary was present.

On this occasion I brought under Colonel Wynyard's notice many facts with which I have not troubled you. His Excellency gave to my remarks the most polite attention, but none but the most unsatisfactory replies. I, therefore, in the belief that I should there find both inclination and power to aid my Maori friends, resolved to bring the main question before the Secretary of State for the Colonies. (A8:II:84){FNREF|0-86472-060-2|19.2.2|16}

19.2.3 On receiving the colonial secretary's despatch Governor Browne obtained a report from Native Secretary McLean. On 26 January 1857 McLean advised the governor:

I can find no trace or record of any other promise made to these Natives; nor have they, to my knowledge, alluded to any direct promise made by the Government, that has not been fulfilled.

If any distinct promise has been made to the Ngaitahu tribe of prospective advantages to be obtained by them, consequent on the cession of their land; I submit that Mr. Mantell should have distinctly stated, for the information of the Government, what the real extent and nature of these promises actually were, by whom made, and by what authority. In the absence of such information, which Mr. Mantell has failed to produce in any definite shape, I conceive that the Government is not chargeable with the blame imputed to it by Mr. Mantell, inasmuch as the terms of the original treaties or

agreements for the cession of their lands have been strictly observed and fulfilled by the Government. (A8:II:88){FNREF|0-86472-060-2|19.2.3|17}

McLean concluded his report by saying:

With the exception of education for the young, for which purpose there are no funds at your Excellency's disposal, I do not perceive that any neglect has been evinced towards the Natives referred to by Mr. Mantell. (A8:II:88){FNREF|0-86472-060-2|19.2.3|18}

On 9 February 1857 Governor Browne reported to the colonial secretary, Labouchere. He advised that he agreed with Mantell in thinking the colonial government was bound to care for the interests of the Maori population. He reported that government agents had long made promises that schools and hospitals would be provided when negotiating a purchase of land from Maori:

I am satisfied that from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial government have been held out to the Natives to induce them to part with their land. Nor does it appear to me that the obligation could be less imperative if no promise had ever been made. The difficulty is how to fulfill either the promise or the obligation. (O21:58){FNREF|0-86472-060-2|19.2.3|19}

It seems to us impossible to construe these comments in any way other than as a categorical endorsement of the promises made by Mantell in the course of his negotiations in both the Kemp and Murihiku purchases. Indeed, the governor appears to be saying that in making such promises Mantell was doing no more than following a long established policy. It is noteworthy too that the governor saw such promises being made as an inducement to Maori to part with their land. It is apparent that this is one of the reasons why the promises were to be made.

19.2.4 Near the end of his correspondence with the secretary for the colonies, Mantell wrote to Tiramorehu:

I am urgently pressing upon the Principal Secretary to the Queen to fulfill my words to you expressed of old when you gave your lands to me. This was the word (but you will probably bear it in mind) that you were not to consider so much the small amount of money given by me for your lands, rather the schools for you and your children and the Hospitals and the constant care for you on the part of the Government. These are the things which constitute the great payment for your lands. (B2:4/2:265-266){FNREF|0-86472-060-2|19.2.4|20}

Mantell's action in making representations in England direct to one of the Queen's principal secretaries of state clearly made a considerable impression on Tiramorehu and Ngai Tahu generally. The letter was produced on more than one occasion before select committees and commissions of inquiry. It served to cement and crystallise the promises in the minds of Ngai Tahu. As the Crown historian Mr Walzl said, from this point on the promises were firmly fixed in the minds of European and Maori, and over the following years there was no serious attempt to challenge their existence (O20:19-20).

19.2.5 When, in July 1861, William Fox formed a new ministry, Mantell agreed to join it as native minister if Fox and his colleagues would support certain measures for the benefit of Ngai Tahu. These included the provision of schools and hospitals and the appointment of a suitable government officer to look after the welfare of Ngai Tahu "as promised by [Mantell] on the sale of their lands to the Queen" (O21:22).{FNREF|0-86472-060-2|19.2.5|21} But the necessary funds did not eventuate and Mantell resigned after five months in office.

In the following year, Matenga Taiaroa addressed a letter dated 13 February 1862 to "all my Tribe, to my Hapu, and to my Son [H K Taiaroa]" in which he referred to the Treaty, the sale of Otakou and Kemp's purchase. He commented that Kemp referred to "schools, hospitals and other words on account of which the land was given". "After that," he said, "came Mr. Mantell, whose words were to the same effect" (M15:170-171).{FNREF|0-86472-060-2|19.2.5|22}

This appears to be the first recorded statement that Kemp, in addition to Mantell, promised Ngai Tahu schools and hospitals at the time of the purchase.

Ngai Tahu continue to seek action

19.2.6 During the 1860s Ngai Tahu maintained pressure on the government for action on the promises. Until November 1863 the Imperial government had responsibility for "native affairs" in New Zealand. But this now devolved to the General Assembly (O21:51). When yet another new government, the Whitaker-Fox Ministry, was formed in October 1863, Fox became colonial secretary and as such, assumed responsibility for native affairs. He appointed H T Clarke to settle the purchase of Rakiura (Stewart Island) and at the same time to investigate and report on the condition of Ngai Tahu in Otago and Southland. Clarke in fact sent two reports to the colonial secretary. One concerned his findings on the general condition of Ngai Tahu in the southern provinces. The second related specifically to the promises of schools and hospitals. The general report, 29 September 1864, gives a depressing account of a "squalid, miserable and ignorant" people. The chiefs, challenged by Clarke as to why they had not exerted themselves to "raise their people from their present condition" answered:

that they have placed full reliance upon the government giving full effect to its engagements-that the Government promised to undertake the task of ameliorating their condition as part of the consideration for their lands; that after waiting in vain for these benefits they concluded in their own minds that the Government had forgotten them. (M15:57-58){FNREF|0-86472-060-2|19.2.6|23}

Clarke, among other recommendations, proposed that:

- a government officer be appointed immediately, whose sole duty would be to look after the interests of Maori in Otago and Southland. He should also act as commissioner for Maori reserves;

- two interpreters, one for Otago and one for Southland, be permanently attached to the resident magistrates' courts as officers of those courts;

- three medical men be appointed to attend the Ngai Tahu sick.

- schools be established at Moeraki, Waikouaiti, Otago Heads, Ruapuke and Aparima.

In his second report, 30 September 1864, concerned with the non-fulfillment of Mantell's promises, Clarke wrote:

At every meeting held with the Natives during my late visit to the southern Provinces, great prominence was given to this subject. Natives from Waimatemate, Waitaki, Moeraki, Waikowaiti [sic], Otakou, Ruapuke, and Aparima, were unanimous in alleging that they have been deceived. They state that besides the monied consideration given by Mr. Mantell, they were also promised that out of the revenue accruing from the lands then ceded, the Government would support schools, hospitals, &c., and would promote and encourage undertakings having for their object the amelioration of the condition of the Natives. These promises, they say, have never been fulfilled. (A8:II:91){FNREF|0-86472-060-2|19.2.6|24}

On 15 November 1864, Fox, in a memorandum on Clarke's two reports, noted that:

Considering the great length of time during which faith has failed to be kept with the Natives they are entitled to a very large amount of arrears, and the Government should propose to the Assembly no niggard vote for the purpose. Since the pledges were given a whole generation has run to seed without receiving the benefit of that culture which was promised. No reparation can be made now for this neglect, but it should be remembered when action is taken, and it should prevent any murmur at the appropriation of what might under other circumstances appear too large an appropriation of the public money, to a small remnant of a tribe which once owned three-fourths of the Middle Island. (O21:56){FNREF|0-86472-060-2|19.2.6|25}

19.2.7 Happily, it appeared for Ngai Tahu, when on 24 November 1864 the Weld Ministry took office, Mantell was again made native minister. Mantell appointed C Hunter Brown to investigate the promises and offer solutions. But some months before Hunter Brown reported on the promises Mantell had yet again resigned as native minister. Hunter Brown advised that he had spoken to Ngai Tahu:

of the intention of the government now to establish schools and hospitals and hostelries if they were found useful and told them in each place what I should recommend, while explaining that the decision would still rest with the Government and I made use of this to urge them strongly to cooperate towards the maintenance of schools but with little success. (O20:27){FNREF|0-86472-060-2|19.2.7|26}

Mantell's successor, FitzGerald, was not sympathetic to Ngai Tahu. On 9 October 1865 he wrote to the Reverend J W Stack at Kaiapoi in reply to news that, although a new school had been opened there, the local Ngai Tahu would not pay school fees to support it:

tell them that when I was Superintendent I went to them with the Bishop of New Zealand, and we told them that to put a clergyman, a School, a Hospital, in each small village of 10 or 12 inhabitants was utterly impossible, but that if they would all come together and live together in one place, all these things should be provided, but they

would not. It is entirely their own fault that we have not been able to do more for them. (O21:44){FNREF|0-86472-060-2|19.2.7|27}

And so Ngai Tahu were expected to believe that it was all their fault that successive governments had not honoured the promises or indeed adhered to the general policy adverted to by Governor Browne in his 1857 despatch to the colonial secretary, Labouchere. Moreover, FitzGerald's comments seem entirely to disregard the fact that the government agent Mantell had apportioned such minuscule reserves in various areas to Ngai Tahu that it would have been economic suicide for them to attempt to relocate onto one totally inadequate reserve. FitzGerald's comments also reveal his insensitivity to the Ngai Tahu wish and indeed legitimate desire to live in their traditional way in their own hapu groups.

In December 1865 Rolleston, under-secretary for native affairs, wrote to yet another native minister, A H Russell, in terms which supported the earlier views of Clarke and Hunter Brown (O21:48-49).{FNREF|0-86472-060-2|19.2.7|28} But Russell, like his predecessor FitzGerald, had begun the dismantling of the Native Department and showed little interest in the plight of Ngai Tahu. Instead the matter lay dormant until 1868 when the Native Land Court conducted its first hearings. Mantell gave evidence at these hearings about his promises. The court held that it had no jurisdiction to make a ruling on the promises.

The Ngaitahu Validation Act 1868 was passed later in the year to legitimate the Kemp purchase deed and to validate its subsequent reference to the court. This Act expressly left open for further consideration Mantell's promises as to schools, hospitals and other advantages in relation to the Kemp purchase.

The first inquiries

19.2.8 In 1871 H K Taiaroa was elected to the Southern Maori seat. He persistently sought to secure investigation of Ngai Tahu grievances regarding the unfulfilled promises and other matters by parliamentary select committees. The select committee which sat in 1872 was the first of many set up to investigate the Ngai Tahu case. It was unable to come to any firm conclusion but noted:

that these claims have not hitherto had that consideration which they deserve. (M15:165){FNREF|0-86472-060-2|19.2.8|29}

It recommended a further inquiry.

Accordingly another select committee was appointed to sit during the following session. But Sheehan, a member of this committee, advised the House of Representatives in 1874 that considerable difficulty was experienced in getting members of the 1873 select committee to attend and it was almost impossible to obtain a quorum (O21:62).{FNREF|0-86472-060-2|19.2.8|30} Eventually it seems the committee fell into a state of disarray and ended up recommending that two arbitrators be appointed to inquire into the matter. The government however, assured Taiaroa the matter would be settled before the 1874 session of Parliament (O21:60).{FNREF|0-86472-060-2|19.2.8|31} This did not happen. Taiaroa, in 1874,

proposed that yet another committee investigate the unfulfilled claims. Sheehan, who supported this suggestion, told the House:

it was absolutely proved by official documents that claims did exist. It was undoubtedly certain that the Natives had been promised schools and hospitals. (M15:159){FNREF|0-86472-060-2|19.2.8|32}

Other members however were opposed to the appointment of yet another committee. In the event, Taiaroa had the questions redirected to the Native Affairs Committee, a fate which Alexander Mackay in a letter to the Reverend Stack prophetically characterised as "consigning it to its grave" (O21:67-68).{FNREF|0-86472-060-2|19.2.8|33}

19.2.9 The Native Affairs Committee duly sat in 1875. It recommended the appointment of a full commission of inquiry, thereby stalling consideration yet again. By the following year nothing further had been done. The native minister, McLean, explained that the government had been unable to find commissioners willing to act. But McLean observed that Judge Fenton, although unable to undertake a full commission due to his "not being a good sailor" would be willing to review the matter and submit a very exhaustive report "embracing his extensive knowledge of the question" (O21:66).{FNREF|0-86472-060-2|19.2.9|34} In his report of 10 July 1876 Fenton, in discussing the promises, said:

Hospitals, I think, they have had, access to the Government institutions having been open to them as well as to Europeans. Schools they have partially had. But even failure in this respect cannot be the subject of pecuniary compensation.... If the Government have been remiss in this matter, all they can do is to hasten to repair their remissness, and provide schools for the future. (M15:179){FNREF|0-86472-060-2|19.2..9|35}

Not surprisingly, Taiaroa was critical of Fenton's report and in a detailed statement of 26 October 1876 denied that Mantell's promises had been adequately met:

Mr. Fenton says that these promises cannot be the subject of a money compensation. That is correct; these promises cannot be paid for with money, but they can be paid for if it be shown what lands went in consideration of those unfulfilled words; the payment would be the restoration of those lands. That is the only way in which compensation could be made. (M15:191){FNREF|0-86472-060-2|19.2.9|36}

The Smith-Nairn Royal commission

19.2.10 Taiaroa called again for a commission of inquiry into Ngai Tahu grievances. Eventually, in 1879, a Royal Commission on Middle Island Native Land Purchases (the Smith-Nairn commission) was appointed. The Royal commission was authorised to investigate whether there remained any unfulfilled promises arising from various purchases from Ngai Tahu. In addition it was to ascertain whether all reserves provided for in the various sale agreements had in fact been made. The commission sat over a two year period, 1879-1880, and reported early in 1881. It travelled extensively and heard voluminous evidence from many of those, both Maori and European, who were parties to the agreements and present at the discussions which

led up to them. Much of the commission's record of evidence was submitted as evidence to the tribunal. Mr Walzl, for the Crown, produced and analysed all the evidence from those actually present at the making of the promises, that is, Mantell and various Ngai Tahu chiefs. Mr Walzl produced two tables summarising the evidence relating to promises of schools and hospitals made during the Kemp and Murihiku negotiations. Rather than reproduce extensive passages from the witnesses' evidence, we propose to state the main points which emerge from Mr Walzl's analysis, which we believe adequately reflects the import of the evidence.

Ngai Tahu evidence

19.2.11 In addition to Mantell, five leading Ngai Tahu chiefs gave evidence in respect of his promises during the Kemp purchase negotiations (R7:64A). They were Waruwarutu, Tiramorehu, Te Uki, Patuki and Naihira. Whereas Mantell testified that he made the promises at various times in many places throughout the negotiations and one of the Ngai Tahu rangatira agreed with him, the other four chiefs indicated that the promises were made once only, at Akaroa, after Mantell returned from a visit to Wellington. Mantell said that he used the promises to overcome opposition to the purchase while three of the chiefs said they were given after Ngai Tahu complained about the inadequacy of the purchase price. In addition, Tiramorehu claimed that the promises followed argument over the boundaries and the size of the reserves. All five men agreed that the promises were explained by Mantell who, in evidence, said schools were to be provided in every major kaika, and that three or four hospitals would also be provided. One of the Ngai Tahu chiefs said schools and hospitals would be established in all places within the boundaries of the land sold; another, that schools were to be provided throughout all the districts, and two were silent on this question. Only Tiramorehu said that Kemp had also promised schools and hospitals. As to the importance of the promises made, Waruwarutu, Tiramorehu and Patuki all alleged, in effect, that but for these promises (including a final payment also said to have been promised), the negotiations would not have succeeded.

In the case of Mantell's promises of schools and hospitals during the negotiations for the Murihiku block, the commission only heard evidence from Ngai Tahu. No doubt Mantell would have given evidence had the commission's warrant not expired. Mr Walzl again very usefully summarised the evidence of 13 chiefs who testified on this topic (R7:87A). He pointed out that the evidence of these witnesses was not always clear, with many lapses in their recollection of events. He was also critical of other aspects. Nevertheless he conceded that there was an overall consistency in the Murihiku Ngai Tahu evidence concerning the promises. Almost all 13 witnesses testified that the promises were made after dissatisfaction had been expressed by Ngai Tahu at the small sum being offered for the land. Several witnesses went on to say, in effect, that the promises had played a significant role in their agreeing to the purchase.

The Smith-Nairn commission reports

19.2.12 The Smith-Nairn commission reported to the governor on 31 January 1881. In doing so it adverted to the fact that in July 1880 further proceedings of the Royal commission were suspended by Native Minister Bryce, who refused to make further funds available. Accordingly, the commissioners were unable to present a detailed report. Instead, they outlined the opinions they had formed during the inquiry so far as

it had proceeded (M15:194).{FNREF|0-86472-060-2|19.2.12|37} As to Mantell's promises during the 1848 Kemp purchase negotiations, the commission said:

It cannot be supposed that, with respect to the promises to establish schools and hospitals, and to promote their welfare generally, it was understood that these promises were to be completely and finally fulfilled immediately on the cession of their land; that hospitals and schools would be built and established forthwith; and that other provision for their needs would be then made as promised. It must have been meant and understood that these promises were only to be completely fulfilled in the future; that is, as the settlement of the land by the pakeha advanced, and funds accrued from its sale to European settlers...

We think it must be admitted that those promises remain unfulfilled. (M15:195){FNREF|0-86472-060-2|19.2.12|38}

In respect to the Murihiku purchase, the commission noted that its inquiry was not complete. But it felt able to say:

It would...appear that similar promises [to those made by Mantell in the Kemp purchase] with respect to schools, hospitals and other advantages were made to the sellers for the purpose of inducing them to part with their land. (M15:197){FNREF|0-86472-060-2|19.2.12|39}

The commission proposed that a fund be established, the income from which could be used in supplying medical aid, establishing and supporting schools and other forms of assistance to Ngai Tahu (M15:196).{FNREF|0-86472-060-2|19.2.12|40}

19.2.13 The long and arduous inquiries of the Smith-Nairn commission, which traversed the lengthy evidence that we, more than 100 years later, have again had to go over, were to no avail. Their recommendations languished and during the 1880s we find the same melancholy outcome as in the preceding decade: endless debates and procrastination by the appointment of further parliamentary select committees and Royal commissions, none of which resulted in any remedial action or compensation in respect of the unfulfilled promises. We can refer only briefly to the sorry history of the failure of successive governments to face up to their obligations and to act in accordance with the principles of the Treaty of Waitangi and the partnership it represented. Thus, on 25 August 1882, the Native Affairs Committee reported on a petition of H K Taiaroa and I Tainui, holding that schools and medical attention had been supplied since 1868 fully and, since 1865, partially. But, it said, there were two places, Arowhenua and Moeraki, where Ngai Tahu refused schools in case their acceptance would interfere with their claims. The committee admitted that prior to 1868 there was insufficient attention to the matter and there ought to be some recompense for that.

The first Mackay Royal commission

19.2.14 Four years later, on 12 May 1886, the government appointed Alexander Mackay, by now a judge of the Native Land Court, to be a Royal commissioner to inquire into all cases of "landless natives" and the adequacy of reserves set aside for Maori in the South Island. In addition, Mackay was to ascertain whether any Ngai

Tahu interested in the Smith-Nairn commission were willing to accept a grant of land in final settlement of all claims for the non-fulfillment of any terms and conditions of the purchases in question, and of any promises made in connection with such purchases. Mackay's report of 5 May 1887 is both comprehensive and informative (B3:7/1).{FNREF|0-86472-060-2|19.2.14|41} It discusses many of the central issues and refers to much material which we, over 100 years later, have yet again traversed. We refer more fully to this valuable report in the following chapter (20.2). For the present we note Mackay's findings in respect of the unfulfilled promises as to schools and hospitals.

Mackay found that:

It was meant and understood at the time that the promises were made to the Natives re the establishment of schools and hospitals that special provisions would be made with all reasonable diligence for the establishment of these institutions, and not that they would have to wait until the requirements of the European community rendered them necessary. (B3:7/1:7){FNREF|0-86472-060-2|19.2.14|42}

He concluded that:

seventeen years had elapsed before medical aid was provided or an officer specially appointed to administer Native affairs in the South, and that nineteen years after the date of the purchase the first systematic attempt was made to establish schools. (B3:7/1:8){FNREF|0-86472-060-2|19.2.14|43}

Later he spoke of a misconception on the part of the Native Affairs Committee of 1882:

with regard to schools and medical attendance having been supplied in the past, but especially as regards education, as the schools now in operation in the South Island were conducted (before the Education Act of 1877) under the general scheme of education that obtained in the colony under "The Native Schools Act, 1867," and cannot be considered as special institutions in fulfilment of the original promise, as the Natives would have gained the advantage derivable therefrom even if they had received a more advanced price for their land. The amount spent for medical aid in the southern provinces up to the 31st March 1882, a period of nearly thirty-four years since the date of the first purchase, and twenty-nine years since the date of the second, only amounted to œ2,559 18s. 8d. (B3:7/1:10){FNREF|0-86472-060-2|19.2.14|44}

Among other recommendations Mackay proposed that 100,000 acres be set apart as an endowment to promote the welfare of Ngai Tahu.

Further parliamentary inquiries

19.2.15 Next followed the inevitable parliamentary consideration of the Royal commissioner's 1887 report. This time it was to be by a joint committee of both chambers. The committee began by investigating Kemp's purchase. On 22 August 1888 it reported:

in consequence of the extensive range of inquiry necessitated by the nature of the case, the voluminous documentary evidence affecting it, and the fact that the labours of the Committee did not begin until the 23rd June, it has been found impossible to enter upon the investigation of the Otakou, Murihiku and Akaroa purchases...

As it is impossible to do justice to the importance of the inquiry during the remaining part of the present session, with which the functions of the Committee end, the Committee recommend that at the beginning of the next session of Parliament a similar Committee should be appointed, so that the inquiry into the Ngaitahu case may be completed, and the other cases also undertaken. (A9:9:1){FNREF|0-86472-060-2|19.2.15|45}

In an "epitome" to the Ngai Tahu (Kemp's purchase) case it detailed the numerous earlier hearings and inquiries concluding with Mackay's 1887 comprehensive report. Despite its admitted inability to complete its inquiry into the Kemp purchase it concluded its epitome by saying that:

The foregoing review of the question seems to establish that no reserves of land have been made which have not been fulfilled, and that at the negotiations no promises of tenths were made or held out. (A9:9:5){FNREF|0-86472-060-2|19.2.15|46}

In coming to this conclusion the committee virtually dismissed Mackay's report. The joint committee recited the history of promises regarding schools and hospitals but reached no conclusion on the question of their non-fulfillment. Mackay, by contrast, had come to a very clear view on this matter and had made appropriate recommendations. These appear not to have been considered by the joint committee.

19.2.16 In June 1889 a further joint committee of both legislative chambers was appointed to report on claims as to unfulfilled promises in respect of reserves actually made, and further reserves promised; schools, hospitals and constant solicitude for Ngai Tahu welfare. In its report of 10 September 1889 it concluded that more land should be provided where the present holdings were insufficient to provide Maori a livelihood (M17:I:2:1-10).{FNREF|0-86472-060-2|19.2.16|47} It continued:

The Committee are satisfied that the educational provision is now, and has been for a number of years, sufficient for the children of Ngaitahu, and that, however much it may be regretted that the provision for the education of the tribe was not begun earlier, it is impossible to assess pecuniary loss arising from failure to fulfil assurances under this head.

As regards hospitals, the Committee find that separate hospitals have never been provided for Ngaitahu, but that the public hospitals are open to Natives equally with Europeans. Medical attendance for Ngaitahu appears to have begun prior to 1864, and has continued to a greater or less extent to the present time.

For a number of years Ngaitahu was looked after on behalf of the Government by specially-qualified persons. The condition of the Natives during that period was at any time easy of ascertainment.

This arrangement was practically ended in 1880 as regards resident officers, and entirely so in 1884; and, although it appears that cases of distress would be more or less relieved if brought under the notice of the Native Office, there cannot be said to be any inspection or any regular means of knowing whether distress exists or not. As a matter of fact, the Native Department is ignorant of the condition of the Ngaitahu, and under existing circumstances can only know of it in the most accidental manner. (M17:I:2:2){FNREF|0-86472-060-2|19.2.16|48}

The committee then put forward suggestions for a "final settlement" of the case. It concluded that the only practical and effective solution would be for a careful inquiry to be made into:

the condition of the Ngaitahu Natives; and, if it be found that any have not sufficient land to enable them to support themselves by labour on it ... to make further provision by way of inalienable reserve to meet such cases. (M17:I:2:2){FNREF|0-86472-060-2|19.2.16|49}

The committee also called for the appointment of suitable officers to report to government from time to time on the condition of Maori, and submit appropriate recommendations. Such reports to be laid before Parliament.

As to Murihiku, the committee found it to be clear that assurances of schools, hospitals and other advantages had been given. They therefore considered their recommendation regarding Ngai Tahu in the Kemp block should also be applied to Murihiku Ngai Tahu.

So yet another investigation was called for. The committee appeared to ignore evidence from the under-secretary of the Native Department that special medical arrangements were by 1889 confined to three part-time medical officers who were inaccessible to many Ngai Tahu. The new inquiry proposed side-stepped the issue of unfilfilled promises as to schools and hospitals.

The second Mackay Royal commission

19.2.17 Following the various joint committee reports, none of which in themselves gave any relief to Ngai Tahu, Judge Alexander Mackay was asked yet again to make an investigation and report. However his warrant as Royal commissioner expressly limited his inquiry to the claims of those who were unprovided with land. In his report of July 1891 (A9:II:7){FNREF|0-86472-060-2|19.2.17|50} Mackay pointed out that because of his very narrow terms of reference it would be necessary for him to furnish a supplementary report dealing (yet again) with long-standing and unmet Ngai Tahu grievances including those relating to unfulfilled promises of schools and hospitals. The commissioner's supplementary report was made on 16 July 1891 (C2:17:3).{FNREF|0-86472-060-2|19.2.17|51} In this report Mackay referred to Ngai Tahu's complaint that the recommendations of neither the 1879 Smith-Nairn Royal commission nor the 1887 Mackay Royal commission had yet been fully considered. He further pointed out that the making of provision for landless members of the Maori community did not comprise all they were entitled to expect in fulfillment of past promises. Later in his report Mackay discussed the reasons for Ngai Tahu's poverty:

The settlement of the country by the Europeans in the early days was looked on with considerable satisfaction by the Natives in the South Island, as it relieved them from the constant dread of hostile attack from the northern Natives; but long experience has proved to them that the colonization of the country is not an unmixed blessing, as it has deprived them of all their privileges and forced them to adopt a mode of life unsuited to their former habits, and under circumstances that keep them in a chronic state of poverty. Formerly they could obtain readily all the food and clothing they required; now they are obliged on scanty means to eke out a precarious livelihood; while the Europeans, who have possessed themselves of the territory that was once theirs, are living in affluent circumstances as compared with themselves. It is no wonder, therefore, that they feel disappointed and dissatisfied with their lot. (C2:17:5){FNREF|0-86472-060-2|19.2.17|52}

The commissioner also found that "The medical aid afforded the Natives has also been of a partial character, many of the settlements not participating in the advantage" (C2:17:5).{FNREF|0-86472-060-2|19.2.17|53} Examples were given of heavy expenses incurred by Ngai Tahu in obtaining medical aid away from the principal towns. Problems of schooling were also noted. Not surprisingly, given the parlous condition of the people which his report discloses, Mackay again recommended, as he had done in his major 1887 report, that adequate land be set aside as an endowment for Ngai Tahu, to relieve their condition and assist in meeting unfulfilled promises. His recommendation has never been implemented.

Ngai Tahu fail to secure redress

19.2.18 We recall that the first (inconclusive) inquiry into Ngai Tahu grievances about unfulfilled promises was made by a parliamentary select committee in 1872. We have chronicled the long series of subsequent inquiries, over 20 years, none of which resulted in any relief to Ngai Tahu. Is it any wonder that 100 years later Ngai Tahu should again seek from the Crown some recompense for the deprivation and sustained marginalisation which has resulted from the failure of the Crown to honour promises made 150 years ago? Promises of course, which relate not merely to the provision of schools, hospitals and other assistance, but to the totally inadequate reserves left Ngai Tahu as a result of the Crown's failure to honour the terms of various deeds of purchase, or to ensure the provision of adequate land for the present and future needs of the Ngai Tahu people.

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19 Schools and Hospitals

19.3 The Nature and Extent of the Promises

19.3. The Nature and Extent of the Promises

19.3.1 There can be no real doubt that promises that the Crown would provide schools, hospitals and general assistance to Ngai Tahu were made by at least Mantell in respect of both the Kemp and Murihiku purchases. The tribunal's lengthy recital of the numerous investigations of parliamentary select committees, Royal commissions and commissions of inquiry put this beyond dispute. But the question was raised by Mr Walzl in the course of well-researched and exhaustive evidence, as to just what was promised by Mantell in 1848 and 1852. Mr Walzl suggested that, over the years, the nature of the promises and their significance had undergone a change in the minds of both Mantell and Ngai Tahu. To substantiate this the evidence of both Mantell and the Ngai Tahu chiefs was closely analysed by Mr Walzl.

As earlier indicated, the claimants have made only one specific claim as to schools and hospitals, and that within the context of the Murihiku claim. But the Smith-Nairn commission evidence of both Mantell and Ngai Tahu, as Mr Walzl himself demonstrated, clearly extended to the making of such promises in respect of the Kemp purchase.

Counsel for the claimants submitted that the promises were made as part of the transaction: being collateral warranties or collateral agreements (W1:207). But counsel for the Crown argued that it had not been proved that definite contractual promises were made and were deliberately broken. We could spend much time traversing the detailed analysis of the evidence given over the span of some 40 years on the nature and extent of the promises, but we doubt if it would prove profitable.

Instead we will start by citing certain conclusions reached by Mr Walzl:

The answer to the problem of where the promises featured in the Ngai Tahu land purchases probably lies somewhere between Mantell's later descriptions and informal Government welfare policies. The promises may not have been part of the contractual negotiations as such, merely general inducements for land-selling which became promises at a later period when the lack of Government action in the South Island became apparent. Or they may have been general comments on the benefits that the European settlement would bring subsequent to the sale, benefits which, for Ngai Tahu, did not arrive. (O20:46)

19.3.2 Before commenting on these observations we should recall the manner in which, as we have demonstrated elsewhere in this report, Mantell conducted his negotiations with Ngai Tahu. He conceded by way of reserves not an acre more than he felt compelled to do. He denied many of the legitimate requests of Ngai Tahu. In

the case of Kemp, he met constant complaint as to the nominal purchase price of œ2000 for 20,000,000 or so acres; in the case of Murihiku he settled on a price of œ2600 for some 7,500,000 acres, again against the legitimate hopes and aspirations of Ngai Tahu for a more realistic price. It is difficult to believe that Mantell was not genuine when he told the Smith-Nairn commission that, "whenever difficulties arose on the part of the natives", he constantly repeated to them the assurance he had received from Lieutenant-Governor Eyre, that the "main consideration" that they would receive for their lands was not the small amount of money given them by the government, but would consist in the enhanced value of their reserves, and the schools and hospitals which the government would establish for them (R7:37-38).{FNREF|0-86472-060-2|19.3.2|54} In the light of this evidence the tribunal is unable to accept Mr Walzl's last-mentioned suggestion that Mantell's promises may have been simply "general comments on the benefits that the European settlement would bring subsequent to the sale".

Having said that, the tribunal does not find it necessary to decide whether, as the claimants argued, the promises were part of the contractual arrangements as such, or alternatively, in Mr Walzl's terms, "merely general inducements for land-selling which became promises at a later date when the lack of government action in the South Island became apparent". In our view it is sufficient if the promises were in the nature of inducements to Ngai Tahu to consumate the respective purchases. There is a very real danger of cloaking this discussion with legal concepts and fine semantic distinctions which, at the time the promises were made, would not have been in the minds of either Mantell or the Ngai Tahu participants. We remind ourselves of Lord Normanby's instructions of 14 August 1839 to Captain Hobson that:

All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern [his] transactions with them for the recognition of Her Majesty's sovereignty in the Islands. (A8:I:15){FNREF|0-86472-060-2|19.3.2|55}

The tribunal cannot accept that Ngai Tahu, to whom these promises were made by an accredited Crown commissioner acting on behalf of the Queen's representative, would have had in mind fine distinctions between collateral warranties or conditions on the one hand, and inducements on the other. The very concepts would be foreign to them. We cannot believe that Mantell's promises, given the minimal price and minuscule reserves which he insisted on, were not influential in the minds of Ngai Tahu. Indeed the tribunal is satisfied that they were intended to be influential. So much was recognised at an early stage by Governor Browne in his statement to Labouchere, colonial secretary, of 9 February 1857:

I am satisfied that from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial government have been held out to the Natives to INDUCE THEM TO PART WITH THEIR LAND. (O21:57-58){FNREF|0-86472-060-2|19.3.2|56} (emphasis added)

Clearly Browne accepted that Mantell's promises were made as inducements to Ngai Tahu to persuade them to part with their land. He was close in time to these events.

The tribunal is unable to dissent from his informed view; indeed it would be wrong and capricious for us to do so.

19.3.3 Ngai Tahu were anxious to become involved in the new economy which would result from settlement; the provision of schools and hospitals would clearly assist them. We find that the honour of the Crown and the requirement of good faith required it to honour the unfulfilled promises. Successive parliamentary committees and commissions of inquiry recognised an obligation on the Crown to do so. Judge Alexander Mackay was surely right when he proposed in 1887, and reiterated in 1891, that the Crown should make a substantial and permanent endowment of land, the income from which would be used to ameliorate the distressing condition of Ngai Tahu, a condition which was the result, in part at least, of the failure on the part of the Crown over several decades to honour the promises made to Ngai Tahu in 1848 and 1852.

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19.4 The Extent to Which the Promises were Met

19.4. The Extent to Which the Promises were Met

19.4.1 It is apparent from our earlier discussion that Mackay was satisfied as late as 1891 that the Crown had failed to compensate Ngai Tahu for its unfulfilled promises. But it is desirable that we should now refer briefly to the detailed evidence which we received, from Crown witnesses in particular, as to the extent to which schools, hospitals and medical aid were in fact provided for Ngai Tahu in the first 40 or so years after the Kemp and Murihiku purchases.

Schools

19.4.2 In 1847 an Education Ordinance was passed by the New Zealand Legislative Council on Grey's initiative. It was applicable to both races although Grey proposed initially to apply it chiefly to the education of Maori and half-caste children (M20:6).{FNREF|0-86472-060-2|19.4.2|57} Funds were made available to the Anglican, Roman Catholic and Wesleyan churches. Dr Barrington, a Reader in Education called by the Crown, told us that all the activity under the 1847 Ordinance took place in the North Island except for some assistance to a school at Motueka in 1852. Ngai Tahu received no benefit at all from the Ordinance.

From the coming into force of the Constitution Act 1852 early in 1853, the six provincial councils assumed responsibility for education. But Dr Barrington testified that there was little evidence that the Canterbury or Otago provincial governments took specific steps to provide for the education of Maori children in those provinces (M20:14). He cited the following passage from a memorandum of 9 March 1868 by the superintendent of the Otago Province to the colonial secretary:

The question of providing schools for the Maori population HAVING BEEN REPEATEDLY BROUGHT UNDER THE NOTICE OF THE GENERAL EDUCATION BOARD OF THIS PROVINCE, and understanding there is a rate for the General Assembly at the disposal of the colonial government available for this purpose-I have the honour to submit on behalf of the Education Board its willingness to undertake the administration of this fund for the establishment of schools at the Native villages of Taieri, Otago Heads and Moeraki. I may state that the Education Board has the control of upward of sixty schools throughout the province and that it should be entrusted with the establishment and management of schools for the Maori population. Such schools will participate in the same successful administration which has hitherto characterized the education system of the Province. (M20:15){FNREF|0-86472-060-2|19.4.2|58} (emphasis added)

As Dr Barrington noted this still represented, as late as 1868, only an intention to provide schools for Maori pupils on the part of the provincial council (M20:15). Settler prejudice denied access to some Maori children living close to provincial schools and in some cases this was aggravated by Maori indifference to education (M20:16). In May 1868 the secretary to the Otago Education Board told the provincial secretary that:

nearly all the Native settlements are beyond the reach of our ordinary district schools and I am hopeful that bye and bye the Native Department will establish schools at Otago Heads, Taieri and Waikouaiti. (M20:16){FNREF|0-86472-060-2|19.4.2|59}

19.4.3 Dr Barrington's investigations did not reveal any involvement by the New Zealand government in assisting Maori education between 1848 and 1858. In 1858 the Native Schools Act was passed. This Act granted an annual sum of œ7000 for a term of seven years for Maori education. Assistance was, however, limited to schools run by religious bodies. The effective operation of the Act was between 1858-65, after which the New Zealand wars closed the schools. But all of the schools which received assistance under this Act were situated in the North Island. The sum of œ200 was, however, granted by Governor Browne towards a school for Maori purposes at Kaiapoi. This was later supplemented by a further grant of œ200 from central government, œ250 from the provincial government and œ50 from Ngai Tahu's Kaiapoi road compensation money. In addition, materials and labour equivalent to œ50 were given. Dr Barrington recorded that this government assistance to the Kaiapoi school is the only real example of central government assistance to Maori education in the South Island prior to 1868 (M20:18-19). Sporadic efforts were made by missionaries or other well-disposed private citizens to operate schools for Ngai Tahu children, but by 1868 Mackay was still reporting extensive failure to provide for the education of Ngai Tahu children (M20:20-21). In 1874 Mackay confirmed that in the South Island "no schools were established until 1868, excepting one at Kaiapoi" (M20:22).{FNREF|0-86472-060-2|19.4.3|60}

19.4.4 The Native Schools Act 1867 provided for the development of a national system of Maori state primary schools under the control of the Native Department. Under this Act, Maori were to provide the school site, of not less than one acre, and in addition to meet:

- half the total expenditure on buildings and repair;

- a quarter of the teacher's salary; and

- a quarter of the cost of school books.

Dr Barrington pointed out that in many parts of New Zealand the Maori desire for schools was not being met. He cited an inquiry made by Alexander Mackay to the under-secretary, Native Department, on 22 January 1868:

May I beg to inquire what action the Government contemplates taking with regard to the payment of fees in these schools (Arowhenua, Waimatimati, Waikowaiti), whether it is proposed to be guided entirely by the 1867 Act or whether, in consideration of the promise held out to the Natives of the Southern Provinces, in the

cession of their lands to the Crown, the Government will be required to pay the entire cost of the education of their children. I would beg to point out, while on the subject that the Natives themselves, as a rule, are too poor to contribute for the education of their children with any degree of certainty, and if the payment of the Government subsidy is to be based on their complying with the conditions of the Act, it will be tantamount to a breakdown of the whole scheme. (M20:26){FNREF|0-86472-060-2|19.4.4|61}

The inability of many Maori to make the substantial contribution to the establishment and running of their schools resulted in an amendment in 1871 to the 1867 Act. This gave the governor-in-council authority to vary the financial contribution of Maori depending on local circumstances.

It is clear from the foregoing discussion that for 20 years at least, following the Kemp purchase in 1848, apart from the single instance of Kaiapoi, central government failed completely to honour the promises of schooling for Ngai Tahu. Moreover, settler hostility continued after 1867 to the admission of Maori children into public schools (M20:28-30). This prejudice was increasing in 1915 (M20:47).

19.4.5 We turn now to the development of Maori schools after 1867. School sites for South Island Maori were obtained in various ways. Dr Barrington found that some sites were declared Crown land. Others were part of Maori reserve land. Others were gifted by Maori to the Crown. Others again were purchased from Maori ownership (M20:31-32).

By 1878 eleven state Maori schools had been established in the South Island under the 1867 Act, at Rakiura (Stewart Island), Molyneux, Riverton, Otago Heads, Waikouaiti, Kaiapoi, Wakapuake, Wairau, Waikawa, Arahura and Wairewa. But local Ngai Tahu in many cases made a substantial contribution. We cite a few examples:

- At Otago Heads Ngai Tahu built both the school and the school house on a church reserve. Later the sum of œ286 was granted towards the house and additions and improvements to the school (M20:32-33).

- At Riverton the school, opened in 1868, was originally a church built at the joint expense of government and Ngai Tahu, the former paying œ120 and the latter the cost of the materials. A later addition was provided by government (M20:36).

- At Port Molyneux Ngai Tahu provided land for a school and erected the school house, described in 1879 as a "mud-walled building, thatched with rushes, about 15 ft x 10 ft...".{FNREF|0-86472-060-2|19.4.5|62} On 19 March 1880 government offered to pay three quarters of the cost up to œ100 for a new building. The teacher reported that the Maori considered the government "under a promise to provide the whole amount for school buildings". On 6 April 1880 the secretary to the Otago Board of Education described the school as a "most wretched clay hovel utterly unfit for a school or for the shelter of any living animal". A new school was erected in 1880 (M20:37-38).

- At Arahura the school was opened in October 1874. The whole of the cost was borne not by government, but by the Greymouth native reserve fund. The government

contributed only half the teacher's salary leaving the balance to be paid out of the Native Reserve Fund.

While in some cases, such as the Little River school, the government appears to have borne the whole cost of erecting the school, it is apparent that in others Ngai Tahu, despite promises made up to 30 years earlier, had been obliged to make a substantial contribution towards the capital cost of the buildings, and in some cases towards the teacher's salary. Dr Barrington advised us that:

Even after the passing of the 1871 Amendment to the 1867 Act, right up to and even beyond the passing of the 1877 Education Act which established free, compulsory (except for Maori) and secular state [primary] education, Maori parents were frequently required to make a variety of financial contributions to the development of schools. The amount often seemed to depend on the discretion of the Inspector; he attempted to estimate the capacity of the people to pay and then set fees or contributions to the building of schools accordingly.

What I do find extraordinary is that even after 1877, Maori parents were still sometimes asked to make financial contributions to the cost of new school buildings (See Port Molyneux 1880). Indeed the requirement that Maoris wishing to have a school in their community should 'make such contribution in money or in kind towards the cost of school buildings as the Minister may require', was preserved in the Native School Code, 1880.

There [were] also occasions, (such as at Rapaki in 1877) where the Government remained reluctant to provide the expenditure required for school construction. I doubt very much if a similar reluctance would have been tolerated or accepted in relation to the educational needs of a similar number of Pakeha children ('30-40' according to the Maoris; 'upwards of 20' according to Stack). (M20:55)

It is not possible to find the Crown's record in the provision of schools for Ngai Tahu in the three decades following the Kemp and Murihiku purchases as being consistent with good faith and honourable dealing with its Treaty partner.

Hospitals and medical aid

19.4.6 Mr Walzl, for the Crown, gave carefully researched evidence of government health measures for Ngai Tahu. He dealt first with the Dunedin hospital and then with other health provisions (O20:49-76).

Dunedin hospital

19.4.7 During his visit to the new settlement of Dunedin in November 1850, Governor Grey pledged central government support for a hospital in Dunedin. The promise, according to Resident Magistrate A Chetham-Strode, was made to Ngai Tahu in response to an urgent request from them. Whether this request, and Grey's response, were a result of Mantell's 1848 promises is not known. As Grey also provided funds for hospitals in Auckland, New Plymouth and Wellington in the North Island, this may have been part of his then policy. Early in 1853 a Dr Williams, the district coroner, was appointed provincial surgeon, to the annoyance of the Otago Settlers'

Association. The association complained that if a hospital was to be for Ngai Tahu it ought to be on one of their own reserves and not in Dunedin (O20:52).

In 1856, in response to demands by the Otago Provincial Council, the hospital was formally taken over by the province, the central government to pay for the cost of any Ngai Tahu patients. Over the next three years such payment amounted to all of œ5 (O20:54).{FNREF|0-86472-060-2|19.4.7|63} In January 1856 Tiramorehu wrote to Governor Browne asking that Dr Williams be appointed doctor for all Maori from Murihiku to Waitaki. In July and September 1857, in letters to Mantell, Ngai Tahu urged the building of a hospital. Mr Walzl observed that they obviously did not feel part of the system and the fragmentary evidence shows only a low level of usage by Ngai Tahu of the Dunedin hospital. Two patients were admitted in 1860 (O20:54-55). Later, general hospitals were built at Invercargill and Riverton which were also used by Ngai Tahu, but to what extent is not known.

Other Ngai Tahu health measures 1860-1890

19.4.8 Before 1860 medical assistance for Ngai Tahu was limited. At the mission stations at Ruapuke and Kaiapoi it is likely that the clergy administered some medical assistance, but Mr Walzl stated that no formal or regular government measures were made for Ngai Tahu before 1860. When Mantell became native minister in July 1861, however, he requested a report from Walter Buller on what medical arrangements could be made for Ngai Tahu in Canterbury (O20:57). In 1862 two part-time medical officers were appointed to visit Kaiapoi and Banks Peninsula respectively. But no medical officers were appointed for Otago or Southland Ngai Tahu during this period (O20:58-59). Mr Walzl pointed out that Mantell's request in 1861 was for proposals for medical aid, not the provision of hospitals. Whereas in FitzRoy and Grey's time hospitals had been seen as the chief means of meeting Maori health needs, the remoteness of many Maori kainga from European settlements led to an emphasis on a medical officer system.

From 1860 through to 1890 the provision of medical assistance to Ngai Tahu by central government varied considerably from time to time depending on the political whim or concern of the government of the day. And governments changed frequently. Thus, when Mantell again became native minister in 1864, he stimulated further action. During his ministry, part-time medical officers were appointed at Timaru and Riverton. The Timaru doctor was to visit Arowhenua weekly and Waimatemate on urgent cases. In 1865 Hunter Brown recommended a hospital at Waikouaiti and a single sick room at Otago Heads. But with Mantell's departure from office a new period of Maori policy would seek the dismantling of the Native Department and the limited services it provided. This trend was to continue for the next three and a half years (O20:63). The three ministers who succeeded Mantell; FitzGerald, Russell and Richmond, all participated in allowing the department to run down. Mr Walzl reported that they were notably successful in reducing medical officers available to Ngai Tahu. Dismissals and salary reductions were put in place. During the period of three and a half years no more doctors were appointed to assist Ngai Tahu in Canterbury, Otago or Southland (O20:64). An exception occurred at Invercargill. In 1868 the government agreed to a request from the provincial hospital at Invercargill for a subsidy for Maori patients treated there. It seems some Ngai Tahu were using the hospital (O20:65).

19.4.9 In June 1869 Donald McLean became native minister. Unlike his three immediate predecessors he was an activist. He reversed the policy of curtailing the provision of medical aid to Maori, including Ngai Tahu. This brought some improvement to Ngai Tahu's situation. The services of a doctor at Riverton continued and in addition central government made a regular contribution of œ50 to Invercargill hospital (plus a payment of œ100 arrears) to meet Ngai Tahu needs for hospital treatment. Even the Reverend Wohlers at Ruapuke was given a œ15 allowance for drugs.
In 1870 subsidies were paid to doctors to attend Ngai Tahu at Timaru, Arowhenua and Waimatemate, replacing the single doctor at Timaru who had resigned. However the rest of Canterbury did not fare so well. It seems that through much of the 1870s no subsidised medical assistance was available on Banks Peninsula (O20:66). Likewise, in Kaiapoi, the Reverend Stack was paid œ50 to meet half the cost of Ngai Tahu medical bills, unless they were in real need. During the McLean period, which came to an end late in 1876, no Maori hospitals were erected.

19.4.10 In October 1877 John Sheehan, who replaced Daniel Pollen as native minister, reversed Pollen's retrenchment of the department. He reinstated some medical officers. Under Bryce, who became native minister in 1879, Ngai Tahu health measures did not suffer. Mr Walzl suggested this may have been, in part at least, because the Smith-Nairn Royal commission commenced hearings in 1879, and unfulfilled promises were within their terms of reference. But by 1883 it appears there was only one government subsidised doctor in Canterbury, and no hospital contributions were now being made (O20:69-70). In Otago, an area which had been neglected by government for some time, the subsidy of œ50 was paid to a doctor, and this arrangement continued until 1885. In Southland, where Mr Walzl considered there had been, since the mid-1860s, "rather good coverage in terms of medical attendance", the position changed. Although the Riverton appointment was maintained, the Reverend Wohler on Ruapuke lost his drug subsidy, and subsidies to Riverton and Invercargill hospitals ceased. Under Ballance, from 1884-1887, subsidised health schemes for Ngai Tahu were further reduced or refused (O20:71). Mr Walzl noted that the 1891 Middle Island Land Commission (the second Mackay commission) revealed that other areas of Ngai Tahu were similarly deprived which resulted in great hardship (O20:72).

19.4.11 It is clear from the foregoing that Ngai Tahu received no government assisted medical aid until 1861, and then only in varying degrees until the turn of the century. Apart from the relatively benign situation at Riverton, which occurred at a comparatively late period, it is apparent that Mantell's promises were not adequately honoured by the Crown. In response to a claim made on behalf of the claimants, that the government's record on the provision of medical services to Ngai Tahu was "half-hearted at least", Mr Walzl commented:
despite the short-term benefits which Ngai Tahu gained, the Crown efforts in both education and health were woefully inadequate. (R7:122)
The tribunal entirely agrees with this assessment of successive governments' performance over the three to four decades following Mantell's promises in 1848 and 1852. They were indeed woefully inadequate.

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19.5 Conclusions

19.5. Conclusions

19.5.1 It remains for us to state our conclusions on Ngai Tahu's grievance, that the Crown failed adequately to fulfill Mantell's promises as to schools and hospitals. We have found that these promises were made by Mantell to induce Ngai Tahu to part with their land in the Kemp and Murihiku purchases. We have further found that, given the grave dissatisfaction of Ngai Tahu chiefs both with the price and the totally inadequate extent of the reserves proposed or insisted on by Mantell, that the prospect of the provision of schools, hospitals and other government assistance constituted material inducements to Ngai Tahu to sell their lands, many millions of acres in extent.

In our earlier discussion of relevant Treaty principles we emphasised that when exercising its pre-emptive right to purchase Maori land, all such dealings were to be conducted on the basis of sincerity, justice and good faith (4.7.8).

Ngai Tahu willingly acceded to the Treaty of Waitangi. The Treaty signifies a partnership and requires the Crown and Maori partners to act towards each other reasonably and with the utmost good faith. The honour of the Crown lies at the heart of the Crown's Treaty relationship with its Maori partner. Mr Justice Richardson has pointed out that:

Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important.{FNREF|0-86472-060-2|19.5.1|64}

Findings as to grievance no 5 (Murihiku)

19.5.2 We find that the Crown, in acquiring land from Ngai Tahu was obliged by the Treaty of Waitangi to conduct its dealings on the basis of sincerity, justice and good faith. Promises made by the Crown's representative to Ngai Tahu to induce them to sell their lands should have been fulfilled by the Crown, and fulfilled promptly. Good faith, fair dealing and the honour of the Crown required no less. But, as we believe the evidence overwhelmingly shows, the Crown failed to meet these tests. Intermittent and long-delayed efforts were made partially to meet the Crown's obligations. To this day Ngai Tahu have not been compensated for the failure of the Crown adequately to meet its Treaty obligations in respect to the promises of schools and hospitals. In those early years, when the provision of these amenities would have made a significant contribution to the advancement of Ngai Tahu, they were left, over a considerable period, largely neglected and forgotten, or ignored. It is not too late for this omission to be repaired. We believe that the remedy proposed as long ago as 1887, by Royal Commissioner Judge Mackay, that a substantial endowment of land be secured to Ngai Tahu, would go far to right so many years of neglect.

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20 Landless Natives Grants

20.1 Introduction

Chapter 20

LANDLESS NATIVES GRANTS

20.1. Introduction

In the previous chapter we traversed the investigations of a series of parliamentary select committees, commissions of inquiry and Royal commissions during the years from 1872 through to 1891 in so far as they touched upon the Crown's promises as to schools and hospitals. A number of these investigations covered a much wider field of grievances, including the failure to provide adequate reserves, boundary disputes and related matters arising out of the various purchases. The Smith-Nairn commission of 1879-80 and the Royal commission presided over by Judge Alexander Mackay in 1886-87 are notable examples. We will return to these investigations in our succeeding chapter.

In the meantime the tribunal is concerned to consider the plight of those Ngai Tahu rendered landless or substantially landless due to the Crown's failure to prevent this occurring as a result of the various land purchases. We will focus on the nature, extent and adequacy of the Crown's response to this problem, the effects of which became increasingly apparent during the latter part of the nineteenth century. A convenient starting point is the report of Judge Mackay, who in May 1886 was appointed under Royal commission to enquire into the "Middle Island Native Land Question". We are particularly indebted to a full discussion of this topic by a Crown historian, Mr David Armstrong (M16), and also to the claimants' historian, Mr J M McAloon (E1).

Ngai Tahu Land Report

20 Landless Natives Grants

20.2 The Mackay Royal Commission 1886-87

20.2. The Mackay Royal Commission 1886-87

20.2.1 On 12 May 1886 the governor, Sir William Jervois, appointed Alexander Mackay, judge of the Native Land Court, to be a Royal commissioner. His warrant of appointment instructed the Royal commissioner:

- to inquire into all cases of Maori alleged to been unprovided with land;

- to inquire into cases where it was asserted that the lands previously set apart were inadequate for the maintenance and support of the Maori for whom they were provided;

- to inquire into the position of all half-castes in the South Island not included in any statutes who may have still been unprovided with land; and

- to ascertain and record the names of all such persons and recommend in what quantities and in what localities land should be set apart and awarded to each for cultivation and settlement purposes (M17:I:doc 1:16).{FNREF|0-86472-060-2|20.2.1|1}

A subsequent warrant dated 20 July 1886 instructed Mackay to report whether any Maori interested in the Smith-Nairn commission of 1879-1880 concerning the Otakou, Kemp, Murihiku and Akaroa purchases would accept a grant of land in final settlement of any claim regarding the non-fulfilment of any of the terms or conditions of those purchases, including any promises made in connection with them. If so, Mackay was to recommend in what quantities and localities land should be set apart for that purpose (M17:I:doc 1:16).{FNREF|0-86472-060-2|20.2.1|2}

In his report to the governor of 5 May 1887 Mackay traversed in considerable detail the background to Kemp's purchase and in less detail the Murihiku and Otakou purchases. We will refer to certain of this discussion in our next chapter. For the present we will focus on Mackay's findings and recommendations.

Kemp's purchase

20.2.2 After a detailed review of the background to this purchase Commissioner Mackay found that:

the fundamental principles laid down were not adhered to in acquiring the land in the Middle Island, neither in the reservation of sufficient land for Native purposes, nor in compensating the Native owners for the loss of a large share of their means of

subsistence through depriving them of their hunting and fishing rights. (M17:I:doc 1:6){FNREF|0-86472-060-2|20.2.2|3}

Mackay pointed out that the average acreage per individual set apart in Kemp's purchase in 1848 was under 10 acres. The Native Land Court hearing in 1868 resulted in an additional 2830 acres being set aside in Canterbury and 2100 acres in Otago. Subsequently a further acreage was allotted bringing the general average increase to under 20 acres per individual. But this additional land was not allotted equally. At places where the average was high per individual Mackay found there were many people without land. Moreover, as the commissioner pointed out, a very large proportion of the additional land awarded in 1868 and subsequently, was "very far below the original reserves in the quality of the soil" (M17:I:doc 1:9).{FNREF|0-86472-060-2|20.2.2|4}

20.2.3 Commissioner Mackay conveniently summarised his recommendations in respect of the Kemp and Murihiku purchases in his covering letter of 5 May 1887. First, he proposed that blocks of land should be set apart as an endowment to provide an independent fund for the promotion of the objects which were held out to Ngai Tahu as an inducement to part with their land. As Mackay saw it:

A fund of this kind would possess manifold advantages, one of the chief being that the moneys accruing for the purpose would be derived from a permanent and independent source, removed from the ever-varying influence of Parliament, or other causes which have hitherto interfered with an equitable fulfilment of the claims of the southern Natives. (M17:I:doc 1:1){FNREF|0-86472-060-2|20.2.3|5}

He envisaged that some of the purposes for which the moneys could be expended were:

- the erection and maintenance of schools and other buildings for general purposes;

- the fencing, improving and drainage of land;

- the purchase of farm implements;

- medical aid and medicines;

- teachers' salaries;

- the purchase of books and other school requisites;

- contribution to local rates;

- the purchase of food and clothing for destitute and elderly Maori; and

- for any other purpose which would promote the social and moral welfare of Ngai Tahu.

Secondly, Mackay recommended that blocks of land be set apart for the use and occupation of Ngai Tahu, to an extent that would augment the quantity owned by each man, woman and child to 50 acres per head.

He accordingly recommended that additional land be set aside as follows:

Kemp purchase:

(a) endowment purposes, 100,000 acres; and

(b) individual use and occupation in addition to the quantity already reserved, 30,700 acres.

Total: 130,700 acres

Murihiku purchase:

(a) Endowment purposes, 40,000 acres; and

(b) additional for individual use, 15,412 acres.

Total: 55,412 acres

Thus Mackay recommended a total of 186,112 acres for all purposes in both blocks. The Banks Peninsula purchases were included in the consideration for Kemp's purchase.

20.2.4 As to Otakou, Mackay took the view that the New Zealand Company had fully admitted the right of Ngai Tahu to have a tenth of the land set apart for them in the Otakou block in the same manner as was carried out in their other settlements. The tribunal, for reasons given in our discussion of the Otakou purchase, believes Mackay to be mistaken on this point (6.6.17). Mackay went on to express the opinion that it was highly inequitable that the Otakou Ngai Tahu should be compelled to suffer for an omission of the colonial government to set apart tenths. As he put it, "the desirability will no doubt be now seen that immediate action should be taken to remedy, as far as possible, the loss they have sustained in consequence" (M17:I: doc 1:15).{FNREF|0-86472-060-2|20.2.4|6} He thought that if the obligation respecting the tenths was admitted, the least Ngai Tahu were entitled to was the minimum quantity of 14,460 acres (one-tenth of the 144,600 acres contemplated for the Otakou settlement) together with additional land as compensation for the years they had been deprived of the benefit of the tenths.

Due to lack of time, Mackay was unable to make a selection of land or ascertain the names of those Ngai Tahu for whom extra land should be provided.

Ngai Tahu Land Report

20 Landless Natives Grants

20.3 Joint Committees

20.3. Joint Committees

The 1888 Joint Middle Island Native Claims Committee

20.3.1 Commissioner Mackay's comprehensive, thoughtful and constructive report was coolly received by the legislature. In June 1888 the House of Representatives and the Legislative Council decided to appoint nine members each to a joint committee:

to consider and report on the claims of the Middle Island Natives on account of unfulfilled promises, and the recommendations made by Mr. Commissioner Mackay thereon on the 5th May 1887.(M17:I:doc 2:1){FNREF|0-86472-060-2|20.3.1|7}

On 22 August 1888 the joint committee reported that it had in the time available not completed its investigation of Kemp's purchase and had not started its investigation of the Otakou, Murihiku and Akaroa purchases. It had, however, amassed a considerable dossier of documentary evidence to which it briefly referred in an "epitome of the Ngaitahu [Kemp] case". Notwithstanding that its investigation was unfinished the joint committee concluded that:

The foregoing review of the question seems to establish that no promises of reserves of land have been made which have not been fulfilled, and that at the negotiations no promises of tenths were made or held out. (M17:I:doc 2:7){FNREF|0-86472-060-2|20.3.1|8}

It recommended that a similar committee be appointed for 1890 to complete the Kemp purchase inquiry and that of the Otakou, Murihiku and Banks Peninsula purchases.

20.3.2 In addition to thedocumentary evidence, including Mackay's 1887 report, the joint committee heard evidence from Walter Mantell, William Rolleston and H K Taiaroa, all of whom were Members of Parliament at the time. It appears Rolleston's evidence was particularly influential. A senior minister of the Crown who had a lengthy involvement in both provincial and central government, Rolleston appeared to reflect the popular view of the issue. He commenced by criticising Mackay's report as exceeding its terms of reference and proposing a totally new adjustment of the original Kemp's purchase agreement on what appeared to Rolleston an entirely untenable basis. Rolleston referred to his membership on a House of Representatives committee which in 1882 inquired into a petition from H K Taiaroa. On the claim that ample reserves had not been provided, the committee had evidence that the reserves made by the Native Land Court in 1868 were given in final settlement of all claims over land.

According to Rolleston, "The allocation by Mr. Mantell was most judiciously made in the interests of the Natives." And later Rolleston observed that Mantell had stated he considered 10 acres for every man, woman and child "a fair apportionment". Rolleston commented that he had "no doubt it was at the time" (M17:I:doc 2:78).{FNREF|0-86472-060-2|20.3.2|9}

When asked whether he thought substantial justice had been done by the Native Land Court concerning the awards made to Ngai Tahu and the supplementary reserves, Rolleston agreed that he did.

Rolleston then went on to deprecate the making of large Maori reserves which he said "would work out extremely mischievously". He asserted that various portions of the reserves were being let. He argued that the enlargement of those reserves:

would tend, not to civilisation, but to the creation of an idle and degraded race; and it is extremely desirable that no step should be taken to prevent a labouring-class from arising among the Natives. In the formation of that class among the Natives lies, to my mind, the future salvation of the race. (M17:I:doc 2:80){FNREF|0-86472-060-2|20.3.2|10}

Rolleston was then asked for his opinion as to what he considered to be an appropriate "endowment". He replied that it varied very much:

I may say I am of the opinion that the landed endowments are more than ample now, but the question is whether we can deal with individual cases of hardship or want. I think no Native should be without reasonable means of settlement upon land to keep him from absolute want, and I think ten acres of good land to a Native, a head of a family, a very fair amount. Of course, if the land is poor, and in a situation where they could not get a living through fishing, a larger quantity would be necessary. It varies according to the situation of the land. (M17:I:doc 2:80){FNREF|0-86472-060-2|20.3.2|11}

Rolleston was later asked for his opinion on ways in which any moral claims Ngai Tahu might have against the government could be satisfied. He reiterated his view that it would be extremely injudicious to provide further reserves by way of endowments:

If necessary, residence reserves might be made where it was shown there was absolute pauperism. My own view would be very strongly to deal no more with land except where pauperism by want of any land was established. Let the Government issue terminable annuities. This dealing with land is, to my mind, from experience which I do not wish to recur to, accompanied with very great evils. I feel, with regard to all land-purchase, it would be far better to pay annuities, which would not allow of the squandering of money, and would maintain the Natives above want. The only hope is that of the Natives becoming an industrious people. (M17:I:doc 2:84){FNREF|0-86472-060-2|20.3.2|12}

20.3.3 In brief Rolleston proposed:

- no land should be set aside as endowments for Ngai Tahu as recommended by Mackay;

- it was dangerous to grant any Ngai Tahu more than the minimum of land and then only where it was shown "there was absolute pauperism";

- rather than grant any more land the government should issue terminable annuities; and

- the only hope for Ngai Tahu was to become an industrious people presumably all as members of the "labouring-class".

And so Ngai Tahu, from whom the Crown had acquired virtually all 34 million acres for a trifling sum, were to be denied a just share in their land. Instead they should settle for becoming industrious labourers. Any further Crown intervention was to be confined to cases of "absolute pauperism". Given this evidence it is not surprising that the joint committee should conclude that no promises of reserves of land had been made which had not been fulfilled.

The 1889 Joint Committee on Middle Island Native Claims

20.3.4 A further joint committee was appointed to complete the work of its 1888 predecessor. The questions investigated by the committee related to reservations of Maori reserves and cultivations, further land reserves, and schools, hospitals and solicitude for Ngai Tahu welfare.

The joint committee reported on 10 September 1889 (M17:I:doc 2).{FNREF|0-86472-060-2|20.3.4|13} It found that the evidence established the promises made in regard to residences and cultivations were fulfilled. No reasons were given for this finding. The committee also found that the further land reserves made, "although not undertaken in so liberal a spirit as might have been suitable to the case", might be considered as having substantially discharged the public obligations under this head. They saw the Native Land Court 1868 decisions as supporting this view. But having said this, the committee conceded that it might "yet be found highly expedient that more land should be provided where the provision proves to be insufficient to afford Natives a livelihood" (M17:I:doc 2:2).{FNREF|0-86472-060-2|20.3.4|14} This would seem to be inconsistent with its earlier finding.

The committee then proposed that the only practical and effective way to reach a satisfactory settlement would be to make a careful inquiry into the condition of the Ngai Tahu people. If it was found that any of them had insufficient land to support themselves by labour on it, further provision by way of inalienable reserves should be made for them. So yet another investigation was called for.

1890 Joint Committee on Middle Island Native Claims

20.3.5 This committee, which reported on 9 September 1890, was concerned solely with the Otakou purchase and in particular the question of tenths. It was unable to satisfy itself that the principle of tenths applied to this purchase. But the committee went on to find that the evidence before it showed the existing provision of land to be

"by no means sufficient" (M17:I:doc 2).{FNREF|0-86472-060-2|20.3.5|15} It recommended an appropriate inquiry in association with that to be undertaken in respect to the Kemp, Banks Peninsula and Murihiku purchases.

Ngai Tahu Land Report

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20.4 The Mackay Royal Commission 1891 and Subsequent Reports

20.4. The Mackay Royal Commission 1891 and Subsequent Reports

20.4.1 Notwithstanding the fact that his 1887 Royal commission report had been largely ignored, Judge Alexander Mackay was again appointed a Royal commissioner on 10 December 1890, on the recommendation of the joint committee. He was to inquire further into the condition of the Ngai Tahu people and to ascertain if any of them had insufficient land for their support by working it. His investigation covered the Otakou, Kemp, Banks Peninsula and Murihiku blocks. Throughout his extensive inquiry Mackay continually received complaints from Ngai Tahu that his terms of reference were too restricted. Ngai Tahu wished to raise yet again their wider grievances about the inadequacy of the reserves granted and about those refused. As a consequence Mackay made a supplementary report of 9 July 1891 (M17:I:doc 3).{FNREF|0-86472-060-2|20.4.1|16} Both reports are somewhat discursive and each contains lengthy schedules of population and land holdings (or lack of them) in various areas. Mackay's two reports were conveniently summarised for us by Crown historian David Armstrong (M16:10-15). We are indebted to him for much of the following account of Mackay's findings in the two reports.

20.4.2 The commissioner provided schedules for all the areas in the Otakou, Kemp and Murihiku blocks and for Rakiura. He listed those having no land, those having insufficient land and those with over 50 acres. We note that even in 1890, 50 acres was apparently considered sufficient land to provide a living. We assume this would be on the basis that it was good quality land.

Mr Armstrong calculated that of Ngai Tahu as a whole, Mackay found that 44 per cent had no land, 46 per cent had insufficient, and only 10 per cent had sufficient land, that is, 50 acres or more. The commissioner also recorded that of the half-caste population of Southland the ten acres each for men and eight each for women was "altogether inadequate".

In general Mackay, who visited and took evidence at all the principal settlements, gave a depressing account of the poverty, listlessness and despair amongst Ngai Tahu. Among the reasons for Ngai Tahu's poverty, as noted by Armstrong, were:

- 90 per cent possessed either no land (44 per cent) or insufficient land (46 per cent);

- of the 10 per cent who owned more than 50 acres, few could make a living due to the inferior quality of the soil or the scattered manner in which the lands were situated;

- unskilled seasonal work on which Ngai Tahu relied to supplement their incomes was becoming harder to find because of competition from Europeans. For many their remoteness from European settlements meant work of this kind was unavailable;

- many Ngai Tahu had made contributions of money to aid H K Taiaroa "in seeking redress for the non-fulfilment of the promises made them on the cession of their land to the Crown" (M17:I: 3); and

- the destruction of many Maori fisheries by the drainage of the country and the introduction of European fish species.

On a more positive note Mackay found that:

There are no cases of entire destitution; but that is attributable in a great measure to the compassionate disposition of the Natives towards each other ... and many persons who ought to be relieved by the Government, in conformity with the understanding to that effect when their land was ceded, are maintained by their relatives, which has the effect of keeping them all in poor circumstances. (M17:I:doc 3:4-5){FNREF|0-86472-060-2|20.4.2|17}

In concluding his supplementary report Mackay stated that, notwithstanding anything that might have been urged to the contrary, he saw no justification for changing the views he had expressed and the recommendations he had made in his May 1887 Royal commission report.

The Crown's reaction to the Royal commission reports

20.4.3 Although pressed by Tame Parata in Parliament to act on the reports' recommendations, the native minister, A J Cadman did nothing until December 1892 when he went to Dunedin and met with Ngai Tahu at Otago Heads. At this meeting Cadman indicated that the government would be prepared to make certain Crown lands available to those who had no or insufficient land (M17:I: 8).{FNREF|0-86472-060-2|20.4.3|18} Later in December the minister wrote to Parata advising him of the lands the government now had in mind, amounting to some 90,466 acres, mainly at Te Wae Wae Bay (60,110 acres) and at Tautuku (9320 acres), Lake Wanaka (11,852 acres) and Stewart Island (9184 acres). It appears that Ngai Tahu were not consulted about the location of the land the government was offering.

Mackay and Smith appointed to assign the land

20.4.4 In December 1893 Cabinet appointed Alexander Mackay and Percy Smith, the surveyor-general, to complete a list of landless Maori and assign sections to them within the blocks nominated. In 1894, with the concurrence of government, Parata joined the commissioners to assist in grouping families. The commissioners' jurisdiction extended to all landless Maori in the South Island. The task was an onerous one.

The commissioners issued a series of interim reports. The first of them in 1896 referred to the fact that they had been sitting at different times for about three months during the evening (M17:I:23).{FNREF|0-86472-060-2|20.4.4|19} Their second

interim report was dated 14 June 1897 (M17:II:24).{FNREF|0-86472-060-2|20.4.4|20} It was necessary to compile a complete alphabetical list of all South Island Maori and their respective holdings. This was a monumental task. The commission then met and completed the grouping of the families who were to receive land at Stewart Island, Waiau in Southland, Tautuku in Otago/Southland and Wanaka. This was accomplished by 1895. The commissioners drily noted that with the exception of about four days "the whole of it has been done outside official hours, and in our own time". (M17:II:4:2){FNREF|0-86472-060-2|20.4.4|21}

20.4.5 In their third interim report of 30 June 1898 the commissioners advised that during the year, surveys had been in progress in the district west of the Waiau River (Fiordland) (M17:II:25:2).{FNREF|0-86472-060-2|20.4.5|22} The surveyor reported that of the large block of 60,110 acres, the western part of it, amounting to some 30,000 acres, was quite unsuitable for settlement purposes, being "both mountainous and barren".{FNREF|0-86472-060-2|20.4.5|23} This being so, the eastern part of the block only could be used, and here 1264 individuals had had farms allocated to them, in sizes varying from 80 to 460 acres-altogether 141 farms, covering an area of 29,908 acres. Although the report does not say so, this land was extremely isolated. A further report, their fourth, was dated 16 June 1899 (M17:II:27).{FNREF|0-86472-060-2|20.4.5|24} It noted that two additional blocks were recommended to government to be set aside for landless Maori: a further 7600 acres on Stewart Island, described as fair and about equal in quality to the adjacent block at Lords River already allocated; and a second block of 50,000 acres at Wairaurahiri, some 15 miles to the west of the Waiau block. The latter fronted on to Foveaux Strait. The land was said to be only "of fair quality", but the commissioners expected some to be too broken for settlement, in which case it would be cut out on survey. Even more remote than the Waiau block, the land was covered with forest. Rainfall was very heavy. Some 1828 Ngai Tahu were said to require this land at Stewart Island and Wairaurahiri.

On 20 June 1901, in their fifth report, the commissioners advised that no progress was made during the period 1899-1900 in allocating lands as the Wairaurahiri block survey was not sufficiently advanced (M17:II:28).{FNREF|0-86472-060-2|20.4.5|25} However some progress had been made in 1901. There still remained some 700 people to be provided for, including those at Kaikoura and Marlborough.

The quality of the land allocated

20.4.6 On 18 August 1904, in response to a request by T Parata, the House of Representatives ordered that the reports of the Survey Department relating to the lands set apart for landless Ngai Tahu at Waiau, Lords River (Stewart Island), Tautuku and Wairaurahiri be tabled. They made depressing reading. The Crown historian, David Armstrong, conveniently summarised the main features (M16:38-41). The tribunal reproduces here some of his comments and citations from the various reports.

Alton district

20.4.7 John Robertson, who surveyed the Alton district, reported on 10 September 1899. The roads were laid off (but not formed) over fairly level country which was wet and boggy in places. The soil on the beach front sections was good but the land

deteriorated inland. Timber was relatively plentiful but the ground was generally of a broken nature.

J H Treseder, the district road engineer, advised that the lack of access and market for produce made the sections of "very little value":

There are one or two sections more that could be settled upon, but taken as a whole the country is not at all suitable for farming purposes, as the ground is pretty broken up ... a great portion of the land is covered with moss of a depth of from 6 in. to 18 in., and the soil is mostly clay. ... the climate is very wet ... I consider the land unsuitable for the purpose for which it was set aside, being far too rough and broken and soil of a poor nature. (M17:II:29:2){FNREF|0-86472-060-2|20.4.7|26}

The county engineer, A McGavock, reported that with the exception of some sections, portions of which were first class, the bulk of the land was not fit for settlement, being clay subsoil covered with moss. The country was very broken and the cost of roading would be considerable. He added:

For settlement purposes I consider they are almost useless, and I am of opinion that were the Government to offer them for nothing, and undertake to give tenants access to the different sections, it would be impossible for settlers to make a living. (M17:II:29:2){FNREF|0-86472-060-2|20.4.7|27}

The chief surveyor for Southland reported for the year ending 31 March 1903. He referred to an inspection of the survey operations beyond the Waiau River (in Fiordland) known as the "Landless Natives" block:

I am sorry to say that a large proportion of this land is of little value, being mostly carpeted with a covering of moss varying from 12 in. to 24 in. deep, then densely over-grown with valueless birch timber with occasional patches of fair red and white pine, and a little sprinkling of totara; but owing to the inaccessible nature of the country the last-mentioned timbers are of no commercial value. Taking the inaccessible nature of the country into consideration, its excessively wet climate, and the poor quality of the land, I fear that the selection has not been all that could be desired for settlement purposes or for landless Natives. (M17:II:29:3){FNREF|0-86472-060-2|20.4.7|28}

Lords River, Stewart Island

20.4.8 On 2 September 1904 John Hay, commissioner of Crown lands, Invercargill, reported that the land set apart at Lords River was densely covered with bush, some of which was suitable for sawmilling. The soil he classed as generally from fair to good. He considered the land suitable for the purpose for which it had been surveyed. One great advantage from the Maori point of view was the good fishing-ground in the immediate vicinity and the excellent harbour.

Tautuku

20.4.9 E O'Neill, a Crown lands ranger, on 17 November 1903 reported that the sections on the south-east coast had a proportion of milling-timber. They were rough,

broken, bush sections with a fair aspect, generally about 23 miles from a proposed new railway terminus at Ratanui and within one mile of a school and post office.

Wairaurahiri

20.4.10 This block was extremely remote, being well to the west of the Waiau River in Fiordland. Commissioner Hay reported on 13 July 1903:

In January, 1902, I walked through this block from the coast along centre road-line to Lake Hauroko,... In this distance there are no doubt small patches of fair land, but undoubtedly the area of such is so infinitesimal that they are not worth consideration. There is also some fair timber in places, but it is of no commercial value owing to the inaccessible nature of the country....

It will now be seen from what I have said... that apparently an error of judgment has been committed in having the land set aside and surveyed for settlement purposes. (M17:II:29:4){FNREF|0-86472-060-2|20.4.10|29}

Separate reports were made on the land east and west of the Wairaurahiri River.

The eastern side

C Otway, surveyor, commented generally on this land which had been surveyed by T G Lilliecrona:

The block as a whole is exceedingly difficult of access, the distance from its centre to the formed road at Waiau Mouth being thirty-five miles. The timber in places is fairly suitable for milling purposes, but milling operations could not be successfully carried on for want of proper access by road, while access from the sea is out of the question, except on very rare occasions. The land, if cleared, would grow grass fairly well, but clearing would be a difficult undertaking owing to the peaty and mossy nature of the surface, which, being always wet and damp, would make it impossible to secure a good burn.

After three years experience of this locality, I am of opinion that the rainfall is as great as, if not greater, than that of any other part of New Zealand. It is also doubtful whether grass would last very well in such a country.

The conditions under which settlement would have to progress make this locality quite unsuitable for Native occupation, while the very inferior quality of the soil generally makes it unfit for settlement of any kind. (M17:II:29:5){FNREF|0-86472-060-2|20.4.10|30}

The western side

Otway's general comments were:

As a whole, this block is exceedingly difficult of access, the distance from Papatotara Post-office varying from thirty-three to fifty-five miles, twelve miles of which is along the beach, and the remainder over a rough and broken track.

The timbers in places along the coast and other parts of the block are fairly suitable for milling proposes, but milling operations could not be successfully carried on for want of proper access by road, while approach by sea, owing to danger in effecting a landing, could not be taken into account. The country, if cleared, would carry grass very well, but clearing would be a difficult and anxious undertaking, owing to the exceptionally wet climate, and the peaty and mossy nature of the surface, which, being always wet and damp, would make it next to impossible to secure a good burn. It is also doubtful whether grass, when grown, would last very well in such country.

As regards the climate, I may say that, after over three years' experience, I have found the rainfall excessive, and consider it as great as, if not greater than, that obtaining in any other part of the colony.

With reference to prices, I have taken 5s. per acre as a basis of valuation, but consider that this basis is much too high, my personal estimate of the value of the land being an average of about 1s. per acre.

My remarks given in the report on the [east] block surveyed by Mr. T. G. Lilliecrona with reference to its suitability for Native occupation or settlement apply equally to this block. (M17:II:29:6){FNREF|0-86472-060-2|20.4.10|31}

20.4.11 It is apparent from these various reports that apart from the land on Stewart Island and to a lesser extent at Tautuku, the bulk of the land so laboriously surveyed was extremely remote and largely worthless for the settlement of landless Ngai Tahu. While the land no doubt had some limited value for timber-milling, its remoteness and the absence of roads meant that even this activity would be severely restricted. Although Stewart Island was accessible by sea it entailed a journey across dangerous waters to one of the most isolated places in New Zealand.

Mackay and Smith's final report

20.4.12 Meanwhile, and despite the apparent futility of their enormous labours, very largely in their own time, the commissioners completed their work. They furnished their final report on 28 September 1905 (M17:II:31).{FNREF|0-86472-060-2|20.4.12|32} Among the reasons they gave for their unavoidable delay in completing their work the most important was the absence of suitable blocks of land in which to allocate the claims:

In the end, lands have actually been found to meet all requirements as to area, but much of the land is of such a nature that it is doubtful if the people can profitably occupy it as homes. (M17:II:31:1){FNREF|0-86472-060-2|20.4.12|33}

The tribunal can only wonder why so much labour was expended, and in their own time, by the two commissioners, when it was apparent to them that it was a largely fruitless exercise. The various surveyors and Crown land commissioners' reports had been tabled in the House of Representatives. No doubt their contents were known to Members of Parliament, the government and the commissioners. The tribunal can only conclude that Mackay and Smith had been directed by the Crown to complete the exercise despite its futility. Or did the Crown seriously believe that by making this gesture it could wash its hands of any future obligation to Ngai Tahu?

20.4.13 The commissioners made a number of other points in their report:

- They considered it necessary that legislation be passed so that titles allocated to the land could be issued.

- They had included half and quarter caste Maori in their allocations.

- Their brief covered the whole of the South and Stewart Islands.

- On instructions from the Crown children born since 31 August 1896 were not included in the considerations.

- Not all those provided for were entirely landless, but all who were landless or who had less than 50 acres if adult, or 20 acres if minors were allocated land to bring their holdings up to these amounts. This was done on the authority of government as this acreage was considered to be a more appropriate area and more in conformity with the original intention:

that land of a sufficient area for their future wants should be set apart for their maintenance. (M17:II:31:1){FNREF|0-86472-060-2|20.4.13|34}

- The commissioners allocated land to Ngai Tahu south of the northern boundary of Canterbury on the basis of the 50 and 20 acre formula. But for those Ngai Tahu north of Canterbury the maximum allocation for adults was 40, not 50 acres. Each eligible child received 20 acres. The commissioners justified this differential treatment because the Ngai Tahu people in Canterbury and south were said to have had a:

special claim to consideration in fulfilment of promises made at the cession of their territory, whereas those to the north had no such rights, and are indebted solely to the generosity of the Crown for the increased area. (M17:II:31:2){FNREF|0-86472-060-2|20.4.13|35}

20.4.14 Mr Armstrong commented on the commissioners' references to "future wants" and "special claims" in the last two quotations as indicating that they, with the concurrence of the government, had begun to see the provision of land for landless Ngai Tahu as a settlement of Ngai Tahu claims. "At no stage", said Mr Armstrong, "was this the reality of the situation" (M16:46). The tribunal would agree with this latter observation. Given the commissioners' conclusion that much of the land allocated was unsuitable for the purposes of settlement we also question whether Mackay and Smith seriously contemplated that it could constitute a settlement of Ngai Tahu's wider claims. Moreover, as Mr Armstrong pointed out, a significant part of Mackay's "final claim" recommendations in terms of "future wants" in his 1887 Royal commission report had been the provision of substantial reserves for endowment purposes. This had never been carried into effect. Indeed it had been ignored, if not rejected, by the Crown. The tribunal agrees with Mr Armstrong that neither Ngai Tahu nor initially the government saw the allocation as anything other than a "compassionate" gesture made to alleviate poverty.

The 1905 land allocations

20.4.15 The commissioners gave the following figures for the area of 142,118 acres allocated to 4064 people, not all of whom were Ngai Tahu:

Block	Persons	a	r	p	
Waiau	1278	44,455	2	1	surveyed
Wairaurahiri	280	10,866	2	33	,,
Tautuku	366	11,615	2	30	,,
Raymond's Gap	8	350	3	15	partly surveyed
Manakaiaua	135	3759	3	20	surveyed
Lords River	241	8724	3	24	,,
Whakapoai (Heaphy River)	38	1600	0	0	,,
Whangarae (Croixelles)	23	934	2	19	,,
Queen Charlotte Sound	166	5701	2	1	,,
Hokonui	772	27,809	0	39	not surveyed
Glenomaru	7	350	0	0	,,
Wanaka	57	1553	2	26	,,
Miritu	9	360	0	0	,,
Tennyson's Inlet	175	6462	3	17	,,
Forest Hill	20	850	0	0	,,
Toitoi River	181	7392	0	4	,,
Port Adventure	308	9340	3	26	,,
Totals	4064	142,118	1	5	

(M17:II:31:2){FNREF|0-86472-060-2|20.4.14|36}

In conclusion the commissioners reminded the government, as they had on an earlier occasion, that their work had been done in their own time quite outside official duties.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.1 Introduction

Chapter 21

PARLIAMENTARY SELECT COMMITTEES, ROYAL COMMISSIONS AND COMMISSIONS OF INQUIRY

21.1. Introduction

In the preceding two chapters we have related how the Crown failed in its Treaty obligations both in respect of the provision made for schools and hospitals and in the allocation of land for landless Ngai Tahu. In the course of our discussion we have referred to many, indeed most, of the parliamentary select committees, Royal commissions and commissions of inquiry appointed to consider Ngai Tahu grievances arising out of the acquisition of their land by the Crown. In this chapter we will be considering only some of these inquiries in relation to the wider grievances of Ngai Tahu for which they sought, largely in vain, remedial action by the Crown. These grievances related to the failure of the Crown to ensure Ngai Tahu were left with ample reserves for their present and future needs, to the claim for "tenths", to mahinga kai and to boundary disputes and associated matters. We will be focusing chiefly on the 1879-1880 Smith-Nairn Royal commission report; the Mackay Royal commission reports of 1887 and 1891, the intervening joint parliamentary select committee reports of 1888-1890 and the 1920 Jones commission of inquiry. We will refer only briefly to some of the background of the principal investigations. A number have already been noted in one or both of the preceding two chapters.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.2 The History of Inquiries

21.2. The History of Inquiries

Middle Island Native Affairs Committee 1872

21.2.1 The first inquiry to be noted is that of the Middle Island Native Affairs Committee of the House of Representatives constituted on 19 September 1872. It reported a month later on 21 October 1872. Its brief was to inquire into unfulfilled promises made to Ngai Tahu. Mr H K Taiaroa, member for Southern Maori, referred to the failure of the Crown to provide the reserves promised by Kemp and to Mantell's exclusion of cultivations and associated matters. The committee, which heard evidence from a few witnesses only, reported that the evidence heard, though far from complete, led them to the conclusion that the claims had not previously had the consideration they deserved. They thought the Princes Street reserve had been dealt with on a legal and technical basis rather than broader considerations of equity and good faith. The committee recommended a further inquiry by an impartial commission (C2:doc 21).{FNREF|0-86472-060-2|21.2.1|1}

Chief Judge Fenton's 1876 report

21.2.2 Following the Native Affairs Committee report of 1872 another select committee was appointed to sit during the following session. For reasons we explained in our discussion of schools and hospitals (19.2.8) no hearing took place until 1875 when the committee again recommended the appointment of a full commission of inquiry, thereby stalling consideration once more. The government, which had difficulty in finding suitable commissioners, prevailed on Chief Judge Fenton who, while unable to undertake a full commission, was willing to review the matter.

Fenton heard little evidence but it was apparently sufficient for him to hold:

- that Ngai Tahu were not promised tenths in 1844;

- that Kemp did not intimidate Ngai Tahu;

- that the boundaries (which were disputed) were part of the deeds and could not be questioned;

- that Mantell did not use threats against Ngai Tahu; and

- that the Native Land Court in 1868 (over which Fenton presided) had given "mahinga kai" a most extensive interpretation and made appropriate orders for reserves; that the court increased the reserves to 14 acres per head and, had the government suggested a much larger quantity he, Fenton, would gladly have sanctioned it (M15:178-180).{FNREF|0-86472-060-2|21.2.2|2}

The Smith-Nairn Royal commission 1879-81

21.2.3 Not surprisingly, H K Taiaroa was not happy with Fenton's 1876 report. He kept up pressure for a full inquiry. This finally resulted in the appointment on 15 February 1879 of T H Smith and F E Nairn to be a Royal commission known at the time as the Middle Island Native Land Purchases Commission, and more shortly, the Smith-Nairn commission.

The commission was required to inquire into:

- whether there were any unfulfilled promises and/or conditions relating to the Kemp purchase, including Mantell's subsequent actions;

- whether the reserves agreed to be granted in Kemp's deed had all been made; and

- the same kind of questions in respect of the purchase of the Otago block by Symonds in 1844, the Murihiku block by Mantell in 1853 and the Akaroa block by Hamilton in 1856.

21.2.4 As will have been apparent from the tribunal's discussion of these various purchases, the Smith-Nairn commission, which travelled widely throughout the South Island, received voluminous evidence from various Ngai Tahu signatories to the deeds of purchase. The commission also heard evidence from Kemp, Mantell, Hamilton, Fenton, Grey, Alexander Mackay, Reverend J W Stack and Symonds. We have already discussed the deliberations of the commission in relation to unfulfilled promises concerning schools and hospitals (19.2.12).

21.2.5 The Smith-Nairn commission held sittings, some lengthy, at Auckland, Wellington, Otaki, Christchurch, Kaiapoi, Dunedin, Port Chalmers, Waikouaiti, Akaroa and Riverton. These sittings took place over the period from March 1879 to April 1880. By January 1880 however, the government, or at least Bryce, the native minister, was becoming either impatient or anxious to find a reason for terminating the commission's proceedings. The Native Office under-secretary on 19 January 1880 wrote to the commission at Bryce's direction stating that if:

satisfactory progress has not been made as will indicate an early conclusion of the inquiry, the Government will seriously consider whether the Commission should not at once terminate. (A9:9:46){FNREF|0-86472-060-2|21.2.5|3}

The commission responded with persuasive reasons why their inquiries would need to continue.

On 12 April 1880 Bryce advised the commission that the sum voted for the commission was approaching exhaustion. He felt Parliament would not support him if

he allowed the vote to be exceeded (A9:9:46).{FNREF|0-86472-060-2|21.2.5|4} The commission responded on 14 April 1880 by saying that it considered it proper to acquiesce in the minister's suggestion that it should stop the inquiry at its present stage pending the matter being referred to Parliament. To which Bryce replied that he would review the position when all outstanding accounts came in, but:

he will not pass any vouchers in excess of the sum voted, either for the services of a secretary or for any other purpose; nor is he even prepared to say that Parliament will be asked to vote any additional sum in connection with the Commission. (A9:9:47){FNREF|0-86472-060-2|21.2.5|5}

The financial harassment of the commission continued. During May and June they worked on collating the evidence and drafting a report. On 28 June they were told that the government would not authorise any further advances and the refund of expenses was refused.

21.2.6 Labouring under the handicap of no further funding and virtual ostracism by Bryce, the commission presented a greatly abbreviated report on 31 January 1881, shortly before the expiry of their two year warrant. They explained that because their work had been suspended by Bryce they were unable to present a detailed report on their uncompleted inquiry (A9:9:52).{FNREF|0-86472-060-2|21.2.6|6}

As to the Otakou and Kemp purchases, the commission found that Symonds, Kemp and Mantell must be regarded as pledging the Crown (in the case of the Otakou block by explicit stipulation, and in the case of Kemp's block by implication) to a reservation of a large proportion of the land for the exclusive benefit of the Maori owners. On the basis of their inquiry, "so far as completed", they considered:

a reservation for the benefit of the Native sellers of a large and permanent interest in the land ceded, which would be fairly and properly represented by one acre reserved for every ten acres sold to European settlers. (A9:9:53){FNREF|0-86472-060-2|21.2.6|7}

In coming to this conclusion they were influenced by certain pre-1840 arrangements made by the New Zealand Company and by certain hearsay statements by Mantell to the Native Affairs Select Committee that, in making the Otakou and Kemp purchases, "it was clearly intended that nominally one-tenth, but virtually one-eleventh was to be reserved for the Natives" (A9:9:52).{FNREF|0-86472-060-2|21.2.6|8} The commission appears also to have relied on a posthumous letter of Matenga Taiaroa and various Ngai Tahu petitions. The commission considered that the reserves set aside by Mantell were only intended as a present provision and that once settlement had taken place and funds were available additional reserves would be made.

As to the Akaroa block they thought it would properly come under the arrangement proposed with reference to the Otakou and Kemp blocks (A9:9:54).{FNREF|0-86472-060-2|21.2.6|9} Regarding the Murihiku block they considered the wording of the deed excluded the possibility of there being any arrangement for tenths. They indicated their inquiries had not been concluded. They noted that in at least two places, Waimatuku and Piopiotahi, "reserves were promised which were not made" (A9:9:54).{FNREF|0-86472-060-2|21.2.6|10}

As will be apparent from the tribunal's findings in relation to the purchases considered by the Smith-Nairn commission, we have come to quite different conclusions on most of the issues discussed. But this tribunal, unlike the Smith-Nairn commission has had the advantage of much more detailed evidence, not only from the Ngai Tahu claimants, but also the Crown. The Crown neither called evidence nor was represented by counsel before the Smith-Nairn commission. In the result we are satisfied that this tribunal is in a very much better position to come to an informed and balanced conclusion on the matters in issue.

21.2.7 The claimants in their grievance no 9 in Kemp's purchase claimed:

That the Crown aborted the Royal Commission of Smith and Nairn and suppressed its evidence to the detriment of Ngai Tahu. (W4)

There is little doubt that the then native minister, Bryce, was not well disposed towards the Smith-Nairn commission. In 1882 H K Taiaroa requested that the evidence given by Mantell to the commission be placed before the Native Affairs Committee including a petition from Ngai Tahu. It appears this was done, the evidence being read to the committee and translated to the Maori members. In addition, H K Taiaroa "asked for a very large amount of evidence of natives which had been taken before the commission".{FNREF|0-86472-060-2|21.2.7|11} This evidence was placed before the committee but it was said that Taiaroa neither looked at it nor asked that it be read to a committee.

Finding on Kemp grievance no 9

21.2.8 The tribunal is unable to find on the very limited information placed before it that the evidence was suppressed by the Crown and is not able therefore to sustain this grievance. Given the hostility or indifference of the government of the day, and in particular its native minister Bryce, to the Smith-Nairn Royal commission, its report virtually sank without trace. Not until substantial portions of the evidence received by the commission were produced to this tribunal by both the claimants and the Crown did it again publicly see the light of day. In the intervening 110 years it had been largely forgotten or ignored.

Native Affairs Committee report 1882

21.2.9 In 1882, the year following the Smith-Nairn report, H K Taiaroa and Ihaia Tainui petitioned the House of Representatives (A9:9:59).{FNREF|0-86472-060-2|21.2.9|12} The petition referred to the work of the Smith-Nairn commission which it said was dissolved before its work was completed. The petitioners complained that they had spent thousands of pounds and much time in seeking redress, and sought relief from Parliament for their grievances. The report of the Native Affairs Committee made on 25 August 1882 summarised the complaints of the petitioners under three heads.

- First, that when the South Island purchases were made there was an agreement that, in addition to cash payments for the land, ample reserves would be made for Ngai Tahu to live on. The committee's short response was that the reserves made at a Native Land Court sitting on 7 May 1868 were given in final settlement of all claims

under this head. The Ngaitahu Reference Validation Act 1868 was invoked as confirmation of this.

- Secondly, it was said by the petitioners that in regard to the Otago and Kemp purchases it was arranged that tenths would be set aside for the benefit of Ngai Tahu. To this the committee replied that there was no evidence to show that the claim for tenths was thought of until within the last few years.

- The third complaint related to schools and medical attention. The tribunal has referred to this in its earlier chapter on this subject.

The brevity and tone of this report confirmed the negative response which a year earlier had befallen the Smith-Nairn report.

Select committee report 1884

21.2.10 This was a report, dated 16 September 1884, on the petitions of Te Maiharoa and others. One group of petitioners led by Te Wetere laid claim on behalf of South Island Ngai Tahu to all the land in Canterbury and Otago inland of certain points, "at no great distance from the Eastern Coast of the island". The select committee reported this claim as being conclusively shown to be totally unfounded. They relied on the Kemp deed which they showed to Wetere who positively denied the identity of the deed and which he said had been fabricated for the occasion. But his own signature as one of the sellers appeared both on the deed of sale and on a receipt for the purchase money and Wetere ultimately acknowledged that this was so.

The committee also referred to a complaint by Te Maiharoa and others that reserves promised them at the time of the sale to the New Zealand Company had not been made and they asked the government to give them land to live upon. The committee's response was to say that the question of reserves was finally decided by the Native Land Court in 1868 when the Ngai Tahu claims were considered. The court had awarded such reserves as appeared to be sufficient in final satisfaction of all claims. The committee said the present petitioners were fully represented at the sitting of the court and the award was made with their knowledge (B3: 6/8).{FNREF|0-86472-060-2|21.2.10|13}

Once again the committee relied, as its 1882 predecessor had done, on the alleged final and binding effect of the 1868 Native Land Court award. It had no regard to the merits of Ngai Tahu's claims.

The Mackay Royal commission report 1887

21.2.11 In the preceding chapter on the South Island Landless Natives Act the tribunal has set out the terms of reference of Royal Commissioner Alexander Mackay, who received his warrant of appointment on 12 May 1886. We largely confined our discussion of the Mackay report of 5 May 1887 to his recommendations. We now refer more fully to his discussion of the background to the Kemp, Murihiku and Otakou purchases.

As previously indicated, Mackay's terms of reference required him to investigate all cases of landless Ngai Tahu and those cases where it was said the lands previously set apart were insufficient for their needs. For the first time in over 20 years, during which courts, select committees and a Royal commission were charged with inquiring into Ngai Tahu's principal grievances, a commissioner went to considerable trouble to record the background to the purchases, especially that of Kemp. While the report is thorough, it is somewhat discursive. The tribunal has necessarily been selective in choosing certain parts for reference. The report deserves to be read in full as the considered judgment of a man, by then a Native Land Court judge, with a wealth of experience in South Island Maori affairs over a considerable period.

Mackay's discussion of the Kemp purchase

21.2.12 In his report (M17:I:doc 1){FNREF|0-86472-060-2|21.2.12|14} Mackay first discussed Kemp's purchase in considerable detail, including events subsequent to the purchase in 1848.

Mackay considered that in the light of a despatch dated 25 March 1848 from Governor Grey to Earl Grey, referring to a visit by the governor to the South Island and also to the tenor of the directions given to Lieutenant-Governor Eyre concerning the purchase of the territory within the Ngai Tahu block, that the settlement with the Ngai Tahu was intended to be made on the following terms:

That ample reserves for the present and reasonable future wants should be set apart for the claimants and their descendants, and registered as reserves for that purpose; and, after the boundaries of the reserves had been marked out, then the right of the Natives to the whole of the remainder of the block should be purchased. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|15}

He then referred to the similar instructions that were given to Kemp. These, he said, were not followed. Instead of the reserves for Ngai Tahu being marked off as was contemplated, and then the remainder of the district purchased, the money was paid in the first place, and the reserves left to be determined at a future time. Mackay noted the result was that Ngai Tahu were placed:

entirely in the hands of the Government as to the quantity of land to be set apart;-a position that was taken advantage of to circumscribe the area of land allotted to them to the narrowest limits, as will be seen from extracts taken from the evidence given by the Hon. Mr Mantell before the Native Land Court in April and May, 1868, at the investigation of the ownership of the Native reserves set apart in Kemp's Purchase. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|16}

Mackay then recorded an extensive quotation from Mantell's evidence and at its conclusion observed:

Sufficient evidence has been adduced in the foregoing extract to show that the Natives, instead of being consulted in respect of the land they desired to retain, were coerced into accepting as little as they could be induced to receive. (M17:I:doc 1:3){FNREF|0-86472-060-2|21.2.12|17}

Mackay then concluded:

The extent of the land ultimately reserved for the Natives in 1848 was 6,359 acres, a quantity that can hardly be considered to come within the meaning of ample reserves for the present and future wants of a population of 637 individuals, the number of Natives then to be provided for within the block. The Governor was empowered under the terms of the deed of purchase to set apart additional lands for the Natives when the country was surveyed; but even that condition was only partially fulfilled in 1868, a period of twenty years after the date of the engagement. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|18}

The commissioner then proceeded to discuss the question of mahinga kai:

The Natives were under the impression that under the terms of the deed they were entitled to the use of all their "mahinga kai" (food-producing places); but they found, as the country got occupied by the Europeans, they became gradually restricted to narrower limits, until they no longer possessed the freedom adapted to their mode of life. Every year as the settlement of the country progressed the privilege of roaming in any direction they pleased in search of food-supplies became more limited. Their means of obtaining subsistence in this way was also lessened through the settlers destroying, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, draining the swamps, lagoons, and watercourses from which they obtained their supplies of fish. Their ordinary subsistence failing them through these causes, and lacking the energy or ability of supplementing their means of livelihood by labour, they led a life of misery and semi-starvation on the few acres set apart for them. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|19}

Mackay next referred to a despatch dated 7 April 1847 from Governor Grey to Earl Grey, in which the governor spoke of the need for Ngai Tahu to continue to have access to their wild lands and not be limited to lands for the purposes of cultivation as they had yet to develop sufficient agricultural skills. He pointed out that the same question was dealt with in a letter from Earl Grey to the Wesleyan Missionary Committee dated 13 April 1848.

Mackay expressed the view that it would not be possible to hold large tracts of land simply to enable the Maori to roam over them as previously, but, he said:

on the other hand the settlement of such lands would not have been allowed to deprive the Natives even of these resources without providing for them in some other way, advantages fully equal to those they might lose. (M17:I:doc 1:4){FNREF|0-86472-060-2|21.2.12|20}

Later in his report Mackay noted that the Native Land Court in 1868 had provided for certain fishery easements to be set apart for Ngai Tahu. These were 212 acres for fishery easements in Canterbury and 112 acres in Otago.

The fishery easements have for the most part been rendered comparatively worthless through the acclimatisation societies' stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the

Natives are debarred from using nets for catching the whitebait in season, nor can they catch eels or other native fish in these streams for fear of transgressing the law.

Another source of injury done to their fisheries is the drainage of the country. In olden times, before the advent of the Europeans and the settlement of the country, they were at liberty to go at will in search of food, but now, should they chance to go fishing or bird-catching in any locality where they have no reserve, they are frequently ordered off by the settlers. All this is very harassing to a people who not long since owned the whole of the territory now occupied by another race, and it is not surprising that discontent prevails at the altered condition of affairs and the want of precaution observed at the outset by their civilised guardians, who could alone foresee the consequent result of colonisation on their former customs and habits of life, to have either secured them these privileges, or else provided them with additional lands as compensation for depriving them of some of the most important means of subsistence. (M17:I:doc 1:8){FNREF|0-86472-060-2|21.2.12|21}

21.2.13 The commissioner referred to certain of Lord Normanby's instructions of 14 August 1839 to Governor Hobson. These required the Crown to conduct their dealings with the Maori people on principles of sincerity, justice and good faith. Nor must they be permitted to enter into injurious contracts. Nor must any land be bought which they required for their own livelihood. To secure compliance would be one of the first duties of their official protector. These instructions, Mackay noted, appeared to have been "entirely disregarded".

Mackay then observed:

The most important consideration that arises in the colonisation of a country inhabited by an aboriginal race like the Maoris is how to give them an equivalent for the lands they surrender, as a payment in perishable articles cannot be considered a fair equivalent for a possession so valuable as the soil. The most equitable mode of payment, and one that could have been easily effected at the time when the purchases were made from the Natives in the southern provinces of the Middle Island, would have been to have appropriated a certain proportion of the land ceded by them as a provision for their advancement in the scale of social and political existence. This system would have been the means of securing to them a property continually increasing in value, as well as practically conferring on them the advantages it was anticipated they would receive through the occupation of their former territory by the European community. (M17:I:doc 1:5){FNREF|0-86472-060-2|21.2.13|22}

Next followed a quite lengthy discussion by Mackay of the New Zealand Company policy of providing for Maori reserves in the form of tenths.

After further discussion of the Imperial government's views on land purchase policy and in particular the need to ensure that Maori were left with sufficient land to enjoy the enhancement in value arising from settlement around them, a view which was shared by the New Zealand Company as evidenced by its tenths policy, Mackay continued:

A perusal of the facts already narrated will furnish ample evidence that the fundamental principles laid down were not adhered to in acquiring land in the Middle

Island, neither in the reservation of sufficient land for Native purposes, nor in compensating the Native owners for the loss of a large share of their means of subsistence through depriving them of their hunting and fishing rights.

It surely could not be considered that the enhancement in value of a few thousand acres reserved for the vendors of Kemp's Block by the introduction of capital and labour into the colony, or the small payment of œ2,000 for the cession of over twenty million acres, was a sufficient recompense for so valuable a territory, even if measured by the amount of benefit the original owners had derived from it. (M17:I: doc 1:6){FNREF|0-86472-060-2|21.2.13|23}

What should have been done at the time, Mackay said, for the protection of the welfare of Ngai Tahu, was to have set apart not only sufficient land for their use and occupation, but also for the purpose of raising an independent fund to be devoted to objects connected with their general welfare, advancement, and improvement. He then referred to the lack of a protector:

Owing to the non-appointment of an official protector for the Natives in the south, as was promised them at the cession of their land, these people have suffered a serious loss, for, had any person been clothed with the necessary authority to look after their welfare in the early days, a great deal of the irreparable neglect they have suffered from the non-fulfilment of the promises made them at the cession of their lands would probably not have occurred. (M17:I: doc 1:7){FNREF|0-86472-060-2|21.2.13|24}

Having reached the prior conclusion that the Crown had failed to provide ample reserves for the present and future needs of Ngai Tahu, Mackay recommended that 100,000 acres be set aside for endowment purposes for Ngai Tahu in the Kemp block, together with a further 30,700 acres for their individual use and occupation in addition to that already reserved.

The Murihiku, Banks Peninsula and Otakou blocks

21.2.14 Mackay next discussed the Murihiku block. He applied the principles he had developed in his discussion of Kemp's purchase and recommended the provision of 40,000 acres for endowment purposes and an additional 15,412 acres for individual use and occupation.

As to Banks Peninsula, which he referred to as the Akaroa block, he said this had been treated as a portion of Kemp's purchase and he therefore found it unnecessary to make any additional recommendation.

Finally he discussed the Otakou block, and while he did not make any express recommendation, he made it clear that the New Zealand Company intended, and as he said, "fully admitted", that Ngai Tahu should have a tenth of the land set apart for them in the Otakou block in the same manner as was carried out in other New Zealand Company settlements.

The foregoing account does not do full justice to Commissioner Mackay's painstaking and comprehensive report. But it is sufficient to demonstrate that in the view of

perhaps the best informed European of the time, grave injustices had been done to Ngai Tahu which required to be remedied.

Reports of Joint Committees on the Middle Island Native Claims 1888, 1889 and 1890

21.2.15 As we have indicated in our previous chapter (20.3.1), Commissioner Mackay's report was coolly received by the legislature. In June 1888 the House of Representatives and the Legislative Council each appointed members to a joint committee to report on the claims of Ngai Tahu on account of unfulfilled promises and on the recommendations made by Commissioner Mackay in his 1887 report. The joint committee reported on 22 August 1888. The tribunal has discussed their report in the preceding chapter and need not refer to it here except to note (a) that the committee had insufficient time to complete its inquiries and (b) notwithstanding this, it concluded that no promises of reserves of land had been made which had not been fulfilled. The tribunal notes that the joint committee paid little regard to Commissioner Mackay's well-documented and convincingly reasoned report.

The 1889 joint committee was appointed to complete the work of its 1888 predecessor. Its conclusions are referred to in the previous chapter at 20.3.4. We simply note here that the committee concluded that promises as to residences and cultivations were fulfilled and the obligation to provide further land reserves had been substantially discharged. Notwithstanding this, it recommended a further inquiry to ascertain whether any individual Ngai Tahu had insufficient land on which to support themselves.

The 1890 joint committee, as we have earlier indicated in 20.3.5, discussed the question of tenths and again recommended further inquiry, as the evidence before it showed the existing holding of land by Ngai Tahu to be by no means sufficient.

Mackay's second Royal commission 1890-91

21.2.16 Somewhat surprisingly perhaps, in view of the Crown's cavalier attitude to Mackay's 1887 report, he was appointed a Royal commissioner for a second time on 10 December 1890. He was to carry out the inquiry recommended by the 1890 joint committee, as indicated in the preceding paragraph. In 20.4.2 of our chapter on "landless natives" we have summarised Mackay's findings. Here we note some further observations made by Mackay in his two reports. His reason for making two reports we earlier noted in 20.4.1.

21.2.17 In his first report (M17:I: doc 3){FNREF|0-86472-060-2|21.2.17|25} Mackay was critical of the observations in the joint committee's report of 10 September 1889 in which the committee suggested that the award of the Native Land Court might have reasonably met the demands arising out of the promises made in respect of the Kemp purchase. He expressed the view that "the trifling additions" made by the court "do not adequately carry out the original intention that the owners of Kemp's Block should be provided with ample reserves". He continued:

The quantity set apart in 1868 was merely a theoretical quantity, and was based on the subdivision of the Kaiapoi Reserve in 1862 into farms of 14 acres, much in the same

manner that the average quantity of 10 acres per individual was adopted by Mr. Commissioner Mantell in 1848 from an estimate furnished him by Colonel McCleverty, whom he had consulted on the matter, but this quantity was only intended for their present wants.

This was the cause that led to 14 acres being fixed in 1868, and that quantity was simply adopted for the purpose of putting all the Natives on the same footing, but the Court accepted it as a full extinguishment of the conditions of Kemp's purchase.

This view of the case, however, was not accepted by the Natives who petitioned Parliament in 1872. This petition was referred to a Select Committee, who reported as follows:- "That the evidence taken by the Committee in reference to the claim of the Natives of the Middle Island, though far from complete, leads them to the conclusion that these claims HAVE NOT HITHERTO HAD THAT CONSIDERATION WHICH THEY DESERVE."

Parliament was again petitioned by the Natives in 1874, 1875, 1876, and 1878; and in 1879 a Commission was appointed by the Governor. The Commissioners reported on the question, but no action was taken to give effect to the report. (M17:I: doc 3:3-4){FNREF|0-86472-060-2|21.2.17|26} (emphasis in original)

Mackay again referred to Lord Normanby's instructions to Hobson as to the principles to be observed to ensure Maori interests were fully protected when the Crown sought to purchase land from them. And again Mackay commented that:

a perusal of the circumstances connected with the acquisition of territory from the Natives in the South Island will indisputably prove that none of these principles were observed. (M17:I: doc 3:4){FNREF|0-86472-060-2|21.2.17|27}

The quality of the land

21.2.18 As to this Mackay reported:

The same statement was made everywhere that the land is insufficient to maintain the owners on it. Even those who owned comparatively large areas made the same complaint.

As regards the larger areas, the cause of this is attributable to several circumstances-namely, the inferior character of the soil, and the scattered manner in which the lands are situated. Only a few of the original reserves contain first-class land; nearly all the land comprised in the awards of the Court in 1868, including also the land given as compensation to the Kaiapoi Reserves for the acreage allotted out of their reserve to non-residents, is very inferior; consequently, although the acreage held by some of the Natives may appear to be large, the inferior character of the land more than counterbalances any seeming advantage they apparently possess. (M17:I: doc 3:4){FNREF|0-86472-060-2|21.2.18|28}

21.2.19 In his supplementary report of 16 July 1891 (M17:I: doc 3/2){FNREF|0-86472-060-2|21.2.19|29} Mackay expressed the mounting frustration of Ngai Tahu at the continued failure of successive governments to address their grievances:

The Natives urge that the principal part of their claim has not received the attention it deserves; and they point to the fact that the report of the Commission of 1879 established the most important points of their case, also that the report of the Commission of 1887 further supported their claims, and made certain specific recommendations for the settlement of the matter, which have not as yet been fully considered. They also pointed out that making provision for the landless portion of the community does not comprise all they are entitled to expect in fulfilment of the promises made to them in the past, nor can it be deemed to be a satisfactory compliance with the condition contained in the Ngaitahu deed-that the Governor would set apart additional land on the country being surveyed, which, according to Mr. Kemp, WAS TO BE DONE IN A LIBERAL MANNER, AND IN SUCH PROPORTIONS AS TO MEET THE WANTS AND PROVIDE FOR THE GENERAL WELFARE OF THE NATIVES.

They further urge that the expenditure they have been put to, amounting to several thousand pounds, in seeking redress for the non-fulfilment of the promises made to them, should be refunded by the Government, as it ought not in common justice to have been left to them to take action for the purpose of establishing their rights, as this duty devolved solely on the Government to perform. They state generally that this expenditure was one of the chief means of plunging them in debt, as all who had not money at command to contribute in aid of their cause sacrificed their cattle and crops for the purpose of acquiring funds.

They have never recovered from the sacrifice made on that occasion, and owing to this and other causes, is the reason why poverty is now lurking in their midst. (M17:I: doc 3/2:3){FNREF|0-86472-060-2|12.2.19|30} (emphasis in original)

Later Mackay commented further on the quality of a significant proportion of their reserves. He referred to general testimony obtained at all the settlements as to the inability of the people to maintain themselves on the land. One problem was that the land was not of a uniform quality. He annexed a return (schedule E) of the character of the soil in the reserves in Canterbury and Otago: 13,138 acres being good; 11,785 acres medium, and 8110 acres inferior. A large proportion of the lands awarded by the court in 1868 were either medium or inferior.

The Natives at Waitaki complained of the poor land reserved for them. Three sections were set apart there in 1868, comprising an area of 489 acres 2 roods 10 perches; more than two-thirds of this area is stony and unfit for cultivation. The only piece of good land has been destroyed by the encroachment of the river, and but a few acres now remain that can be utilised. The people are very badly off for food-supplies in consequence, and, to make matters more trying for them, they cannot fish in the Waitaki for eels or whitebait, owing to that river being stocked with imported fish; and the runholders will not allow them to go over their country to catch woodhens or other birds in season. Owing to this and other circumstances they are compelled to lead a life of semi-starvation. The young people find employment during the busy season, but cannot obtain work all the year round, consequently the small amount they can earn is soon exhausted in paying their debts, and nothing is left to maintain their families with while they are out of work.

The Natives of Taumutu are very badly off, owing to the poor character of the land reserved for them. A large proportion of the original reserve made in 1848 is very poor, and all the land that has been added since is decidedly inferior.

The 700 acres allotted to the residents under "The Taumutu Commonage Act, 1883," is only fit for pasturage purposes, and a very small proportion is useful even for that. (M17:I: doc 3/2:6){FNREF|0-86472-060-2|21.2.19|31}

Mackay concluded this report by saying he saw no reason to change the opinions expressed in his 1887 report, nor to change the recommendations for the settlement of the problems which he made in that report. Again, regrettably, Mackay's report of Ngai Tahu's major grievances fell on deaf ears. Instead the government, as we have seen in the previous chapter, in 1893 appointed Mackay and Smith to compile a list of landless Maori in the South Island and assign sections to them within nominated blocks. This protracted exercise, as the tribunal has shown, proved largely ineffective.

Native Land Claims commission 1920

21.2.20 On 8 June 1920 the government appointed another commission of inquiry to investigate 11 petitions and claims by Maori in different parts of New Zealand. Most were relatively recent, originating within the previous two or three years. Quite the oldest was the petition by Tiemi Hipi and 916 other Ngai Tahu to the House of Representatives with respect to the purchase of the Kemp block in 1848. It will be recalled from our previous chapter (20.5.3) that this petition was heard by the Native Affairs Committee in 1910. That committee referred the petition to the government for favourable consideration. Now, a decade later, some of Ngai Tahu's long-standing and frequently aired grievances were to be heard yet again. Seventy-two years had by now elapsed since the purchase in 1848.

21.2.21 The commissioners appointed were the then chief judge of the Native Land Court, R N Jones, and J Strauchon and J Ormsby. They reported on Tiemi Hipi's 1909 petition on 30 November 1920 (M17:II: doc 42).{FNREF|0-86472-060-2|21.2.21|32} It appears from the report that it was entirely based on the commission's reading of certain documents, principally the report and enclosures of the 1888 Joint Committee on Middle Island Native Affairs and the Mackay compendium of official documents and correspondence. There is no indication that any Maori, or indeed Pakeha, witnesses were heard or that counsel were present to assist. The commission's report therefore is not so much the result of an inquiry as a review of certain material which they chose to read. It does not appear that the commissioners read either of Judge Alexander Mackay's 1887 or 1891 reports which constituted the most comprehensive and authoritative accounts of the Ngai Tahu grievances over Kemp's purchase. We propose therefore to refer only briefly to certain aspects of the report.

21.2.22 The commission referred to the Ngai Tahu contention that they sold only the eastern seaboard. It concluded that whatever may have been intended, the deed covered all the land from the east to the west coast.

The decision of the Native Land Court in 1868 that the matter of granting reserves was purely within the discretion of the governor or the Crown, whatever the demands of Ngai Tahu, and that the court was bound by the evidence of the Crown witnesses,

was strongly criticised by the commission. "This was scarcely", they thought, "the kind of investigation contemplated by the Act of 1865." (M17:II: doc 42:36){FNREF|0-86472-060-2|21.2.22|33}

The commission held that the request of Ngai Tahu for further reserves should have been met "in a more liberal spirit". The question then, said the commission, was what would have been a liberal spirit? "Certainly not 14 acres per head." The commission went on to find:

The requisite reserves for the present and reasonable future wants of the sellers and their descendants, as arranged by Sir George Grey with the principal chiefs of the South Island; or Lieutenant-Governor Eyre's instructions to Mr. Kemp, to reserve ample portions for their present and prospective wants; or those to Mr. Mantell, that liberal provision be made both for their present and future wants, and due regard be shown to secure the interests of the Natives and meet their wishes, have never been carried out. (M17:II: doc 42:37){FNREF|0-86472-060-2|21.2.22|34}

The tribunal observes that this finding is in marked contrast to the findings of the Native Affairs Committee of 1882 (21.2.9), the select committee of 1884 (21.2.10) and the joint parliamentary committees of 1888 (21.2.15).

21.2.23 Having decided that Ngai Tahu were entitled to be compensated for this failure the commission then wrestled with the problem of the appropriate remedy. It saw the only fair way would be to put "the aggrieved party in the same position as if the contract had been fulfilled, by allotting proper reserves, ascertain what the present value of them would be, and measure loss accordingly" (M17:II: 42:37).{FNREF|0-86472-060-2|21.2.23|35} But the commission found this not to be possible:

At this date there is, however, no land which can be set apart, or, if there were, the setting of such apart would not be conducive to effective settlement of the Dominion. (M17:II: doc 42:36){FNREF|0-86472-060-2|21.2.23|36}

After deducting the Arahura block, the Banks Peninsula block, the reserves actually provided, and "absolutely valueless land", such as snowy mountain tops, waste beds of rivers, and precipitous cliffs from the 20 million acres arguably bought under Kemp's deed, the commission arrived at a figure of 12.5 million acres. They assessed this to be worth œ78,125. They then deducted the purchase price paid of œ2000 to give œ76,125; to this was added 72 years interest at 5 per cent-œ274,050-to give a sum of œ350,175. Finally, a sum was added in recognition of the heavy expenses incurred by Ngai Tahu bringing the total sum to œ354,000. This sum the commission recommended should be paid as full compensation. The tribunal notes that whereas the commission placed an 1848 value of œ78,125 on 12.5 million acres of Ngai Tahu land, Mr D J Armstrong, a valuer called by the Crown in this inquiry, placed an 1848 value of œ205,000 on only 220,000 acres of such land. There is an extraordinarily wide disparity between the two valuations.

Implementation of the 1920 commission recommendation

21.2.24 The appointment of the 1920 commission to inquire into Kemp's purchase was in response to the petition of Tiemi Hipi and 916 other Ngai Tahu in 1909. That

petition was referred by the Native Affairs Committee in 1910 to the government for favourable consideration. A decade was to elapse before the Crown took any action. This, typically, was to instigate yet another inquiry.

Once again the government received a positive recommendation. On this occasion that a lump sum of œ354,000 be paid Ngai Tahu as compensation for the Crown's failure to honour its obligation to provide "ample", or "liberal", reserves in respect of Kemp's purchase.

The tribunal notes that the 1920 commission took no account of the serious failure of the Crown to protect Ngai Tahu's mahinga kai; it ignored the failure to set aside land which Ngai Tahu wished to keep. Nor is there any indication in the report that the commissioners were aware of the impoverished condition to which generations of Ngai Tahu had been subjected by the Crown's failure to honour its Treaty obligations. The report is completely silent on the devastating effect of the Crown's failure to respect and protect Ngai Tahu's rangatiratanga over their lands and other taonga and the consequential break down in their social and economic structures, the dispersal of the tribe and their near disintegration as a people. The report makes no mention of the Treaty or the Crown's obligations under it.

21.2.25 It remained to be seen what action if any the Crown would take on this occasion to implement the commission's recommendation. Would it suffer the fate of earlier recommendations? In fact, 24 years was to pass before anything was done. In 1944 the Crown agreed to pay œ10,000 a year to Ngai Tahu for 30 years in settlement of its obligations under Kemp's purchase. In 1973 statutory provision was made for the payment of $20,000 per annum in perpetuity to Ngai Tahu as further recognition of the Crown's obligation. In the concluding part of this chapter the tribunal considers in some detail the Crown's submission to us that as a result of the Ngaitahu Claim Settlement Act 1944 and the subsequent 1973 legislation the claimants are barred or estopped from seeking any further relief in respect of Kemp's purchase. For reasons which we there give the tribunal is unable to accept the Crown's submission.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.3 The Tribunal's Findings

21.3. The Tribunal's Findings

21.3.1 In this chapter the tribunal has been concerned to relate the long history of efforts made by Ngai Tahu to persuade the Crown to meet its obligations under the various deeds of purchase. As noted, Ngai Tahu's grievances related principally to the failure of the Crown to:

- ensure ample reserves were left with Ngai Tahu for their present and future needs, including the claim for tenths;
- set aside land which Ngai Tahu made it clear they did not wish to sell;
- protect their right to mahinga kai; and
- investigate boundary and associated disputes.

The first formal inquiry was made in 1872 by a parliamentary select committee at the instigation of the newly elected member for southern Maori, H K Taiaroa, in 1871. This committee recognised that Ngai Tahu's claims had not previously had the consideration they deserved. It recommended a further inquiry. As we have seen, this was to be the dreary and unrewarding pattern for the next 50 or so years. Inquiry followed inquiry. Parliamentary inquiries were generally negative. The Crown ignored the well-documented recommendations made in 1887 and confirmed in 1891 by royal commissioner Judge Mackay. It took 10 years to follow up the favourable recommendation of the 1910 parliamentary committee. It took a further 24 years to, in part, implement the recommendation of the 1920 commission.

21.3.2 The tribunal cannot reconcile the Crown's failure for more than 140 years to meet its obligations to Ngai Tahu with its duty to act towards its Treaty partner reasonably and with the utmost good faith. Its record of prevarication, neglect and indifference over so long a period, in facing up to its obligations, cannot be reconciled with the honour of the Crown. Nor can the decision in 1944 to pay œ10,000 for 30 years and the later decision to continue a payment of $20,000 be regarded as more than a small contribution to its obligations to Ngai Tahu. The Crown's failure to meet its Treaty obligations to provide ample reserves, to protect Ngai Tahu's right to mahinga kai, to return or make compensation for its failure to leave with Ngai Tahu land they did not wish to sell, to reinstate Ngai Tahu's rangatiratanga in appropriate ways, has continued down to the present day, greatly to the detriment of the Ngai Tahu people.

Ngai Tahu Land Report

21 Parliamentary Select Committees,

Royal Commissions and Commissions of Inquiry

21.4 The Ngaitahu Claim Settlement Act 1944

21.4. The Ngaitahu Claim Settlement Act 1944

21.4.1 In her closing address for the Crown, Mrs Kenderdine submitted that the 1944 settlement with Ngai Tahu and the subsequent 1973 adjustment to that settlement, constitute a full and final settlement to claims arising from the Kemp purchase. Crown counsel relied on the submissions made earlier in our hearings by the then senior counsel for the Crown, Mr A Hearn, QC (M22).

We now consider Mr Hearn's lengthy submissions, on the Ngaitahu Claim Settlement Act 1944 (the 1944 Act). Although nowhere stated explicitly, the burden of Mr Hearn's submissions was that the claimants are in some way estopped or barred from seeking any further relief in respect of Kemp's purchase by the provision of the 1944 Act (M23).

21.4.2 In his submissions Mr Hearn briefly outlined the background circumstances or "factual matrix" in which the 1944 Act is said to have been enacted. His starting point was that part of the Report of the Native Land Claims Commission 1920 which, as we have seen concerned Kemp's purchase, and which resulted in a recommendation that Ngai Tahu be paid œ354,000 as full compensation.

The 1920 commission report did not attempt to chronicle the outcome of the many hearings by the various parliamentary select committees, Royal commissions and commissions of inquiry which we discuss elsewhere, (of which the 1920 commission was simply the last in a long series). Nor did the report so much as mention the Treaty of Waitangi.

While purporting to outline the "factual matrix" to the 1944 Act counsel ignored virtually all the relevant facts which date in a continuum from the time of the Kemp purchase, (some only of which are described in the 1920 commission report and which we have earlier related in considerable detail). Instead he took as his starting point the recommendation of the 1920 commission. He did not discuss the contents of the 1920 commission report. Thus, while quoting from an English case, Reardon Smith v Hansen [1976] 1 WLR 989, involving a contract for a charter party and sub-charter party to the effect that what the court must do is to place itself in thought in the same factual matrix in which the parties were, counsel has not himself attempted to do this.

Rather, he emphasised events subsequent to that report, and commented that the 1920 commission report recommendation "was not IMMEDIATELY given effect to..." (M22:2 emphasis added). This comment perhaps unconsciously reflects the sense of

time in Crown dealings with Ngai Tahu. The 1920 commission recommendation was not given effect to for 24 years, and then only in part.

21.4.3 Lengthy delays occurred while the Native Land Court determined the Ngai Tahu beneficiaries. Section 21 of the Native Land Amendment and Native Land Claim Adjustment Act 1928 stated that a decision had not yet been made as to whether the recommendations of the 1920 commission would be given effect to, but nevertheless constituted the Ngaitahu Trust Board "for the purpose of discussing and arranging the terms of any settlement of the claims for relief that may be come to".

In March 1930 Treasury advised the Prime Minister of the day that liability should not be admitted by the government but that, given the "false hopes" raised by the 1920 commission report, an ex-gratia payment of one lump sum of œ15,000 might be paid. In October 1935 discussions were held between representatives of Ngai Tahu, G W Forbes (Prime Minister and Minister of Native Affairs), H G Coates (Minister of Finance) and Sir Apirana Ngata, following which the coalition government made an offer of œ100,000 in full settlement. This was rejected by Ngai Tahu (M17:II: doc 43:9).{FNREF|0-86472-060-2|21.4.3|37}

In March 1938 F Langstone (acting Minister of Native Affairs) met a further Ngai Tahu delegation led by Mr E T Tirikatene, Member of Parliament. In his opening remarks the minister pointed out that:

we [the government], are not responsible for what has taken place in the past and my effort has been ...to try and get the people to stop looking backwards and forget the past and get their faces towards the future... (M17:II: doc 43:1){FNREF|0-86472-060-2|21.4.3|38}

At this meeting there was some discussion as to how the government might meet its obligation. Mr Langstone concluded by saying that:

when the Government has made up its mind it will take some legal form. You (Tirikatene), as the member will be informed and you will be able to inform your Maori people.(M17:II: 43:27){FNREF|0-86472-060-2|21.4.3|39}

This suggests that the government would unilaterally decide the amount and form of relief (if any) and then simply advise the Southern Maori member.

21.4.4 In fact, nothing further was done until 1944 when, on 4 December H G R Mason, Minister of Native Affairs, gave instructions for a Bill to be prepared providing for 30 successive annual grants of œ10,000 each. In introducing the Bill in the House of Representatives, Mr Mason said any approach to a settlement must involve fairly arbitrary estimates:

Therefore, a compromise of some sort is all that is open to us; and this compromise embodied in the Bill is satisfactory to the Maoris and to the Government. (M17:II, doc 49:755){FNREF|0-86472-060-2|21.4.4|40}

The Ngaitahu Claim Settlement Act 1944 was passed on 15 December 1944. Its long title was "An Act to effect a Final Settlement of the Ngaitahu Claim". Its preamble recited that:

WHEREAS the members of the Ngaitahu Tribe and their descendants have from time to time made certain claims in respect of the purchase of the Ngaitahu Block by Mr Kemp on behalf of the Crown in the year eighteen hundred and forty-eight; And whereas the persons now interested in the claims have agreed to accept the payment of the sum of three hundred thousand pounds in the manner hereinafter appearing in settlement of the aforesaid claims:

Section 2 of the Act provided:

In settlement of all claims and demands which have heretofore been made on His Majesty's Government in New Zealand and for the purpose of releasing and discharging His Majesty's said Government from any claims or demands which might hereafter be made on it in respect of, or arising out of, the purchase of certain lands in the South Island belonging to the Ngaitahu Tribe (the purchase aforesaid being that referred to under the heading of "South Island Claims-Kemp's Purchase" in the report of a Native Land Claims Commission contained in paper G.-5 of the Appendices to the Journals of the House of Representatives for Session I of the year nineteen hundred and twenty-one), there shall be paid to the Ngaitahu Trust Board, being the Board referred to in section sixty-five of the Native Purposes Act, 1931, without further appropriation than this Act, in each year for a period of thirty years and no longer, the annual sum of ten thousand pounds, payable on the first day of April in each year, commencing with the first payment on the passing of this Act as for the first day of April in the year nineteen hundred and forty-four.

21.4.5 There is very real doubt as to how much, if any, consultation with Ngai Tahu preceded the enactment of this legislation in 1944. Mr Tirikatene, during a later debate in 1946, is reported as saying:

The fund...was agreed upon during the dying hours of the 1944 session of Parliament. An amount of œ300,000 was offered, and I gave a promise to my people that whatever I was able to achieve in the way of a settlement offer would be submitted to them for THEIR acceptance. I have done that. Two proposals were put before the beneficiaries. I was not in the position of my predecessors of going out with a promise only. An amount of œ300,000, to be paid over a period of thirty years, had actually been provided for by statute, and the money was transferred to the Native Trustee to be held in trust until a second examination had been made by my people and an answer given....; I said that if they thought the amount was insufficient they could pass a motion accordingly, and we would return the money, but if they considered that they should accept the money and set up some form of administration to disperse it, they should move accordingly. I said that I wanted a majority opinion from my people. (M17:II: doc 51:49){FNREF|0-86472-060-2|21.4.5|41}

It is apparent from this statement by the minister that his consultation with the Ngai Tahu people took place after the passage of the Act. This is confirmed by the affidavit dated 13 October 1971 sworn by Mr R J Taylor, who was private secretary to the minister from 1943 to mid 1946. He recounted in detail the discussion between the

Prime Minister (Mr Fraser) and Sir Eruera Tirikatene which took place in his presence in the later stages of the 1944 parliamentary session, and states that, when consulted by the Prime Minister, he indicated that he (Taylor) considered the minister's proposal of 30 annual payments of œ10,000 would be unacceptable to the Ngai Tahu people (M23:49).{FNREF|0-86472-060-2|21.4.5|42} Mr Taylor went on to testify that he was unaware of any meetings held subsequent to such meeting with the Prime Minister and prior to the passing of the 1944 Act. In his capacity as private secretary to the minister, Mr Tirikatene, he did not attend any meetings called in connection with the claim. He expressed his certain opinion that at the time of enactment of the 1944 settlement Act there had not been acceptance of the settlement by the Ngai Tahu people (M23:49-50).{FNREF|0-86472-060-2|21.4.5|43}

It does appear, however, that during the period 1944-46 Tirikatene did consult with Ngai Tahu in their various localities, and that a majority gave retrospective approval to the 1944 settlement which by then of course was a fait accompli. The comments of Mr Matiu Rata, Minister of Maori Affairs, in 1973 during the debate on clause 3 of the Maori Purposes Bill, which provided for a payment to the Ngai Tahu Maori Trust Board of $20,000 per annum in perpetuity, are of interest. This Bill was the government's response to a petition by Mr Frank Winter, on behalf of the Ngai Tahu Maori Trust Board, and representations by the Ngai Tahu people.

Arising from a petition heard last year it became obvious to members of the present Government that the SO-CALLED SETTLEMENT OF 1944 WAS BY NO MEANS TO BE REGARDED AS A FAIR AND FINAL SETTLEMENT. Members of the then Maori Affairs Committee heard leaders from the Ngaitahu people explain how, when the settlement was proposed, they had accepted it on the basis that in years to come a more enlightened determination would prevail. The committee heard valuation and statistical evidence in relation to the claim. Taking into account the fluctuation in purchasing power, and more particularly the view expressed in 1921 by a Royal Commission headed by Chief Judge Jones of the Maori Land Court, the Government considers that the matter ought to be settled in a more reasonable way. (M23:54){FNREF|0-86472-060-2|21.4.5|44} (emphasis added)

Later, during the debate on the second reading of the same Bill Mr Rata said this:

The other matter concerns the continuation of payments to the Ngaitahu Trust Board. By agreement in 1944, the payment ceased as from 1 April this year. After considerable thought it was felt that there was a case, and, while the board members, and in particular the beneficiaries, may feel that this of itself can never be considered final and absolute payment, it is nevertheless a realistic attempt to meet what has been a long outstanding problem and one that needs to be resolved in the interests of people concerned and of the country generally. (M23:59){FNREF|0-86472-060-2|21.4.5|45}

Several points emerge from the minister's statements:

- the government accepted that the "so-called settlement of 1944" was by no means to be regarded as a fair and final settlement;

- Ngai Tahu accepted it on the basis that in the years to come a more enlightened determination would prevail. As indeed proved to be the case;

- such acceptance was given after the passage of the Bill and at a time when Ngai Tahu's only option was to reject it and have the Act repealed, thereby subjecting Ngai Tahu to very considerable pressure to agree and making it difficult, if not impossible, to exercise a free choice in the matter;

- taking into account fluctuation in purchasing power and the views expressed in the 1920 commission report the government considered the matter ought to be settled in a more reasonable way; and

- the minister recognised that neither the board nor the beneficiaries might feel that the new proposal would be considered a final and absolute payment. Nevertheless he saw it as a realistic attempt to meet a long outstanding problem.

21.4.6 It was against this limited "factual matrix" that Mr Hearn submitted that in some way Ngai Tahu should be irrevocably bound by the provisions in the 1944 Act and the Maori Purposes Amendment Act of 1973 (the latter providing the payment of $20,000 per annum in perpetuity), and that Ngai Tahu are estopped or barred from making any claim for further or other relief under the Treaty of Waitangi Act 1975. Thus, he submitted, there can be no escape from a finding that it was the intention of the parties that such provision (the payment of $20,000 in perpetuity) should be in full and final settlement (M22:18).

At least two observations should be made on this submission. First, it is clear that the minister in charge of the legislation in fact recognised that the board, and in particular the beneficiaries, might not consider the new proposal to be "a final and absolute payment". While doubtless the government of the day hoped it had found a final solution to a long-standing grievance, it did not enact a new provision making the 1973 payment a full and final settlement. Second, and more importantly, there was no suggestion that the provision was intended to be a settlement of the Crown's obligations under the Treaty of Waitangi. The Treaty was not in issue. It was not even mentioned. It is not referred to either in the 1920 commission report, or by any of the ministers. The Treaty of Waitangi Act 1975 which confers the jurisdiction for the present claims before the tribunal, was to be two years in the future.

What in fact happened was that a unilateral settlement was reached in 1944 which was later retrospectively accepted as a fait accompli. Subsequent events, and submissions of the Ngai Tahu people, showed that settlement to be inadequate. The government changed its terms. The responsible minister, far from characterising it as final and irrevocable, recognised that the Ngai Tahu board or the beneficiaries might not consider it to be a "final and absolute payment", although no doubt the government hoped they had heard the last of it.

21.4.7 Mr Hearn, in dealing with the 1944 Act, did so on the footing (without necessarily accepting) that there was a breach of Treaty principles arising out of the Kemp purchase, in that the Crown did not ensure that the people were left with sufficient land for their maintenance, support and livelihood. He thought it fair to accept this as having been recognised by subsequent events. The question he proceeded to address was whether the principles of the Treaty have any relevance to, or can be said to be breached, by the 1944 Act and subsequent events.

However, he then proposed that an appropriate way might be first to consider all the transactions without bringing the Treaty principles into account. Counsel suggested the broad issue to be whether it could be said there was equitable fraud or whether there was an unconscionable bargain between the parties. We would say at the outset that this question, assuming it is useful and relevant, could only be decided after a comprehensive review of all the events, from and including the Kemp purchase in 1848, and not from the arbitrary point of a commission report in 1920, and even less so from the passage of an Act in 1944.

The tribunal was referred to certain dicta from two commercial cases. One, Blomley v Ryan (1956) 99 CLR 362, involved the court in setting aside a contract for the sale and purchase of a grazing property on the grounds that it was an unconscionable bargain and such that a court of equity would not enforce. In the other, Commercial Bank of Australia v Amadio (1983) 57 ALJR 358, an order was made setting aside a mortgage and a guarantee. The factual situations in each of these cases, involving as they do commercial contracts, are far removed from the present, which is not concerned with a contract but with legislative enactments.

Mr Hearn contended, from what he described as the vantage point of the Crown, that the parties reached an agreement in 1944 and a statute was drawn up and passed reflecting that agreement "as the Crown saw it" at the time. As indicated earlier, the weight of evidence strongly suggests that there was not, in fact, an agreement with Ngai Tahu at the time the 1944 Act was passed. While the Crown may have thought that to be the position, we believe that view was mistaken. Be that as it may, Mr Hearn further pointed to the subsequent petition by Mr Winter on behalf of the Ngai Tahu Maori Trust Board, and the consideration by parliamentary committees, and contended that, "what was asked was given and that arrangement was reflected in a statutory amendment passed by members of the House of Representatives" (M22:26). He submitted that "in ordinary circumstances" there could be no grounds whatsoever for setting aside such a transaction and a party could be estopped from further claims. Mr Hearn cited from two further commercial cases in which parties to contracts were held to be estopped from attempting to escape from certain contractual provisions (Charles Rickards Limited v Oppenheim [1950] 1 KB 616 and Coupe v J M Coupe Publishing Limited [1981] 1 NZLR 275). We do not find these contract cases helpful in considering Mr Hearn's submission that Ngai Tahu are in some way estopped by the 1944 Act or the 1973 amendment from pursuing a claim under the Treaty of Waitangi Act 1975 and in particular its 1985 amendment.

21.4.8 While the 1944 Act purported to release and discharge the Crown from any further claims and demands, it was clearly not regarded as binding on the Ngai Tahu people. On the contrary, the Crown subsequently conceded, and it was explicitly stated by the responsible minister, M Rata, "that the so-called settlement of 1944 was by no means to be regarded as a fair and final settlement." The same minister when speaking to the 1973 amendment explicitly recognised that the board members, and in particular the beneficiaries, might feel that this of itself could never be considered a final and absolute payment. We are not dealing here with a contract but with an attempt by government to right past wrongs for which there was, at the time, no legal remedy. As events showed, equity and justice required the Crown in good conscience to review the 1944 Act. Who can say (the Treaty apart, for purposes of this discussion), that the Crown might not be persuaded to do so again. Consider for

instance, the quite unforeseen high rates of inflation since 1973 which must have seriously devalued the real worth of the provision made in that year and in perpetuity. We see no possible basis on which Ngai Tahu may be held to be estopped by either the 1944 Act or the 1973 amendment.

We have dealt with the foregoing argument from Mr Hearn, which ignored Treaty principles, because he raised them. The tribunal considers they are lacking in substance and of no real assistance to us. Our duty is to apply Treaty principles.

21.4.9 Counsel chose to address a very brief argument only on the Treaty principles as such. In this context the only Treaty principle to which he appeared to advert is the duty of Treaty partners to act reasonably and in the utmost good faith towards each other. Directing attention to the 1944 settlement and subsequent events, including the granting of relief on the 1973 petition, he asked where in the evidence before the tribunal is there material to suggest any lack of good faith on the part of the Crown?

There is a basic fallacy in this approach to which we have already adverted. Mr Hearn has sought to isolate his whole discussion of the 1944 Act and subsequent legislative acts from all that happened before 1920. In short, he has excluded more than 70 years of relevant historical events. These we have dealt with at length in an earlier chapter.

But if we confine our consideration to the limited "factual matrix" proposed by counsel the following facts are pertinent:

The 1920 commission report found there to be a clear case for a substantial award to the Ngai Tahu people. It took the Crown almost 25 years to decide to take some action on it. It is legitimate to ask whether this was consistent with a Treaty partner's obligation to act reasonably and in good faith towards the other. Was it reasonable to procrastinate for a quarter of a century (a depression and war intervening notwithstanding) before providing some relief? Is that consistent with good faith? But the inordinate delay was compounded by a refusal to implement the commission's recommendations. Ngai Tahu had been deprived of the sum of œ354,000 ($708,000) for some 24 years. No interest was paid. Instead the government decided to pay 30 annual instalments of œ10,000 ($20,000). The 1944 value of such an arrangement being substantially less than the nominal amount of œ300,000 ($600,000), which in turn was substantially less than the œ354,000 ($708,000) awarded by the 1920 commission, and even less had interest been paid on that sum over the 24 year period. Since 1973 inflation has severely eroded the value of the annual payments of $20,000.

Mr Hearn overlooked"as did the 1920 commission"that an important part of the Ngai Tahu complaint about the Kemp purchase related to mahinga kai. Is the so-called settlement of 1944 and its modification in 1973 to be conclusive of that claim also when it was never considered? Is it to be conclusive of the claim for reserves and the return of Crown land? Is the Crown acting reasonably and in good faith in seeking to bar the Claimants from any relief under the Treaty of Waitangi Act 1975, an Act which was not even in existence when the events of 1944 and 1973 occurred? Can Ngai Tahu be estopped from making a claim under an Act of Parliament which, for the first time in 1985 conferred on them a right to make claims based on breaches of the Treaty going back to 1840, by events to which they were a party before those statutory rights were conferred? In our view such a proposition, which seems to be

implicit in Mr Hearn's lengthy submissions, is not only untenable but difficult to reconcile with good faith on the part of the Crown. We confirm what we said in the Orakei Report (1987) 184:

it would be contrary to equity and good conscience for the Crown to rely on undertakings given at the time on behalf of the elders as foreclosing the possibility of claims being made for the remedy of grievances for which no legal provision existed in 1978 but for which provision was later made in 1985.

Counsel submitted that, whatever happened before, "what happened in 1944 and subsequently, was not or is not, inconsistent with the principles of the Treaty" (M22:29). He argued that the claim then made (in 1944 and presumably later) was not treated as if no legal right existed to make such claim. Accordingly, he submitted the circumstance that such a claim can legally be made now does not alter the position. In our view these submissions are also untenable.

- They suggest that it is appropriate to deal with the 1944 Act and later events in total isolation from events originating in 1848 and continuing since then.

- We do not accept that the Ngai Tahu claim for action by the Crown on the 1920 commission was made in pursuance of a legal right to make such a claim. This assumes that in some way their claim was enforceable at law which clearly it was not. Nor indeed was it enforceable in a court of equity. The Crown, after a quarter of a century, finally granted some relief because it found the will to do so, having long recognised that in equity and good faith it should so do.

21.4.10 We should perhaps consider one final point made by Mr Hearn in this context. He asked if it is not possible for a claim to be settled as purported to be done in 1944 and subsequently, how is it within the power of this tribunal to make a recommendation, which if accepted by the Crown, could be a settlement of this claim? (M22:30)

Let us accept for the purposes of the argument that there was a settlement in 1944 and subsequently which was intended to be binding and irrevocable. Our first observation is that if it is later shown to have been inequitable then the Crown, in good conscience, may well decide to re-open it. In the same way, if Crown implementation of a tribunal recommendation is later shown to be inequitable, the Crown might subsequently be persuaded to grant further relief. We suggest there is a clear distinction between a "settlement" made before the enactment of the Treaty of Waitangi Act 1975, and without reference to or in pursuance of the principles of the Treaty on the one hand, and actions of the Crown which fully implement recommendations of the tribunal following findings and a report by the tribunal under the 1975 Act. Assuming the tribunal bases its findings on thoroughly researched evidence and the correct application of Treaty principles, and the Crown implements those findings, they are likely to be invoked by the Crown as a complete answer to a subsequent claim on the same set of facts. There may be an exceptional case when new and highly relevant facts are discovered or new or extended Treaty principles are developed which might justify a review. In that event, the Crown might refer the matter back to the tribunal. We would expect such cases to be rare. Given the virtual impossibility of ensuring that all material facts have been discovered in all cases at a

particular point of time the need for a review cannot be altogether excluded, unless, of course, the Crown chose to legislate to this end. But we would expect the need for a review in such circumstances to arise only infrequently. In those cases where a settlement based on tribunal findings is freely negotiated between claimants and the Crown we would anticipate such settlements, except in rare instances, to be binding on both parties.

21.4.11 We have found that Ngai Tahu is not barred by the Ngaitahu Claim Settlement Act 1944 or the Maori Purposes Amendment Act 1973 from pursuing its claim in respect of Kemp's purchase. But, when seeking compensation from the Crown for the loss arising from breaches of Treaty principles which this tribunal has found, clearly full regard must be had to the payments made by the Crown since 1944 to the present time. It will be a matter for negotiation between Ngai Tahu and the Crown as to how far such payments have gone to compensate the iwi for the Crown's failure to meet its obligations in respect of this purchase and the consequential ongoing and cumulative loss suffered by Ngai Tahu since 1848.

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Ngai Tahu Land Report

22 Ngai Tahu's Search for Redress and the Crown's Response--An Overview

22.1 Introduction

Chapter 22

NGAI TAHU'S SEARCH FOR REDRESS AND TEH CROWN'S RESPONSE - AN OVERVIEW

22.1. Introduction

In chapters 5 to 16 the tribunal reviewed the eight Crown purchases from Ngai Tahu. We concluded that these resulted in the near total denial of Ngai Tahu's rangatiratanga, their confinement to a handful of totally inadequate reserves, and the inevitable tribal disintegration and impoverishment of a proud and loyal tribe. In chapter 17 the tribunal has found that the Crown failed to take appropriate measures to preserve and protect Ngai Tahu's mahinga kai and to provide sufficient reserves to allow Ngai Tahu to participate in the developing economy.

In chapters 18 to 21 we have investigated the consequences of the purchases for Ngai Tahu, their unremitting search for redress and the Crown's response to Ngai Tahu's pleas for justice-for the Crown to honour its obligations under the various purchases.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

22 Ngai Tahu's Search for Redress and the Crown's Response - An Overview

22.2 The Crown's Response

22.2. The Crown's Response

22.2.1 How did the Crown respond? In 1872 the first parliamentary select committee met, came to no final conclusion and called for further inquiry. From then on through to 1920 at least 17 inquiries were held into Ngai Tahu grievances as to unfulfilled promises or their landless state. Most of these inquiries were carried out by parliamentary select committees, in some instances joint committees of both Houses. In only one case, in 1910, did a parliamentary select committee make a recommendation that government accord a Ngai Tahu petition favourable consideration. No action was taken by the Crown on that recommendation for 10 years, and then only to constitute another inquiry. In all other cases the select committees either rejected Ngai Tahu's grievances or proposed that a commission of inquiry investigate them further. It is a story of seemingly endless delay and procrastination.

22.2.2 The Smith-Nairn Royal commission was appointed in 1879. In 1880, after carrying out an extensive investigation, its funds were cut off. Its attenuated report recommending substantial relief to Ngai Tahu was completely ignored by the Crown. Its evidence was left to gather dust in Parliament's vaults.

In 1886 the first Mackay Royal commission was appointed. Judge Mackay made a thorough investigation and wrote a comprehensive and persuasive report. He found grave injustice had been done to Ngai Tahu. He recommended substantial relief. His report was ignored; none of its recommendations were implemented. Notwithstanding this, in 1891 Judge Mackay was again appointed a Royal commissioner to inquire further into the condition of the Ngai Tahu people and to ascertain if any of them had insufficient land. This he had already done in 1886-87.

Mackay reported that 44 per cent of Ngai Tahu had no land, 46 per cent had insufficient, and only 10 per cent had sufficient land, that is, 50 acres or more. Mackay confirmed the views and recommendations he had made in his 1887 Royal commission report for a substantial endowment and significant grants of additional land for the Canterbury and Murihiku people.

The Crown's response to this was to appoint yet another commission, comprising Judge Mackay and Surveyor-General Smith, to compile a list of landless Maori and assign sections of up to 50 acres to them within government allocated blocks. This took nearly 12 years, partly because of the size and complexity of the task, but more importantly because the commissioners were obliged to do virtually all the work in

their own time, outside official hours. Such was the low priority assigned by the Crown to this work. The result was the South Island Landless Natives Act 1906.

Unfulfilled promises as to schools, hospitals and general welfare

22.2.3 The tribunal proposes briefly to consider the outcome of each of the three broad heads of Ngai Tahu grievances. We look first at the promises made on behalf of the Crown as to schools, hospitals and general welfare. The evidence shows that such promises were made to Ngai Tahu by at least Mantell, in respect of both the Kemp and Murihiku purchases.

Schools

22.2.4 Detailed evidence from Crown witness Dr Barrington, a university reader in education, catalogued the history of neglect and occasional partial compliance with its obligations in the provision of schools for Ngai Tahu. The tribunal has concluded that it is not possible to find the Crown's record in this respect, in the three decades following the Kemp and Murihiku purchases, as being consistent with good faith and honourable dealing with its Treaty partner.

Health

22.2.5 Another Crown witness, historian Tony Walzl, provided a detailed account of government health measures for Ngai Tahu over the period 1850 to 1890. In response to a claim on behalf of the claimants that the Crown's record was "half-hearted" at best, Mr Walzl commented that despite the short-term benefit which Ngai Tahu gained, "the Crown efforts in both education and health were woefully inadequate" (R7:122). The tribunal subscribes to this view.

General welfare

22.2.6 In an appendix to his main report, Professor Ward discussed Lord John Russell's 1841 instructions to Hobson to ensure there was a fund for Maori purposes of not less than 15 per cent, or more than 20 per cent, of the revenue from the sale of Crown lands. It was this fund which paid the costs of the protectorate until its abolition by Grey in 1846. The Crown historian Mr David Armstrong later provided details of the Crown's policy with regard to endowments in the period 1840 to 1860. This was followed by a commentary by Mr Tony Walzl on how this policy related to Ngai Tahu purchases. This and related topics have been discussed by the tribunal in chapter 5. As we have indicated, the figures provided to us, although far from complete, suggest an expenditure directly on Ngai Tahu of œ4 in 1850, œ10 in 1851 and œ17 in 1852. Only in the year 1859-60 was a significant sum spent on the tribe, with 1058 being of direct benefit to Ngai Tahu (X6:appendix 2:table 5). These expenditures were for welfare matters other than schools and hospitals. It is a sorry record. And yet, as we showed in our discussion of schools and hospitals, Governor Browne in 1857 informed the British colonial secretary Labouchere, that from the date of the Treaty of Waitangi:

promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial government have been held out to the Natives to induce them to part with their land. (O21:58){FNREF|0-86472-060-2|22.2.6|1}

22.2.7 Just as the Crown failed to meet its obligations in respect of schools, hospitals and other medical services, so it largely failed to honour its promises to care for the general welfare of Ngai Tahu and offer them its protection. The tribunal reiterates its finding (19.5) that the Crown in acquiring land from Ngai Tahu was obliged by the Treaty to honour promises made by the Crown's representatives to induce them to sell their lands. Such promises should have been fulfilled by the Crown and fulfilled promptly. Good faith, fair dealing and the honour of the Crown required no less. Infrequent and long-delayed efforts were made partially to meet the Crown's obligations. But to this day Ngai Tahu have not been compensated for the failure of the Crown to meet its Treaty obligations in respect of these various promises.

Landless Ngai Tahu

22.2.8 The tribunal has chronicled the long, frustrating, and in the end largely unrewarding record of the Crown to make some amelioration of the distressing situation of so many Ngai Tahu rendered landless by the Crown. When, finally, the South Island Landless Natives Act was passed in 1906, it was found that the landless and near landless Ngai Tahu had been allocated land in some of the remotest areas of the South Island; land substantial parts of which was unsuitable for settlement. Little if any of such land was viable in lots as small as 50 acres. The climate was excessively wet and access in some areas virtually impossible. No wonder so few Ngai Tahu took up the land. Yet the Crown, while well aware of all this, persisted with what had every appearance of a hollow gesture. Nor, when the Gilfedder and Haszard commission of inquiry in 1914 demonstrated the unsuitability of much of the land, did the Crown take remedial action. In the tribunal's view the facts speak for themselves. The tribunal is unable to reconcile the Crown's action (or inaction) with its duty to act in the utmost good faith towards its Treaty partner. The South Island Landless Natives Act 1906 and its implementation cannot be reconciled with the honour of the Crown. The Crown's Treaty breach has yet to be remedied.

Wider grievances of Ngai Tahu

22.2.9 In our preceding chapter on parliamentary select committees, Royal commissions and commissions of inquiry we considered how the Crown had addressed Ngai Tahu's wider grievances. In particular the tribunal was concerned with the failure of the Crown to ensure Ngai Tahu were left with ample reserves for their present and future needs; their claim for tenths; their grievance that lands they sought to retain were acquired by the Crown; their claim to mahinga kai; and their dispute over certain boundaries and related matters.

As with schools and hospitals and provision for landless Ngai Tahu, so with these grievances the Crown's response was characterised by a series of inconclusive hearings, often by parliamentary select committees. These led in turn to first the Smith-Nairn Royal commission in 1879-81, and then the two Mackay Royal commissions in 1887 and 1891 respectively, whose recommendations for substantial relief were totally ignored by the Crown.

The Crown similarly ignored the favourable recommendation of the Native Land Committee in 1910. It did nothing for 10 years when it referred the 1909 petition of Tiemi Hipi and 916 other Ngai Tahu to yet another body, this time the 1920 commission of inquiry, chaired by the chief judge of the Native Land Court, R N Jones. The commission's favourable recommendation, which related solely to Kemp's purchase, was not acted upon for a further 24 years and then only in part. In all, 35 years had elapsed since Tiemi Hipi petitioned the House of Representatives and the Crown sponsored legislation in 1944. The tribunal has carefully considered but not been persuaded by a submission from the Crown that the claimants are in some way estopped from further relief by the Ngaitahu Claim Settlement Act 1944.

22.2.10 As we have said (21.3.2) the tribunal cannot reconcile the Crown's failure for more than 140 years to meet its obligations to Ngai Tahu with its duty to act towards its Treaty partner reasonably and with the utmost good faith. We reiterate that its record of prevarication, neglect and indifference over so long a period cannot be reconciled with the honour of the Crown. While the payments under the 1944 Act and its subsequent amendment constitute in small measure a recognition of the Crown's obligation to Ngai Tahu, it is no more than that. And in respect of one purchase, albeit the largest, only.

22.2.11 Crown counsel and the several historians and other witnesses called by the Crown made a major contribution through extensive and rigorous research to uncover the facts. Crown counsel and various witnesses freely conceded that the Crown was in default both in its Treaty obligations in respect of the various purchases, especially on the question of inadequate reserves, and in its failure adequately to respond to legitimate post-purchase grievances by Ngai Tahu. The record shows that Ngai Tahu time and time again sought relief for the grave injustices it had incurred at the hands of the Crown, the last occasion being a petition in 1979 on behalf of the Otakou people. Time and time again, Ngai Tahu were rebuffed by the Crown. Yet another unproductive inquiry would be called for. Decade after decade have passed. Generation after generation of Ngai Tahu, largely landless, impoverished, their rangatiratanga unprotected, have sought relief with little success.

Ngai Tahu Land Report

22 Ngai Tahu's Search for Redress and the Crown's Response - An Overview

22.3 Conclusion

22.3. Conclusion

This tribunal, with the help of counsel and a great many witnesses, an extensive historical record, and lengthy submissions, has attempted to conduct a comprehensive, fair and objective inquiry into Ngai Tahu's grievances. They are not new grievances. They have their origin in the failure of the Crown to treat fairly and honourably with Ngai Tahu both at the time of the purchases and subsequently over almost a century and a half. With the exception of the disputed boundaries Ngai Tahu have established their major land and associated grievances. They are entitled to speedy and generous redress if the honour of the Crown is to be restored. The tribunal would urge, in the interest of all New Zealanders, that the Crown at long last repays its debts to Ngai Tahu. Surely Ngai Tahu have waited long enough.

References

{FNTXT|0-86472-060-2|22.2.6|1}1 T Browne to Labouchere, 9 February 1857, G1/43, NA, Wellington

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Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.1 Introduction

Chapter 23

EVIDENCE OF OTHER INTERESTED BODIES

23.1. Introduction

At its first hearing the tribunal publicly announced that it would give all persons or organisations wishing to give evidence the opportunity to do so. At the time several government departments and state-owned corporations as well as other corporate bodies, farming interests and Maori organisations sought and were granted leave to appear and be heard. Subsequently, on 30 June 1988 the Treaty of Waitangi (State Enterprises) Act 1988 was passed and was deemed retrospectively to have come into force on 9 December 1987. Section 4 of this Act amended the Treaty of Waitangi Act 1975 by inserting a new provision, section 8C. This section restricts entitlement to appear and to be heard in relation to land transferred to or vested in a state enterprise to those persons named in the section. State-owned enterprises are excluded.

The tribunal on 11 November 1988 issued a direction (O54) that while the new section 8C(2) of the Treaty of Waitangi Act expressly excludes (inter alia) the application of section 4A of the Commissions of Inquiry Act 1908 which regulates those persons entitled to be heard, it does not exclude section 4B of that Act. Section 4B empowers the tribunal to receive as evidence any statement, document, information or matter that in its opinion might assist it to deal effectively with the subject of the inquiry. The tribunal directed that if a state-owned enterprise was able to help the tribunal in this way the tribunal might well authorise it under section 4B provided such evidence did not touch upon any question relating to the return of land to which section 8A applies.

Following this direction and in the absence of any objection from the claimants or the Crown the tribunal received evidence from certain state-owned enterprises. In addition the tribunal heard from other interested organisations. This evidence came from various disparate groups or organisations comprising high country pastoral lessees members of Federated Farmers, the Federated Mountain Clubs, NZ Deerstalkers Association, the North Canterbury Catchment and Regional Water Board and the Department of Conservation.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.2 High Country Pastoral Lessees

23.2. High Country Pastoral Lessees

23.2.1 Mr E Chapman appeared as counsel for Federated Farmers in respect of Crown pastoral leases (P22(a)). His submissions concentrated on what he termed the "inappropriateness" of using the Crown's interest in pastoral leasehold land as a remedy. He said this was of very real concern to all pastoral lessees, given the "direct and onerous role" the Crown is said to play in managing high country lands.

Pastoral leases were created under the Land Act 1948. They succeeded pastoral licences, which had several disadvantages, including no security of tenure. As a result, Mr Chapman told us, some licensees tended to exploit the pasturage immediately before the termination of the licence to the detriment of erosion control. Without permanent tenure there was little incentive to improve land and buildings. The new pastoral leases removed these disadvantages. Leases are registered under the Land Transfer Act and are perpetually renewable at 33 year intervals, with rental reviews at 11 year intervals. The leases are freely transferable and may be used as mortgage security.

Mr Chapman advised that the obligations on the Crown as lessor are such that, while they produce revenue for the Crown, they cost the Crown far more to administer than the total received by way of rent. The Crown's interest is confined to the unimproved value of the land. All improvements, including buildings, fencing, improvements to pasture, drainage and water reticulation are the absolute property of the lessees. The lessees value their association with the Crown and its ability to participate in the management of the land. They wish to retain the Crown as lessor, in keeping with their present contractual arrangements. They submitted that the assignment of the Crown's interest in pastoral leases would not ensure a sound economic base for the future prosperity of Ngai Tahu.

23.2.2 The principal evidence in support of Mr Chapman's submissions came from Mr Hamish R Ensor in his capacity as chairperson of the High Country Committee of Federated Farmers (P22(b)). Mr Ensor, who along with other pastoral lessees attended various sittings of the tribunal while the claimants were presenting evidence, is a pastoral lessee in the Rakaia gorge in central Canterbury. He is the third generation to own and farm the Glenaan station and fourth generation in the country. As chairperson of the High Country Committee Mr Ensor represents approximately 360 pastoral lessees from Lumsden, in the south, to Blenheim, in the north. The great majority (324) are on the land comprised in Kemp's purchase.

Mr Ensor explained that the High Country Committee deals directly with the minister of the Crown responsible for the administration of pastoral leases. Despite the reorganisation of the Crown's landholding agencies into state-owned enterprises,

pastoral leases remain under the jurisdiction of the Crown. Mr Ensor told us that this was because pastoral lease lands have particularly high multiple use values for production and scenic/conservation purposes. For these reasons it was thought the residual interest in the land should remain with the Crown rather than individuals, groups or companies. Mr Ensor commented on the concern expressed at the first hearing of this tribunal by various Ngai Tahu kaumatua at the depletion of their resources through the introduction of European species and exploitation of waterways and other traditional food collecting grounds. He emphasised that pastoral lessees shared a common desire to preserve the very delicate balance between production and conservation on high country land. Mr Ensor referred to evidence from a number of Ngai Tahu concerning the difficulty of access to certain food collecting grounds or places of spiritual significance. He said pastoral lessees acknowledged that concern. In so far as their farm management practices allow, the policy of the High Country Committee is to encourage lessees to facilitate public access. He cited a recent study to demonstrate that this occurs. He thought runholders would not be insensitive to any special Maori needs.

Mr Ensor related to us the views of lessees on the proposal that the Crown's interest in pastoral leases might be transferred to Ngai Tahu as one remedy for the past wrongs of the Crown. It was suggested that Ngai Tahu's cultural and spiritual links with the high country pastoral lease land were no greater than that on freehold land. Indeed it was thought that "apart from the transitory greenstone passages and certain lakes and peaks of special spiritual significance", the South Island high country was considered a rather harsh environment compared with the coastal and river margins on which Ngai Tahu permanent settlements were located. Mr Ensor suggested that if any group of New Zealanders could claim to be the indigenous people of the pastoral lease land perhaps it is the lessees themselves, as they are the only people in the history of New Zealand to have actually settled on and worked the land in question. In many cases, it was claimed, occupation by these lessees extends back over four or five generations. The tribunal notes that these contentions overlook the fact that when the Kemp and other purchases were effected by the Crown, requests of Ngai Tahu to retain extensive areas of land which would have included some high country, were wrongly denied by the Crown. Ngai Tahu were left with no high country land and virtually no other land. They were in no position to engage in pastoral farming whether in the high country or elsewhere. But European settlers, by contrast, were enabled to take up extensive runs of many thousands of acres.

In support of the contention that the Crown should not vest its interests in any pastoral leasehold land in Ngai Tahu, Mr Ensor argued that this should not occur simply because the title derives from the Crown. He argued that the pastoral lessees entered into an agreement with the Crown in perpetuity when they signed their lease documents, and in exchange for their rights to pasturage accepted certain restrictions and undertook a caretaker role. They strongly believe in the sanctity of lease documents and believe them to be just as binding as any Treaty or Crown purchase. They see the transfer by the Crown to Ngai Tahu as in "abdication" of its side of the deal.

Mr Ensor also told us that pastoral lessees on occasion have sought to increase their share of ownership from the Crown, presumably by being permitted to purchase the freehold. He suggested that if it has been unsuitable for lessees to acquire a greater

interest in their pastoral land, it seems inappropriate for the Crown to change the title in favour of Ngai Tahu, in the absence of substantial grievances relating specifically to the pastoral lands by way of justification. Finally, Mr Ensor made the point that the pastoral leasehold lands are held by the Crown to protect the wider national interest and not to generate income from rentals. It was strongly argued that these lands cannot be an economic base for two different groups at the same time, without involving conflict and depletion of an existing improving resource.

23.2.3 Mrs Iris Scott, a pastoral lessee of Rees Valley station, Glenorchy, gave evidence in support (P22(b)). Two thirds of her property is covered by snow in a normal winter, which seriously limits the carrying capacity. Traditional high country farming is said to rely on nature to a greater extent than most types of farming, the secret of sustainability being to keep stocking-rates low enough to allow the natural vegetation to replenish itself. At present the Crown has an involvement in setting and ensuring compliance with stocking-rates. This, Mrs Scott said, emphasises the Crown's important non-commercial function in lease management. Maintaining a viable farming operation in a harsh environment must be balanced against the Crown's intention to preserve the land for the benefit of all New Zealanders. Mrs Scott described their stocking practices. Most of the land is grazed for less than two months of the year. In these ways the Crown's conservation objectives are said to be a major part of pastoral lease management. Improvements to pasture and buildings, while the sole property of the lessees, are only done with Crown consent, thus ensuring that any developments are compatible with sound environmental practice and the productive capacity of the land. In Mrs Scott's case the development area is less than 2 per cent of the run, the remainder being in its natural undisturbed state. Department of Conservation records indicate that some 1200 trampers passed through Mrs Scott's valley in 1988 and she thought that two or three times that number make day trips to the valley, most of whom act responsibly and cause no problems to farm management or the environment.

23.2.4 Mr Jim Morris, formerly a high country farmer from the headwaters of the Rakaia River in Canterbury, recently purchased a pastoral lease at Ben Avon, in the Ahuriri valley near Omarama. He spoke movingly of the high country people's affinity for the mountain lands and the strong bonds formed with the land by successive generations of the high country farming community:

If you have ever walked a ridge line as the sun rises on a clear day, whether searching for sheep, botanical species, game or just for the love of it, whether Maori, Chinese or European, your thoughts on nature, your god and the fellowship of man will be the same. (P22(b):4)

Mr E D Lyttle spoke on behalf of the Otago Federated Farmers (P29). He is a farmer on the Otago peninsula. Like Mr Morris he spoke of the strong feeling which he and his fellow farmers have for the land.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.3 Federated Mountain Clubs of New Zealand (Inc)

23.3. Federated Mountain Clubs of New Zealand (Inc)

Mr David Henson, vice-president of the Federation of Mountain Clubs gave evidence on its behalf (S18). The federation has over 100 clubs affiliated to it, comprising some 16,000 individual members. The member clubs are those concerned with mountain recreation, including tramping, climbing, skiing and deerstalking. The federation is represented on the National Parks and Reserves Authority, the Walkway Commission and walkway committees. Federation members are frequently included on national parks and conservation parks boards and committees.

The general thrust of the federation's submissions was to express its concern for the sound management of New Zealand's public natural lands. It strongly believes these should be retained in Crown ownership and managed for the public good. The only exception it recognised is the pastoral lease system, which it considered should remain in Crown ownership, while recognising that the lessees have occupancy and trespass rights. At the same time the federation expressed considerable sympathy for the Maori sense of grievance over land rights issues.

The federation referred to suggestions that one or more national parks might be passed into Ngai Tahu ownership and leased back to the Crown for ongoing use as a national park. The federation speculated that if this occurred rental costs to the Crown could amount to millions of dollars. This in turn, it was said, would have a significant impact on federation members and other users of national parks. The federation strongly believes in freedom of entry, without charge, to national parks, while having no quarrel with charges for facilities such as huts. It predicted large rentals were bound to "raise the spectre of substantial entry fees".

The federation advised that currently "highly concessional rentals apply to pastoral leases". It supported continuance of this rental system, which it saw as a recognition of the sensitive nature of the land and the need for careful grazing. It argued that if rentals were set at normal commercial levels there would be pressure on runholders to over graze, with consequent damage to water and soil and natural values.

It was submitted by the federation that the transfer of title of Crown land to Maori ownership would amount to privatisation of such land. The new owners would, it was suggested, acquire the right to grant or deny access to such land,the right to charge for public access, the right to "economic exploitation", with far fewer environmental constraints than exist at present, and the right to sell the land to other private interests.

A large proportion of the land originally acquired by the Crown, the federation said, has been retained in public ownership for good reasons. This land, the federation considered, should be held in trust for all New Zealanders and managed for the

common good. It argued that it would be a "dereliction of duty" by government if national parks were used in settlement of claims. In the federation's opinion, if Maori land claims are proven, government should buy land of higher economic value on the open market for settlement of such claims.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.4 New Zealand Deerstalkers' Association (Inc)

23.4. New Zealand Deerstalkers' Association (Inc)

This association, which represents New Zealand's recreational hunters, made a late written submission signed by its president, Mr David Hodder. The association said that since its formation in 1937 it had fought to protect the public's right of access to, and hunting on, the open high country of the South Island. Mr Hodder referred to a paper presented by Mr Maika Mason on behalf of the Ngai Tahu Trust Board to a Wild Animal Management Seminar in 1988, in which the Ngai Tahu tribal position on rehabilitation of traditional mahinga kai was explained. Mr Hodder stated there appeared to be no conflict between the goals of the association and those of Ngai Tahu. He urged the tribunal to include a finding in its report that the hunting of deer, thar and chamois be retained as a public use.

This issue is relevant to the tribunal only in so far as it relates to restoration of mahinga kai rights to Ngai Tahu. The broader question of continued access and public use raises conservation and other issues outside the parameters of this inquiry. It would seem evident however, from Mr Mason's statement, that there is indeed a conflict between Ngai Tahu and the association over wild animal management, in that the impact of the introduction of the exotic species referred to has been destructive of such mahinga kai as weka, kaka and kereru. It is possible that there may be room for compromise, although Ngai Tahu see the continued presence of wild animals as subordinate to the redevelopment of Maori mahinga kai rights. Obviously there will be need for further consideration of hunting rights and management systems when Ngai Tahu are negotiating remedies with the Crown. Ngai Tahu have declared their aim of working in partnership with the Crown in achieving policy goals.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.5 North Canterbury Catchment and Regional Water Board

23.5. North Canterbury Catchment and Regional Water Board

Two submissions were made on behalf of this board (A14, P23). The second was presented by Mr J M Glennie, the group leader, planning. We were told that the board's interests in and concerns for land and water management were largely independent of tenure arrangements. But the board intimated that its ability to influence land management did vary with tenure and government policy, among other matters. In practice the board had been able to more directly control certain land management practices on Crown pastoral land than on freehold land. The board expressed its concern that its land and water interests should continue to be adequately provided for should Ngai Tahu be successful with its claim.

The board expressed particular concern for certain class VIII and seriously eroding class VII land. It submitted that, should the interest of the Crown in pastoral leases be transferred to Ngai Tahu, it should be on the condition that significant areas of class VIII and seriously eroding class VII land would not be used for pastoral farming or any other use detrimental to soil and water conservation. The board also urged that ownership of water should remain with the Crown.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.6 Telecom Corporation of New Zealand Ltd

23.6. Telecom Corporation of New Zealand Ltd

Evidence was given by Mr John Crook, assistant to the chief executive of Telecom (P24(a) & (b)). Mr Crook provided detailed information relating to land assets held by Telecom, many of which were shown to have special features which might bear on any relief which might ultimately be granted either by the tribunal, in terms of the Treaty of Waitangi (State Enterprises) Act 1988, or in negotiations between the claimants and the Crown. The information supplied recorded four separate classifications of properties held by Telecom and their location. It will prove very helpful should any Telecom properties become the subject of possible remedies.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.7 Land Corporation of New Zealand Ltd

23.7. Land Corporation of New Zealand Ltd

Submissions were made on behalf of Landcorp by their counsel, Mr C Mouat (P25). The tribunal was informed of the various categories of land held by Landcorp, including some 54 farms vested in Landcorp in the South Island, plus a further six Crown owned farms managed by Landcorp on an agency basis. Mr Mouat advised that the properties taken over by Landcorp from the Crown (and subject to resumption under the State Owned Enterprises Act) were underdeveloped farms not suitable for individual ownership. Additional land required for finishing purposes has since been acquired by Landcorp to enhance the economic viability of some farms.

Counsel for Landcorp told the tribunal:

Ngai Tahu people have an affinity with the land. Ngai Tahu also require a strong economic base to look to the future with confidence. Some of the remnant lands left to Landcorp are really in the same category as the "worthless" lands left to the tribe in 1840 and subsequent years. The Crown must compensate Landcorp for lands resumed. Landcorp would very likely replace its lands with better country to continue its breeding of superior quality animals. Landcorp does not want to look over the fence at Ngai Tahu struggling on difficult country. (P25:5)

Accordingly, Mr Mouat advised that Landcorp would support the idea that Ngai Tahu should receive the compensation, not Landcorp, "so that they may find land that suits their needs". Just because land is "available", Mr Mouat said, it should not be forced upon the claimants. As to the presence of wahi tapu on Landcorp properties, counsel advised that Landcorp would respect the position. Finally, Mr Mouat expressed Landcorp's willingness to assist in a positive manner in any discussions with the claimants in respect to possible remedies.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.8 Electricity Corporation of New Zealand Ltd

23.8. Electricity Corporation of New Zealand Ltd

Submissions were made on behalf of Dr R S Deane, the chief executive of Electricorp, by Mrs Geraldine Baumann, the corporation secretary (Q15), and on behalf of Mr J P F Robinson, hydro group manager for the South Island, by Mr M J France the group environmental manager, South Island, for the corporation (Q16).

On the question of water rights, Dr Deane advised that in line with an agreement with the Crown, the corporation, which at present has perpetual water rights, intends to apply for standard water rights to replace its existing use water rights.

As to land, Dr Deane undertook that the corporation would seek to hold only those lands which are reasonably required for its commercial operations. These would include land upon which there are structures, or where the effect of the corporation's control of water is extremely pronounced, as with former river beds now used as spillways. The corporation will not own the beds of artificial or of natural lakes subject to hydro electric control, except where structures are erected on them. Dr Deane said he knew Ngai Tahu were particularly concerned in this regard in respect to Lakes Pukaki, Ohau and Tekapo. He assured Ngai Tahu that the corporation did not aspire to hold the beds of these lakes, which the corporation knew were of particular significance to the Maori people of the area.

Dr Deane conceded the need to develop further good working relationships with the local tangata whenua. This would include production areas and matters such as fish and water rights. The corporation recognised that further investigation was required into indigenous fish and wildlife to ensure appropriate recognition is given to their requirements, including such facilities as elver passes, where these are appropriate. It would ensure that local Maori are consulted and their views incorporated.

Mr Robinson made available a topographical map (Q16A) showing the situation of the corporation's power stations in the South Island and their associated control structures. There are currently 14 such stations, having been commissioned during the period 1915-1984. Mr Robinson described the upper Waitaki system, which includes the Tekapo A and B and Ohau A, B and C stations together with the Twizel control system. The tribunal inspected this complex. The tribunal was advised of measures taken by the corporation to reduce pollution from human waste.
Mr Robinson saw the need for consultation and co-operation between the corporation and Ngai Tahu on matters of mutual interest and undertook to foster this.

Ngai Tahu Land Report

23 Evidence of Other Interested Bodies

23.9 Department of Conservation

23.9. Department of Conservation

The tribunal received a substantial and constructive submission from Mr Ken Piddington, the director-general of conservation, who was shortly after to relinquish his position to become the first director of environment with the World Bank (G8). Mr Piddington outlined to us the various functions of the new Department of Conservation, which was formally inaugurated in the previous April of 1987. In addition to its management and promotional functions in respect of the conservation of natural and historic resources generally, the department has taken responsibility for the proper conservation of the coastal areas and for the care of marine mammals and indigenous freshwater fish. Mr Piddington stressed that conservation is about the actions of a community in respect of what it has inherited and what it would like to see passed on intact to future generations. He argued that this involved some modification of the concept of private ownership by the incorporation of such concepts as guardianship, trusteeship, stewardship, or, in the Maori concept, rangatiratanga. By way of illustration he cited two examples where New Zealand has opted against the notion of exclusive ownership. These were pastoral leasehold lands and the coastal estate.

Mr Piddington said that, should the claimants be successful in respect of national parks, and he mentioned Fiordland National Park, Mount Aspiring National Park and Aoraki National Park specifically, he saw no consequential change for the purposes of day to day management. He understood that the Ngai Tahu Trust Board saw the possibility of unaltered status for national parks and other conservation areas, citing their recent support for the establishment of the Paparoa National Park.

Mr Piddington indicated that, in thinking about the way in which the principles of the Treaty of Waitangi affect the department in its operational work and how it might best achieve the form of partnership articulated by the Court of Appeal in the New Zealand Maori Council case, he proposed to develop a set of guidelines. Later he said:

In considering our responsibilities for the public estate the central issue comes back to whether or not the question of title is actually relevant to our management role. Since the claimants have raised several issues in respect of title I believe the conclusion we have reached is highly significant. As already indicated the stewardship of a public resource does not require the steward to obtain evidence of ownership. It is, however, necessary for that agent to receive unequivocal instructions from a source of higher authority. This authority in my submission equates precisely with the concept of "Rangatiratanga" in Article the Second. It follows that by seeking appropriate guidance from a tribal Trust or other authority the Department can align its protective role with the wording of the Maori version of the Treaty. (G8:17)

In short Mr Piddington envisaged the development of a partnership between the department and the tangata whenua, working for the common good.

The tribunal notes in concluding its record of the evidence of the high country farmers, the Federated Mountain Clubs, the state owned enterprises and the Department of Conservation, that all gave their evidence in a spirit of good will, indeed sympathy, toward Ngai Tahu, even though in some cases not supporting certain remedies which Ngai Tahu might seek for their grievances.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.1 Introduction

Chapter 24

THE CROWN AND NGAI TAHU TODAY

24.1. Introduction

The tribunal has found on the evidence before it that many of the claimants' grievances arising out of the eight Crown purchases, including those relating to mahinga kai, have been established. Indeed the Crown has properly conceded that it failed to ensure Ngai Tahu were left with ample lands for their present and future needs. The tribunal cannot avoid the conclusion that in acquiring from Ngai Tahu 34.5 million acres, more than half the land mass of New Zealand, for œ14,750, and leaving them with only 35,757 acres, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi. The evidence further establishes that subsequent efforts by the Crown to make good Ngai Tahu's loss were few, extremely dilatory, and largely ineffectual. As a consequence Ngai Tahu has suffered grave injustices over more than 140 years. The tribe is clearly entitled to very substantial redress from the Crown. The Crown has publicly acknowledged that where breaches of the Treaty by the Crown have occurred resulting in loss to Maori it is, in the words of Sir Ivor Richardson in the New Zealand Maori Council case, "required to take positive steps in reparation". The Crown's obligation to effect redress in this case is indeed a heavy one.

The tribunal was advised by both the claimants and the Crown that they did not wish us to formulate a comprehensive set of recommendations as to the relief which should be provided by the Crown. While it was recognised that the tribunal would wish to make recommendations on some specific matters (as we have done in respect of pounamu for example), the parties preferred that they should enter into direct negotiations with each other. These negotiations would be on the basis of the tribunal's findings of fact and its consequential findings of breach of Treaty principles. For its part, the tribunal has been happy to accept this proposal. Indeed it believes it to be the preferable course to be followed. But, as will be later indicated, the tribunal will wish to be informed of the progress of such negotiations and will be prepared to give further consideration to the question of remedies should one or both parties so request. However, having said this, the tribunal proposes at this stage to indicate in a very general way the various forms of redress which it believes the parties will wish to consider.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.2 Restoration of Ngai Tahu's Tribal Mana

24.2. Restoration of Ngai Tahu's Tribal Mana

It is clear that if the Crown is to meet its Treaty obligation to redress its numerous and longstanding breaches of the Treaty it must restore to Ngai Tahu their rangatiratanga and hence their mana within the Ngai Tahu whenua. This extends over the greater part of Te Wai Pounamu, of which Ngai Tahu were and remain the tangata whenua.

It is equally clear that the restoration of Ngai Tahu rangatiratanga will, in today's circumstances, need to take various forms. Given the expressed wish of the parties to negotiate directly on the specific forms of redress, the tribunal proposes to comment in a general way only. It has earlier made a limited number of formal recommendations for redress on discrete matters, where this seemed appropriate or was sought by the parties.

Perhaps we should observe at the outset of this discussion that, given the nature and magnitude of the losses sustained by Ngai Tahu, no redress made almost a century and a half later will fully compensate the claimants. Generations of Ngai Tahu have suffered as a consequence of Crown Treaty breaches. Virtually all the valuable land has long since passed into private hands. Irreparable damage has been done to Ngai Tahu mahinga kai resources. And so a fair, just and practical settlement is likely to be based on a mixed set of remedies which reflect not only the nature and extent of the grievances but present day realities.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.3 Need for Appropriate Tribal Structures

24.3. Need for Appropriate Tribal Structures

Because reparation is likely to be to the tribe, it is clear that there must be appropriate tribal structures to control and administer tribal assets, whether money, lands or other property. The tribunal understands that in June 1990 in anticipation of the passage of the Runanga Iwi Act 1990 the tribe constituted the Runanganui o Tahu. We assume the new runanganui will be incorporated under the recently enacted Runanga Iwi Act 1990. If so, it will have the necessary legal status to act on behalf of the Ngai Tahu people. The runanganui's charter will no doubt provide for its accountability to the various Ngai Tahu hapu.

The chairperson of the claimant trust board, Mr O'Regan, has stated publicly that the Ngai Tahu Maori Trust Board in its present form is not an appropriate vehicle to deliver what is going to be required next century (see Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi, edited by I H Kawharu, p 255). He currently envisages a central tribal governing structure which will service the regional tribal communities through a network of regional offices. Mr O'Regan says that the proposal is for a runanganui elected by the tribal runanga which will hold the tribal assets as trustee and will decide matters of tribal policy. Mr O'Regan sees the trust board as being the executive arm of the tribe and accountable to the runanganui. He emphasises however that other tribal administrative structures, involving possible division into autonomous regions, are also being considered.

No doubt there will be further tribal debate on this question which is not a matter for either this tribunal or the Crown to determine. It is however important that if negotiations for remedies are to be satisfactorily conducted, there should first be resolution by Ngai Tahu of their internal structures. The tribunal was informed by the claimants that that process is under way.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.4 Need for Consultation

24.4. Need for Consultation

The tribunal, in its discussion of mahinga kai in chapter 17, stressed the need for a marked improvement in the processes of consultation by the Crown and local authorities with Maori, including Ngai Tahu. The tribunal particularly emphasised the need for discussion on proposed policy changes between central and local government officials and Maori on marae. This discussion should take place on matters affecting Maori while policy is still in the formative stage, to ensure adequate Maori input. We do not propose to repeat our detailed discussion in (17.6.10).

While the tribunal was there chiefly concerned with consultation on environmental matters, we emphasise that the need for adequate consultation extends to a wider range of social, economic and cultural matters of particular significance to Maori. We were pleased to note in the submissions of the SOEs who gave evidence, willingness to enhance their level of consultation with Ngai Tahu. The director-general of the Department of Conservation gave a similar assurance.

The tribunal is concerned that whilst affirmative statements of intention to consult may be expressly made and intended by representatives of government departments, it does not always follow that these proposals are implemented.

The claimants' counsel, at a recent hearing in Wellington called to discuss future timetabling for the sea fisheries claim, informed the tribunal that the Department of Conservation, in moving to establish a draft coastal planning scheme have not involved the iwi. Ngai Tahu's standing has not been recognised by the department and the trust board is not being heard on this important measure.

If consultation offers are to be effective and meaningful there should be a clear effort made to involve Ngai Tahu in every aspect of environmental planning. It is apparent to the tribunal that statutory intervention, as proposed earlier by the tribunal in this report, is needed to ensure Maori participation in local regional council planning as well as national environmental policies.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.5 A Diversity of Remedies

24.5. A Diversity of Remedies

24.5.1 As we have indicated, the remedies sought by Ngai Tahu are likely to take several forms. While we have not received detailed submissions from the claimants on the total range of remedies they might seek from the Crown, we are aware of their interest in various forms.

In seeking to re-establish their rangatiratanga Ngai Tahu expect to have land returned to them. The tribunal agrees with this view. There is adequate land held by the Crown and state-owned enterprises to enable land settlement to feature in any remedy. Ngai Tahu made clear, for instance, their interest in land held under pastoral leases from the Crown. Perhaps understandably the pastoral lessees opposed the suggestion that the Crown should transfer its interest in some or all of this land to Ngai Tahu. They stressed their view that the returns by way of rent to the Crown do not fully compensate the Crown for its expenses in administering the leases. This includes regular scrutiny of the land-use by lessees and a responsibility to ensure that conservation and environmental values are maintained or enhanced. Ngai Tahu might well respond that the Crown could continue to assist in these matters notwithstanding the transfer of the ownership of the land to Ngai Tahu. We heard from the Ngai Tahu people of past degradation of the environment following European settlement. The tribunal has no reason to believe that, were the Crown title to pastoral leasehold land to be vested in Ngai Tahu, they would be other than sensitive and caring for the proper conservation of this high risk land. With goodwill on all sides a workable solution should be possible.

24.5.2 Several witnesses, notably the Federated Mountain Clubs, discussed the possibility that some national parks in the South Island might be vested in Ngai Tahu. Dr Deane, for the Electricity Corporation, referred to the particular interest of Ngai Tahu in Lakes Pukaki, Ohau and Tekapo. Dr Deane made it clear that the Electricity Corporation had no wish to own the beds of these lakes. A number of the South Island national parks include mountains, lakes and landscape of particular spiritual value to Ngai Tahu. They are the repository of much Ngai Tahu mythology and tradition. Restoration of their rangatiratanga would seem unfulfilled were the return of some at least of these treasured natural features denied to Ngai Tahu.

However, Ngai Tahu have made it clear that they have no wish to change the essential character of national parks. The opposition of the Federated Mountain Clubs to any such public lands being vested in Ngai Tahu appears to be based on an apprehension that the public's access to such lands might be restricted and that fees might be charged for entry were Ngai Tahu to become the owners. These and any other concerns would be matters for negotiation between Ngai Tahu and the Crown. It

seems unlikely that a reasonable solution could not be found which suitably recognised the public interest in these lands, should some be restored to Ngai Tahu ownership.

There is provision in section 439 of the Maori Affairs Act 1953 for the setting apart of any Maori freehold land or general land for the purposes of a reserve or place of historical or scenic interest or for any other specified purpose.

Section 439(12) permits constitution of a Maori reservation to be held for the common use and benefit of the people of New Zealand.

Trustees representing the public user can be appointed as trustees along with Maori Trustees to administer the reserves. There are a number of these reserves already in existence. Transfer of ownership, or should it perhaps be stated more aptly, return of ownership to Maori, need not affect public use. Section 439 could also be further extended to provide procedures for partnership management.

24.5.3 As we have seen, counsel for Landcorp contemplated that some lands presently owned by the corporation might be transferred into Ngai Tahu ownership. He pointed out, however, that most, if not all, of the South Island lands vested in Landcorp are marginal economic units unsuitable for individual ownership. But, should they be resumed by the Crown for transfer to Ngai Tahu, Landcorp would be entitled to compensation under the provisions of the Treaty of Waitangi (State Enterprises) Act 1988. Rather than see Ngai Tahu struggling with such properties, the corporation supported the suggestion that Ngai Tahu, not Landcorp, should receive the compensation so that Ngai Tahu could find land better suited to their own needs.

Again, these are matters for negotiation between the parties should Ngai Tahu wish to pursue this particular remedy.

24.5.4 Several state-owned enterprises, including Landcorp, Forestcorp and Electricorp, now hold substantial interests in former Ngai Tahu territory. These have been transferred to them by the Crown. The shares in these SOEs are at present wholly owned by the Crown. It may be that as part of a negotiated settlement it would be reasonable for an appropriate interest in one or more SOE involved in the Ngai Tahu whenua to be assigned to Ngai Tahu by the Crown. The basis on which such an interest was assigned would be a matter for agreement between Ngai Tahu and the Crown.

24.5.5 In chapter 14 the tribunal has discussed the claimants' grievances in respect of the West Coast leases in perpetuity. We have found that these leases were imposed on Ngai Tahu in breach of the Treaty and that Ngai Tahu are entitled to redress. The government has had these and similar leases under consideration for some time, with a view to finding an appropriate form of remedy for the greatly disadvantaged Maori owners. The tribunal considers that a satisfactory solution must be found to this serious grievance as part of a comprehensive settlement.

24.5.6 Ngai Tahu have a natural and understandable desire to have returned to them a substantial interest in the land they once owned. The restoration of their rangatiratanga depends upon this happening. But it is clear that the land which

remains in the possession of the Crown, whether high country pastoral leasehold land, national parks, or other land still vested in the Crown or Landcorp, would not provide Ngai Tahu with an economic base. Such land as is being farmed is either marginal or, in the case of the high country pastoral lease land, has a high conservation component. The value of the remainder lies in its scenic, recreational, environmental and wilderness qualities. In addition it has special and unique value to Ngai Tahu as tangata whenua. While, therefore, the return of part of this land is of importance to Ngai Tahu, its importance is as much intangible as tangible.

Yet it cannot be disputed that, as a result of the Crown's numerous Treaty breaches, Ngai Tahu has suffered grievous economic loss. Moreover much of this loss has persisted for a century or more. Ngai Tahu is plainly entitled to very substantial compensation over and above any or all of the foregoing forms of redress. Such compensation would necessarily have to be financial. It would need to be sufficiently substantial to enable Ngai Tahu, now a numerous tribe, to be able significantly to enhance the social, educational and economic well-being of its people. Whether the tribe opts for the purchase on the open market of viable farm properties in suitable locations, or for the establishment or purchase of commercial ventures offering employment opportunities for its people, or for other forms of investment or economic activity, or for a combination of some or all of these, is of course for Ngai Tahu to decide. The tribunal is conscious of the fact that Ngai Tahu, up to 1844, owned more than half the land mass of Aotearoa, yet only 20 years later it had been reduced to less than 38,000 acres. The serious and repeated breaches of the Treaty of Waitangi which so reduced Ngai Tahu to near landlessness have yet to be redressed. Ngai Tahu's loss has been great and continuing. The honour of the Crown can only be restored by a settlement which recognises the magnitude of Ngai Tahu's great deprivation, sustained over more than a century. Only a large and generous response by the Crown will suffice to redress the wrongs done to Ngai Tahu and lay their numerous grievances to rest. No less will serve to restore the honour of the Crown.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.6 Financial Assistance to Ngai Tahu in Their Negotiations with the Crown

24.6. Financial Assistance to Ngai Tahu in Their Negotiations with the Crown

24.6.1 Although significant financial assistance has been made available by government towards legal and research expenses incurred by Ngai Tahu in the prosecution of its claims, the tribe has been obliged to expend substantial additional sums. In the result, the Ngai Tahu Trust Board, which has borne the brunt of the financial burden, is sorely pressed financially.

Tribunal's recommendations

24.6.2 The tribunal is conscious that the negotiations with the Crown which will follow the release of this report on the land claims will be lengthy and intricate. Ngai Tahu will require the services (among others) of experts in accounting, taxation, valuation and law. Such professional services, given the likely magnitude and complexity of the matters in issue, will be very costly. It is not easy to estimate the likely sum involved. The tribunal is satisfied that necessary professional services will cost at least $1 million. This may well be an underestimate. The tribunal recommends that a sum of not less than $1 million be made available to Ngai Tahu to enable it to engage the necessary professional and related administrative services to prosecute its negotiations with the Crown.

24.6.3 The tribunal is hopeful that in a spirit of goodwill and with a commitment on the part of the Crown to act justly and generously towards Ngai Tahu, a settlement satisfactory to both parties will be reached without undue delay. At the end of twelve months following the release of this report the tribunal would expect to receive a report from the parties as to the progress made towards achieving a settlement. If at any time the parties are unable to reach agreement on the whole or any part of matters in issue, the tribunal would be amenable to setting a date for hearing the parties on the question of remedies and to make appropriate recommendations. The tribunal expresses the hope that this contingency will not arise and that the parties in the spirit of partnership are able to arrive at a mutually acceptable settlement.

Ngai Tahu Land Report

24 The Crown and Ngai Tahu Today

24.7 Reimbursement of Costs

24.7. Reimbursement of Costs

24.7.1 At the conclusion of its final hearing on 10 October 1889, the tribunal received from the claimant Henare Rakiihia Tau a statement of costs claimed by him in prosecuting his claim. The claim detailed time involved of 5561 hours costed out at $31 per hour and totalling $172,391, together with travelling costs of $14,525 also detailed, making a total amount of $186,916. From this sum Mr Tau had deducted $13,040 paid to him by the trust board, making a net sum claimed of $173,876. The period covered by the statement was from July 1986 to August 1988 inclusive.

Mr Tau stated that during this period his employment with the meat industry was interrupted and his claim was based on the then ordinary employment rate of $31 per hour.

24.7.2 The tribunal also received from the Ngai Tahu Maori Trust Board through its secretary, Mr S N Ashton, a chartered accountant in public practice in Christchurch, a detailed schedule of costs directly incurred by the board in respect of its involvement in the claim up to 6 October 1989. The total sum claimed was $399,168.

24.7.3 The tribunal has no statutory power to award costs. The tribunal however has considered both the above claims with a view to making recommendations to government.

Dealing first with claimant Mr Tau's application, although the tribunal accepts that Mr Tau has incurred expenses and may also have suffered loss of employment, the tribunal is reluctant to recommend reimbursement of an individual claimant's costs. Although Mr Tau has brought the claim and has taken a significant part in its preparation and presentation the grievance itself is substantially on behalf of the tribe. Ngai Tahu as a tribal group in these proceedings has been represented by the trust board.

The legal costs of Mr Tau as well as the research and administrative costs in presentation have been met by the trust board and substantially refunded to the board by grants made pursuant to appointments and commissions authorised by sections 7A and clause 5A (second schedule) of the Act. To this extent Mr Tau has not been called upon to meet any legal or research costs other than his own time. The tribunal notes that a number of tribal members have been involved in the presentation of this claim and considers it would be inappropriate to reimburse an individual claimant even though that person may have made a major contribution and even though the claim is brought in his name under the statutory prescription. The tribunal considers that reimbursement of an individual's expenses must be looked at in the circumstances of

each case before it. If the grievance is personal to an applicant and well-founded there may be justification for the tribunal to consider reimbursement. On the other hand if a grievance is really brought on behalf of iwi or hapu the tribunal should regard the claim as such and consider the position of the tribal group rather than the individual.

Without encroaching into the area of iwi or hapu discretion it may well be that the iwi or hapu itself might take some steps to reimburse costs and expenses incurred by any of its members. The tribe generally is in the best position to know the respective contributions of its members. This decision may well be looked at with disappointment by Mr Tau but the tribunal considers there is a need for the tribunal to assess its position having regard to all claims that might be brought before it. There is no doubt that Mr Tau has taken a major role in this case. He has served Ngai Tahu well.

24.7.4 The tribunal has examined the schedule of costs prepared by the trust board's accountants and is satisfied these reflect the direct costs incurred by the board over the period of the claim.

As earlier noted, the board's financial position has been placed in a precarious position as a direct result of the extraordinary expenses incurred. The board has made several requests during the claim for financial assistance but the tribunal deferred making any recommendation to government until the report on the major claims was completed. The trust board has consequently been obliged to tread most cautiously in managing its affairs. The reimbursement which the board now seeks are the actual costs of the claim. The total sum involved up to 6 October 1989 is $399,168.

The tribunal, as the report confirms, considers that the Ngai Tahu claim is well-founded and that justice requires the tribunal to recognise the tribe's request for refund of its actual expenses.

24.7.5 Accordingly there is a recommendation that the Crown reimburse to the Ngai Tahu Maori Trust Board the sum of $399,168 in repayment of costs incurred by the board as set out in its statement presented to the tribunal on 13 November 1989.

Ngai Tahu Land Report

25 Tribunal Recommendations

25.1 Introduction

Chapter 25

TRIBUNAL RECOMMENDATIONS

25.1. Introduction

In this chapter the tribunal sets out its recommendations made pursuant to section 6(3) of the Treaty of Waitangi Act 1975 on five matters only.

The tribunal also makes a number of other recommendations which although not directly arising from or remedying breaches of the Treaty nevertheless flow from the tribunal's inquiry and need to be addressed by the Crown.

As stated earlier in this report the tribunal at the commencement of the claim was urged by both the claimants and the Crown to make findings on the issues and to determine whether there had been breaches of any Treaty principles. We were asked to defer the question of remedies. We agreed to that course for two reasons. First, it obviated possible waste of time in both parties addressing remedies prior to the tribunal establishing whether breaches had occurred. Secondly, and more importantly, it gave the parties an opportunity, after having received the tribunal's findings, to negotiate a settlement.

The tribunal did however reserve the right to make recommendations on matters of urgency or in those cases it deemed appropriate. To that extent therefore the following recommendations are preliminary and limited. It may be necessary for the tribunal to come back to this question later should the parties fail to reach a settlement. The question of remedies is therefore reserved.

The recommendations are listed in the same chronological order as the grievances to which they relate. The reference given at the end of each recommendation is to the relevant section of the report.

Ngai Tahu Land Report

25 Tribunal Recommendations

25.2 Recommendations Pursuant to Section 6(3)

25.2. Recommendations Pursuant to Section 6(3)

Pounamu:

1 That to remove doubts as to the ownership of the pounamu in or on the land described in section 27(6) of the Maori Purposes Act 1976 the Crown take appropriate legislative action to vest all such pounamu in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

2 That section 27 of the Maori Purposes Act 1976 be amended so as to vest the beds of all tributaries of the Arahura River in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

3
(a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired and any such land already owned by the Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 That the Crown transfer ownership and control to Ngai Tahu or such other body as may be nominated by Ngai Tahu (including the right to mine) of:

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfers to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

(a) That the Crown pursuant to section 7 of the Mining Act 1971 by order in council declare in respect of all pounamu which is the property of proprietors of privately owned land on or under the land in the districts described in the preceding paragraphs 4(a) and (b), that pounamu on or under such land shall be prospected for or mined only pursuant to the said section 7.

(b) An appropriate amendment should be made to the Mining Act that no prospecting, exploration, mining or other licence relating to pounamu shall be granted under that or any other Act to any person or body other than Ngai Tahu or such other body or person as may be nominated by Ngai Tahu (13.5.31).

Mawhera perpetual leases

6 That the Maori Reserved Land Act 1955 be amended so that the leases prescribed in that Act will:

(a) Over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act;

(b) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act; and

(c) Immediately change the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land (14:9:7).

7 That the lessees be reimbursed by the Crown for any provable loss suffered by them as a result of the legislative changes recommended above (14:9:7).

Waihora (Lake Ellesmere)

At the option of the claimants either:

8(a) That the Crown vest Waihora for an estate in fee simple in Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

(i) controlling the opening of the lake to improve the fishery; and

(ii) improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal. The joint management scheme binding the Crown to provide financial, technical, scientific and management resources;

or

8 (b) That the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee. The Crown then, in consultation with the beneficial owners, to make regulations for the future control and

management of the lake in manner similar to the Titi Islands regulations and to provide the resources of the kind mentioned in the first alternative to improve the fishery and water quality (17.5.2).

Wairewa (Lake Forsyth)

9 That the existing fisheries regulations giving Maori exclusive eel fishing rights over Wairewa be amended to substitute "Ngai Tahu" for "Maori" so as to return the rights to the tribe.

10 That the same regulations be amended to give Ngai Tahu exclusive rights to fish the waters leading into the lake and to cancel any other existing licences.

11 That an area of land be reserved around the eel trenches at the southern outlet which will secure Ngai Tahu rights of access.

12 That a management plan be prepared, involving Ngai Tahu as part of the decision making process along with the Department of Conservation, Regional Authority, Ministry of Agriculture and Fisheries, for the improvement of the water quality with the Crown providing the same resources as recommended in respect of Lake Waihora (17.5.3).

Financial Assistance to Ngai Tahu

13 That a sum of not less than one million dollars be made available to Ngai Tahu Trust Board to enable it to engage the necessary professional and related administrative services to prosecute its negotiations with the Crown on the question of remedies (24.6.2).

14 That the sum of $399,168 being the costs incurred by Ngai Tahu Maori Trust Board up to 6 October 1989 in the preparation and presentation of its claim to the tribunal and as set out in a statement filed on 13 November 1989 be reimbursed by the Crown to the Trust Board. (24.7.4)

Ngai Tahu Land Report

25 Tribunal Recommendations

25.3 Other recommendations

25.3. Other recommendations

1 Whenua Hou (Codfish Island)

That subject to prior notification and to arrangements with conservation authorities, free access be available to Rakiura Maori to visit the island but consistent at all times with the security of the wild-life on the island (15.7.4).

2 Crown Titi Islands

That beneficial ownership of the Crown Titi Islands be vested in such persons or bodies as may be nominated by Ngai Tahu and be subject to similar management regime as the beneficial Titi Islands (17.5.4).

3 Pingao

That the question of reserving the pingao plantation for Ngai Tahu on Kaitorete Spit be brought to the notice of the Minister of Conservation for consideration and action. (17.5.5)

4 Consultation in environmental matters

That remedial action be taken by government in these four fields:

(a) amendment to statutes to ensure that Maori values are made part of the criteria of assessment before the tribunal or authority involved;

(b) proper and effective consultation with Maori before action is taken by legislation or decision by any tribunal or authority;

(c) representation of Maori on territorial authorities and national bodies; and

(d) representation of Maori before tribunals and authorities making planning and environment changes (17.5.8).

Ngai Tahu Land Report

Epilogue

Epilogue

Epilogue

And so a little over four years after the presentation of this claim to the tribunal we have completed our examination of the major land grievances of Ngai Tahu and their loss of mahinga kai.

It has been quite an experience and for all those who took part there will be unforgettable moments; some awesome, such as the sudden rush of wind at the church service at Kaiapoi pa; some poignant, such as the lament of Hana Morgan at Te Aroha marae; some heart-warming, such as the planting of three trees by the Crown, the claimants and the tribunal at Tuahiwi and the subsequent presentation and hoisting of the Red Ensign with Tuahiwi emblazoned across it. Perhaps most memorable of all, the poroporoaki and the satisfaction and relief of Ngai Tahu at the knowledge they had completed the trust reposed in them.

We have already paid tribute to the people of Ngai Tahu for their graciousness and hospitality. We have also commended counsel and the researchers for their diligence and fairness. This tribunal must place on record however its recognition of the outstanding research, administrative and organisational support given to this tribunal by Dr Michael Belgrave, research manager, and his small team of tribunal staff. Dr Belgrave's contribution and the assistance he has so willingly given to the claimants, the Crown and all those people who have wished to place their views before this tribunal are well known to those persons and deeply appreciated by them.

In accordance with section 6(5) of the Treaty of Waitangi Act 1975, the registrar is directed to serve a sealed copy of this report on:

(a) The claimants, Henare Rakiihia Tau and the Ngai Tahu Maori Trust Board

(b) Minister of Maori Affairs
Minister of Justice
Minister of Conservation
Minister of Mining
Minister for the Environment
Minister of Fisheries
Minister of Lands
Minister of State-Owned Enterprises
Solicitor General

(c) J L Marshall for New Zealand Fishing Industry Board
T J Castle for New Zealand Industry Association

(d) Federated Farmers of New Zealand

DATED at Wellington this 1st day of February 1991.

A G McHugh, presiding officer

M T A Bennett, member

M E Delamere, member

G M Te Heuheu

I H Kawharu, member

G S Orr, member

D J Sullivan, member

Ngai Tahu Land Report

Waiata

Waiata

Waiata

Ka hoki tonu mai au
Ki a koe Ngai Tahu
Ki te whakarongorongo
Ki te wherawhera
I o Poutini Pounamu

Kua hahaea te ata
I runga o Rekohu
Tirotiro noa ana
Poua ma
Ka ngaro koutou i runga
I o Otautahi

E tangi te Hakuwai
I runga i o Moutere
Whakamatakutaku ana au
Te Kaitiaki nga titi
Nga Mahinga Kai

E tama ma
I mua o te Honore
Whakaitiiti iho ra
Pupuritia ko Te Tokotoru

E Hine, e Shonagh
Ko koe te ngakau nui
Tangi whakaroto ake nei
Te arohanui hei hoa
Haere rerenga

Makahuri e tu
Kua mutu te nohotanga
Te Matua Whakarite mai tatau
Homai nga korerorero
Te kupu Tapu
Mo tenei ra

Ngai Tahu Land Report

Appendix 01 The Treaty of Waitangi

1.1 The Treaty of Waitangi

Appendix 1

THE TREATY OF WAITANGI

The Treaty of Waitangi

The Text in Maori

KO Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o No Tirani [sic] i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawangatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua ki te Kuini e mea atu ana ia ki nga Rangatira to te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki [nga] tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. 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.

Ko te Tuatoru

Hei wakariteta [sic] mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,

Consul and Lieutenant-Governor

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.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

Treaty of Waitangi 1975, First Schedule, as amended by Treaty of Waitangi Amendment Act 1985

The Text in English

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands-Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result form the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees 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 as long as it is their wish and desire to retain the same in their possession; 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.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON Lieutenant Governor

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 understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]

Treaty of Waitangi Act 1975, First Schedule

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.1 Otakou, 31 July 1844

2.1 OTAKOU 1844-Maori/English

2.2 KEMP 1848-Maori/English

2.3 PORT COOPER 1849-Maori/English

2.4 PORT LEVY 1849-Maori/English

2.5 MURIHIKU 1853-Maori/English

2.6 HAMILTON'S AKAROA DEED 1856-Maori/English

2.7 NORTH CANTERBURY 1857-Maori/English

2.8 KAIKOURA 1859-Maori/English

2.9 ARAHURA 1860-Maori/English

2.10 RAKIURA 1864-Maori/English

2.1 Otakou, 31 July 1844

1A 1 1885/2457 (Colonial Secretary, NZ, Inwards Letters), National Archives, Wellington. Otago 3, DOSLI, Heaphy House, Wellington

Kia Mohio, nga Tangata katoa ki Tenei Pukapuka, ko matou ko nga Rangatira me nga tangata o Ngaitahu i Nui Tireni kua tuhia nei o matou ingoa ki raro, ka wakaae i tenei rangi i te toru tekau ma tahi o nga rangi o Hurai i te tau o to tatou Ariki kotahi mano e waru rau e wa te kau ma wa; kia tukua, kia hokoa; kia whakamahuetia rawatia mo Wiremu Wekepiri (William Wakefield) te tino kai mahi o te wakaminenga o Nui Tireni i Ranana mo nga kai wakarite o taua wakaminenga o matou wahi katoa to matou papa katoa i roto i nga wenua i roto i nga rohe kua tuhia nei ki raro, ko nga ingoa o aua wenua ko Otakou, ko Kaikarae, ko Taieri, ko Mataau, ko te Karoro, ko nga rohe enei, ka timata te rohe wakararo i Purehurehu haere tonu i tatahi wakawiti atu ki tawahi o te ngutu awa o Otakou ki Otupa, haere tonu i tatahi a Poatiri, ko te taha ki te haurawaho ko te moana nui haere tonu i Poatiri-a-Tokata, ko te taha ki toka ka haere tonu i reira a runga i te hiwi i Taukohu-a-Pohueroa haere tonu i runga i te hiwi i kaihiku wakawiti ki tawahi o Mataau, haere tonu i runga i te hiwi o Maungaatua-a-i runga i Wakaari-a-runga i Mihiwaka i te hiwi-a-Otuwarerau-a-heke noa ki tatahi ki Purehurehu, me nga moutere katoa hoki, ka tukua e matou a Kamautaurua a Rakiriri a Okaihe, a Moturata, a Paparoa, a Matoketoke, a Hakinikini a Aonui. Tenei hoki nga wahi wenua kua kotia e matou mo matou mo a matou

Tamariki ko tetahi wahi wenua i te taha wakawaho o Otakou ko Omate te ingoa, ka timata te rohe i moepuku wakawiti atu ki Poatiri haere tonu i tatahi-a-te Waiwakaheke ka wakawiti i reira ki Pukekura haere i tatahi a moepuku ko tetahi wahi wenua hoki kei Pukekura kotahi pea te ekara o roto kua poua ki te pou, ko tetahi wahi wenua hoki kei Taieri ka timata te rohe i onumia tika tonu te rohe a Maitapapa ko te awa o Taieri hoki te rohe o tetahi taha. Ko tetahi wahi hoki kei te Karoro ko te Karoro te rohe ki runga ko te moana nui te rohe wakawaho ko te rohe wakararo kei te kainga a kia kotahi te maera o te rohe wakauta. Ko enei wahi kua kotia e matou e kore e hokoa e retia ki tetahi tangata atu kia wakaae ra ano te Kawana o Niu Tireni-Ko nga utu enei mo aua wenua kua wakahuatia ki runga, e ruai [sic] mano e waraua [sic] Pauna moni kua tangohia e matou i tenei rangi i te aroaro o enei kaititiro.

Hoani Tuhawaiki tana X tohu Pokene tana X tohu

Hoani Tuhawaiki, X mo Topi Te Kai Koarere tana X tohu

Pohau Kihau tana X tohu

Kahuti tana X tohu Kuru Kuru tana X tohu

Papakawa tana X tohu Moko Moko tana X tohu

Tutewaiao Korako Karetai tana X tohu

Raki Wakana tana X tohu Te Haki tana X tohu

Taiaroa tana X tohu Karetai tana X tohu

Korako tana X tohu Taka Maitu tana X tohu

Te Raki tana X tohu Horomona Pohio

Te Ao tana X tohu Te Raki

Potiki tana X tohu Tairoa, mo Pokihi X

Pohata tana X tohu

Witnesses:
John Jermyn Symonds, P.M.
Frederick Tuckett
George Clarke, junior, Protr, Aborigines
David Scott

Know all men by this document We the chiefs and men of the Ngaitahu Tribe in New Zealand whose names are undersigned consent on this thirty first day of July in the year of our Lord one thousand eight hundred and forty four to give up, sell, and abandon altogether, to William Wakefield the Principal Agent of the New Zealand Company of London on behalf of the Directors of the said Company all our claims and title to the Lands comprised within the under mentioned boundaries, the names of

the said Lands are Otakou, Kaikarae, Taieri, Mataau, and Te Karoro. These are the boundaries-The northern boundary line commences at Purehurehu runs along the sea shore crossing the entrance of Otakou (Harbour) to Otupa, thence along the coast to Poatiri-the Eastern boundary is the ocean from Poatiri to Tokata, thence the southern boundary runs along the summit of Taukohu to Pohueroa-it then runs along the summit of the Kaihiku range and crosses the Mataau river, thence along the summit of the Maungaatua range to Wakaari along the summit of Wakaari to Mihiwaka and Otuwareroa, thence it descends to Purehurehu on the sea coast-We also give up all the Island Kamautaurua, Rakiriri, Okaihe, Moturata, Paparoa, Matoketoke, Hakinikini and Aonui-Excepting the following places which we have reserved for ourselves and our children that is to say a certain portion of Land on the eastern side of Otakou called Omate-the boundary line commences at Moepuku crosses over to Poatiri thence along the coast to Waiwakaheke then crosses to Pukekura and runs along the side of the harbour to Moepuku-also-a certain portion of Land at Pukekura the boundaries of which are marked by posts containing one acre more or less-also-a portion of Land at Taieri, the boundary line of which commences at Onumia and runs across in a strai[gh]t line to Maitapapa, the Taieri river forms the other boundary, also a portion of Land at Te Karoro bounded on the south by the Karoro river, on the east by the ocean the northern boundary includes the village of that place and extends inland about one mile which said reserved places we agree neither to sell nor let to any party whatever without the sanction of His Excellency the Governor of New Zealand.-We have received as payment for the above first mentioned Lands the sum of one thousand [sic] and four hundred Pounds in money, on this day, in the presence of these witnesses.

A true translation-George Clarke Junior, Protector of Aborigines.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.2 Kemp, 12 June 1848

2.2 Kemp, 12 June 1848

Canterbury 1, DOSLI, Heaphy House, Wellington
English translation included in G Eyre to His Excellency the Governor in Chief, 5 July 1848, G7/1, National Archives, Wellington.

Wakarongo mai e nga iwi katoa. Ko matou ko nga Rangatira, ko nga tangata o Ngaitahu kua tuhi nei i o matou ingoa i o matou tohu ki tenei pukapuka i tenei ra i te 12 o Hune, i te tau tahi mano waru rau wha tekau ma waru ka whakaae kia tukua rawatia atu kia Wairaweke (William Wakefield) te Atarangi o te Whakaminenga o Niu Tireni e noho ana ki Ranana, ara ki o ratou Kaiwhakarite, o matou Whenua, o matou oneone katoa e takoto haere ana i te taha tika o tenei moana timata mai i Kaiapoi i te tukunga a Ngatitoa i te rohe hoki o Whakatu, haere tonu, tae tonu ki Otakou, hono tonu atu ki te rohe o te tukunga a Haimona, haere atu i tenei tai a te mounga [sic] o Kaihiku, a puta atu ki tera tai ki Wakatipu Waitai (Milford Haven) otira kei te pukapuka Ruri te tino tohu, te tino ahua o te whenua. Ko o matou kainga nohoanga ko a matou mahinga kai, me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou; a ma te Kawana e whakarite mai hoki tetahi wahi mo matou a mua ake nei a te wahi e ata ruritia ai te whenua e nga Kai Ruri- ko te nui ia o te whenua, ka tukua whakarereretia mo nga Pakeha oti tonu atu.

Ko te Utu kua tukua mai mo matou e Rua mano pauna moni (2,000) e tuawhatia mai te utunga mai o enei moni ki a matou, utua mai kia matou inaianei, e Rima rau pauna (500), kei tera utunga e 500, kei tera atu 500, kei tera rawa atu e 500, huihuia katoatia, e 2,000.

Koia tenei tuhituhinga i o matou ingoa i o matou tohu, he whakaaetanga nuitanga no matou, i tuhia ki konei ki Akaroa i te 12 o Hune 1848.

Ko te tohu tenei o Taiaroa X John Tikao

Maopo X John Pere

Paora Tau X Tiaki x

Tainui X Ko Te hau

Koti X Matiaha

Karetai Ihaia

Pohau Waruwarutu

Wiremu Te Raki Taki

Solomon Pohio Ko Rirawa

Te Whaikai Pokeno Korehe

Rangi Whakana Ko Te Poriohua

Potiki Wiremu

Tiare Wetere Ko Hape

Ko Tare Te haruru Pukenui

Haereroa Tuauwau

Tiraki Tuahuru

Te Matahara Te Hau

Manahe

Ko te Uki

Pukari

By proxy Taiaroa &
Solomon for Topi
Kihau, son of Tuhawaiki
& Te Korako.

Nga ingoa o te kai titiro-

Witnesses-
R.A. Olliver, Commander H.M.S. "Fly"
T. Bull, Lieutenant
John Watson, Resident Magistrate
Charles H. Kettle, J.P., Principal Surveyor, New Zealand Company
H. Tacy Kemp, J.P., Commissioner
James Bruce, Settler

Know all men. We the Chiefs and people of the tribe called the "Ngaitahu" who have signed our names & made our marks to this Deed on this 12th day of June 1848, do consent to surrender entirely & for ever to William Wakefield the Agent of the New Zealand Company in London, that is to say to the Directors of the same, the whole of lands situate on the line of Coast commencing at "Kaiapoi" recently sold by the "Ngatitoa" & the boundary of the Nelson Block continuing from thence until it

reaches Otakou, joining & following up the boundary line of the land sold to Mr Symonds; striking inland from this (The East Coast) until it reaches the range of mountains called "Kaihiku" & from thence in a straight line until it terminates in a point in the West Coast called "Wakatipu-Waitai" or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same (the condition of, or understanding of this sale is this) that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the lands shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.

We receive as payment Two Thousand Pounds (2000) to be paid to us in four Instalments, that is to say, we have this day received 500, & we are to receive three other Instalments of 500 each making a total of 2000. In token whereof we have signed our names & made our marks at Akaroa on the 12th day of June 1848.

Signed

Here follow Forty Signatures

Witnesses signed

True translation H. Tacy Kemp

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.3 Port Cooper, 10 August 1849

2.3 Port Cooper, 10 August 1849

Canterbury 5, DOSLI, Heaphy House, Wellington

Whakarongo mai ra e nga tangata katoa; ko matou ko nga rangatira ko nga tangata o te Wakaraupo, (Port Cooper) ara, o nga wenua katoa e takoto ana i ia taha i ia taha o te Wakaraupo e mau nei te ahua, kua tuhi i a matou ingoa, i a matou tohu, he wakaaetanga mo matou mo a matou wanaunga, mo o matou tamariki, mo o matou uri katoa e whanau i muri iho ia matou kia tino tukua rawatia atu nga wenua katoa o matou e tuhia nei nga rohe, e mau nei te ahua ki tenei pukapuka tuku whenua kia Her Majesty the Queen of Great Britain, her heirs and successors, hei wenua tumau tonu iho mona, mo nga pakeha ranei e wakaaetia e ia, ara e His Excellency the Governor, kia tukua mo ratou aua wenua.

Ano te mea kua wakaae matou kia tukua rawatia atu o matou wenua e takoto nei i roto i nga rohe oneake nei tuhia, e wakaae ana Mr Mantell Commissioner for the Extinguishment of Native Claims, i runga i te mana kua tukua mai kia ia e His Excellency the Lieutenant Governor of the Province, kia utua matou ki nga pauna moni rua nei rau takitahi-kua riro mai nei kia matou i nga ringaringa o Mr Mantell, hei utunga wakamutunga rawatiatanga mo aua wenua.

Na, ko nga rohe enei o nga wenua ka tukua tonutia e matou: ka timata te rohe wakauta i te ngutuawa o Opawa, ka haere atu ma te rohe i tuhi ai ki te kautu o te pukapuka tuku wenua a Mr Commissioner Kemp i te 12 o Hune 1848, a-haere tonu ma taua rohe puta tonu ki Waihora: ko te rohe wakawaho ka timata ki Kaitara, a haere tonu ma te Pohue, a, ma te hiwi a te Ahupatiki a, puta tonu ki Waihora ki te wakamarotanga, taua maunga ki Kuhakawariwari; otira ki te pukapuka ruri te tino tohu te tini ahua o te wenua. A, ko te wenua katoa one nga aha noa iho o aua wenua e takoto ana i roto i enei rohe, haunga ano nga wahi i wakatapua mo matou e Mr Mantell, Commissioner, kua oti nei te tuku tonu atu.

Ko te wahi tuatahi e wakatapua nei mo matou ko te wahi wenua ki Purau, e iwa pea eka o roto i ruritia ai i a W. Octavius Carrington, Surveyor i wakaturia ai nga rohe kia Tiemi Nohomutu, kia Kautuanui kia Tami Tukutuku kia Tiemi Kokorau i te aroaro o Joseph Thomas Esqre i te 25 o nga ra o Hurae 1849.

Ko te tuarua; ko nga rakau o te motu ngaherehere e huaina nei ko Motuhikarehu, kiuta atu o Purau, hei mahinga wahie mo matou, ko te wenua e hara ia hei a matou, hei te pakeha ano ia. I wakaturia ano taua wahi kia Tiemi Nohomutu ma e Mr Mantell Commissioner raua ko W. Carrington i te 26 o nga ra o Hurae 1849.

Ko te tuatoru, ko te wahi wenua e huaina ana ko Rapaki, ko Taukahara; ko nga rohe enei i wakaturia ai ki nga tangata maori e Mr Carrington i te aroaro o Joseph Thomas Esqre raua ko Mr Mantell, Commissioner: E timata ana kei te pou e tu ana ki te rae ki Otuherekio, ka haere ka piki mai te Hiwi ara, ma nga tohu i wakaturia ai e Mr Carrington a tae tonu ki runga ki te Upokookuri, a, haere tonu ana aua tohu, a, heke iho ma te hiwi ki te taha wakauta o Taukahara ma te pari e huaina ana ko Nohomutu, a, hono ki te awa iti ko Okaraki te ingoa, a tika tonu ma taua awa, a hono tonu ki te wai tai.

Otira ki nga kautu o Mr Carrington, te tino tikanga o aua rohe katoa.

Heioi, ko te wakamutunga rawatanga tenei o nga wahi e wakatapua mo matou i roto i te rohe mo Her Majesty the Queen of Great Britain a ko aua wahi e wakaae ana hoki a Mr Mantell, Commissioner, kia waiho hei wenua tumau iho mo matou, mo o matou uri i muri iho i a matou, ake tonu atu.

E wakaae ana hoki matou kia kaua e hokona ki te pakeha aua wahi kua oti nei te wakatumau kia matou kia wakaae mai ra ano His Excellency the Governor.

Ano, e wakaae aha hoki matou kia kaua e tukua he pakeha ki aua wahi noho ai kia wakaae mai ra ano His Excellency the Governor.

Ano, e wakaae ana hoki matou kia waiho tonu mo His Excellency the Governor te wakaaro mo nga ara ruri nui e wakaaetia a mua e His Excellency the Governor kia hanga, kia takoto marire ki roto i nga rohe kua oti nei te wakatapu tonu mo matou.

A, mo to matou wakaaetanga pono rawa ki nga tikanga katoa i roto i tenei pukapuka tuku wenua kua panuitia mai nei kia matou ka tuhia o matou ingoa me o matou tohu:- a, mo te wakaaetanga hoki a Her Majesty the Queen of Great Britain ki nga tikanga katoa i roto i tenei pukapuka ka tuhia hoki te ingoa o Mr Mantell, Commissioner for the Extinguishment of Native Claims.

I Oketeupoko, i te Wakaraupo (Port Cooper) no te ngahuru o nga ra o Akuhata, i te tau kotahi mano, ewaru rau, e wa tekau ma iwa i tuhia tenei pukapuka. 10 August 1849

ko nga ingoa o nga kai titiro

Charles. O. Torlesse
Octa Carrington
John Gebbie
John Bannister
Ngarongomate
Kerere
L Fitch

Walter Baldock Durrant Mantell, Commissioner

Ko te tohu tenei X a Nohomutu
Tami Tukutuku

Ko te tohu tenei X a Tiemi Kokorau
Ko ra na wete
Ko Te tohu tenei X a Matiu Kurihia
Ko te tohu tenei X a Hape
Ko te tohu tenei X a te Rua
Ko te tohu tenei X a Poharama Ru
Ko te tohu tenei X a Maru
Ko te one Teuki
Ko te Pukenui
Ko Topi
Ko Kairakau
Ko te tohu tenei X a Tukaha
Ko Porokori
Ko te tohu tenei X o Apetara Kautuanui
Ko Tiakikai
Ko Tahea

Hearken all people; we the Chiefs and people of Te Wakaraupo (Port Cooper) that is to say of all the lands lying on either side of Te Wakaraupo, a plan of which is attached, have signed our names and made our marks in token of our consent, for ourselves, our relatives, our children and our descendants after us to cede finally all the lands, of which the boundaries are described in this deed of sale, to Her Majesty the Queen of Great Britain her heirs and successors as a lasting possession for her or for the Europeans who may be allowed by her, that is to say by His Excellency the Governor to become possessed of these lands.

And whereas we have agreed to cede finally our lands which are within the boundaries hereafter to be described, Mr Mantell, Commissioner for the Extinguishment of Native Claims by virtue of the powers vested in him by His Excellency the Lieutenant Governor of the Province agrees to pay of two hundred pounds, which we have received by the hands of Mr Mantell in final payment of the said lands.

Now these are the boundaries of the lands which we have finally ceded: the inland boundary commences at the mouth of Opawa thence along the boundary described in the plan attached to Mr Kemp's deed dated the 12th June 1848 to Waihora; the outer boundary commences at Kaitara, thence by Te Pohue, thence by the Ahupatiki ridge to Waihora following the line of the said mountain to Kuhakawariwari, but the survey plan will accurately shew the description of the land, and we hereby cede for ever all the land, with all belonging thereto, which lies within these boundaries excepting the portions reserved for Mr Mantell, Commissioner.

The first portion reserved for us is the land at Purau estimated to contain nine acres as surveyed by Mr Octavius Carrington Surveyor and as pointed out to Tiemi Nohomutu, to Kautuanui, to Tami Tukutuku and to Tiemi Kokorau in the presence of Joseph Thomas Esqre on the 25 July 1849.

The second: we are to have the use of the trees in the bush called Motuhikarehu for firewood, but the land is not for us but for the Europeans. That piece also was pointed

out to Tiemi Nohomutu and others by Mr Mantell Commissioner and Mr Carrington on the 26 July 1849.

The third: the piece of land called Rapaki and Taukahara of which these are boundaries as pointed out to the Maoris by Mr Carrington in the presence of Joseph Thomas Esqre and Mr Mantell Commissioner: Commencing at the post standing on the point at Otuherekio thence it runs up and along the ridge following the marks shewn by Mr Carrington and on to Te Upokookuri thence following these marks down by the ridge to the inland side of Taukahara thence along the cliff called Nohomutu to the small stream called Okaraki thence following the course of that stream to the sea.

All these boundaries are correctly shewn in the plan made by Mr Carrington.

These are the whole of the places reserved for us within the boundary for Her Majesty the Queen of Great Britain, and Mr Mantell Commissioner agrees that these places shall be permanent possessions for us and for our descendants after us for ever and ever.

We also agree not to sell to the Europeans those places which have been reserved for us without the consent of His Excellency the Governor; and we further agree not to allow Europeans to occupy these places without the consent of His Excellency the Governor and we further consent to leave to His Excellency the Governor the decision as to the main lines of road which His Excellency the Governor may hereafter agree to have made within the boundaries which are herein reserved for us.

And in token of our true consent to all the provisions contained in this deed of cession which has now been read over to us we sign our names and make our marks, and in token of the assent of Her Majesty the Queen of Great Britain to all the provisions contained in this Deed, the name of Mr Mantell Commissioner for the Extinguishment of Native Claims is hereunto affixed.

This deed was made at Oketeupoko, Te Wakaraupo (Port Cooper) on the tenth day of August one thousand eight hundred and forty nine.

[Here follow the signatures]

T G Young translator, Native Dept, 9 June 1871

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.4 Port Levy, 25 September 1849

2.4 Port Levy, 25 September 1849

Canterbury 2, DOSLI, Heaphy House, Wellington

Wakarongo mai ra e nga Iwi katoa ko matou ko nga Rangatira ko nga tangata katoa o nga wenua katoa e takoto haere ana i roto i nga rohe meake nei tuhia e mau nei te ahua, kua tuhi i a matou ingoa i a matou tohu hei wakaaetanga mo matou mo o matou wanaunga mo o matou uri katoa e wanau i muri iho ia matou, kia tino tukua rawatia atu nga wenua katoa o matou e tuhia nei nga rohe, e mau nei te ahua ki tenei pukapuka tuku wenua kia Her Majesty the Queen of Great Britain her heirs and successors hei wenua tumau tonu iho mona mo nga Pakeha ranei e wakaaetia e ia, ara, e His Excellency the Governor kia tukua mo ratou aua wenua. A no te mea kua wakaae matou kia tukua rawatia atu o matou wenua e takoto nei i roto i nga rohe meake nei tuhia e wakaae ana Mr. Mantell Commissioner i runga i te mana kua tukua mai ki a ia e His Excellency the Lieutenant Governor of the Province kia utua matou ki nga pauna moni e toru nei rau takitahi (300) kua riro mai nei kia matou i nga ringaringa o Mr. Mantell hei utunga wakamutunga rawatanga mo aua wenua. Na ko nga rohe enei o nga wenua ka tukua tonutia e matou; ka timata te rohe wakauta ki Kaitara-a haere tonu ma te Pohue a ma te hiwi a te Ahupatiki, a puta tonu ki Waihora ki te wakamarotanga o taua maunga ki Kuhakawariwari, ara ma te rohe wakawaho a Nohomutu ma; ko te rohe wakawaho ka timata kei Waihora kei Waikakhi ka haere a ma te tohu e tuhia i roto i te kautu ahua wenua e mau nei a hono tonu ki te waitai ki Pohatupa (Fly or Flea Bay).

Otira, kei te pukapuka ahua wenua e mau nei te tino tohu me te tino ahua o te wenua o nga rohe ano hoki. A ko te wenua katoa me nga aha noa iho o aua wenua e takoto ana i roto i enei rohe haunga ano te wahi i wakatapua mo matou e Mr. Mantell kua oti nei te tuku tonu atu. Ko te wahi tenei e wakatapua nei mo matou ko te wahi wenua kei Koukourarata; ko nga rohe enei o taua wahi i wakaaturia ana e Mr. Octavius Carrington, Surveyor raua ko Mr Mantell ki a Apera Pukenui, kia Himeona kia etahi atu o nga tangata o matou, a kua waitohungai ki nga pou kua pania hoki nga pohatu i te kokowai:- E timata ana taua rohe ki te pou kei te rae ko Pariahineteata te ingoa, ka piki i konei ka haere ma nga pou i poua ai e Mr Carrington a tae ki te pou e tu ana kei te Watamaraki, witi tika atu i reira ki te Upokoohinetewai, a, haere tonu ma te hiwi o te maunga, ara, ma nga tohu ki Kakanui a heke iho i reira ma te hiwi ara ma nga tohu ki te wai tai ki Puketi: Otira kei te pukapuka ahua wenua o Mr O. Carrington Surveyor te tino tikanga o taua rohe. Heoi, ko te whakamutunga rawatanga tenei o nga wahi e wakatapua mo matou i roto i te rohe mo Her Majesty the Queen of Great Britain a ko taua wahi e wakaae ana hoki a Mr Mantell Commissioner kia waiho hei wenua tumau iho mo matou mo a matou uri i muri iho ia matou, ake tonu atu. E wakaae ana hoki matou ki a kaua e hokona ki te Pakeha taua wahi kua oti nei te

wakatapu mo matou kia kaua hoki e tukua ki Pakeha ki taua wahi noho ai kia wakaae mai ra ano a His Excellency the Governor. Ano e wakaae ana hoki matou kia waiho tonu mo His Excellency the Governor te wakaaro mo nga ara ruri nui e wakaaetia a mua e His Excellency the Governor, kia hanga, kia takoto marire ki roto i nga rohe kua oti nei te wakatapu tonu mo matou. A ko nga mara katoa me nga kainga katoa e takoto ana i waho o te rohe mo matou hei tenei tau (1849) ano era katoa te wakarerea e nga tangata Maori kia watea ai te wenua; haunga ano nga ware me nga mara kei te Wakaroi (Pigeon Bay): a koia tenei te tikanga tenei mo aua wahi kei te Wakaroi (Pigeon Bay) ko nga mara e ngakia ana i naianei e tupu ana te kai i naianei me ngaki marie i tenei tau, i tera tau ano hoki a, hei te tau kotahi mano, e waru rau, e rima tekau ma tahi (1851) me wakarere katoa aua mara me aua kaika e nga tangata Maori kia watea ai te wenua mo te Pakeha kauraka hoki he mara hou e topea ki taua wahi kei te Wakaroi (Pigeon Bay). A mo to matou wakaaetanga pono rawa ki nga tikanga katoa i roto i tenei pukapuka tuku wenua kua panuitia mai nei kia matou, ka tuhia i matou ingoa me o matou tohu; a mo te wakaaetanga hoki a Her Majesty the Queen of Great Britain ki nga tikanga katoa i roto i tenei pukapuka ka tuhia hoki te ingoa o Mr Mantell Commissioner of the Extinguishment of Native Claims.

I Koukourarata i Port Levy no te rua tekau ma rima o nga ra o Hepitema i tuhia tenei pukapuka 1849.

Ko nga ingoa o nga kaititiro.
Octa Carrington
James Egan
Ngarongomate
Henere Kowa
Walter Mantell, Commissioner

Apera Pukenui
Kairakau
Himiona
Na Puehu tenei X tohu
Na Kauoma tenei X tohu
Na Haimona Kaiparuparu tenei X tohu
Na Te Warerakau tenei X tohu
Tamati Pukurau
Na Ipika tenei X tohu
Na Wiremu Parata Te Atawiri tenei X tohu
Na Poharama Ruru tenei X tohu
Na Taoraki tenei X tohu
Peneahi te Pai
Na Timaru Tiakikai tenei X tohu
Na Waipuhuru tenei X tohu
Na Hokokai by Poharama tenei X tohu
Na Te Ao tenei X tohu
Ko Te Waipapa
Ko Hapaikete
Pohata by proxy by Apera
Rangiaupere
Na Tupeha tenei X tohu

Tamakeke by proxy by Apera
Te Kapiti by proxy by Apera
Wi Karaweko by proxy by Apera
Na Pirimona

Hearken all the tribes. We the chiefs and people of all the land within the boundaries hereunder described and of which the plan is attached have signed our names and made our marks in token of the consent of us on behalf of our relatives and all our descendants to the final cession of all those of our lands whereof the boundaries are herein described and the plan attached unto this deed to Her Majesty the Queen of Great Britain her heirs and successors as a lasting possession for her or for Europeans who she, that is to say His Excellency the Governor, may allow to become possessed of these lands.

And whereas we have consented to give up entirely our land within the boundaries hereunder described Mr Mantell, by virtue of the power granted to him by His Excellency the Lieutenant Governor of the Province agrees to pay us the sum of three hundred Pounds (300) which we have received from the hands of Mr Mantell as a final payment for those lands.

These are the boundaries of the lands which we absolutely give up: The inland boundary commences at Kaitara, thence to Te Pohue and along the ridge to Te Ahupatiki, it comes out at Waihora following the ridge of that mountain to Kuhakawariwari, that is to say by the outer boundary of Nohomutu and his people; the outer boundary commences at Waihora at Waikakahi thence it goes as is shewn on the plan hereunto attached till it reaches the sea at Pohatupa (Fly or Flea Bay).

But an accurate description of the land and its boundaries is contained in the plan hereunto attached. And all the land together with the things belonging thereto within the boundaries (except the piece reserved for us by Mr Mantell) is hereby absolutely given up.

This is the portion reserved for us-the land at Koukourarata; these are the boundaries of that piece pointed out by Mr Octavius Carrington, Surveyor and Mr Mantell to Apera Pukenui to Himiona and to others of our people, pegs have been put in to mark them and the stones have been marked with red ochre. That boundary commences at the pole on the bluff called Paniahineteata, it strikes up from here and follows the poles put in by Mr Carrington till it reaches the pole at Te Watamaraki, thence straight across to Te Upokoohinetewai, thence along the Manukuia ridge thence as marked to Kakanui, it comes down there by the ridge thence as marked to the sea at Puketi. The boundary is, however, more fully described in the plan of the land made by Mr. Carrington. Well, this is the only reserve made for us within the boundary of Her Majesty the Queen of Great Britain, and Mr Mantell Commissioner consents to leave that as a lasting possession for us and our descendants after us for ever. We also agree not to sell to Europeans that piece which is reserved for us and not to allow any Europeans to live on that place without the consent of His Excellency the Governor. Also we consent to leave it to His Excellency the Governor to decide about the main lines of road which His Excellency the Governor may agree to make and lay off within the boundaries which have been reserved for us. And all the cultivations and all the places situate outside of the boundary for us are to be abandoned by the Maori

in this year (1849) that the land may be clear, excepting the houses and cultivations at Te Wakaroi (Pigeon Bay). This is the arrangement in respect of these places at Te Wakaroi (Pigeon Bay) the cultivations now being worked upon and upon which crops are growing may be cultivated during this year and next year and in the year one thousand eight hundred and fifty one (1851) all those cultivations and all those kainga must be abandoned by the Maori in order that the land may be clear for the Europeans: no new cultivation is to be made in that place at Te Wakaroi (Pigeon Bay).

And in token of our true consent to all the covenants contained in this deed of conveyance which has now been read over to us we affix our names and marks; and in token of the consent of Her Majesty the Queen of Great Britain to all the covenants contained this deed the name of Mr Mantell Commissioner for the Extinguishment of Native Claims is hereunto affixed.

This document was written at Koukourarata, Port Levy on the twenty fifth day of September 1849.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.5 Murihiku, 17 August 1853

2.5 Murihiku, 17 August 1853

Otago 1, DOSLI, Heaphy House, Wellington

Kia mohio mai nga Tauiwi katoa; ko matou ko nga Rangatira me nga tangata katoa o nga whenua katoa e takoto haere ana kiroto ki nga Rohe kua tuhia kiraro, a, i riro mai kia matou no o matou Tupuna tuku iho kia matou, e mau nei hoki te Ahua, kua tuhi i o matou Ingoa i a matou tohu, hei Wakaaetanga mo matou ano, mo o matou Whanaunga, mo o matou Hapu me o matou Uri katoa e ora nei a ka whanau i muri iho i a matou, kia tukua rawatia atu o matou nei Whenua katoa kua whakaritea, kua tuhia nga Rohe a e mau nei hoki te Ahua ki tenei pukapuka tuku whenua kia Her Majesty the Queen of Great Britain Her heirs & Successors for ever hei Whenua tumau tonu iho mona mo nga Pakeha ranei e whakaaetia e ia ara e His Excellency the Governor kia tukua mo ratou. A no te mea kua wakaae matou kia tukua rawatia atu o matou nei whenua e takoto nei kiroto ki nga rohe kua tuhia nei kiraro, e wakaae ana Walter Mantell, Commissioner for Extinguishing Native Claims ta te mea kua tukua mai kia ia e His Excellency the Governor-in-Chief, te wakaaro ki te wakarite i te utu mo enei whenua, kia utua mai matou e ia ki nga pauna moni kia rua mano taki tahi (2000) Ko te tikanga o te utunga tenei, kia wehea nga moni nei kia rua nga tukunga; na ki te tukunga tuatahi kia kotahi mano pauna (1000) a, kia riro mai aua moni ki a matou ki Otakou kia rupeke mai ra ano ka takata; ko te tukuka tuarua kia kotahi mano pauna (1000) hei awarua tuku ai ki te marama e tae mai ai te moni. Na, ka huihuia katoatia nga moni e nga tukunga nei ka rite ki nga 2000 kua wakaritea ki waenga.

Na, ko nga Rohe enei o nga Whenua kua oti nei te tuku. Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotai,) haere atu i reira ki Kaihiku a, i reira haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe, me nga Turanga me nga Tauranga, me nga awa, me nga roto, me nga ngahere, me nga Pakihi, me nga aha noa katoa kiroto ki aua wahi me aua mea katoa e takoto ana; Otira kei te pukapuka ruri kua oti te whakapiri ki tenei pukapuka te tino tikanga me te tino ahua. Ko nga whenua katoa me nga aha noa katoa, kua oti nei te tuhituhi kirunga a e takoto ana ki roto ki nga rohe kua wakaritea kirunga kua tukua rawatia atu kia Her Majesty the Queen ake ake ake. Otira ko nga wahi whenua i wakaritea e Mr Mantell i ruritia hoki e C. Kettle Esq. J.P. Government Surveyor ki Tuturau, Omaui, Oue, Aparima, Oraka, Kawakaputaputa, me Ouetota, e mau nei hoki nga tohu whika, 1, 2, 3, 4, 5, 6, 7, i pania hoki ki te ta ahua kohai, mo matou hei wenua tumau rawa mo matou, me o matou tamariki, ake, ake, ake: ka mutu o matou wahi ko enei kua wakahuatia nei hoki nga ingoa, E whakaae ana hoki matou

kia kaua e hokona aua wahi kua oti nei te wakatumau kia matou, kia wakaae mai ano His Excellency the Governor. E wakaae ana hoki matou kia kaua e tukua he pakeha ki aua wahi noho ai kia wakaae mai ano His Excellency the Governor. A, ki te mea ka wakaaro His Excellency the Governor ki te whaihanga amua ake nei etahi huarahi ki roto ki enei nga wahi i wakatumauria mo matou e wakaae ana matou kia tukua utu koretia atu etahi wahi kia takoto pai ai nga huarahi e wakaaro ai ia kia hangaia. A, mo to matou wakaaetanga, ponotanga rawatanga ki nga tikanga katoa kiroto ki tenei pukapuka tuku whenua kua panuitia mai nei kia matou kua tuhia e matou i o matou ingoa me o matou tohu; a mo te wakaaetanga a Her Majesty the Queen of Great Britain, ki nga tikanga katoa ki roto ki tenei pukapuka, kua tuhia hoki e Walter Mantell, Commissioner for the Extinguishment of Native Claims, i tona ingoa.

I tuhia o matou ingoa me o matou tohu ki tenei pukapuka ki te 17 o ka ra o Akuhata, kotahimano waru rau rima te kau ma toru ki Tanitini.

Dated at Dunedin, Province of Otago, this seventeenth day of August, one thousand eight hundred and fifty-three.

Walter Mantell, Commissioner Teoti Rauparaha

Taiaroa Tipene Pepe

Koau John Wesley Korako

Taheke Kereopa Totoi

Karetai Tiare Hape

Potiki

Tare Wetere Te Kaahu Moihi Hamero

Reihana James Rikiriki

Huriwai Te Marama

Tiare Ru Maraitaia

Wi Rehu Ihaia Whaitiri

Paitu Kahu Patiti

Akaripa Pohau Horomona Mauhe

Matewai Hoani Hoani Korako

Riwai Piharo John Topi Patuki

Paororo Manihera Tutaki

Ko Matewai Matene Manaia

Tare Te Au Te Pae

Makaia Pokene

Whaiti Pirihira Timoti White

Inia te Meihana Horomona Pohio

Hohaia Poheahea Paororo

Irai Tihau Matiaha Kukeke

Pukuhau Takurua

Korako Turinaka Huruhuru

Tare Te Ao Haimona Pakipaki

Wiremu Te Raki Rawiri Teawha

Ko Te Tohu, tenei x a Kaikai-Witness Hugh Robinson

Ratimira Tihau Te Au

Tiare Te Au

Pitoko Wiremu Rehua

Rota Pikaroro

Witnesses to the signatures and marks-
Edmund Hooke Wilson Bellairs, Esq., Dunedin, Otago

James Fulton, J.P., West Taieri

Robert Williams, J.P., Dunedin, Otago

A. Chetham-Strode, R.M., Dunedin, Otago

Charles H. Kettle, J.P., Dunedin, Otago

William G. Filleul, Dunedin

Richard Anthony Filleul, Dunedin

Robert Chapman, of Dunedin, Clerk to the Bench

Sealed by me, this 17th day of August, 1863.

(L.S.)A. CHETHAM-STRODE

Let all the Nations know. We the chiefs and all the people of all the lands lying within the boundaries hereunder written, derived through our ancestors from whom it descended to us, the plan whereof is hereunto annexed, have written our names and marks as the act of consent of us, for ourselves, for our relations, for our families, for our heirs now living, and our descendants who shall be born after us,-entirely to give up all those our lands which have been negotiated for, the boundaries of which have been described, and the plan whereof is annexed to this deed of conveyance, to Her Majesty the Queen of Great Britain, her heirs and successors for ever, as a lasting possession for her or for the Europeans to whom Her Majesty, or rather His Excellency the Governor, shall consent that it shall be given.

And whereas we have agreed entirely to give up our land within the boundaries hereunder written: Walter Mantell, the Commissioner for extinguishing Native Claims (by virtue of the authority given to him by His Excellency the Governor-in-Chief to arrange and determine the price to be paid for these lands), agrees that he will pay us the sum of two thousand pounds sterling, the manner of payment to be as follows:- The money shall be divided into two portions: In the first instalment there shall be one thousand pounds, which shall have been paid to us at Otakou when all the people shall have assembled. The second instalment of one thousand pounds shall be paid at Awaroa in the month in which the money arrives. The whole of the moneys of these payments being added together, they shall amount to the sum of two thousand pounds, as agreed upon above.

Now these are the boundaries of the land which have been alienated: The boundary commences at Milford Haven (the name given to that place in Mr. Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the lands within those boundaries, with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. A more accurate description and representation of the land is given in the plan hereunto annexed.

All the lands, and all other things above enumerated, and which lie within the boundaries above recited, have been entirely surrendered to Her Majesty the Queen for ever and ever.

But those portions of land which have been set apart by Mr. Mantell, and surveyed by C. Kettle Esq., J.P., Government Surveyor, at Tuturau, Omaui, Oue, Aparima, Oraka, Kawakaputuputa [sic], and, Ouetoto, marked with the figures 1, 2, 3, 4, 5, 6 and 7, and coloured yellow, are for ourselves as lasting possessions for us and for our children for ever. The only portions for ourselves are those just named. We also agree that the portions which have been reserved for us shall not be sold without the consent of His Excellency the Governor.

And if His Excellency wishes at any future time to cause a road to be made through the land reserved for us, we agree to give up some portions thereof without any

payment being made, that the roads which he thinks necessary may be properly laid off.

And in testimony of our true and unreserved assent to all the conditions of this deed, which has been read aloud to us, we have signed our names and marks; and in testimony of the consent of Her Majesty the Queen of Great Britain, Walter Mantell, Commissioner for the extinguishment of Native Claims, hereunto signed his name.

Our names and marks were signed to this deed on the seventeenth of the days of August, one thousand eight hundred and fifty-three, at Dunedin.

[Here follow the signatures.]

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.6 Akaroa 10 December 1856

2.6 Akaroa 10 December 1856

Canterbury 3, DOSLI, Heaphy House, Wellington

He pukapuka tuku whenua tenei, i tuhituhia ki Hakaroa i tenei ra i te tekau o nga ra o te Marama o Tihema i te tau o to tatou Ariki 1856. Ko te whakaaetanga tenei onga [sic] tangata Maori o Hakaroa, o Pigeon Bay, o Port Levi, o Port Cooper o Kaiapoi, o Hairewa o te motu puta noa ki runga, puta noa ki raro, kia tukua katoatia nga wahi, e tohea nei ki Akaroa, ki a Te Kuini Wiki toria [sic] ki ona uri, ake ake-hei utu mo nga pauna moni. Ko tahi rau ma rima tekau kua riro mai i tenei rangi.

Heoi ano nga kainga, e tohutohungia mo matou, mo nga tangata Maori ko nga eka e wha rau (400 acres) ki Onuku. Ko nga eka e wha rau ki te tumu ki tenei taha mai o Wainui-Ko nga eka e wha rau/400 acres/ ki Wairewa.

Ma matou te whakaaro ki te tangata e puta mai ki te tohe i te whenua-ki te tono moni ranei, no te mea kua riro rawa mai ki a matou nga moni mo te whakaotinga katoatanga o nga whenua ki Hakaroa. Koia matou ka whakaae nei i tenei ra, ka tuhituhi i o matou nei ingoa ki tenei pukapuka.

I te aroaro o

J W Hamilton
William Aglmer-offg Minster, Akaroa
John Aldred-Wes Minister, Lyttelton
Robert Frenvel-sub. coll. customs, Akaroa
William George Poole
O Davie

Na tenei X tohu Wiremu Karaweko
Hone Taupoki
Na tenei X tohu Matini Pawiti
Na tenei X tohu Tuauau
Na tenei X tohu Tamati Tikao
Na tenei X tohu Rangimakere
Na Te Teira
Na tenei X tohu Ropoama
Na tenei X tohu Enoka
Na tenei X tohu te Wakapiri
Na tenei X tohu Tamati Tipene
Hoani Pita Akaroa

Eli Tihau
Paurini
Na tenei X tohu Hoani Wetere
Na tenei X tohu Hakiaha
John Patterson
Solomon Pohio
Na tenei X tohu Raihania
Na tenei X tohu Hona
Na tenei X tohu Hori Waitutu
Na tenei X tohu Heneri Watene
Marutai
Henere te Paro
Na tenei X tohu Raniera
Na tenei X tohu Ekaia
Na tenei X tohu Hamuera
Na tenei X tohu Hoani Timaru
Na tenei X tohu Enoka
Na tenei X tohu Hoani
Na tenei X tohu Paora Tangi
Na tenei X tohu Horo Papera
Na tenei X tohu Paora Tau
Hoani Akaroa
Teoti William

Ko nga rohe o te wahi mo nga Maori o Wairewa.

Me timata ki te uri ko te Waipawa-a haere ki Owika-a haere ki te puke ko Karawera-a kei muri-ko Hukahuka te roa.

He kupu tikanga mo nga Huanui mo nga ara i tahi. Ko matou ko Wiremu Koraweko o Onuku, ko Hoani Papeti o Wainui ko Mautai o Wairewa e wakaae ana ki nga Huanui ka karangatia e te Kuini kia keria i runga i o matou whenua e wakaae ano hoki matou ki a tuwera tonu nga ara i tatahi o te moana.

Witness of signatures Dec 10 1856 at Akaroa

J W Hamilton Hoani Akaroa
Robert Grenvel Na tenei X tohu Mautai
John Aldred Na tenei X tohu Wiremu Korawheko
C. Davie

This is a Deed conveying land, written at Hakaroa on this day, on the tenth of the days of the month of December in the year of our LORD 1856. This is the consent of the aboriginal inhabitants of Hakaroa, of Pigeon Bay, of Port Levi, of Port Cooper, of Kaiapoi, of Wairewa of the island extending to the South, extending to the North, entirely to surrender the pieces [of land] now disputed at Akaroa, to the Queen Victoria to Her Heirs for ever and ever in consideration of the sum of One hundred and fifty pounds in money received on this day.

These only are the places reserved for us, for the Native people the four hundred acres (400 acres) at Onuku; four hundred acres (400 acres) at Wairewa.

With us will be the consideration for any person coming to claim the land or to demand money because we have entirely received the monies for the full and final surrender of the lands at Hakaroa. Wherefore we consent on this day and sign our names to this document.

[here follow the signatures]

The boundaries of the piece for the Natives of Wairewa,-to commence at the ridge called Waipaua, thence to Oweka thence to the hill Karawera, and afterwards to Hukahuka te roa.

An agreement relative to the roads and the seaside paths. We Wiremu Koraweko of Onuku Hoani Papeti of Wainui and Mautai of Wairewa agree that the Queens roads should be dug (formed) upon our lands and we also agree that the roads by the sea side should always remain open.

[Here follow the signatures]

A true translation H Smith for the Chief Commissioner.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.7 North Canterbury, 5 February 1857:

2.7 North Canterbury, 5 February 1857:

Canterbury 4, DOSLI, Heaphy House, Wellington

He pukapuka tuku whenua i tuhituhia ki Kaiapoi i tenei ra i te rima o nga ra o te marama o Pepuere i te tau o to tatou Ariki 1857. Ko te whakaaetanga tenei o nga tangata Maori o Kaiapoi, o te Whakaraupo (Port Cooper) o Kokorarata (Port Levy) o Whakaroi (Pigeon Bay) o Hakaroa, o Wairewa, o te tuauru o te motu katoa, kia tukua to matou tohe mo te whenua katoa i Kaiapoi puta noa ki Waiau-ua, puta noa ki nga awapuna o Waiau-ua o Hurunui o Raka Hauri kia tukua rawatia taua whenua katoa ki a te Kuini Wikitoria ki ona uri, ake, ake, he utu mo nga pauna moni e rua nga rau kua riro mai ki a matou i tenei rangi.

Ma matou te whakaaro mo te tangata e putamai ki te tohe i te whenua, ki te tohe moni ranei mo te whenua, no te mea kua riro rawa mai ki a matou nga moni mo te whakaotinga katoatanga o te whenua ki a te Kuini, i Kaiapoi putanoa ki Waiau-ua, putanoa ki nga awapuna o Waiau-ua o Hurunui o Raka hauri.

Hoia ka whakaae matou ka tuhituhi hoki i o matou nei ingoa i tenei ra.

Ko te Pa o Kaiapoi o mua kei te moture, kua whakatapua me tona hua nui.

Na Paora Tau tenei X tohu

Na Paora Take tenei X tohu Henere Pereita Tawiri

Na Horomona Haukeke tenei X
tohu Wiremu Te Uki

Hakopa Solomon Pohio

John Patterson Ihaia Tainui

Na Matiu Hutoi tenei X tohu Pita te Hori

Na Hoani Timaru tenei X tohu John Pere

Na Hopa Kaukau tenei X tohu Kaikoura Whakatau

Na Arapata Koti tenei X tohu Na Te Aika tenei X tohu

Ihaia Taihoa Na Tukaha tenei X tohu

T Tikao

i te aroaro o

William Congreve of Christchurch
John Aldred (Wesleyan Minister, Christchurch)
William H Revell, Sub-Inspector of Police at Kaiapoi,
G F Day of Kaiapoi, Publican,
J W Hamilton of Lyttleton, Collector of Customs, Agent for purchase of Kaiapoi and Akaroa lands

A deed conveying land written at Kaiapoi on this day on the fifth of the days of the month of February in the year of Our Lord 1857. This is the consent of the Natives of Kaiapoi, of Te Whakaraupo (Port Cooper) of Kokorarata (Port Levi) of Whakaroi (Pigeon Bay) of Akaroa, of Wairewa of the West-side of all the Island to give up our claim to all the land at Kaiapoi and on to Waiau-ua and on to the sources of the Waiau-ua. Hurunui and Rakahauri, entirely to give up all that land to the Queen Victoria and her descendants forever in consideration of the sum of Two hundred pounds paid into our hands on this day.

With us will be the consideration for any person coming forward to claim the land or demanding money for the land because we have finally received the monies for the entire surrender of the land to the Queen at Kaiapoi and on to Waiau-ua and on to the sources of Waiau-ua of Hurunui of Rakahauri. Wherefore we consent and sign our names on this day.

The old Pa of Kaiapoi at Te Moture has been reserved-made sacred with its road also.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.8 Kaikoura, 29 March 1859

2.8 Kaikoura, 29 March 1859

Marlborough 9, DOSLI, Heaphy House, Wellington

TENEI PUKAPUKA i tuhituhia i tenei i te rua tekau maiwa o nga ra o Maehe i te tau o tatou Ariki 1859 he Pukapuka tino hoko tino hoatu tino tuku whakaoti atu na matou na nga Rangatira me nga Tangata o (Ngahitau) Ngaitahu no ratou nga ingoa e mau i raro nei a hei whakaatu tenei Pukapuka mo matou mo a matou whanaunga me o matou uri mo te tuhituhinga o o matou ingoa ki tenei pukapuka i raro i te ra e whiti nei kua whakarerea rawatia kua tino tukuna rawatia atu kia Wikitoria Kuini o Ingarangi ki ona uri ki nga Kingi ki nga Kuini o muri iho i a ia me ana me a ratou e whakarite ai hei whakaritenga mo nga Pauna moni etoru rau (300-0-0) kua utua mai ki a matou e (James Mackay Jr) Tiemi Make mo te Kuini (a e whakaaetia nei e matou te rironga mai o aua moni) ko taua wahi whenua katoa kei te Parawini o Whakatu ko Kaikoura te ingoa o taua wahi whenua ko nga rohe kei raro i te Pukapuka nei e mau ana te korero whakahaere ko te mapi hoki o taua whenua kua apititia ki tenei. 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 take 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. A hei tohu mo to matou whakaaetanga ki nga tikanga katoa o tenei Pukapuka kua tuhituhia nei o matou ingoa me o matou tohu. A hei tohu hoki mo te whakaaetanga o te Kuini o Ingarangi mo tana wahi ki nga tikanga katoa o tenei Pukapuka kua tuhia nei te ingoa o (James Mackay Jr) Tiemi Make Kaiwhakarite Whenua. Ko nga rohe enei o taua whenua ka timata i te taha ki terawhiti i te kurae o te karaka ka haere tonu i tatahi i te taha o te moana ki Parinui o whiti, ka whati i konei a ka haere whakauta tika tonu ki Rangitahi i nga matapuna o te awa o Waiautoa (Clarence). Ka whati i konei a ka haere tonu i te taha o nga maunga, i Maunga Tawhai i Waiaki (i te matapuna o Waiauuwha) i Te Rangiamoa, ki Hokakura (te roto i nga matapuna o te Hurunui) ka whati i konei a ka haere tonu te rohe i te awa o te Hurunui tuhono noa ki te moana. Ka whati i te Kongutu awa o Hurunui a ahu whaka te marangai. Ka haere tonu i tatahi ki te Karaka (Cape Campbell) ka tutuhi nga rohe o reira.

Eruiti his X mark Ko Kaikoura Whakatau

Raiania his X mark Raihania his X mark

Hakuira his X mark Ihaia Poieke his X mark

Tioti Wira his X mark Tumaru his X mark

Aperahama his X mark Hohepa his X mark

Arama Karaka his X mark

Ihaia Taiawa his X mark

Hakopa his X mark

Hoani Timaru his X mark

Mu Korapa his X mark

Renata te Whiringa his X mark

Parateni Whiti his X mark

Wiremu Kepa his X mark

Haora his X mark

Karehoma his X mark

Parata his X mark

Rawiri te Kauhariki his X mark

Ihau his X mark

Hakaraia te Utu his X mark

Ohaia his X mark

Whera his X mark

Ko nga tangata i kite i te hoatutanga o nga moni me te tuhinga o nga ingoa -

James Mackay Jr (Tiemi Make)-Assistant Native Secretary
Kai Whakarite Whenua-Acting Native Land Purchase Commissioner
George Fyff-Sheep Farmer, Kaikoura
Alexander Mackay-Settler, Nelson

THIS DEED written on this twentyninth day of March in the Year of our Lord 1859 is a full and final sale conveyance and surrender by us the Chiefs and People of the Tribe (Ngahitau) Ngaitahu whose names are hereunto subscribed And Witnesseth that on behalf of ourselves our relatives and descendants 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 and Their Assigns for ever in consideration of the Sum of three hundred Pounds (300-0-0) to us paid by James Mackay Jr on behalf of the Queen Victoria (and we hereby

acknowledge the receipt of the said monies) all that piece of our Land situated in the Province of Nelson and named the Kaikoura or East Coast District the boundaries whereof are set forth at the foot of this Deed and a plan of which Land is annexed thereto with 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. And in testimony of our consent to all the conditions of this Deed we have hereunto subscribed our names and marks. And in testimony of the consent of the Queen of England on her part to all the conditions of this Deed the name of James Mackay junr, Acting Native Land Purchase Commissioner is hereunto subscribed. These are the boundaries of the Land commencing at Karaka (Cape Campbell) and proceeding by the Sea Coast in a Westerly direction to Parinui-o-whiti (Wairau Bluffs) from thence turning inland it runs in a direct line to Rangitahi (Tarndale) at the source of the River Waiautoa (Clarence) whence turning in a South Westerly direction it continues by the mountains to Hikatura (Lake Sumner) turning thence in an Easterly direction the boundary is the Hurunui to its confluence with the Sea-Thence turning at the mouth of the Hurunui in a North Easterly direction it goes along the sea beach to Karaka (Cape Campbell). Where the boundaries join.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.9 Arahura, 21 May 1860:

2.9 Arahura, 21 May 1860:

Westland 1, DOSLI, Heaphy House, Wellington

TENEI PUKAPUKA i tuhituhia tenei i te rua te kau matahi o nga ra o Mai (21 Mai) i te tau o to tatou Ariki 1860 he Pukapuka tino hoko tino hoatu tino tuku whakaoti atu na matou na nga Rangatira me nga Tangata o Ngaitahu no ratou nga ingoa e mau i raro nei a hei whakaatu tenei Pukapuka mo matou mo o matou whanaunga me o matou uri mo te tuhituhinga o o matou ingoa ki tenei pukapuka i raro i te ra e whiti nei kua whakarerea rawatia kua tino tukuna rawatia atu kia Wikitoria Kuini o Ingarangi ki ona uri ki nga Kingi ki nga Kuini o muri iho i a ia me ana me a ratou e whakarite ai hei whakaritenga mo nga Pauna moni etoru rau (300) kua utua mai ki a matou e Tiemi Make mo te Kuini (a e whakaaetia nei e matou te rironga mai o aua moni) ko taua wahi whenua katoa {FNREF|0-86472-060-2|APP2.9|1} kei nga Porowhini o Whakaatu, Kutaperi, me Otakou ko Poutini ko Arahura nga ingoa o taua wahi whenua ko nga rohe kei raro i te Pukapuka nei e mau ana te korero whakahaere ko te mapi hoki o taua whenua kua apititia ki tenei. 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 take 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. A hei tohu mo to matou whakaaetanga ki nga tikanga katoa o tenei Pukupuka kua tuhituhia nei o matou ingoa me o matou tohu. A hei tohu hoki mo te whakaaetanga o te Kuini o Ingarangi mo taua wahi ki nga tikanga katoa o tenei Pukapuka kua tuhia nei te ingoa o Tiemi Make Kaiwhakarite Whenua. Ko nga rohe enei o taua ka timata i te taha o te moana i Piopiotai a ka haere ki utu ki nga maunga huka ki Taumaro-haere tonu ki nga maunga Tiore Patea-Haorangi, me Te Rae o Tama ka haere i kona ki runga ki te tarahanga o Taramakau haere tonu ki te maunga o Wakarewa a haere tonu i reira ki runga ki nga maunga tae noa ki te hapua o te Rotoroa a ka haere i kona ki nga tauru o nga awa o Karamea me Wakapoui a ka haere maro tonu ki te Kurae o Kaurangi i te taha o te moana. Ka whati i kona a ka haere tonu whaka te haurunga i te taha o te moana ki Piopiotai, ka tutuki nga rohe i reira.

Kinihi his X mark Tarapuhi te Kaukihi his X mark

Kerei his X mark Mere te Aowangai his X mark

Rawiri Mokohuruhuru Werita Tainui his X mark

his X mark

Pako his X mark Hakiaha Taona his X mark

Wiremu Parata his X mark Purua his X mark

Puaha te Rangi his X mark Makarini Tohi his X mark

Arapata Horau his X mark Riwai Kaihi his X mark

Ko nga tangata i kite i te hoatutanga o nga moni me te tuhinga o nga ingoa-

James Mackay Jnr-Assistant Native Secretary and Acting Land
Purchase Comm

Samuel M Mackley-settler, Nelson

James Burnett-surveyor, Nelson

Tamati Pirimona his X mark Collingwood

Hori e Koramo his X mark Collingwood

THIS DEED written on this twenty first (21st) day of May in the Year of our Lord 1860 is a full and final sale conveyance and surrender by us the Chiefs and People of the Tribe Ngaitahu whose names are hereunto subscribed And Witnesseth that on behalf of ourselves our relatives and descendants 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 three hundred Pounds (300) to us paid by James Mackay Jr on behalf of the Queen Victoria (and we hereby acknowledge the receipt of the said monies) all that piece of our Land{FNREF|0-86472-060-2|APP2.9|2} situated in the Province of Nelson, Canterbury and Otago and named Poutini or Arahura the boundaries whereof are set forth at the foot of this Deed and a plan of which Land is annexed thereto with 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. And in testimony of our consent to all the conditions of this Deed we have hereunto subscribed our names and marks. And in testimony of the consent of the Queen of England on her part to all the conditions of this Deed the name of James Mackay Junior, Commissioner is hereunto subscribed. These are the boundaries of the Land commencing at the Sea-side of Piopiotai (Milford Haven), thence proceeding inland to the Snowy Mountains of Taumaro; thence to the Mountains, Tiori Patea, Haorangi (Mount Cook), Te Rae o Tama thence to the saddle at the source of the River Taramakau, thence to Mt Wakarewa, thence following the range of Mountains to the Lake Rotoroa, thence to the sources of the River Karamea and Wakapoui, thence by a straight line drawn to Kaurangi Point at the Sea side. Thence turning in a Southerly direction the Sea Coast is the boundary to Piopiotai (Milford Haven) where the boundaries meet.

[signatures follow]
{FNTXT|0-86472-060-2|APP2.9|1}1 [footnote included on deed] "Otira tenei tenei ano matou i roto ki aua whenua ano ki nga pukapuka A me B o aua whenua ki tenei pukapuka e mau ana - kihai i utu aua whenua. Na Tieme Make."
{FNTXT|0-86472-060-2|APP2.9|2}2 [footnote included on deed] "There are certain Lands within this block reserved from sale, these are described in Schedules A and B attached to this deed, James Mackay.

Ngai Tahu Land Report

Appendix 02 Deeds of Purchase

2.10 Rakiura, 29 June 1864:

2.10 Rakiura, 29 June 1864:

Otago 5, DOSLI, Heaphy House, Wellington

Ngai Tahu Land Report

Appendix 03 The Claims

3.1 General Claim of 26 August 1986

Appendix 3

THE CLAIMS

3.1 General Claim of 26 August 1986

THE WAITANGI TRIBUNAL

E NGA MANA, E NGA REO, E NGA KARANGARANGA O NGA HERENGA WAKA KATOA. ENA KOUTOU I RARO I TE MARU O TE MATUA TAMA WAIRUA TAPU ME NGA ANAHERA PONO. TENA HOKI KOUTOU NGA KANOHI ORA O RATOU KUA WEHE ATU KI TE PO HAERE E NGA MATE, HAERE, HAERE, HAERE. HAERE KI TO TATOU MATUA I TE RANGI TE HUNGA ORA, TENA KOUTOU TENA KOUTOU, TENA TATOU KATOA.

HENARE RAKIHIA TAU and the NGAITAHU MAORI TRUST BOARD (a Maori Trust Board constituted by the Maori Trust Boards Act 1955) claim:

THAT:

1. The provisions of the Land Act 1948 and amendments affect the legitimate claims and rights of the Ngaitahu people to Crown Pastoral Lease Lands and Crown Lands generally lying within boundaries of land acquired from Ngaitahu by the Crown under Kemp's Deed and subsequent purchases and awards.

2. Proposed grants, transfers or sales of freehold title by the Crown to various parties affect the legitimate claims and rights of the Ngaitahu people to the lands referred to in (1) above.

THAT these things are contrary to the Treaty of Waitangi;

THAT the claimants are prejudiced as a result; and

THAT the claimants seek reform of these acts and policies

TO: The Registrar of the Waitangi Tribunal and to the following who should receive notice of this claim:

1. The Minister of Lands
2. Director-General of Lands
3. Department of Lands and Survey
4. Department of Maori Affairs

5. Ministry of Agriculture and Fisheries
6. Ministry of Environment
7. Ministry of Conservation
8. Royal Forest and Bird Protection Society
9. President, Federated Farmers
10. Federated Mountain Clubs
11. Deerstalkers Association

(Signed) H.R. TAU

SEAL OF THE
NGAITAHU MAORI
TRUST BOARD

Dated this 26th day of August 1986

Ngai Tahu Land Report

Appendix 03 The Claims

3.2 Amended Claim of 24 November 1986

3.2 Amended Claim of 24 November 1986

THE WAITANGI TRIBUNAL

E NGA MANA, E NGA REO, E NGA KARANGARANGA O NGA HERENGA WAKA KATOA. TENA KOUTOU I RARO I TE MARU O TE MATUA TAMA WAIRUA TAPU ME NGA ANAHERA PONO. TENA HOKI KOUTOU NGA KANOHI ORA O RATOU KUA WEHE ATU KI TE PO HAERE E NGA MATE, HAERE, HAERE, HAERE. HAERE KI TO TATOU MATUA I TE RANGI TE HUNGA ORA, TENA KOUTOU TENA KOUTOU, TENA TATOU KATOA.

HENARE RAKIHIA TAU and the NGAITAHU MAORI TRUST BOARD (a Maori Trust Board constituted by the Maori Trust Boards Act 1955) claim by way of amendment to the claim WAI-27

THAT:

1. The acts and omissions of Henry Tacy Kemp and other officials and agents of the Government of New Zealand in and after acquiring the lands of the Ngaitahu people have prejudicially affected the legitimate claims and rights of the Ngaitahu people.

2. The provisions of the Land Act 1948 and amendments affect the legitimate claims and rights of the Ngaitahu people to Crown Pastoral Lease lands lying within boundaries of land acquired from Ngaitahu by the Crown under Kemp's Deed and subsequent purchases and awards.

3. Proposed grants, transfers or sales of freehold title by the Crown to various parties affect the legitimate claims and rights of the Ngaitahu people to the lands referred to in (1) above.

4. That the particular claims specified in the schedule attached hereto are contrary to the Treaty of Waitangi and should be remedied.

THAT these things are contrary to the Treaty of Waitangi

THAT the claimants are prejudiced as a result; and

THAT the claimants seek reform of these acts and policies

TO: The Registrar of the Waitangi Tribunal and to the following who should receive notice of this amended claim:

1. The Minister of Lands
2. Director-General of Lands
3. Department of Lands and Survey
4. Department of Maori Affairs
5. Ministry of Agriculture and Fisheries
6. Ministry of Environment
7. Ministry of Conservation
8. Royal Forest and Bird Protection Society
9. President, Federated Farmers
10. Federated Mountain Clubs
11. Deerstalkers Association

DATED this 24th day of November 1986.

SEAL OF THE NGAITAHU
MAORI TRUST BOARD

SCHEDULE

A. We claim that the refusal of the Crown to honour the allocation of "Tenths" in respect of the Otago Purchase renders that purchase invalid and contrary to the principles of the Treaty of Waitangi and merits remedy by

(i) the return to the descendants of the Maori owners of the land within the boundaries of the Otago Purchase of 1844 OR alternatively

(ii) the allocation of Crown land within the boundaries of the Otago Purchase equivalent to the "Tenths" and FURTHER that

(iii) that suitable compensation be provided for the loss of use of those lands since the date of purchase

B. That the lands specified in the Petition to Parliament of the Ngai Tahu Maori Trust Board dated 7 December 1979 be returned to the Maori owners and compensation provided for loss of use of those lands.

C. That the native lands reserved from the Kaikoura Purchase and later vested in the Hundalee Scenic Reserves Board and now administered under the Reserves Act and other Acts were improperly alienated and should be returned to tribal ownership.
D. That the lands reserved from the exchange about 1900 of Maori land at Kaikoura for Crown land at Mangamaunu were improperly vested in the Crown and Public Bodies and should be returned to tribal ownership or appropriate compensation paid.

E. That the lands described in Kemps Deed, otherwise known as the Ngai Tahu Purchase of 1848, and subsequent purchases and awards which should have been allocated as reserves under that agreement should be now allocated from Crown lands within the boundaries of that deed.

Ngai Tahu Land Report

Appendix 03 The Claims

3.3 Amended Claim of 16 December 1986

3.3 Amended Claim of 16 December 1986

Mr S. M. Gracie,
Administration Officer,
Waitangi Tribunal,
Department of Justice,
Databank House,
175 The Terrace,
WELLINGTON.

Dear Sir,

Re: Ngaitahu Claim-Your Ref:WAI-27

Henare Rakihia Tau and the Ngaitahu Trust Board lay claim to either the freehold and/or the lessor rights in the lands as set out below and in the attached schedules, on the grounds that their allocation by Crown grant was made contrary in whole or part to agreements reached between the Crown and Ngaitahu representatives after 1840.

In view of our claim, disposal of all or part of any Crown Lands to State owned enterprises affect the legitimate claims of the applicants.

1. Land Act 1948 and Amendments. Enclosed are current, identifiable lands within the category of Section 66, 67 and 68 which would affect the Ngaitahu claim.

2. Identifiable Pastoral Leasehold Land also enclosed that would affect the Ngaitahu claim.

3. Other areas of land relevant to above sections of the Land Act and amendments not definable at this time as well as those lands within the category of section 63 referring to renewable leases of Crown Lands affecting the Ngaitahu claim.

4. Crown Lands currently administered by the Department of Lands and Survey such as:

Section 53 Blk VI Kawarau Survey District
Section 11 Blk V Arrowtown
Section VI Hokonui 100
and others that affect the legitimate claims and rights of the Ngaitahu people.

5. Section 15, Maori Purposes Act 1962 removed all unallocated South Island landless native blocks into Crown ownership. These lands were all defined but ownership not

determined. Land affected were within the Heaphy Survey District, Waimumu, Tautuku, Toi Toi (Stewart Island), Wairaurahiri and other areas within the Ngaitahu regions which affect the Ngaitahu claim.

Yours faithfully,

NGAITAHU MAORI TRUST BOARD
H.R. TAU
DEPUTY CHAIRMAN

Schedule Included.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Appendix 03 The Claims

3.4 Amended Claim of 2 June 1987

3.4 Amended Claim of 2 June 1987

WHEREAS the Claimants have already filed claims dated respectively the 24th November, 1986 and the 16th December, 1986

AND WHEREAS both those claims were accompanied by schedules

AND WHEREAS they are now requested to particularise those claims

THE CLAIMANTS SAY:

THE CLAIM

From 1840 to the present day the Crown has, in respect of the Maori people, their land, their culture and their well being, consistently acted in ways contrary to the Treaty of Waitangi, and therefore has been and remains in breach of the Treaty and its principles.

The multiplicity of the Acts complained of and the extent of the lands involved, together with the range of cultural and social grievances is such that, short of calling the evidence to be presented at the hearing of the claims, it is not possible for the complainants to succinctly state their grievances. For this reason, the complainants are concerned lest any omission from this document should be held to deny them the right to later seek redress of grievance in respect of the omitted material. They therefore give notice that in the event of matters not covered by this document arising later, they will seek leave to further amend their claims.

PARTICULARS

LAND

In 1840 the Ngai Tahu people owned virtually all the land in the South Island south of a line drawn between Cape Foulwind in the West and White Bluff just north of Cape Campbell in the East. Today they own very little land. The acquisition of this land by the Crown and the subsequent sales to other owners, were contrary to Article 2 of the Treaty of Waitangi in that Ngai Tahu did not "wish or desire" to sell, nor were they "disposed to alienate" all of the land. Further, the prices paid for the various blocks were never "agreed upon" in the manner required by Article 2.

Land purchases apart, other Crown dealings with the land were contrary to Article 2 of the Treaty. In particular the Crown has:

(a) Failed to allocate reserves which were an integral part of the agreements for sale and purchase of Ngai Tahu land to the Crown.

(b) Failed to allocate all the reserves required by the South Island Landless Natives Act 1906.

(c) Confiscated without compensation various reserves in the South Island.

(d) Appropriated to itself Ngai Tahu land without consultation or agreement and, in at least one case, namely Greymouth, without the knowledge of its Ngai Tahu owners.

(e) Without the consent of its Ngai Tahu owners has converted freehold land into Leases in perpetuity.

(f) Without the consent of its Ngai Tahu owners has fixed unrealistically low rentals for their leased lands.

(g) Without the consent of its Ngai Tahu owners has fixed unrealistically long rests between rent reviews in respect of their leased lands.

(h) Has refused to permit registration of land in the names of the Maori tribes and/or in other ways which would reflect Maori customary land ownership.

All these actions are contrary to the preamble and Articles 2 and 3 of the Treaty of Waitangi in that the Crown:

(i) Has failed to "protect the just rights and property" of the claimants.

(ii) Has failed to "guarantee" to the claimants and their ancestors "the full, exclusive, and undisturbed possession of their lands and estates, forests and fisheries and other properties so long as they wished and desired to retain the same in their possession".

(iii) Has failed to "import" to their ancestors all "the rights and privileges of British subjects".

The land transactions giving rise to these breaches of the Treaty occurred at Horomaka (Banks Peninsula), Te Pakihi o Waitaha (North Canterbury), Kaikoura, Otakou (Otago), Murihiku (Southland) Rakiura (Stewart Island) and on Te Tai Poutini (West Coast of the South Island). The lands which the claimants seek to have allocated to them or which they seek to be compensated in respect of are largely described in a schedule lodged with the Claim dated the 16th December, 1986. It should be noted that that schedule is as complete as the data made available by the Crown thus far permits and the claimants give notice that the schedule will be extended as further necessary data becomes available.

MAHINGA KAI

According to the Treaty of Waitangi and later specifically confirmed by the Kemp Deed the Ngai Tahu people were guaranteed "the full, exclusive and undisturbed possession" of their kainga and mahinga kai, but the acts and ommissions of the

Crown and agents of the Crown have in fact dispossessed Ngai Tahu of their mahinga kai. Ngai Tahu have thus been deprived of a major economic and sustaining resource in their mahinga kai including birding, cultivation, gathering and fishing resources. Since the issue of Treaty rights to mahinga kai, especially in respect of fisheries, is subjudice in the Muriwhenua Claim now proceeding in the Waitangi Tribunal it would be inappropriate to detail it further at this stage, but notice is given now that claim will be pressed for a share in the fisheries, including the commerical fisheries, of Te Waipounamu and for the recovery of or compensation for birding and other traditional resources of which Ngai Tahu have been wrongfully deprived.

CULTURE

From shortly after 1840 down until the present time, all legislation affecting the Maori people, (and therefore the claimants) has reflected a policy of assimilation. As part of this process the Maori has been required to adapt to a Westminster system of Central and local government which gives little or no recognition to Maori ways of performing these functions. Wherever the Maori and Pakeha cultures have been in conflict it is the Maori who has had to bend. The result is that Maori cultural and social patterns and values have broken down and the people have become confused and dispirited, with some now tending to seek radical remedies for Maori grievances.

The claimants seek a recommendation that the policy of assimilation be reversed. This would involve a substantial programme of legislative reform to all statutes which reflect that policy.

The claimants believe that the Treaty of Waitangi can be read for the principles which it spells out and for the spirit which underlies the whole document. The former are currently under consideration by the Court of Appeal so comment on them would be presently inappropriate. The spirit which underlies the Treaty, and the instructions given to those who wrote it, is a simple acceptance of the fact that we are two races. The Treaty is a partnership between those two races and that partnership requires consultation, the absence of which is the root cause of all the grievances now held by the Maori people. The claimants therefore seek a recommendation that the Crown should now unequivocally give a public assurance that hereafter the Maori people will be consulted and listened to in all matters affecting them.

REMEDIES

Changes to Crown policies and attitudes have already been mentioned. These will need to be extensive and the detailed implementation of them will be difficult and may take a long time. The claimants believe that these changes are fundamental to the future of our country, and the only reason that they do not develop this aspect of the claims further at this stage is their belief that the changes will be largely uncontroversial if carried out with sensitivity.

The resolution of land based claims is quite another matter and is likely to be extremely controversial. For that reason it is important to state that the claimants acknowledge the sanctity of contracts and the provisions of the Land Transfer Act. Although they seek land as a partial remedy for their claims, they acknowledge that people who have bought or leased land for value cannot be dispossessed of it.

Contracts arising from the operation of the State Owned Enterprises Act may be another matter, but that Act is currently under consideration by the Court of Appeal, so the claimants reserve their position in respect of it.

For these reasons the claimants seek the allocation of Crown Land to them. The lands which are the subject of the claims have largely passed into private ownership and so other lands are sought in substitution. Any lands allocated to the claimants should be representative of the lost land in both character and geographic distribution. It may well be that any recommendation of the Tribunal should be limited to the kind and quantity of the land to be allocated leaving the identification of particular parcels for determination elsewhere. Alternatively, if the Tribunal is minded to recommend allocation of land, it might give an interim decision to that effect. The claimants and the Crown could then consult with each other and, hopefully, reach an agreement which they could present to the Tribunal for its approval.

The claimants recognize that complete compensation in the form of land may prove impossible. In that event they would seek compensation in the form of a mix of land and money. They have also considered whether they should claim interest on the money value of all disputed land from the date of the dispute down to the present day. At this moment they have not decided whether to make such a claim but hereby give notice of the possibility, so that those potentially concerned may take such steps as they are advised in case such a claim is finally made.

DATED at Christchurch this 2nd day of June 1987.

D. M. Palmer

Solicitor for the Claimants

Ngai Tahu Land Report

Appendix 03 The Claims

3.5 Amended Claim of 5 September 1987

3.5 Amended Claim of 5 September 1987

ARAHURA CASE: MAORI RESERVED LAND LEASEHOLD

The applicant has been asked by the Tribunal to detail its proposed remedies in respect of the above leases.

It is the applicant's position that the Crown acted in a manner contrary to the spirit and intent of the Treaty of Waitangi in unilaterally imposing the form of leasehold now known as Maori Reserved Land Leasehold on the lands reserved from the Arahura Purchase of 1860 against the clearly expressed wishes of the Poutini Ngai Tahu owners.

The applicant further contends that the above form of leasehold has severely disadvantaged the Poutini Ngai Tahu owners since that time and continues to do so in that they are deprived and have been deprived of the ordinary benefit of those lands, they are effectively prevented forever from enjoying the ordinary use and benefit of those lands and that they have not been able to enjoy the ordinary rights of ownership.

The applicant therefore proposes two remedies on behalf of its Poutini Ngai Tahu beneficiaries who are shareholders in the Mawhera Incorporation which presently holds the title to such leasehold lands:

They are:

(a) Monetary compensation from the Crown calculated on the basis of the difference between ordinary term leasehold rates pertaining to similar lands and the actual rates derived to the owners from the perpetually renewable leasehold imposed by the Maori Reserved Land Act 1955 and its preceding acts. Calculated as a lump sum from 1872 to the present.

(b) Amendment to the Maori Reserved Land Act 1955 to the effect that the leases prescribed in that Act will:

(i) Over two 21 year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act.

(ii) Immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act.

(iii) Immediately change from the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

The applicant believes it appropriate to inform the Tribunal that the above leasehold amendment has been publicly advocated over the past decade by the Mawhera Incorporation and by other major Maori Incorporations administering Maori Reserved Land leases. Apart from the division of the rental review provisions into two groups it is similar to the proposals of the New Zealand Maori Council's Legislative Review Committee which formed the basis of the present Maori Affairs Bill currently before Parliament. The Maori Reserved Land Act is however not dealt with in the current Bill.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Appendix 03 The Claims

3.6 Amended Claim of 25 September 1987

3.6 Amended Claim of 25 September 1987

NGAI TAHU MAORI TRUST BOARD

The Registrar,
Waitangi Tribunal,
Tribunals Division,
Justice Department,
WELLINGTON

ATTENTION: DR. MAARIRE GOODALL.

I write to notify you of the basis of the Ngai Tahu fisheries Claim in respect of WAI 27 currently proceeding before the Waitangi Tribunal.

The content of this claim was communicated to the Minister of Fisheries by the Secretary of this Board by FAX on September 24.1987.

You should note that the fisheries component of WAI 27 is contained within the "Mahinga Kai" section of the case. It is anticipated that this component will be dealt with separately pending the outcome of the Muriwhenua Claim currently being considered by the Tribunal.

The Ngai Tahu Fisheries Claim is as follows:

1. Ngai Tahu claim sole ownership of the fishery off their tribal coasts out to the twelve mile limit under the Treaty of Waitangi.

2. In the light of the partnership principle implicit in the Treaty and developed in some detail in the recent Court of Appeal decision, Ngai Tahu are prepared to grant to their Treaty Partner, the Crown, a full half share in that fishery.

3. Without prejudice to its position on the question that the Crown may have been in breach of the Treaty in imposing both general legislation in fisheries and the recently imposed ITQ system in particular, Ngai Tahu accept that the ITQ system is now a commerical and practical reality.

4. Ngai Tahu therefore retains for itself 50% of all ITQ for all species out to the twelve mile limit and grants to its Treaty partner, the Crown, the right to 50% of all ITQ within the twelve mile limit. This retention and grant apply only to those waters

offshore from the tribe's traditional boundaries. Those boundaries are currently being considered by the Tribunal.

5. On account of its Treaty partner's action in unilaterally imposing its own stewardship on the fishery described in past years with the effect that the fishery has become seriously depleted, Ngai Tahu claims compensation for its losses so sustained.

6. The tribe is prepared to accept such compensation from its Treaty partner in the form of an allocation of ITQ in the fishery beyond the twelve mile limit. The quantum of such allocation is regarded as being negotiable.

7. Should the negotiation on the quantum of ITQ beyond the twelve mile limit be acceptable to Ngai Tahu then the tribe is prepared to abandon its prosecution of the question that the Crown has acted in breach of the Treaty and the principles of the Treaty in respect of Ngai Tahu fisheries.

The above Claim is filed with you without prejudice to its substance being filed in a more formal way at a later date.

It is further filed without prejudice to Ngai Tahu consideration of a proposed MAORI FISHERY PROGRAMME currently being considered by Government but on which the tribe has not as yet been consulted.

Tipene O'Regan
Chairman

Ngai Tahu Land Report

Appendix 03 The Claims

3.7 Amended Claim of 13 April 1988

3.7 Amended Claim of 13 April 1988

ADDITIONAL ITEM / INLAND WATERS

Document H20

WAI 27 Mahinga Kai

It is the Ngai Tahu position that the waters comprising our mahinga kai are properly the property of the tribe. We assert further that the inland waters comprising both lakes and rivers and streams which occur in the area of the Kemp purchase which we have claimed not to have sold to the Crown (the areas beyond the foothills described in Mr. Evison's evidence) are in fact the real property of Ngai Tahu.

It is our contention that the action of the Crown in declaring all natural waters to be the property of the Crown was contrary to the Crown's obligations under the Treaty. Insofar as the inland waters referred to above were the property of Ngai Tahu and insofar as they were not sold in 1848 in the Kemp Purchase then the Crown failed in its duty to protect the tino rangatiratanga of Ngai Tahu in these lands and waters. This was over and above the Crown's contractural misconduct in misusing its powers to assert ownership over lands and waters which it had not in fact purchased.

The Ngai Tahu position in respect of the future of the lands and waters referred to is similar to that referred to above earlier in respect of other resources. The principle of partnership remains at the forefront of our thinking.

Ngai Tahu Land Report

Appendix 03 The Claims

3.8 Amended Claim in Respect of Fisheries (j7)

25 June 1988

3.8 Amended Claim in Respect of Fisheries (j7)
25 June 1988

Tena koutou nga Kaiwhakawaa o te Taraipiunara nei, tena koutou nga Rangatira o te Roopu Whakamana i te Tiriti. Tena koutou.

Anei matou e tu ake nei ko Ngai Tahu Whanui.

Kia whakarongohia a matou tangi mo nga uri a Takaroa i ngaro ai.

In accord with our earlier reservations and notice given that we would in due time bring our fishing claim up to date with events to the time of hearing we now seek leave to amend our claim as follows.

We previously stated to the Tribunal in written and also verbal submissions the kind of negotiated agreement with the Crown we then contemplated as possible as to sharing of the resource in various zones, but that we recognise no seaward limit to our fishery nor do we concede any derogation from our tribal tino rangatiratanga in the seas off our coasts. Because of the many significant changes in the New Zealand fisheries and in their management since our claim was first filed, and particularly due to recent developments in the work of the Courts, Government and the Waitangi Tribunal itself, it is necessary now to reformulate the detailed principles of the Ngai Tahu fishing claim.

We have already given evidence on our inland fishing claims, and further detail relating that information to our whakapapa and land usage rights will be given at this hui. Although it will be convenient to the Tribunal to deal with our sea fishing claim as a separate and major issue in itself, we would emphasise to you that Ngai Tahu consider their lands and seas to be a physical and spititual unity, a seamless whole which cannot properly be divided into parts. Within that unity is our mahika kai, which cannot be separated from our mana as a Tribe.

We therefore now assert our marine fishing claim:

Ngai Tahu Whanui encompasses all the hapu of Kaitahu, Kati Mamoe, Waitaha, and all of the earlier tangata whenua tribes or hapu of Te Waipounamu. For brevity in our claim we just say Ngai Tahu, which includes us all.

1. Ngai Tahu own the marine fishery adjacent to their Tribal territory. That fishery is our property and has been since time immemorial.

2. The geographic extent of our fishery is bounded laterally by perpendicular projection into the sea of our tribal land boundaries with other tribes at the coast at Pari-nui-o-whiti on the east, and at Kahuraki on the west, and sweeping southwards around the coast of Te Waipounamu and offshore islands including those to the south of Rakiura.

3. No seaward boundary offshore is recognised. Our traditional and customary tribal fishery is not limited by any past or present law or custom of Britain or of the Crown in New Zealand as regarding 3, 12, 200 or any other number of miles offshore, nor the alleged projectile strength of their cannon. We have the right to go to sea as far as we must, or are able, in order to obtain the fish that we require.

4. Our fishery includes inshore waters, beaches, inlets, fjords and tidal rivers and estuaries, as well as littoral swamps, and it includes submarine fishing grounds without any limitation as to their depth.

5. Ngai Tahu do not claim mana whenua on Rekohu-Chathams Island or the smaller offshore islands of that group, and therefore we do not claim that mana moana nor the Chathams fishery. Ngai Tahu do claim and acknowledge their blood and historical relationship with many Chathams people of mixed Moriori, Maori or Pakeha descent. Accordingly we do not ourselves claim in the Chathams fishery, instead we recognise the duty of whanaungatanga requiring us to support the Chathams people in making their own claim. Ngai Tahu do not wish to intrude on the mana of the Chathams and only offer their support on such terms and at such times as those people might request from the Chathams Islands community itself, so long as we are satisfied their runanga genuinely represents the Chathams community itself rather that [sic] any external mainland group. Ngai Tahu expects in due time to negotiate directly with the Chathams people agreements for the boundaries and regulation of their respective fisheries where they abut. Equally we expect to negotiate suitable agreements with the tribal authorities to the north of us on west and east coasts of Te Waipounamu.

6. The Ngai Tahu fishery includes all property and user rights inherent in the business and activity of fishing within their tribal waters defined above.

7. The Ngai Tahu fishery includes commercial sustenance and cultural aspects and is not subdivided into compartments by such categories as listed in the Fisheries Acts or Regulations made by the Crown purportedly for the general NZ fishery; instead our fishery is one whole entity or taonga controlled by our tribal authorities for the benefit of all and for those who come after us according to our traditional values.

8. The Ngai Tahu fishery includes the right to fish without any interference or restriction whatever by the Crown or by other British subjects or New Zealand residents or by foreign persons.

9. Ngai Tahu fully recognise the conservation and management duties inherent in their rights of ownership usage and control of their fishery, for the continuing benefit of themselves and all other citizens of New Zealand. In that respect the expensive but

disastrously ineffective management methods of the Crown intruded on our fisheries during the past half century or more must be modified to include the more sophisticated approach of Southern Maori tradition.

10. Ngai Tahu are entitled to the protection of the Crown against any interference in their fishery by other citizens including Maori of other tribes, or by other residents or foreigners.

11. The Ngai Tahu fishery comprises fish of all species finfish shellfish crustacea seals whales and sea plants existing from time to time in southern waters or on our coasts including migratory species passing through those seas, and including also anadromous and catadromous species migrating between fresh and salt waters. Certain particular species such as squid, barracouta, hoki, hapuku seals whales or shellfish had especial traditional economic importance for Ngai Tahu but all species without exception are part of our fishery.

12. The fish in our fishery include all those speciies now found there whether or not they were all used at any particular date in the past, and also included are any other species of fish or plant life which might be newly discovered there at any time in the future. We are conscious that various species have been newly commercially exploited after findings by independent fishermen, including foreigners in the famous case of orange roughy which we understand was first found by Japanese invited by the Crown for a substantial fee payable to themselves, into our fishery. Ownership of those fish resources has nevertheless been arrogated to itself by the Crown, in breach of the Treaty of Waitangi and our ownership and control rights guaranteed to us in the Treaty.

13. The Ngai Tahu fishery includes all those places within our tribal seas where fish can from time to time be caught whether or not they were all used at 1840 or at any other date. Our property belongs to us no matter what particular use we might choose to make of it at any time.

14. Ngai Tahu fisheries include all the gear that is apparatus nets lures pa weirs hinaki lines hooks navigational aids and the like used in fishing, and it includes all the methods of fishing which were at any time used or which may in future be used for the species and places accessible to our fishermen at any time past in the future. Our fishing property is in no way limited by past technology and we have every right to utilise modern knowledge in its development.

15. The Ngai Tahu fishery includes all the cultural and spiritual values held to be important by Ngai Tahu and its various hapu whether or not those values are recognised or considered important by the Crown in its legislation, or by other Maoris or other citizens residents or foreigners, or by corporations. Ngai Tahu are entitled under the Treaty to have those spiritual or non-material values identified by them protected by the Crown.

16. The managment and control of their fishery is guaranteed exclusively to Ngai Tahu by the Treaty of Waitangi, and further by s.88(2) ofthe Fishing Act in our view of the law. Ngai Tahu were also entitled to the income and other benefits that may from time to time accrue from the activity and business of fishing in our tribal seas.

Furthermore the entire property in the fishery was guaranteed to Ngai Tahu however that property title might be expressed in modern legal terms following legislation by the Crown whether it is now in real or such abstract forms as "quota" "licences" or any other form of title or right to fish. In our view the Crown has never had any right to interfere in the management or control of the fishery, nor to divert away from the rightful owners the income and benefits of fishing, nor to issue "quota" "licences" or other forms of purported title in property or user rights in the fisheries that in right belong to Ngai Tahu. The fishery property still belongs to Ngai Tahu.

17. Ngai Tahu have long recognised the need to develop a conjoint Maori-Pakeha society based upon mutual respect and reasonableness as between partners in accordance with the Treaty of Waitangi. The file of submissions by the Deputy Chairman and the Chairman of our tribal Trust Board to the Minister of Fisheries clearly shows a responsible attitude, acknowledged by the Minister himself, in regard to management and sharing in the fishery resource. Such submissions have been made by our Tribe over a long period of time, but so far with no satisfactory result, requiring us now to prosecute our claim to the fullest.

18. Ngai Tahu historically as shown in evidence to this honourable Tribunal have always been generous in their view of the needs and reasonable wishes of manuhiri peoples coming within our tribal boundaries in peace and friendship or for trade or mutual benefit. Long before the Treaty of Waitangi our tribal leaders recognised and encouraged trading educational and religious interrelationships both with other Maori and with Pakeha. The reasonable needs of those manuhiri for sustenance fishing were always allowed and protected under our tribal mana, continuing right through to the landmark 1986 case acquitted from the District Court by Williamson J in which the learned Judge saw clearly that the accused person belonging to a northern tribe was in fact exercising a Ngai Tahu fishing right under our approval and control through our hapu leaders of Ngai Tuahuriri. Thus the law acknowledged that our fishing rights had not been extinguished, even though only a small part of those rights were in issue in that case. In fact that case turned on the aboriginal rights under British and New Zealand common law, and not at all upon our much greater rights reserved to us under the Treaty of Waitangi.

19. Ngai Tahu alone has the authority to give, and to revoke, fishing rights to manuhiri peoples coming into our rohe. We have in fact granted such rights since ancient times, which we call tuku whenua or tuku moana and which my colleagues will have referred to in other evidence. Any such grants are exercised under the mana of Ngai Tahu and have always been protected by us from intrusion by others, Pakeha or Maori, and equally may be revoked by us for good cause.

20. The policy of Ngai Tahu is no different today and we intend as a people to negotiate fair and reasonable arrangements with all those persons, Crown officers or foreign interests who will properly recognise our prior rights to do so, and our right to determine the best use of our inherent property in fishing. Therefore the single most essential requirement for those wishing to negotiate settlements within the Ngai Tahu fisheries as our Treaty partners will be that they need to acknowledge the fundamental fact that Ngai Tahu continue to hold the full and exclusive property and user rights in their tribal fishery as defined earlier and in their tribal activity and business of fishing. The Treaty of Waitangi guarantees nothing less.

21. Those who do acknowledge the proper basis to begin negotiations with Ngai Tahu as equals and as responsible Treaty partners, but only then, can expect honest negotiations for some share in the southern fishery to reach meaningful and practical results. In earlier pro forma and draft versions of this fishing claim we indicated the type of arrangement that Ngai Tahu might be willing to contemplate as a basis for negotiation.

Due to the significant developments in this field nationally following High Court orders, the issue of the Muriwhenua Fishing Report by the Waitangi Tribunal, and the executive negotiations between Crown and Maori representatives, we have reserved the right to modify our earlier offers (filed 25 September 1987) to negotiate, in light of the latest information. Hence our definition now of our full marine claim for your consideration.

However the principle earlier indicated, remains unchanged, that Ngai Tahu has always sought and still seeks proper recognition of our tribal property in the fishery, a fair and equitable negotiation with our Treaty partners in the Government representing the Crown today, and an equitable and practical arrangement in our fisheries. In seeking such a fair resolution Ngai Tahu cannot agree to abandon any of our fundamental rights, especially the clear property right in fishing guaranteed to us by the Treaty.

22. With acknowledgement of Ngai Tahu rights to at the least an equal share in the management and control of the southern fishery, an equal or at least very substantial share in the income and benefits of fishing and similarly in the equity or property involved, we foresee a constructive and peaceful relationship developing for the benefit of Maori and all others in this country. We say at least an equal share in the management and control Mr Chairman, and that is a very considerable concession by my tribe, bearing in mind that the Treaty of Waitangi guaranteed to us the total and exclusive rights to control, indeed to own, the fishery, and bearing in mind that both the English and the Maori versions of the Treaty were written by Crown agents. If there were any doubt in this matter, and it is hard for reasonable people to see how there can be, it must be construed in favour of the Maori ownership and control of the property so clearly reserved to us in Article Two of our Treaty.

If such fundamental values are to be further denied despite the Treaty of Waitangi signed in all good faith by Ngai Tahu, despite specific reservations of our mahika kai in our land sale Deeds in Te Waipounamu, despite findings of the Waitangi Tribunal, despite orders and determinations of the High Court and Court of Appeal, then New Zealand will be condemned to unending conflict.

Ka whawhai tonu matou, ake ake ake!

The best time for peaceable settlement, is now.

23. Ngai Tahu continue to reserve their right to claim compensation at law in the Courts, and under the Treaty in this Tribunal, for damages to their fishery and for the exclusion of our tribesmen from fishing and the tribal benefits of our traditional activity and business of fishing caused by the wrongful actions of the Crown during past years. While our Tribal leaders hope that successful negotiations with our Treaty

partners might make it unneccessary to pursue that course we give notice that such claims will be prosecuted if no fair agreement is reached.

24. Because of its importance to all New Zealand we emphasise again the importance of conservation as raised in paragraph Nine above. Ngai Tahu acknowledge the responsibility to so manage their fisheries on soundly based conservation principles that there is assurance the fishery will provide a sustainable resource for future generations. Ngai Tahu consider they have a valid position in conservation based on traditional Maori values, and supplemented by modern scientific knowledge and expertise. We do not deprive ourselves of any technical progress or discoveries in the modern scientific world, and we are not afraid to employ the best brains of other Maori, of Pakeha, or of foreign experts when we think they will be able to assist us in the management of this most valuable resource.

You will recall the official motto in the seal of our Ngai Tahu Maori Tribal Trust Board:

Mo tatou, a, mo ka uri a muri ake nei.

Therein lies a difference from the hasty short term profits approach so prevalent today in the way fisheries are being mis-managed. You must have found amongst all the other Maori tribes which your Tribunal has heard throughout the land, the same thing that I say to you now on behalf of Ngai Tahu

Maori take a very long view.

We are grown from the seeds of Ra'iatea planted here, ours is a very great canoe, and we shall not disappear.

25. We thus look far to the future, as we do to the past when the taniwha Poutini brought to our tribal lands Waitaiki, the mother of the taonga pounamu by which we are known throughout the Maori world.

Kia whakarere iho au ko toku mokai Tapu,
Ko Poutini tena kei te tahu o te uru
Here ai toku kupenga ki te Taramakau
Ara ki te Ara hura hei awhi e
ei ano toku whakaaro ki nga roto
tapu ..
e aue Taiki e

Ngai Tahu Land Report

Appendix 04 Maori Appellate Court Decision

4.1 4 South Island Appellate Court Minute Book 672

Appendix 4

MAORI APPELLATE COURT DECISION

4 South Island Appellate Court Minute Book 672

CASE STATED NO 1/89
IN THE MAORI APPELLATE COURT
OF NEW ZEALAND

IN THE MATTER of the Treaty of Waitangi Act 1975
AND
IN THE MATTER of a claim to the Waitangi Tribunal by
HENARE RAKIIHIA TAU and the NGAI TAHU TRUST BOARD
as Claimants and HER MAJESTY THE QUEEN as
Respondent.

TO: The Waitangi Tribunal

FROM: The Maori Appellate Court

On the 17th day of March 1989 the Waitangi Tribunal did state a question to this Court requesting determination in respect of two areas of land purchased by the Crown and contained in the Arahura Deed of Purchase dated 21 May 1860 and the Kaikoura Deed of Purchase dated 29 March 1859:

(1) Which Maori tribe or tribes according to customary law principles of "take" and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective Deeds at the dates of those Deeds.

(2) If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries.

The decision of this Court is:

The Ngai Tahu tribe according to customary law principles of "take" and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those Deeds.

Having decided that Ngai Tahu only is entitled question two above does not require an answer.

We annex hereto the reasons for our decision as recorded in 4 South Island Appellate Court Minute Book commencing at folio 673.

DATED at Rotorua this 12 day of November 1990

H K Hingston-President
H B Marumaru-Judge
Andrew Spencer-Judge

Coram

H K Hingston (Presiding Judge)
H B Marumaru (Judge)
A D Spencer (Judge)

DECISION

There were four claimants:

(i) Rangitane Ki Wairau (Mr M N Sadd)

(ii) Te Runanganui O Te Ihu o te Waka a Maui Incorporated.
(Mr J Stevens, Counsel) representing the tribes of Nelson and Marlborough:

Ngati Apa Ki Te Ra To
Ngati Kuia
Ngai Koata
Ngati Rarua
Ngati Tama
Ngati Tearangatira Ki Waipounamu
Ngati Waikauri
Rangitane Ki Wairau
Te Atiawa

These tribes were formerly represented by Kurahaupo Waka Society in the proceedings, before the Waitangi Tribunal.

(iii) Ngati Toa (Mr Williams, Counsel-Mr M Rei)

(iv) Ngai Tahu Maori Trust Board (Mr P Temm Q.C. & Mr Knowles) representing Ngai Tahu.

The Waitangi Tribunal has referred this matter to the Maori Appellate Court pursuant to Section 6A of the Treaty of Waitangi Act 1975 as amended by Section 4 of the Treaty of Waitangi Act 1988 ("The Act").

The question in terms of the Act referred to this Court concerns tribal boundaries in the northern part of the South Island of New Zealand and is set out hereunder:

By agreement the parties namely the claimants and the respondents, have formulated the following question for determination by this Honourable Court having regard to the two areas of land purchased by the Crown and contained in the Arahura Deed of Purchase dated 21 May 1860 and the Kaikoura Deed of Purchase dated 29 March 1859.

1 Which Maori tribe or tribes according to customary law principles of "take" and occupation or use, had right of ownership in respect of all or any portion of the land contained in those Deeds;

2 If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?

From the wording on the question referred to us, a decision finding one iwi had right of ownership at the relevant date, in respect of all the land in one or both of the Deeds would mean no answer to the second question would be needed in respect of that Deed.

Throughout this decision, because the case stated requests a determination as at the dates of the Deeds, we have ignored any European occupation of any of the lands up to those dates.

We are of the view that before embarking on an evaluation of the evidence presented to the Court it would be proper to record our understanding of the relevant law.

We begin initially with the relevant portion of Section 6A Treaty of Waitangi Act 1975 which provides:

3 Power of Tribunal to state case for Maori Appellate Court or Maori Land Court-The principal Act is hereby amended by inserting, after section 6, the following section:

6A(1) Where a question of fact-

(a) Concerning Maori custom or usage; and

(b) Relating to the rights of ownership of Maori of any particular land or fisheries according to customary law principles of "take" and occupation or use; and

(c) Calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries,-arises in proceedings before the Tribunal, the Tribunal may refer that question to the Maori Appellate Court for decision.

This provision directs the Court to make its decision on the question referred, taking into account Maori custom and usage relating to Maori rights of ownership in lands and fisheries according to customary law principles of "take" and occupation or use. To do this we must first decide what these principles are.

The pre-European inhabitants of New Zealand had, over many centuries, developed certain customary take or rights concerning land the principal being as follows:

1 Discovery such as when the first canoes arrived

2 Ancestry (take tupuna)

3 Conquest (take raupatu)

4 Gift (take tuku)

These take when supported by actual occupation of the land, generally signified rights (mostly in common) somewhat allied to ownership; these ownership rights could be lost in various ways; if a people left the area and none of their issue returned within three generations; if an iwi or hapu were defeated in battle and the victors remained and occupied the land to the exclusion of the losers; if iwi gifted the land to others, are examples.

Norman Smith in his book Maori Land Law (at pp 88, 91 & 92) described the general principles to be considered when weighing up occupation rights as follows:

(a) Those who show complete and continuous occupation ie occupation commenced before 1840, and extending up to the time of investigation of title. Where the occupation is by virtue of ancestry it is usual to require that constructive possession was held for at least three generations. Where the occupation arises out of conquest it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest. Where the occupation is claimed to be under a gift, unbroken occupation by the various generations from the time of the gift should be shown.

(b) Those who have never personally occupied but whose near antecedents had undisputed occupation or whose rights have been kept in existence by relatives.

(c) Those who have occupied at some former period but are not in present occupation.

(d) Those who are in occupation by right of ancestry but whose permanent occupation is recent in its origin.

It must not be necessarily assumed, however, that the application of one rule will exclude persons to whom the others might apply. On the contrary all four rules should, where applicable, be utilised.

Throughout the evidence of the various claimants there has been reference to the holding of mana-whenua in various lands comprised in the Deeds as additional right to the land; "mana-whenua" became the vogue in Maoridom circa the Kingitanga Movement in the 1860s. We believe the more appropriate word in relation to land is rangatiratanga, particularly as the Treaty of Waitangi uses that word.

The Court recognizes that the matters to be decided in its case are of great moment to each iwi making a claim and to Maoridom as a whole, this being the first case to be dealt with by this Court pursuant to this legislation.

We have throughout been conscious that the Court is sitting as a Court of first instance, that an appeal from our decision would necessitate the expense of a Privy Council appearance and that our decision is binding on the Waitangi Tribunal, and, because of these factors, have allowed more leeway to the claimants in the presentation of their respective cases as well the testing of the other claimants' evidence than would normally be in the Maori Appellate Court. We believe that section 54(1) of the Maori Affairs Act 1953 should be liberally interpreted by the Court when dealing with cases stated of this nature.

We note that the case stated requires determination as at 1859 and 1860 and refer to our finding at - S.I. APP CT MB - where we said:

We understand the rule to be that put to us by the claimants, simply, LAND COULD NOT BE ACQUIRED POST TREATY BY CONQUEST OR TAKE RAUPATU BUT THE OTHER INCIDENCES OF CUSTOMARY TITLE CHANGE REMAINED INTACT.

Having found accordingly we are mindful that where an iwi have proven one of the customary take supported by occupation but were absent in 1840 they could revive their ahi kaa as long as the re-occupation was peaceful and within three generations of their leaving the area.

One factor that influenced the title situation in respect of those deeds was the invasion of Te Waipounamu by Te Rauparaha and his allies.

In 1828 the Ngati Toa, led by their Chief Te Rauparaha, invaded the South Island. They were joined in alliance by Ngati Koata, Ngati Tama, Te Atiawa and Ngati Rarua. The invasion took the Ngati Toa and their allies to Akaroa on Banks Peninsula in the east and to Arahura on the west coast of the South Island. Patricia Burns, in Te Rauparaha: a new Perspective says at the beginning of a chapter headed "Power and the Final Peace" that Te Rauparaha "commanded Cook Strait, the north of Te Waipounamu in the thinly populated coasts east to Kaiapohia and west to the river Hokitika". The Ngati Toa had not had any presence in the South Island prior to their invasion in 1828. Acts of warfare had effectively ended by 1836.

It is therefore necessary for us to clarify the title situation as it was prior to the invasion then consider the effect of the invasion, the title situation going into the 1840s and any legitimate revival of iwi occupational rights post 1840 and before the time of execution of the Deeds evidencing the Kaikoura purchase of 29 March 1859 and the Arahura purchase of 21 May 1860.

THE KAIKOURA DEED "Exhibit A" annexed to the case stated shows the land in question is the north eastern block on that map. The parties to the Deed were the Crown and Ngai Tahu.

In respect of much of the land comprising the Kaikoura purchase, Deeds of Sale were entered into by the Crown with other iwi which specifically included areas sold by Ngai Tahu in the in the 1859 deed.

1 1847 Wairau Deed (Ngati Toa).

2 1853 General Deed covering the Northern Te Waipounamu. In this Deed Ngati Toa, claiming to be acting "co-jointly" with Ngatiawa Ngati Koata, Ngatirarua, Rangitane and Ngai Tahu ceded all their rights to the "Northern part of the South Island".

3 Rangitane in a receipt dated 1 February 1865 acknowledged payment by the Crown of one hundred pounds in consideration "for all their claims to land in the North and South Islands" as recorded in the note describing this transaction recorded in Mackay's compendium however the body of the document (receipt) referred to lands "from Wairau to Arahura ...".

4 1856 Deed whereby Ngatiawa is described as ceding all claims to land in the middle Islands to the Crown - again the translation of the body of the document refers to specific areas.

Insofar as the various deeds are concerned we adopt Dr Mitchell's (a witness for the Rangitane claimants) observation when he said viz a viz the various deeds-

There are other indications too of the Government's desire to extinguish all native claim regardless of their validity.

At 3.S.I. Appellate CT MB 240 this Court had this to say:

All Counsel ... are reminded that s6A of the Treaty of Waitangi Act is a comprehensive code and the Court's investigation will be conducted with the matters therein raised to the forefront-the fact that the Crown paid certain tribes for areas of New Zealand means nothing in terms of that section of the Act, however any properly recorded and documented evidence leading to the translation would on the other hand be extremely helpful.

During the course of the hearings, there was a substantial amount of evidence led concerning these deeds. In our view, however, the deeds themselves do little to assist us in determining the respective tribal rohe. The very fact that within the space of 13 years the Crown entered into a number of agreements which overlapped, thereby purchasing in some cases the same lands from different tribes, is evidence that the status of the respective deeds in determining "ownership" was questionable. Clearly, Ngati Toa received favoured treatment at the hands of the Crown, but we do not consider that this was necessarily an acknowledgement of their holding the "rangatiratanga" over the territories concerned. That situation probably came about through a policy actively adopted by Te Rauparaha of establishing a close working relationship with the settlers. Hence he established a strong trading relationship in flax and food etc., provided protection for whaling settlements and encouraged Pakeha settlement in areas under his control, such as Cloudy Bay. From the settlers' perspective one could imagine their ready acceptance of his having the authority to enter into the Deeds of Sale without making close enquiry, being happy to conduct their negotiations in Wellington and leave the tribal relationships among the Maori people for them to sort out amongst themselves.

Having stated what we believe to be the law that is to be followed in cases of this nature we now turn to the respective Deeds.

KAIKOURA DEED 1859

The Deed describes the boundaries of the land as follows:

These are the boundaries of the land commencing at the Karaka (Cape Campbell), and proceeding by the sea coast in a Westerly direction to Pari nui o whiti (Wairau Bluffs); from thence turning inland, it runs in a direct line to Rangitahi (Tarndale), at the sources of the River Waiautoa (Clarence); whence, turning in a South-westerly direction, it continues by the mountains to Hokakura (Lake Summer); turning thence in an Easterly direction, the boundary is the River Hurunui to its confluence with the sea; thence turning at the mouth of the Hurunui, in a North-easterly direction, it goes along the sea beach to Karaka (Cape Campbell), where the boundaries join.

Rangitane conceded that Ngai Tahu occupied the East Coast as far north as Kaikoura during the period prior to the northern invasions in the 1820s led by Te Rauparaha. To that extent, and during that period Ngai Tahu's title was not disputed.

Rangitane claimed it had clear customary title to the Wairau and as far south as the Waiau-toa in pre-Te Rauparaha times. It based its title on take tupuna (ancestral rights).

In support of its claim, Rangitane contended that the Waiau-toa has long been recognised as the tribal boundary between Rangitane to the north and Ngai Tahu to the south; that Tapuae-o-Uenuku, is the sacred mountain of the Rangitane; and that Rangitane's claim is recognised by the fact that the Blenheim Maori Committee administers Kaimoana as far as the Waiau-toa. It was further asserted that the Ngai Tahu currently residing in Kaikoura do not believe they have a claim to land north of the Waiau-toa as evidenced by the acceptance of the Waiau-toa-as their northern boundary when the Kaikoura Tribal Committee lodged objection with the Minister of Lands to possible sales of Crown pastoral leases in 1983.

Extensive evidence was given by Rangitane and by Ngai Tahu as to their occupation of various parts of the disputed lands and surrounding territory, and to the battles fought between them prior to the advent of Te Rauparaha. As can be expected there were conflicting accounts of many of the historical events that occurred over 200 to 300 years ago.

According to Mr Frank Dodson Wairau MacDonald, a kaumatua who gave evidence for Rangitane, the first migration of Ngai Tahu from the North Island arrived at Moioio Island in the Tory Channel in the late 1600s. Over a period of a generation thereafter, Ngai Tahu were harried from place to place by the iwi of Rangitane, Ngati Mamoe and Ngai Tara until Ngai Tahu eventually migrated from Karaka (Mussel Point) to Kaikoura.

Mr MacDonald described a series of battles or incidents in which Ngai Tahu were forced to move firstly from Moioio Island where their Chief Puraho was killed; then from Pukatea Pa; from Patiawa; from Ruatekanikani,; from Hikurangi Pa; from Otekainga at the mouth of the Awatere River; from Otuwheru; and finally from Karaka (Mussel Point) when Ngai Tahu departed south to Kaikoura.

Mr MacDonald and other witnesses, spoke of the Waiau-toa as the sacred boundary of Rangitane. He said the boundary was established in the time of Te Hau (grandfather of Kupe) around 750 to the year 800. The sacred boundary was established in mythical times long before Rangitane was known as a tribe. It was firmly established when Ngai Tahu came to the South Island and Rangitane never trespassed south of the boundary. Ngai Tahu trespassed at Miromiro (northwest of Hamner Springs) and there were several battles to keep them back on the southern side of the boundary.

In the late 1700s a battle was fought at Matariki, on the north bank of the Waiau-toa, and Ngai Tahu were defeated by the combined forces of Rangitane and Ngati Mamoe. Tapuae-o-Uenuku, the sacred mountain of Rangitane, is on the northern side of the Waiau-toa.

Rangitane claimed that before the advent of Te Rauparaha, Ngai Tahu had been expelled from the northern parts of the South Island after suffering a series of defeats, and that the land north of the Waiau-toa was the domain of Rangitane.

Mr Tipene O'Regan, chairman of the Ngai Tahu Maori Trust Board, gave a different account. He described how Kai Kuri, a hapu of Ngai Tahu, migrated to the South Island under the leadership of Puraho and his son Muru Kaitatea. They settled in Tory Channel and established a great Pa Kaihinu (Mr MacDonald claimed this was a Ngai Tara/Mamoe Pa). Mr O'Regan related subsequent events that occurred and we set out an extract from his evidence:

Ngai Tara were living on Totaranui and Arapaoa Island on the other side of the water and before long they were in conflict with Puraho and his people in the wars over the bone fish hooks made from graves which had been interfered with. The conflict escalated and ended in the death of Puraho. With their ariki's death Kati Kuri set out to destroy Ngai Tara and this was accomplished and that tribe has never been known as a people of mana in this island since.

The Rangitane living at Wairau had assisted Ngai Tara in the fighting with Kati Kuri and it was necessary to seek utu from them. It was also convenient because Kati Kuri could not continue living at Kaihinu after the death there of Purahonui. War was made against Rangitane at Wairau and they were defeated. In the course of that fighting one of Maru's warriors, Tuteurutira, captured a wahine rakatira thinking she was Rangitane. He later found she was a recently captured prisoner of Rangitane. Her name was Hinerongo and she was ariki of the Kati Mamoe people of Waipapa (or Waiau-toa) Clarence River. It was her tangi for her tupuna places, Te Rae o Te Kohaka, Te Rae o Te Karaka and the hill of tikumu named Kairuru, that made him realise she was not Rangitane. Tuteurutira returned her to her Mamoe people and married her and lived amongst Mamoe at Waipapa. Meantime, Maru and the rest of Kati Kuri lived at Wairau and Rangitane stayed there as a subject people.

After a time Rangitane became restless and it became necessary to subdue them. The take was to avenge their attacks on Kati Mamoe and the capture of Hinerongo (who was partly related to Rangitane herself as well as being ariki to Kati Mamoe). Kati Kuri combined in alliance with Kati Mamoe and the battle was fought on the beach beneath the Pa, Pukatea (Whites Bay). This time Rangitane were completely

conquered and ever since have been confined to Wairau where they were later to be overrun again by Ngati Toa in the 19th century.

Mr O'Regan stated that historically the real issue to them has always been the Awatere Valley and the control of the route right into the heartland of the Ngai Tahu. He said Ngai Tahu have never argued the Rangitane right to look upon Tapuae-o-Uenuku. He thought two peoples can look at different sides of the same mountain. What they differed with is where it stands. He referred to Aoraki which still remains the mauka atua of Ngai Tahu although it sits in a National Park.

Ngai Tahu, in their evidence, disputed the Waiau-toa as their northern boundary. Official documents produced to us indicated that in 1848, Ngai Tahu were claiming Parinui-O-Whiti to be their true boundary. We accept the assertion by Rangitane of the special significance of the Waiau-toa in their traditional history but we find insufficient evidence to establish that at the time of Te Rauparaha's incursions, the Waiau-toa was the tribal boundary between Rangitane and Ngai Tahu.

In 1828, Ngati Toa and their allies crossed to Te Waipounamu and at Pelorus Sound, Ngati Kuia were attached and defeated. Rangitane who occupied the Wairau, were then overwhelmed and the invaders turned their attention to Ngai Tahu at Kaikoura and southwards.

Rangitane were not further involved in major warfare with the northern allies or any other iwi. Their defeat appears to have been comprehensive. J W Hamilton, Native land purchase agent, writing to Donald McLean, Commissioner of Native Land Purchase Department on 8 January 1857 says:

The Rangitane, now almost extinct appears to have been the original occupants of the northern portion of the middle island and might possibly maintain some kind of claim as far south was Waipapa or Waiau-toa (Clarence River). They seem, however to have been hemmed in on both sides by Ngai Toa and Ngai Tahu, and I am not able in this part of the Country to learn much about them. South of Waipapa however, I am of opinion, as I have stated before that the Ngai Tahu title in incontrovertible.

Ngai Tahu's defeats, and their resurgence against Ngati Toa in the 1830s onwards are discussed later and it is contended by the Ngai Tahu claimants that Ngai Tahu had never lost title to the lands up to Parinui-O-Whiti by 1840. We agree that that contention holds good as against the adverse claim by Rangitane who were in no position to assert customary title to the disputed land following their decisive defeat by the northern allies. There can be no doubt that Ngati Toa as at 1840 were in occupation of the area known as Cloudy Bay, North of Parinui-O-Whiti (White Bluff). They are claiming however, that their "sphere of influence" extended south of Kaikoura.

We must say at the outset that we found very little evidence of this. It is certainly true that the exploits of Te Rauparaha and his allies were well remembered. But we are unable to find evidence that Ngati Toa exercised ahi kaa south of "the Wairau". The only evidence which could seriously challenge that finding may be the observation by W.J.W Hamilton in 1849 that there were a number of Maori in the area of the Waiau-toa river who, it has been suggested, were descended from Tuhere Nikau. These

people would apparently have been of Ngati Toa descent and were tupuna of Makari Miller ("Granny Mag") who died in about 1942.

Apart from this isolated reference to people of Ngati Toa descent living south of Parinui-O-Whiti, there is no evidence to support the claim that Ngati Toa people exercised ahi kaa in that area. It is noteworthy that Hamilton did not himself identify the tribal affiliation of the people he described and nor was any evidence led which could recall the names of places in that area which were specifically of significance to Ngati Toa. For example, the mountain known as Tapuae-O-Uenuku was the subject of special reference by both Ngai Tahu and Rangitane. In the case of Ngati Toa, however, no traditions by which the people identified themselves with the area were referred to. In our view, the existence of an isolated handful of people of its own is insufficient to establish ahi kaa - there is nothing to suggest in the evidence that these people kept in touch with their tribe and were in turn held out as being their representatives.

We are satisfied, however, that Ngati Toa had established their ahi kaa in the 12 years following their invasion in the area of the "the Wairau" and as far south as Parinui-O-Whiti. In 1845, Commissioner Spain reported that the Ngati Toa were settled in that area and had parts of the land under cultivation. In 1847 the Surveyor General, C W Ligar, reported that members of the Rangitane tribe who wished to cultivate land for growing potatoes in the Wairau first sought the permission of Te Rauparaha before doing so.

During the hearings the expression, "the Wairau", was the subject of extensive argument. For the purposes of the claim by Ngati Toa, especially having regard to a the short period of time in which they had to establish themselves in the South Island prior to 1840, we find that "the Wairau" is the area they had settled in the vicinity of the Wairau Valley extending as far south as Parinui-O-Whiti only.

Accordingly, although it is clear that the Ngati Toa and their allies had effectively conquered the East Cost as far as Kaiapoi, (or possibly to Akaroa) they nevertheless did not follow up their military success by exercising ahi kaa over the territory south of Parinui-O-Whiti to such an extent as to establish a cultural tradition in the area. North of Parinui-O-Whiti, however, it is clear they established themselves in cultivating land there and established a mixed settlement with the European settlers. Kaumatua Pateriki Rei described Te Rauparaha as a cultivator who encouraged his people to sell produce to the Pakeha. This is consistent with Te Rauparaha's policy of trading with the new-comers rather than maintaining the more nomadic lifestyle of other tribes whose territory may better be described as takiwa rather than rohe. Accordingly, apart from possibly Granny Mag's forebears, there was very little evidence of the Ngati Toa exercising any presence south of Parinui-O-Whiti on either a seasonal or permanent basis. The incidence at Kaparatehau (Lake Grassmere) in 1836 when it is alleged Te Rauparaha had to make an undignified withdrawal from a duck shooting expedition, can only be assumed to have been an isolated expedition as no evidence was led which would suggest that a tradition of seasonal hunting in that area had been established by Ngati Toa after that event.

In his opening submissions, Counsel for Ngati Toa, Mr J V Williams, first amended the synopsis of submissions, he had filed, dated 21 June 1990, by the addition at

paragraph 1.3 to extend the area claimed on the east coast of the South Island to a "sphere of influence" south of Kaikoura.

Counsel subsequently went on to discuss the "1840 Rule" and the concept of ahi kaa. He said:

It may be that a tribe which has maintained the traditions of the exploits of its tupuna that recalls the battles that were fought, the defeats, the victories, that recites the whakapapa, that recalls the names of the places, the burials of the dead and wahi tapu which relate to its history, have maintained an ahi kaa, have not lost their connection with the land in respect of which they claim an interest ... My submission if the Court is to take a view of whether an iwi has maintained its ahi kaa up to the present day, then this court is invited to take a view that the maintenance of traditional stories, the maintenance of whakapapa, that the remembrance of wahi tapu, battles won and lost, is evidence of the maintenance of that ahi kaa.

We accept the thrust of those submissions but we have been unable to find evidence for Ngati Toa which satisfies the criteria described by their Counsel for finding that they had established ahi kaa south of Parinui-O-Whiti.

The historical evidence presented to the Court covering the settlement of Te Waipounamu by the Maori insofar as the lands, the subject of our enquiry clearly demonstrates the coming into being of the iwi now known a Ngai Tahu. This iwi evolved, we are told, over many generations by a process (in modern terminology) combining assimilation, amalgamation, conquest and intermarriage. The manuscript of Hariata Whakatau Pitini-Morera (Aaro Book 'B' as well the evidence of Tipene O'Regan adequately demonstrates this evolution). This evidence of evolution was uncontradicted and we accept it.

The evidence regarding the customary title to the disputed lands prior to the invasion by Ngati Toa and other northern iwi produced by Ngai Tahu demonstrated that they had occupation and one or more of the various take; because of the evolutionary process adverted to above, discovery followed by intermarriage with conquerors and actual occupation for many generations made it difficult to clearly show a single take; this of course was not uncommon in Maori tradition and we accept it as it has been accepted by the Maori Land Court from the beginning.

There is adequate evidence that Ngati Tahu had the Rangatiratanga over the lands comprising both the Kaikoura and Arahura Deeds circa 1820; examples from the Ngai Tahu presentation were for the most part uncontradicted.

In his account of his Adventures in New Zealand published in 1845 Edward Jeringham Wakefield had this to say:

The Ngati Apa, Rangitane and Maupoko occupied the succeeding coast as far as Kapiti, and "ALSO SHARED THE SOUTHERN SHORES OF COOK STRAIT WITH THE NGAI TAHU WHO INHABITED CLOUDY BAY AND QUEEN CHARLOTTE SOUND.

Another commentator was Ernst Dieffenbach, naturalist to the New Zealand Company, who had this to say in his pamphlet New Zealand and its Native Population when describing Te Rauparaha's campaigns against the Te Waipounamu iwi:

He brought the war over to the Southern Island, to Queen Charlotte Sound, D'Urville's Island, to Cloudy Bay, Tory Channel and further along the eastern coast. These places were inhabited by a numerous tribe, the Naheitou[sic]-I often found the deserted dwelling places of the Naheitou.

The Ngai Tahu claim to the lands comprising the Kaikoura Deed was put simply as follows:

(i) They had customary Title before the Northern Tribes invaded.

(ii) Te Rauparaha and his allies defeated them at Kaikoura, Omihi and in the second campaign at Kaiapo then retired from the Ngai Tahu domain.

(iii) That within two years of these defeats Ngai Tahu were seeking battle with Ngati Toa north of Parinui-O-Whiti and Te Rauparaha did not respond in kind to these excursions.

(iv) Ngai Tahu continued to fish and hunt over the northern portion of their claimed lands as well living in the areas around Kaikoura and south, all this to the exclusion of other iwi.

Much has been written about Te Rauparaha and his invasion of Te Waipounamu-the reason why he invaded (if he needed a reason) the campaigns and what happened after the campaigns. The evidence presented by the claimants setting out the course of the campaign beginning in the Southern Cook Strait area against Ngati Kuia and Rangitane and then moving south is consistent with the evidence of other claimants.

On the east coast it is clear that Te Rauparaha devastated Takahanga Pa (Kaikoura) and Omihi Pa (both Ngai Tahu strongholds) in his first campaign, but was rebuffed at Kaiapoi and further in the following campaign he captured and sacked Kaiapoi. We also believe that on the east coast the invaders did not proceed further south than Akaroa.

It is also clear that Ngai Tahu were decisively defeated and the northern invaders if they had remained in occupation of the lands from the Wairau Valley to Kaiapoi would have, by reason of take raupatu, the "ownership" of the lands.

In our perusal of the material placed before us by all the parties there is a dearth of clear evidence of physical occupation either by the Northern Iwi, Rangitane or Ngai Tahu of the lands between Kaikoura and Parinui-O-Whiti post the northern invasion. There is uncontradicted evidence from the claimants that Tuhawaiki, a Ngai Tahu chief from Otago, led an expedition against Te Rauparaha and almost captured him at Lake Grassmere-there is independent evidence that the Europeans in the Cloudy Bay area were in the 1830s apprehensive fearing a Ngai Tahu invasion because they (the settlers) were there by licence of Ngati Toa. It is also not disputed that Tuhawaiki did

in the 1830s mount an expedition in the Cloudy Bay area, and occupy the land for a short period before retiring southward.

Walter Mantell a Crown Official with a real knowledge of the Maori of the Southern Cook Strait suggested that land immediately south of the Wairau Valley was possibly wasteland because it was not occupied by Maori and was probably forfeited to the Crown because of this. We are of the view that he may have been correct in his opinion that the land was in a technical sense uninhabited ie, there was no Pa or permanent evidence of iwi residing there but categorically disagree with his assumption that this circumstance meant no Maori had title; we much prefer the view expressed by Sir William Martin, the first Chief Justice of New Zealand, as he put it, before the Treaty of Waitangi the whole of New Zealand "or as much of it as is of value to man" was divided amongst the Maori tribes and sub-tribes.

We are aware that Ngati Toa claimed certain rights south of the Wairau Valley to Kaiapoi basing this on evidence that some of their principal chiefs had been murdered there and also their having almost exterminated the Ngai Tahu resident in these lands, the survivors of that iwi having fled southwards. This account does not demonstrate actual occupation by Ngati Toa after the wars, ignores the excursions of Tuhawaiki in retaliation mentioned earlier and more importantly attempts to import a take not recognised by this Court-that the murder (killing) of invading chiefs creates title rights to the land where they were killed.

Ngai Tahu are adamant that the expedition by Tuhawaiki clearly demonstrate that they held the Rangatiratanga over the lands north of Kaiapoi to at least Parinui-o-Whiti, they argue that no competent Maori general would have left his flank so exposed, there was no threat therefore there would not have been occupation by Ngati Toa south of Wairau.

This Court though sympathetic to this view accepts that Te Rauparaha must have considered he could safely hunt at Lake Grassmere until rudely interrupted by Ngai Tahu; significantly we believe is the absence of evidence of use of this lake by Ngati Toa post Te Rauparaha's well documented escape.

We are not satisfied that there was occupation to the exclusion of all other iwis by any of the claimants of the lands south of the Wairau Valley to Kaikoura circa 1840 and therefore accepting that there could not be waste lands considered whether this land could be classed as kainga tautohe, that is land over which rights were enjoyed by more than one iwi. The evidence does not substantiate this because as mentioned above Ngati Toa had retired north and any "shared" use would then have to have been agreed between Ngai Tahu and other iwi. There is no evidence before us from which we can conclude there was agreed use of these land by Ngai Tahu and other iwi.

To satisfy the question of re-occupation by Ngai Tahu however we are not tied to occupation as at 1840; having found that Ngai Tahu held customary title before the north invasion they could, as long as it was not forcibly, occupy post 1840 and within three generations thus reviving their ahi kaa.

It is clear from what is before us that due to missionary influence Ngai Tahu slaves that had been taken by Ngati Toa were released in the late 1830s and early 1840s-

many of these Ngai Tahu returned to their previous homes. These people were able to rekindle the fires as their release was within one generation of their capture as well they could not be classified as still subject to their former masters because of the Christian ethos as well the assumption of British sovereignty over New Zealand and the fact that all Maori post treaty held British Citizenship.

We have mentioned the Deeds entered into by the Crown with various iwi concerning the lands included in the Kaikoura Deed. Ngai Tahu suggest in their claim that the Crown's actions were based on a philosophy of divide and rule. We neither disagree or agree with this proposition but let the evidence speak for itself. We as a Court, though making clear our views as to the evidentiary value of the actual deeds, because all claimants appear to place great value on them, feel constrained to comment on both the Deed whereby Ngati Toa purported to dispose of the Wairau Valley and lands south to Kaiapoi was well the Kaikoura deed.

Though much has been made of the Wairau deed we believe the whole transaction was used by Governor Grey more as a device to appease the clamouring of the New Zealand Company's lobbyists than a genuine bargain with the iwi entitled to sell the land. We note that the Wairau incident whereat company officials had been killed had been the subject of a recent official enquiry which exonerated the Maori participants and blamed the company. When giving evidence in 1879 to the Smith-Nairn Commission which body was investigating the Crown Purchase of and in the South Island, Governor Grey said regarding the Wairau purchase, that the sellers (who were christians) wished to make atonement for the Wairau killings.

It is our view significant that before the Deed was entered into there was no enquiry of any persons living on any of the lands north of Kaiapoi, an enquiry would have produced competing claimants particularly Ngai Tahu. Also of some import is the dealings with three younger chiefs of Ngati Toa, an unusual circumstance; the negotiations proceeded initially to encompass the Wairau Valley, the lands of the Wairau incident, then it expanded to include the lands south to Kaiapoi.

We believe the Wairau deed effectively reduced the pressure being exerted by the New Zealand Company on the Governor and had the added benefit to the Crown of eventually forcing Ngai Tahu to deal with the Crown later very much on the Crown's terms.

Governor Grey in his 1879 evidence had this to say about the transaction:

I regarded it more as a giving up of the land for the good of both races than as a purchasing of it.

Lieutenant W F G Servantes, the negotiator interpreter and a witness to the Wairau Deed, said in 1850 when explaining the reasons why Ngati Toa were able to sell land as far south as Kaiapoi:

Although the right of the-above named tribe "(Ngati Toa)" was considered doubtful, I beg to add that I believe it questionable whether according to Native customs Ngai Tahu had a better title.

We observe that Servantes had access to Ngati Toa representatives but he had not dealt with Ngai Tahu on this question. Ngai Tahu have placed evidence before us detailing their objection to the Wairau Deed from the outset culminating in the negotiations that resulted in the Kaikoura purchase. During this period there were various Crown Officials involved in one capacity or another. Messrs Mantell, Hamilton, James Mackay (Jun), McLean and the Governor of the time. Throughout Ngai Tahu petitioned the Governors and attempted to impress other officials with the validity of their claim. The documentation presented to us shows that they convinced many of the officials that the Crown had erred when dealing with Ngati Toa for land south of the Wairau Valley.

We have found it useful to refer to the evidence of Wiremu Te Uki a Ngai Tahu chief given to the Smith-Nairn Commission on 3rd April 1880 when referring to discussions Ngai Tahu had with Governor Grey at Akaroa in March of 1848 when he said:

At the request of Governor Grey, I and about 20 others went to Wellington with reference to a word Governor Grey had spoken to me at Akaroa. When at Akaroa Governor Grey had spoken to me about Kaiapoi being sold. I said, 'That land does not belong to Ngati Toa' Sir George Grey said 'Oh, yes; according to the Ngati Toa, it belongs to them; it belonged to their ancestors.' There was another word of the governor's. He invited us to go and stand on one side and meet the Ngati Toa, who would stand on the other side, and he would be the judge between us; and if were able to show that the land belonged to us, he would recognise it as so; and if the other party showed that the land belonged to them, he would recognise them. When we arrived in Wellington we saw the Governor. We met him, and he immediately sent a message to Ngati Toa. They did not come upon the first message, and a second was sent. The Ngati Toa were afraid of the whakawaa, which they heard it was to be. Then a third messenger was sent, and then they made an excuse and went over to Queen Charlotte's Sound, professedly to a tangi. When the Governor saw that they would not come-(Governor Grey, Governor Eyre and Mr Kemp were there, the latter as interpreter), I proposed that for the money which had been received by Ngati Toa land should be given at Kawhia, where their original possessions were. Taiaroa spoke to the same effect. All the other chiefs spoke to the Governor about putting back the boundary of Kemp's Purchase further north to Parinuiowhiti, near Wairau. On our return from Wellington Mantell was at Murihiku. Taiaroa followed him up, and overtook him at Arowhenua.

Though Ngai Tahu were there complaining about "Kemps" purchase Deed which had put the Ngati Toa boundary as far south as Kaiapoi, the southern boundary complaint is relevant in our enquiry into the Wairau Deed.

In a letter reporting to D McLean the then Chief Commissioner of the Native Land Purchase Department dated 8th January 1857, J W Hamilton a Crown Official relates how he had received Whakatau, a Ngai Tahu Chief, from Kaikoura, and heard him assert that Ngai Tahu owned the country southwards from Parinui-O-Whiti.. Hamilton had this to say with reference to the general question of Ngaitahu title:

The Rangitane, now almost extinct, appear to have been the original occupants of the North portion of the Middle Island, and might possibly maintain some kind of claim

as far south as Waipapa or Waiu Toa (Clarence River). They seem however, to have been hemmed in on both sides by Ngati Toa and Ngai Tahu and I am not able in this part of the country to learn much about them south of Waipapa, however I am of the opinion, as I have before stated, that the Ngai Tahu title is incontrovertible.

Hamilton went on to quote from and referred to Commissioner Mantell's report of 5th September 1848 wherein the submissions in favour of Ngai Tahu's ownership were recorded concluding:

This evidence seems to me to be conclusive in favour of Ngai Tahu for Mr Mantell's knowledge of the Cook Strait Maoris was so complete, that he could hardly be misled on noted facts in their history or drawn to express an opinion where he had not sifted the evidence.

The Kaikoura purchase from Ngai Tahu was negotiated by James Mackay, then Assistant Native Secretary for the Government and in a letter he wrote on 25th February 1859 to the Chief Land Purchase Commissioner he spells out clearly the claim of the Ngai Tahu of Kaikoura viz:

The district claimed by them commences at the Hurunui and is bounded on the south by that river to it's source; on the east by the sea from the Hurunui to Cape Campbell (Te Karaka) on the north by the sea from the last named place to the Wairau Bluffs (dividing the Wairau Plan from Kaparatehou); on the west by a line drawn from the Bluffs (Pari-nui-o-Whiti) to the Wairau Gorge from there to Rangitahi (Lake Tennyson, Tarndale) from there it is bounded by the range of mountains lying to the eastward of the Buller and Grey Districts, West Coast to the Pass of the Hurunui and Taramakou.

We believe it is significant that Messrs Mantell, Hamilton and Mackay were all aware of the Ngati Toa claim as well the Wairau Deed of Cessation of 18th March 1847, they all at various times were offered evidence by Ngai Tahu and all three concluded that Ngai Tahu's claim were valid. We believe also that these persons were all experienced in Maori land dealings and yet, being Crown Officials knowing of prior purchases by the Crown of the lands, they all accepted the validity of the Ngai Tahu claim. We believe they were in a better position to reach a fair result than we are today; we are heavily influenced by their conclusions.

As we stated earlier the weight of evidence presented to us was in favour of Ngai Tahu holding rangatiratanga over the east coast of Te Waipounamu from Parinui-O-Whiti south to Hurunui including all the land comprised in the Kaikoura Deed immediately prior to the northern invasion.

We conclude our investigation in respect of the lands comprised in the Kaikoura Deed of Purchase by a finding that notwithstanding the conquest of Ngai Tahu by Ngati Toa and their allies, the failure of the northern tribes to remain in occupation post the conquest and the return of Ngai Tahu thus reviving their ahi kaa meant that at the time of the signing of the Deed (1859) the right of ownership of the lands comprised in that Deed was according to customary law principles of take and occupation or use vested in Ngai Tahu.

THE ARAHURA DEED 1859

Turning now to the Tai Poutini (West Coast).

The Arahura Deed describes the boundaries of the land as follows:

Commencing at the seaside, at Piopiotai (Milford Haven); thence proceeding inland to the Snowy Mountains of Taumaro; thence to the mountains,, Tiori Patea, Aorangi (Mount Cook) Te Rae, o Tama; thence to the saddle at the source of the River Taramakau; then to Mount Wakarewa; thence following the range of mountains to the Lake Rotoroa; thence to sources of the rivers Karamea and Wakapoai; thence by a straight line drawn to Kahurangi Point at the seaside; thence turning in a southerly direction, the sea coast is the boundary to Piopiotai (Milford Haven), where the boundaries meet.

The claimants are Ngai Tahu, Ngati Toa, Ngati Rarua, Ngati Tama, Te Atiawa and to a certain extent Ngati Apa. Once again, the historical accounts given by the respective claimants and their interpretation of certain events, differ markedly in several material respects.

A principal argument for Ngati Apa was that their ownership rights to lands, particularly in the Buller area, were recognised by the inclusion of members of their iwi (and also other non-Ngai Tahu) as owners in several of the West Cast Reserves. They pointed also to Puaha Te Rangi, of Ngati Apa, who asserted rights to land and compensation, during the negotiations leading to the signing of the Deed of the Arahura Purchase, and Mackay reports (Vol II, p.4.1):

... it was deemed expedient to permit Puaha Te Rangi on behalf of himself and a few other Ngati Apa Natives to participate in the payment, and it was arranged that some reserves should be allotted to them in the neighbourhood of the Buller River ...

Puaha Te Rangi was a signatory to the Deed of Purchase.

For Ngai Tahu, it was argued that Ngati Apa occupied the northern area of Te Waipounamu after their conquest of the early occupiers, Ngati Tumatakokiri. Ngati Apa were then replaced by Ngati Toa and Ngati Rarua and remnants of the Ngati Apa sought refuge from Ngati Rarua by moving to the lands of the Tai Poutini around Westport where Tuhuru allowed them to occupy land. Ngai Tahu contended that the Ngati Apa who settled there were a few individuals rather than a tribal entity.

In respect of the case presented by Ngati Toa in the area of the Arahura Deed, we find that they did not establish their claim. There was no evidence led which showed a cultural tradition with the area beyond leading at the early stages the invasion with their allies. There is nothing which suggests settlement or the exercise of any authority. They appear to have left any interest they would have established to their allies whom we have already considered, and limited their interests to the Cloudy Bay area. The sale in 1854 of the land which included pounamu is indicative of a lack of tradition in that resource. We were impressed by the significance attached to that tradition by Ngai Tahu, in particular Mr Maika Mason, and indeed it was Tuhuru, a Ngai Tahu Chief, who was allowed by the newcomers to continue that tradition. We

accordingly cannot identify any interest sufficient to satisfy the criteria to establish ahi kaa-or to satisfy the criteria described by their Counsel to which we referred earlier.

Ngai Tahu offered evidence showing how they were the iwi that had title to the lands comprised in the Arahura Deed prior to the arrival of Ngati Tama and Ngati Rarua and of their Chiefs Niho and Takerei at the Tai Poutini (West Coast). Their evidence is that the Ngai Tahu had long envied the Tai Poutini Iwi their pounamu (greenstone) and when a captured women was prevailed upon to show them the pass whereby Ngai Tahu could travel from the Canterbury plains over the Alps to Tai Poutini it was inevitable that Ngai Tahu would invade. Ngai Tahu consolidated their position on that coast and traded the pounamu through Kaiapoi and not northward through Taitapu as had been the norm up to their invasion. In the years preceding the arrival of the North Island iwi (1800-1827) Tuhuru was the chief and he enjoyed great mana; he had conquered the Ngati Wairangi of Tai Poutini and remained in occupation. Tuhuru's people developed the working of pounamu to the highest standard known to Maori. Ngai Tahu also maintain that Tuhuru as well as occupying the Tai Poutini fought against a large Ngati Toa taua (war party) circa 1820 the battle being at Otakoro-iti a place below Kahurangi Point; Ngati Toa after the battle withdrew to the sea. We were also told of other battles where Tuhuru defeated Tumatakokiri.

Ngai Tahu acknowledge that after the Ngati Rarua invasion of Taitapu about 1828-1829 a few Ngati Apa fled southward into Te Tai Poutini and Tuhuru allowed them to settle around Kawatiri (Westport).

Andrew Maika Mason of the Kati Waewae hapu of Ngai Tahu described their tribal boundary as follows:

Ko nga rohe enei o taua whenua ki tamata i te taha o te moana i Piopiotahi a ka haere ki uta ki nga maunga huka ki Taumaro-haere tonu ki nga maunga Tioripatea, Aoraki me te Ra o tama, ka haere i kona ki te tarahaka o Taramakau - haere tonu ki te maunga o Wakarewa haere tonu i reira ki runga ki nga maunga tae ki te hapua o te Rotoroa, a ka haere i kona ki nga tauru o nga awa Karamea me Whakapoai a ka haere maro tonu ki te kurae o Kahuraki i te taha o te moana.

Mr Mason stated that this boundary remained unchallenged for some 190 years until this present dispute.

We are of the opinion that Ngai Tahu held the "customary" title to Tai Poutini and had held it for a considerable time before 1827 the year Niho, Takerei and their Taua moved into the area.

There are conflicting stories regarding Niho's advent into the Tai Poutini; Ngai Tahu argue that Tuhuru and Niho made peace forthwith and Niho, Takerei and their people settled without there being battles; on the other hand we have before us evidence that Tuhuru was beaten in battle captured and ransomed by his people and the Northern iwi occupied Arahura and the surrounding lands.

Ngai Tahu presented evidence that Te Puoho a Ngati Tama chief, decided to move down the West Coast and attack the Southern Ngai Tahu: Niho did not become involved; Ngai Tahu suggest this was because he was aware of the strength of the

Ngai Tahu of Murihiku-be that as it may all the commentators agree that Te Puoho was killed and those few of his taua who were not also killed were enslaved by the Southern Ngai Tahu. This battle on the Molyneux Plains is remembered by Ngai Tahu and Ngati Toa as the battle of Tuturau.

There is an interesting side issue to this defeat of Te Puoho; in 1850 his nephew/stepson Paremata wrote to Governor Grey claiming the lands where Te Puoho had been killed for Ngati Tama, basing his claim on the fact that his uncle had been killed there. This was another attempt to invoke this new "take". We repeat that this Court does not acknowledge such a customary incidence of title.

Ngai Tahu's evidence is that upon Te Puoho's defeat, Niho, Takerei and their supporters withdrew from Tai Poutini northward to Taitapu. This withdrawal is not contradicted by other claimants and later European travellers in the 1840s (Heaphy & Brunner) confirm that Niho was not living on the Tai Poutini.

Ngai Tahu argue that with Niho's going north, any rights he might have had went with him.

For the purpose of this Court, once Niho and his people left it becomes irrelevant whether he was a conqueror in occupation or a friendly iwi living with Ngai Tahu with their consent; we agree with Ngai Tahu that any rights he or his supporters may have had were extinguished according to Maori custom. We say this because there is no evidence before us that he left any of his iwi behind to maintain the ahi kaa; as well Ngai Tahu's evidence that Niho never returned south of Kahurangi Point is uncontradicted.

We believe that consistent with this view if Ngati Toa, Rangitane and Te Ati Awa rely upon conquest and occupation by Niho or Takerei to substantiate their claims to Tau Poutini any such right would necessarily have been lost with those chiefs' withdrawals.

There has been, as mentioned earlier, much reference to the various Deeds of purchase and receipts signed by representatives of various iwi. We note that the Crown in its purchases of land on the West Coast of Te Waipounamu adopted a similar method to its approach on the east coast. It appears to have been willing to deal with any Maori other than those living in the area and finally after repeated approaches dismissing those on the lands with paltry sums.

The 1853 Deed with Ngati Toa and others purported to deal with all rights of various iwi, including Ngai Tahu, to the land in the Northern part of Te Waipounamu. There is no evidence that Ngai Tahu were:

(a) Parties to the Deed

(b) Received any payments thereunder.

The Ngati Toa receipt dated 13 December 1854 refers to the 1853 Deed and includes Arahura as part of the lands being paid for.

On 2 March 1854 the Te Ati Awa Deed was signed, this included lands down to Arahura.

The Ngati Tama Deed of 10 November 1855 again includes lands down to Arahura.

This Deed was followed by the Rangitane Deed of 1 February 1856 and again includes lands down to Arahura.

As this Court has stated earlier in this judgement the various Deeds indicate:

(a) The Crown was attempting to extinguish all Maori claims regardless of their validity.

(b) The fact of payment of lands by the Crown is only evidence of such payment and without the evidence leading up to the payment is unhelpful in deciding these boundary issues.

The evidence before us in respect of the Arahura Deed of Purchase signed by Ngai Tahu is that James Mackay visited Arahura and the surrounding areas, held long meetings with the persons then occupying the lands and convinced them that it was in their interest to contract with the Crown.

We believe it significant that Mackay was convinced that it was proper for the Crown to deal with Ngai Tahu in respect of lands as far north as Kahurangi Point because:

(a) He was the first Crown official to deal directly with the persons occupying the land.

(b) He would have been well aware of all the prior dealings wherein the Arahura and surrounding lands were included in previous sales to the Crown.

(c) He was known as a knowledgable but 'hard' man who boasted that no Maori had ever got the better of him.

We believe that any doubt Mackay may have entertained would have been resolved in favour of his employers and not the Maori. In a letter to the Native Land Court dated 27 September 1859 Mackay stated inter-alia:

I find the Ngai Tahu title to be good.

We believe it significant that when he made this statement Mackay was well aware that the claims of Takerei and Ngati Ratua were extinguished by McLean (Land Purchase Office for the Crown) in 1854, (he mentions it in the same letter); it is also extremely valuable that notwithstanding this knowledge he having investigated the Ngai Tahu claim was prepared to categorically confirm the title. McLean had not investigated the Ngai Tahu claim to these lands.

In the evidence presented by or on behalf of Rangitane much has been made of the fact that Puaha Te Rangi is included in the West Coast Reserves, this was met by Ngai Tahu claiming Puaha as being also of Ngai Tahu. Mr Sadd in his evidence

acknowledged that Matanihoniho a (sister/cousin) of Puaha is also of Ngai Tahu as well she is entered in Ngai Tahu records as theirs. Mr Tipene O'Regan of Ngai Tahu had no problem in accepting Puaha as Ngai Tahu.

Ngai Tahu also explained why persons of Ngati Apa descent were living in Tai Poutini post 1840-they put it simply, these people were allowed to settle by Ngai Tahu.

Having decided earlier that Ngati Toa had no rights of ownership in the Arahura Deed land we also confirm our understanding that any rights of Ngati Tama and Ngati Rarua were extinguished with the defeat of Te Puoho at Tuturau and the retirement of Niho and Takerei north of Kahurangi Point.

We accept that Ngati Apa and possibly other northern tribe remnants were in occupation of land along the Kawatiri and such occupation must have, as Mason suggests, been allowed by Tuhuru. However in the evidence before us nowhere have we found a customary take to support something more than a mere right of residence.

In our discussion earlier in this decision on the relevant law applicable in cases of this nature we accepted that to attain ownership there must have been one of the original take supported by actual occupation. We refer to our finding that Ngati Toa on the East Coast had conquered Ngai Tahu at least as far South as Kaiapoi yet because they did not remain in occupation, though they had Take Raupatu they did not attain ownership; In this West Coast question we have the opposite situation ie, occupation or residency but not supported by a customary take therefore we find that the rights of ownership of those people in terms of s6A(b) of the Treaty of Waitangi Act 1975 have not been established.

Having determined earlier that Ngati Tahu held the rangatiratanga over the lands comprised in the Arahura Deed before the invasion by Niho and Takerei in the late 1820's we now make a finding that for the reasons given above, in particular the defeat of Te Puoho of Ngati Tama and the consequential retirement of Niho and Takerei north of Kahurangi, the right of ownership accordingly to customary law principles of take and occupation or use was in 1860 vested in Ngai Tahu.

H K Hingston (Presiding Judge)

H B Marumaru (Judge)

Andrew Spencer (Judge)

This decision was formally promulgated in the Maori Appellate Court Te Waipounamu, Christchurch by Judge Heta Kenneth Hingston on the 15th day of November 1990.

Ngai Tahu Land Report

Appendix 05 Schedule of Ancillary Claims

5.1 Schedule of Ancillary Claims

Appendix 5

SCHEDULE OF ANCILLARY CLAIMS

WITNESS REFERENCE		NATURE OF GRIEVANCE
KAIKOURA		
1 Te Wharetutu Haretu Stirling Haututu (A18) Whakaue	1 Reserves too small 2 Portion of reserves taken by Crown for scenic purposes without knowledge of owners and now used for holiday camps or in private ownership. No compensation	
2 Trevor Howse Mangamaunu reserve A (A12) (Aa(r))	1 More land than necessary taken for roadway and railway	
	2 No compensation for roadway or railway	
3 Trevor Howse Kaikoura (Takahanga Pa)	E Loss of area in exchange pre-1890	
4 Trevor Howse Kie Kie	H Excessive roads through reserves	
5 Trevor Howse Haututu	L Reserve too small. Land behind L never received in exchange	
6 Trevor Howse South Bay Te Hikuawaho	F Loss of landing reserve	
CANTERBURY		

7 Riki Tau Taerutu (J10) 1 Inappropriate allocation as
a fishery
2 Reduction of lagoon

8 Riki Tau Waimaiaia (J10) 1 No longer access to river
2 Too small
3 Should be re-gazetted

9 Riki Tau Torotoroa (J10) 1 Fishery reserve-drained
(see also Te Maire Tau and useless
.. H6)

10 Riki Tau Teakaka (J10) 1 Does not give access to reserves
see also as first dedicated
Te Maire Tau (H6)
2 Erosion of beds affected use of
reserve
3 Ban against camping prevents use

11 Riki Tau Ihutai (J10) 1 Taken under PW Act in 1956 for
sewage treatment see also
Te Maire Tau (H6)

12 Riki Tau CT 199/076 Left dry by land drainage
see also (Ellesmere Reserve)
Te Maire Tau (H6)

13 Riki Tau Tutae Patu Lagoon Local Maori believe land theirs, but
see also (J10) have no title-an old pa site and
Te Maire Tau (H6) burial place of Turakautahi-founder
of Kaipohia

14 Te Maire Tau Houhoupounamu (H6) Fishery easement, but drained
by 1891

15 Rewi Brown Taumutu Claims right to village of Taumutu
(Hearing 18.8.87)

16 Catherine Brown Ellesmere Landing This reserve of 5 acres should belong
Reserve (H10)to the tangata
whenua

17 Mere Teihoka Ellesmere Landing Objects to being called "a squatter"
Reserve (H10) Claims Ellesmere Land-
ing Reserve is
Maori land

18 Rewi Brown Koru (H10) Right to this eel catching creek
also Mere Teihoka claimed

19 Kelvyn Te Maire Pukatahi & Reserves lack access
Te Houriri
Reserve Tauhinu (H10)

20 Rangimarie Te Maihora Waihao 903 Reserve Poor agricultural value

21 Kelvyn Te Maire "The Box" (H10) A reserve which is not gazetted and
of significance to traditional
history
of the Waiha

22 Matthew Ellison Waikouaiti Lagoon Although given as a fishing reserve,
(H11) has has been designated a wildlife
area and
Maori cannot fish nor hunt there

23 Matthew Ellison Wanaka-Hawea 1 Access denied
2 100 acres reserve sold by M/T
without consent

ARAHURA

24 Kelly Wilson Reserve (D10) 1 Reserves for South Westland were

and 48 inadequate
Omoeroa Gillespies
Beach, Paringa, 2 Areas of inadequate reserves
Arawata, Jacksons acquired by Crown
Bay
3 Succession orders missed out
tangata whenua

25 Kelly Wilson Waiatoto Paringa Land non-farmable. Land too steep
Karangarua and Land waterlogged
Kawhea

26 Kelly Wilson Karangaroa An area of mahinga kai. Reserves

Karangarua and should have been granted
others

27 Kelly Wilson Arawata Land taken under Public Works Act
for aerodrome

28 Kelly Wilson Bruce Bay (D10) No compensation for Reserve 781
at Mahitahi in 1938 for construction
of a roadway. Five (5) chain scenic
reserve either side and strip reserve
either side of river

29 Kelly Wilson Bruce Bay (D10) Reserve Section 782-Needs protection from goldmining

30 Kelly Wilson Okarito Bay (D10) 1 Maori were forced to sell 281 acres of 500 acre block in 1952 for a low price

2 Balance "most likely" taken for other purposes under Public Works Act

31 James Russell Kaniere S.D. Rural Claims that he and others have been Section 1737, dispossessed of Rural Section 1737 Block 9 (D17) by the 1952 Land Transfer Act

32 Kelly Wilson Poerua Reserve at Poerua seems to have disappeared

33 James Russell Offshore Island "Dispossession" of some Katiwaewae as Taumaka Popotai islands off Te Tai Poutini coast

34 John Duncan Mawhera Incorp. Unable to obtain title to a section (non-Maori)

OTAKOU

35 Sydney Cormack Moeraki (E16, E20) Crown grant not seen as a valid Block 1, Section title 62,&23

36 Sydney Cormack Donaldson Land at Maori Land Court would not Moeraki (E16, E20) recognise title

37 Sydney Cormack Moeraki Maori women whose European husband (E16, E20) received land as half-caste grants not entitled to share

38 Mrs Wright Karitane (L22, p33) Foreshore containing bones in urupa. (nee Parata) Land taken back by Silverpeaks County Council

39 Magdeline Wallscott Pukekura L32 p28 Land taken for defence and no longer Harington Point required and should be handed back

40 Mrs Grooby-Phillips Otakou Peninsula Five (5) acres taken under Proc 976 (C5, C6) for defence purposes, no compensation and No longer required for defence

41 Riwai Karetai The Kaik, Claims right to live in Kaik
3.11.87 Otakou Peninsula See Jesse Beard (L10)
(L32, p41)

42 Magdeline Wallscott Lake Tatawai (L32 p28) Lake filled and fishing resource
see also: (C13a, C13b, E53, lost
Craig Ellison and H12 and H53)
Edward Ellison

43 Sydney Cormack Taieri Block 22 Several half-caste sections should
(E16, E20) have been allocated

44 Robert Agrippa Whaitiri Te Anau Section purchased for a meagre sum
for(L32 p25) nurses home being
offered back to Maori at inflated
price

45 Robert Agrippa Whaitiri Te Kau Excessive land taken for a television
(L32 p25) transmitter and long delay in
returning

46 Mori Pickering Waitaha Land taken from family at Waitaha
(L32, p10) without notice

MURIHIKU

47 Sydney Cormack Marunuku Acquired by Crown through
(E16, E20)aka Section 15 MPA.
Te Karoro Reserve

48 Sydney Cormack Marunuku Recreation Land taken in 1940 by Courts
Ground for a proposed recreation ground
which never eventuated and land
went back to Crown

49 Emma Grooby-Phillips Marunuku "Best" timber taken over 30 years
without Maori knowledge or payment

50 Emma Grooby-Phillips Marunuku Land taken for road upsets urupa and
no compensation

51 Sydney Cormack Tautuku 1000 acres set aside for those who
(E16, E2, L32 p73) signed Kemps Deed but did not receive
land. Not honoured

52 Sydney Cormack Tautuku Landless There are a number of small sections
Maori grants of Crown land scattered through Maori
landless grants

53 Taare Bradshaw Tautuku Urupa Urupa at Tautuku disrupted by
(E8A, E8b) construction of a carpark and picnic
area

54 Sydney Cormack Forest Hill Block Two (2)Sections sold to Europeans
(E16, E20) containing valuable timber were
valued unfairly

55 Sydney Cormack Waimumu Objection to taking of land at
also (E16, E20, E8a, Hedgehope by Crown for a
Taare Bradshaw and E8b) repeater station

56 Sydney Cormack Waimumu 2500 acres should have been
Part 1,m Block 1 allocated as landless native land
-not allocated and resumed by
Crown under Maori Affairs Amendment
Act 1967

57 Sydney Cormack Omaui Crown offered only one half of true
value

58 Taare Bradshaw Omaui (E8s, E8b) Reduced by 369 acres to create a
scenic reerve

59 Rena Naina Peti Fowler Invercargill Loss of seven house sites without
Hundred, Block II notice and payment
Section 73

60 Syd Cormack Aparima (E16, E20) 1 Crown took part section 71 and
part of section 80 for a rifle
range-never returned
2 Crown passed on land to Wallace
County Council and then Riverton
Borough Council for Night Soil
Reserve and Rubbish tip

61 Sydney Cormack Aparima Section 37, Urupa at Aparima College disrupted
Block XXV
Jacobs River Hundred
(E16, E20)

62 Sydney Cormack Jacobs River Block 1 Eight of ten sections used by
adjacent farmer without compensation

63 Jane Davis Aparima All lands taken for Domain or
Recreational Reserve Recreational Reserve ie, Jacobs
River Hundreds Block 25 Sections 16A,
17A, 18, 22-24, 37 (urupa), 38
(urupa), 82 and Ngarimu Street-
Should be returned

64 Jane Davis Aparima Land should not have been rezoned as
Jacobs River Hundred "industrial" as it was recognised
Block 25 landing place of all Southland Maori
Section 20 (E31)

65 Jane Davis Jacobs River Hundred These blocks should be returned to
Pilot Reserve Maori
Howell Point

66 Naomi Bryan Jacobs River Hundred Land zoned recreation and she was
Section 25, Block 25 unable to deal with it. Fences
bulldozed

67 Naomi Bryan Jacobs River Hundred Oxidation pond placed next to ten
Block 25, Section 70 sections and
builing restriction
imposed

68 Eva Wilson Jacobs River Hundred Lands should be reserved for
Howells Point Pilot tourism and historic value
Reserve

69 Wiremu Bill Davis Jacobs River Hundred Should be returned to Maori
Howells Point Pilot ownership places of importance to
Reserve More's Reserve Maori
(L32 p66, E7)

70 Sydney Cormack Merivale Aparima Land passed out of Maori ownership
Hundred Block 4, and should be investigated
Section 56
(E16, E20)

71 Sydney Cormack Colac Bay (E16, E20) No compensation given to John Poko
by Wallace County Council for
construction of road over land

72 Sydney Cormack Colac Bay (E16, E20) Land donated by Mrs Cameron for
school and no longer required for
that purpose and should be returned
to Maori owners

73 Lovell Hart Rangi Marama Boundaries of land not defined
Colac Bay
(C/T B1/1062 (E35)

74 Wiremu Bill Davis Colac Bay Riverton That land set aside in 1870s as half-
caste grants between Colac Bay v
Riverton are uncultivatable and lack
access

75 Sydney Cormack Ouetota Block 5 Reserve did not and should have
Section 182 (E16) included site of Pahi pa

76 Sydney Cormack Te Waewae Bay (E16) The section is not recognised by Lands and Survey as Maori Land

77 Sydney Cormack East Rowallan Objection to retention of small
& Alton Blocks (E16) blocks of Crown land and to width
of roads allowed in reserve

78 Sydney Cormack Te Waewae Block 8 Should be Maori land because it has
Section 6 (E16) Maori title in Land Court

79 Sydney Cormack Waiau (E16) 1700 acres improperly resumed
by Crown

80 Teriana Nilsen Wairaurahiri Roadway access cannot be obtained and
(E30, RD70) Maori owners denied right to control
their own land

81 Teriana Nilsen Land between Hauroko Other blocks of reserved land

and Poteriteri disappeared

82 Syd Cormack Te Waewae Bay Block Title taken from Maori and vested
Block 13, Section 14 in Crown
Sandhill Point

RAKIURA

83 Rena Fowler Paterson Inlet General discontent
Block 16
(E13, 14, 15)
Section 1 Loss of Section 1 which was
The Neck granted to five of her tupuna
Section 14 Block 1

84 Syd Cormack Titi Islands Successors of 32 trustees became
(E16, E20) owners of some islands thus
dispossessing persons other than
descendants of the trustees

85 Harold Francis Ashwell Titi Islands The Titi Islands were unfairly
(E3, E28, E29, RD63) included in the Rakiura sale

86 Sydney Cormack Centre Island That Rauatoka was a Kati Mamoe
(Rauatoka) (E16, E20) retreat acquired by Crown by force

LEGISLATION OR PROCEDURES WHICH REQUIRE AMENDMENT

87 Robert Whaitiri Titi Islands That tangata whenua should have been informed of change in administration of their islands from CCL to Director/DOC

88 Aroha Reriti Crofts Maori Affairs Amendment Act 1967 That this amendment allowed land in multiple ownership to be willed to individuals and individualisation is detrimental to preservation of Maori culture

89 Te Maiharoa Maori prehistoric and historic sites That Maori Enironmental Officer should be appointed in Government Departments to ensure protection of these sites from human interference

90 Tiny Wright Town and Country Planning Act That restriction placed on Maori by this Act prevents people buidling on inherited Maori land and ability of people to live with hapu

91 Sandra Lee (a) S.I Native Reserve Act 1883 (b) Westland & Nelson N.R Act1887 (c) Maori Reserved Land Act 1955 (d) Maori Affairs Amendment Act 1967 (S.48(1). (e) Maori Incorporation Regulations 1969 That these five areas of legislation need review

92 Syd Ashton Boyd Maori Reserved Lands Act 1955 That leasing provisions of this Act are objectionable

93 Taare Bradshaw Town and Country Planning Act 1977 Public Works Act That these Acts are confiscatory and should be reviewed

94 Teriana Nilsen Maori Affairs Act & Companies Act That Waitutu Incorporation should have right to control and own its own LAND and coastal waters

95 Sydney Cormack Counties Act Amendment Act 1967 M.4. That levy taken on sawn timber has not been used for maintenance of Maori Road and That 1967 Act

changed status of land from Maori
to European

96 Tiny Wright Traditional Maori That traditional Maori names have
Names (oral evidence been lost
18.8.87 at Rangiora)
(L32, p32)

97 Dorothy Hitchcox Maori Language That Maori language lost as it was
(L32 p35) not permissible to speak Maori at
school

98 Dorothy Walsh Maori Language Loss of cultural value through loss
(L32 p35) of language

99 Sydney Cormack Small Reserves and That allocations of reserves up to
unduly wide roads 30 acres under Landless Natives
(A22, A23) Act 1906 were too small. That
roadways of 2 chains were too wide

100 Sandra Lee Road taken from Maori That Maori owners had to pay
reserves (L32 p50) for roading from Maori reserves

101 Taare Bradshaw Loss of mana, language, General grievance covering
tribal structure various issues
(L32 p67) (E8a, E8b)

102 Sydney Cormack Crown grants and General complaint covering several
other issues. issues
(L32 p75)(A22)

103 Kelly Wilson South Westland That reserves created were
Omoeroa, Gillespies uneconomiC and too small to farm
Beach paringa etc
(L32 p46)(D10)

104 Wiremu Davis Land set aside as That land allocated was unable to
half-caste grants be cultivated and led to loss

SUMMARY OF MAHINGA KAI ISSUES OTHER THAN SEA FISHERIES

105 Alan Russell Arahura River (D19) That legislative
assistance/protection
(see L39 p49) be given to prevent pounamu
fossickers in river bed

106 Mr Daniels Lake Wairewa That eels depleted by Council
(Forsyth) openingoutlet to sea and nets being
(oral 18.8.87) set at inlets

107 Emma Grooby-Philips Kororo Creek That eels have been depleted from Marunuku creek and shellfish from Marunuku
(C5, C6)

108 Ihaia Hutana Arahura River That water level depleted by power station and affecting fishing at
Arahura Pa

Ngai Tahu Land Report

Appendix 06 Record of Documents

6.1 Record of Documents

Appendix 6

RECORD OF DOCUMENTS

NOTE: Documents marked with an * are ruled confidential and are available only to counsel. Copies cannot be made.

The reference in brackets after each document refers to the person or party producing the document in evidence

A

FIRST HEARING AT TUAHIWI MARAE, 17 AUGUST 1987 AND RANGIORA HIGH SCHOOL, 17-20 AUGUST 1987

Document:

A1

Statement of claim Wai-27: Ngai Tahu claims (filed 24 February 1986; registered as Wai-27, 28 August 1986; revised claim 24 November 1986; amended 16 December 1986; further amended 2 June 1987). Full copies of these claims and later amendments are included in Appendix 3

(registrar)

A2

The Treaty of Waitangi as signed by principal chiefs of Ngai Tahu (extract from A3)

(registrar)

A3

Facsimiles of the Declaration of Independence and the Treaty of Waitangi (Government Printer, Wellington 1976)

(registrar)

A4

Plan of land purchases in South and Stewart Islands, AJHR 1875 G-3

(registrar)

A5

H C Evison Ngai Tahu Land Rights (3rd ed, Ka Roimate Whenua Series No 1, Ngai Tahu Maori Trust Board, Christchurch 1987)

(registrar)

A6

G W Rusden (ed) Aureretanga: Groans of the Maoris (William Ridgeway, London 1888)

(registrar)

A7

D F McKenzie Oral Culture, Literacy & Print in early New Zealand: The Treaty of Waitangi (Victoria University Press & Alexander Turnbull Library Endowment Trust, Wellington 1985)

(registrar)

A8

A Mackay (ed) A Compendium of Official Documents Relative to Native Affairs in the South Island 2 vols (Government Printer, Nelson 1872) (later referred to as Compendium)

(registrar)

A9

Supporting papers to A12, A13, A31

(counsel for claimants)

A10

Sample copies of Crown leases and licences (with Acts issued under):

(a) Special lease (Land Act 1948 s 67(2))

(b) Lease (Land Act 1948 s 67(2))

(c) Licence to occupy, (Reserves Act 1977 s 74(2)(a))

(d) Grazing licences, New Zealand Forest Service, (Forests Act 1949)

(e) Licence to occupy a reserve (grazing license), (Reserves Act 1977 s 74)

(f) Deed of lease (television translator site), (Reserves and Domains Act 1953 s 27(10)(a))

(g) Permit to erect maintain and use buildings and towers and to maintain and use tracks (Reserves Act 1977 s 48A)

(h) Deed of lease of part Lake Mahinapua recreation reserve (Reserves Act 1977 s 54(1)(b))

(i) Deed of lease of part Lake Kaniere scenic reserve (Reserves and Domains Act 1953 s 27(10)(a))

(j) Industrial site licence, New Zealand Forest Service, for the purpose of allowing the site to be employed as a seasonal base for commercial eeling and whitebaiting (Forests Act 1949)

(k) Licence to occupy a reserve solely for the purpose of a boatshed site (Reserves Act 1977 s 74)

(registrar)

A11

Sample copies of leases for Maori land

(a) Memorandum of lease of rural land issued by the Mawhera Incorporation

(b) Memorandum of lease of urban land issued by the Mawhera Incorporation

(registrar)

A12

Evidence of Trevor H Howse on Banks Peninsula, North Canterbury and Kaikoura

(counsel for claimants)

A13

Evidence of Harry C Evison on Banks Peninsula, North Canterbury and Kaikoura

(counsel for claimants)

A14

Submission of the North Canterbury Catchment Board and Regional Water Board, dated 11 August 1987

A15

Submission of Henare R Tau and Ngai Tahu Maori Trust Board on lands of Crown subject to claim, and schedules as available at 16 December 1986

A16

New Zealand Maori Council and G S Latimer v Attorney-General and Others [1987] 1 NZLR 651

(registrar)

A17

Submission of Henare R Tau with attachment of Te Ngai Tuahuriri Runanga Incorporated rules

A18

Submission of Te Wharetutu Te A Stirling

A19

Submission of Rangimarie Te Maiharoa

A20

Submission of Aroha H Rereti-Crofts

A21

Dr P G McHugh "The Aboriginal Rights of the New Zealand Maori at Common Law" (PhD thesis, University of Cambridge, 1987)

(registrar)

A22

Map of blk 25, Jacob's River Hundred, March 1874

(counsel for claimants)

A23

Map of blk 25, Jacob's River Hundred, showing survey section plans

(counsel for claimants)

A24

Notice of interest by Kuku Karatiana, dated 12 August 1987

(registrar)

A25

Submission of Eruera Te M I Te Aika

A26

Opening submissions of claimants' counsel

A27

Evidence of Tipene O'Regan

(counsel for claimants)

A28

Map of Crown lands acquired from Ngai Tahu

(counsel for claimants)

A29

Plan of Wairau plain and valleys attached to Wairau purchase deed (see A30)

(counsel for claimants)

A30

Copy of deed of cession of the Wairau district

(counsel for claimants)

A31

Addenda to evidence of Harry C Evison (see A13)

(counsel for claimants)

A32

Additional copy of A31

(counsel for claimants)

A33

Copy of Kemp's deed with translation and map

(counsel for claimants)

A34

Map of South Island

(counsel for claimants)

A35

Map of South Island showing boundaries lower half Kemp's purchase, Arahura, Otakou, and Murihiku blocks, AJHR 1909 C-1

(counsel for claimants)

A36

Map of South Island showing boundaries upper part Kemp's purchase, Arahura, North Canterbury, Kaikoura and three Banks Peninsula blocks of Ngai Tahu land, AJHR 1909 C-1

(counsel for claimants)

A37

The Ngaitahu Claim Settlement Bill, first and second readings, 267 NZPD 615

(registrar)

A38

The Ngaitahu Claim Settlement Bill, committal and third reading, 267 NZPD 754-761

(registrar)

A39

Ngaitahu Claim Settlement Bill, legislative council, 267 NZPD 761

(registrar)

A40

Ngaitahu Claim Settlement Act 1944 (No 33, 9 Geo VI)

(registrar)

A41

Ngaitahu Trust Board Act 1946 (No 33, 10 Geo VI)

(registrar)

A42

Maori Trust Boards Act 1955 (RS vol 8 p 683)

(registrar)

A43

Statutory provisions related to:

(a) Pastoral leases (Land Amendment Act 1979 s 66)

(b) Pastoral occupation licences (Land Act 1948 s 66AA)

(c) Recreation permits (Land Act 1948 s 66A)

(d) Disposal of land in special cases (Land Act 1948 s 67)

(e) Short tenancies for grazing purposes (Land Act 1948 s 68)

(f) Licences for timber, flax, minerals etc (Land Act 1948 s 165)

(registrar)

A44

Claim (affecting the Kaikoura block) of Joe Tukupua and the Interim Committee of Kurahaupo Waka Trust, dated 6 August 1987

(registrar)

A45

Claim (affecting the Arahura block) of Joe Tukupua and the Interim Committee of Kurahaupo Waka Trust, dated 10 August 1987

(registrar)

A46

Memorandum of deputy-chairperson on claim of Joe Tukupua and the Kurahaupo Waka Trust on the Kaikoura purchase, dated 11 August 1987

(registrar)

A47

Memorandum of deputy-chairperson on claim of Joe Tukupua and the Kurahaupo Waka Trust on the Arahura blocks, dated 11 August 1987

(registrar)

A48

Deed of sale of Banks Peninsula to Captain J Langlois, 2 August 1838, BPP/CNZ (IUP) vol 2 pp 438-439

(a) English translation supplied by Waitangi Tribunal staff

(registrar)

A49

The Nanto-Bordelaise Company's agreement with the French government, 9 December 1839, Serie Marine, BB4 1012, Nouvelle Z,lande, Particuliers, 1838 … 1842, no 16, Archives Nationales, Paris. Micro Z 2806, National Archives, Wellington

(a) English translation supplied by Waitangi Tribunal staff

(registrar)

A50

Agreement between Captain Langlois, the Nanto-Bordelaise Company and the French immigrants, NM 8/31 1852 239, National Archives, Wellington

(a) English translation supplied by Waitangi Tribunal staff

(registrar)

A51

Deed of confirmation of the 1838 sale of Banks Peninsula to Captain Langlois, 11 August 1840, Serie Marine, BB4 1011, Lettres r,cues de M Lavaud, 1842, no 2, Archives Nationales, Paris. Micro MS 330, Alexander Turnbull Library, Wellington

(a) English translation supplied by Waitangi Tribunal staff

(registrar)

A52

Conditions of sale of Canterbury and West Coast to the French company - including receipt of an instalment of the price dated 24 August 1840, Serie Marine, BB4 1011, Lettres r,cues de M Lavaud, 1842, no 3, Archives Nationales, Paris. Micro MS 330, Alexander Turnbull Library, Wellington

(a) English translation supplied by Waitangi Tribunal staff

(registrar)

A53

Map of Banks Peninsula showing purchase boundaries and estates resumed by the Crown under Land for Settlements Acts, based on NZMS 281 (see A31)

(counsel for claimants)

A54

Directions of deputy-chairperson to Joe Tukupua and Kurahaupo Waka Trust, dated 25 August 1987

(registrar)

B

SECOND HEARING AT TUAHIWI MARAE, 21-23 SEPTEMBER 1987

Document:

B1

(a) Directions of deputy-chairperson to claimants directing filing of further particulars in respect of the Mawhera leaseholds and also all other Crown licences and leaseholds, dated 3 September 1987

(registrar)

(b) Statement on proposed remedies in respect of leases under the Maori Reserved Land Act 1955 (ie Mawhera leases), dated 5 September 1987

(registrar)

B2

Evidence of Harry C Evison on Kemp's block

(counsel for claimants)

B3

Supporting papers to B2

(counsel for claimants)

B4

Evidence of Professor John T Ward on the Kemp's purchase case study

(counsel for claimants)

B5

Unsworn affidavit of Manahi Paewai for Kurahaupo Waka claimants (see C20)

(counsel for Kurahaupo Waka)

B6

(a) Submission of Mervyn N Sadd, dated 17 August 1987

(b) Further submission of Mervyn N Sadd with supporting maps, received 18 September 1987

(registrar)

B7

Submissions of counsel for Kurahaupo Waka

B8

Submission of counsel for claimants on the history of legislation affecting the Ngai Tahu land claim (Kemp's purchase)

B9

Memorandum of counsel for claimants on intentions concerning existing leases and licences over Crown land, dated 23 September 1987

B10

Submission of Jean Jackson

B11

Maps supplied by Trevor H Howse for Kaikoura site visit, 25 September 1987

(registrar)

B12

Map of South Island land tenure as at 1978, NZMS 187

(counsel for Crown)

B13

Ngai Tahu fishery claim, received 28 September 1987

(registrar)

B14

Correspondence from secretaries of the Treasury and of Maori Affairs to Ministers of Finance and of Maori Affairs, dated 17 July 1987

(registrar)

B15

Submission of Robin Mitchell, received 9 October 1987

(registrar)

B16

Submission of P N Gould, dated 11 September 1987

(registrar)

B17

Evidence before the Native Land Court, Tuahiwi, 30 January-3 February 1925. 20A South Island Minute Book, folios 51-56, 57-69, and 76-83

(registrar)

C

THIRD HEARING AT OTAKOU MARAE, 2 NOVEMBER 1987 AND RE-CONVENING AT TUAHIWI MARAE, 5 NOVEMBER 1987

Document:

C1

Evidence of Dr Ann R Parsonson on the Otakou tenths

(counsel for claimants)

C2

Supporting papers to C1

(counsel for claimants)

C3

(a) Directions of the deputy-chairperson on application by the Maori Trustee that the claimants give further particulars of claims, dated 20 October 1987

(registrar)

(b) Application by the Maori Trustee for order that claimants give further particulars of claims, received 20 October 1987

(counsel for Maori Trustee)

C4

Whakapapa of Mori C M Ellison

(M C M Ellison)

C5

Submission of Emma P Grooby-Phillips

C6

Correspondence from Wilkinson Mirkin & Kendall to the Department of Conservation, Dunedin, on land taken for defence purposes on Otago peninsula, dated 29 October 1987

(E P Grooby-Phillips)

C7

Maps and documents on Te Karoro and Maranuku

(B Ellison)

C8

(a) Evidence of Dr Atholl Anderson on Maori settlement at Otakou

(b) References to C8(a)

(counsel for claimants)

C9

Submission of Kuao Langsbury on the Treaty of Waitangi

C10

M van Ballekom and R Harlow (eds) Te Waiatatanga mai o te Atua, South Island Traditions recorded by Matiaha Tiramorehu (Canterbury Maori Studies, No 4, Christchurch 1987)

(counsel for claimants)

C11

Opening address of counsel for the claimants on the Otakou purchase

C12

Submission of Edward Ellison on the history of the Otakou claim

C13

(a) Submission of Craig Ellison on pollution of lands and waters in Otago

(b) Documents presented with C13(a)

C14

Part of Kettle's map of the Otakou block, 1846-7, LS D-5, National Archives, Wellington

(counsel for claimants)

C15

Additional evidence of Dr Ann R Parsonson on the Otakou "tenths" in relation to the 1844 proclamation

(counsel for claimants)

C16

Correspondence between secretary of state for colonies & the New Zealand Company on the establishment of a proprietary government in New Zealand, BPP/CNZ (IUP) vol 4 pp 493-500

(counsel for claimants)

C17

Minutes of a special meeting of the committee of the New Zealand Company, August 1845, CO 208/188, pp 327-332, National Archives, Wellington

(counsel for claimants)

C18

(a) "He Ture kua whakaaetia e nga rangatira Maori o te Wahipounamu", Te Ware Runanga e kiia ana ko Te Mahi Tamariki, Otakou, 10 Hune 1875 (with translation)

(b) "Notice of the Business of a Hui in January 1874, to open the New Hall, Te Mahi Tamariki & to discuss Te Kerema" Otago Witness 31 January 1874 p 2 (with translation)

(counsel for claimants)

C19

(a) Evidence of Wiremu Potiki to the Smith-Nairn Commission, 20 February 1880, MA 67/5 No 41, National Archives, Wellington

(b) Evidence of Hape Merekiherike to the Smith-Nairn Commission, 20 February 1880, MA 67/5 No 42, National Archives, Wellington

(c) Evidence of Hone Kahu to the Smith-Nairn Commission, 20 February 1880, MA 67/5 No 43, National Archives, Wellington

(counsel for claimants)

C20

Affidavit of Manahi Paewai for Kurahaupo Waka claimants, dated 3 November 1987 (see B5)

(counsel for Kurahaupo Waka)

C21

Submission of Andrew M Mason on boundaries of Arahura block

C22

Evidence of Harry C Evison on the northern and inland boundaries of the Kaikoura and Arahura purchases of James Mackay, 1859 and 1860

(counsel for claimants)

C23

Correspondence of Tipene O'Regan on claim of Kurahaupo Waka and aquacultural developments, Kaparatehau (Lake Grassmere), received 10 November 1987

(registrar)

C24

(a) Correspondence of Tipene O'Regan on Kurahaupo Waka claim

(b) Ngai Tahu Kaumatua alive in 1848 as established by the Maori Land Court in 1925 and the Ngai Tahu census committee in 1929, issued by the Ngai Tahu Trust Board as at 1 January 1967

(counsel for claimants)

D

FOURTH HEARING AT ARAHURA MARAE AND THE CONFERENCE ROOM, ASHLEY MOTOR INN, GREYMOUTH, 30 NOVEMBER-3 DECEMBER 1987

Document:

D1

Report of Commission of Inquiry into Maori Reserved Land (Government Printer, Wellington 1975)

(registrar)

D2

Report of the Committee of Inquiry: Crown Pastoral Leases and Leases in Perpetuity (Government Printer, Wellington 1982)

(registrar)

D3

Evidence of James P McAloon on Arahura

(counsel for claimants)

D4

Evidence of Andrew M Mason, Sidney B Ashton, Malcolm R Hanna and Tipene O'Regan on Arahura

(counsel for claimants)

D5

Supporting papers to D4 (see D3, D18)

(counsel for claimants)

D6

Submission of W E and A M Blythe on Mawhera Incorporation leases, received 2 November 1987 (registrar)

D7

Submission of I S Marshall on Mawhera Incorporation leases, received 2 November 1987

(registrar)

D8

Submission of B N Davidson on behalf of FTC Properties Ltd, received 27 October 1987

(registrar)

D9

Preliminary decision of tribunal on Kurahaupo Waka claim, 26 November 1987

(registrar)

D10

Submission of Kelly R Wilson on behalf of the Maitahi Maori Committee

D11

(a) Submission and evidence of Sandra Te H Lee on behalf of the families and descendants of Iri Te A P Lousich-Feary, Nikau Te K Pihawai-Tainui, Roka Te H Pihawai-Johnson, Wiremu Welch and Metapere N Barrett

(b) Supporting papers to D11(a)

D12

Submission of Iri Barber

D13

Submission of Aroha H Reriti-Crofts

D14

Submission of Dorothy M Fraser on behalf of the Maitahi Maori Committee

D15

Correspondence of James Mackay to the chief land purchase commissioner, Auckland, 21 September 1861, Compendium vol II p 40

(Dorothy M Fraser)

D16

Particulars of claim concerning Mawhera supplied by claimants to the Maori Trustee (see C3(a)-(b))

(counsel for Maori Trustee)

D17

Submission of James M Russell on Arahura

D18

Submission of Tipene O'Regan on Arahura

D19

Submission of Alan L Russell on pounamu

D20

"Greymouth Native Reserves", AJHR 1879 G-3A, G-3B

(registrar)

D21

Map of Maori reserved land from the Grey to the Hokitika rivers, MA 15/1,2, National Archives, Wellington

(registrar)

D22

Portion of cadastral map showing the Arahura river bed

(registrar)

D23

Portion of physical map showing Arahura river bed

(registrar)

D24

Submission of Barry M Dallas on Greymouth, Mawhera leases

D25

Proposed town plan of Greymouth, 1865

(Barry M Dallas)

D26

Map of township of Greymouth, 1865

(Barry M Dallas)

D27

Computer printout of Mawhera lessees, dated 14 October 1987

(registrar)

D28

Minutes of the eleventh annual general meeting of shareholders of the proprietors of Mawhera Incorporation, held 3 October 1987

(counsel for claimants)

D29

Submission of W F Morgan on behalf of Dingwall and Paulger Ltd and Ballie Neville & Co Ltd on Mawhera leases

D30

(a) Documents relating to land ownership and milling and mining rights on the Arahura river above the Arahura Maori reserve

(b) Portion of map, NZMS 261 sheet J33 Kaniere, showing mining rights and land tenure for blocks above the Arahura reserve

(counsel for claimants)

E

FIFTH HEARING AT TE RAU AROHA MARAE, AWARUA, BLUFF, 1-3 FEBRUARY 1988, WITH SITE VISIT TO LAKES WANAKA AND HAWEA

Document:

E1

Evidence of Robert A Whaitiri, Sydney Cormack and James P McAloon on Murihiku, (Note: the evidence of Sydney Cormack was replaced with E16)

(a) Addenda to E1

(counsel for claimants)

E2

Supporting papers to E1

(counsel for claimants)

E3

Submission of Harold F Ashwell on Bluff - Motupohue

(counsel for claimants)

E4

Supporting papers to E3

(counsel for claimants)

E5

Material supplied for the tour of Southland by Maori Land Board and Chairmen of Maori Land Advisory Committees, 30 and 31 October and 1 November 1979

(counsel for claimants)

E6

Submission of George N Te Au

E7

Submission of Wiremu Davis

E8

(a) Submission of Taare H Bradshaw

(b) Portion cadastral map, Bluff Harbour

E9

Eva Wilson Hakoro Ki Te Iwi, The Story of Captain Howell and His Family (Times Printing Service, Invercargill 1976)

(E Wilson)

E10

Submission of Alexander P Laing on behalf of the estate of R G Selbie

E11

Submission of Naomi A Bryan on section 70, blk 25, Jacob's River Hundred

E12

Submission of Naomi A Bryan on section 25, blk 25, Jacob's River Hundred

E13

Map of Toitoi and Port Adventure blocks, Rakiura

(H Ashwell)

E14

Submission of Rena Fowler on Stewart Island Grants Act 1873

E15

Correspondence from Maori Land Court to Rena Fowler on section 73, blk 2, Invercargill Hundred, dated 25 January 1988

(R Fowler)

E16

Evidence of Sydney Cormack on Murihiku reserves (replaces that included in E1)

(counsel for claimants)

E17

Copy of the deed of sale of Rakiura, 29 June 1864 and related papers from Compendium vol II pp 390-393 & pp 60-61

(counsel for claimants)

E18

Schedules of native reserves in Otago, Southland and Stewart Island, from Compendium vol II pp 341

(counsel for claimants)

E19

Copy of the plan of the Murihiku purchase, dated 17 August 1853

(counsel for claimants)

E20

Maps referred to in E16

(counsel for claimants)

E21

J H Beattie Our Southernmost Maoris: their habitat (Otago Daily Times, Dunedin 1954) pp 28-31

(counsel for claimants)

E22

Insert to evidence of James P McAloon (see E1 p 54)

(counsel for claimants)

E23

Submission of George N Te Au on behalf of the Waihopai Maori Committee Incorporation, dated 1 January 1988

(registrar)

E24

Preliminary evidence of James P McAloon on Maori Land at Wanaka/Hawea

(counsel for claimants)

E25

Papers relating to Maori reserves at Lakes Hawea and Wanaka

(counsel for claimants)

E26

Further papers relating to Maori reserves at Lakes Hawea and Wanaka

(counsel for claimants)

E27

Three maps of Lakes Wanaka and Hawea showing Maori reserves and proposed Maori reserve at the Neck, and showing impact of the raising of Lake Hawea on 1868 fishing reserve

(counsel for claimants)

E28

Correspondence from K Cayless, acting director-general, Department of Lands, to Invercargill district manager, dated 13 January 1988, response to E29

(registrar)

E29

Correspondence from Invercargill district office to Director-General, Department of Lands on Port Adventure and Toi Toi blocks for landless Maoris - Stewart Island, dated 5 January 1988

(registrar)

E30

Notes of Teriana Nilsen, secretary-treasurer, Waitutu Inc, dated 3 February 1988

(registrar)

E31

Submission of Jane K Davis on Rakiura and Murihiku

E32

Further submission and documents presented by Jean Jackson

E33

Further submission of Mervyn N Sadd, dated 20 November 1987

(registrar)

E34

Application of Mervyn N Sadd, received 28 January 1988

(registrar)

E35

Papers submitted by Lovell Hart on Colac Bay, Southland

(registrar)

F

SIXTH HEARING AT OTAKOU MARAE, 22-23 FEBRUARY 1988

Document:

F1

Evidence of Dr Ann R Parsonson on Princes Street reserve, Dunedin

(counsel for claimants)

F2

Supporting papers to F1

(counsel for claimants)

F3

Map of site of 1853 native reserve showing high water mark in relation to later reclamation, 1871, SO 14420, DOSLI, Dunedin

(counsel for claimants)

F4

Kettle's 1846 plan of Dunedin South laid out in town sections, showing site of 1853 native reserve, DOSLI, Dunedin

(counsel for claimants)

F5

Plan of site of proposed Dunedin post office, dated 17 November 1870, SO 14527, DOSLI, Dunedin

(counsel for claimants)

F6

The New Zealand Native Reserves Act 1856

(counsel for claimants)

F7

The Native Reserves Amendment Act 1862

(counsel for claimants)

F8

Dunedin Reserves Management Ordinance 1873, Ordinances of the Province of Otago, session XXXII no 417

(counsel for claimants)

F9

Correspondence from J C Richmond to W Mantell, 19 August 1867, MS papers 83/173, Alexander Turnbull Library, Wellington

(counsel for claimants)

F10

Auckland and Onehunga Native Hostelries Act 1867

(counsel for claimants)

F11

Evidence of Bill Dacker on "The Prejudicial Effects of the Lack of Land with Particular Reference to the Otakou Block"

(counsel for claimants)

F12

Submission of George Ellison on Princes Street

F13

Correspondence from Earl Grey to Governor Grey, dated 23 December 1846, BPP/CNZ (IUP) vol 5 pp 520-543

(counsel for claimants)

G

SIXTH HEARING RECONVENED AT TUAHIWI MARAE, 24-25 FEBRUARY 1988

Document:

G1

Further evidence of Harry C Evison on Banks Peninsula and Kemp's deed

(counsel for claimants)

G2

Supporting papers to G1

(counsel for claimants)

G3

Transcript of C B Robinson's letters in Mantell's private memorandum book (see G2 pp 294-307)

(counsel for claimants)

G4

Transcript from N Z Gazette (New Munster) 6 September 1851 p 141

(counsel for claimants)

G5

Copy of portion of Port Levy deed

(counsel for claimants)

G6

Map of Port Levy block, signed Walter Mantell, 25 September 1849

(counsel for claimants)

G7

Copy of Hamilton's Akaroa deed 1856

(counsel for claimants)

G8

Submission of Ken Piddington, director-general, Department of Conservation

(counsel for Crown)

G9

Memorandum of Kurahaupo Waka claimants, dated 18 March 1988

(counsel for Kurahaupo Waka)

H

SEVENTH HEARING AT TUAHIWI MARAE AND TE RAU AROHA MARAE, BLUFF, 11-20 APRIL 1988

Document:

H1

Evidence of Dr Atholl Anderson on mahinga kai

(counsel for claimants)

H2

Supporting papers to H1 (see H3)

(counsel for claimants)

H3

Figures and tables supplementary to H1 and H2

(counsel for claimants)

H4

Evidence of Barry Brailsford on mahinga kai, "Maori trails of Canterbury" (withdrawn and replaced by J10)

(counsel for claimants)

H5

Evidence of David T Higgins and William A G Goomes on sea fishery

(counsel for claimants)

H6

Evidence of Rawiri Te M Tau and Henare R Tau on mahinga kai, Tuahuriri area (submission of Henare R Tau withdrawn and replaced by J10; see also H57)

(counsel for claimants)

H7

Evidence of Wiremu T Solomon and Trevor H Howse on mahinga kai, Kaikoura area

(counsel for claimants)

H8

Evidence of Ray Hooker, Hemi Te Rakau, Kelly R Wilson, Gordon McLaren, Albert K Te Naihi-McLaren, Iris Climo, James M Russell, Allan L Russell on mahinga kai, Arahura area (submission of Hemi Te Rakau replaced by H36)

(counsel for claimants)

H9

Evidence of James P McAloon, Mere K E Teihoka (Hamilton), Catherine E Brown, Morris T Love, Rewi Brown, Donald R Brown on mahinga kai, Waihora area

(counsel for claimants)

H10

Evidence of Jack T Reihana, Wiremu Torepe, Kelvin Anglem, Murray E Bruce, Kelvyn T A D Te Maire and Rangimarie Te Maiharoa on mahinga kai, Arowhenua area

(counsel for claimants)

H11

Evidence of Matt Ellison on mahinga kai, Puketeraki area

(counsel for claimants)

H12

Evidence of Edward Ellison on mahinga kai, Otakou area

(counsel for claimants)

H13

Evidence of Robert A Whaitiri, Harold F Ashwell, Paddy Gilroy, Taare H Bradshaw, Huhana P B Morgan, and Kevin O'Connor on mahinga kai, Murihiku area

(counsel for claimants)

H14

Memorandum of counsel for Kurahaupo Waka, dated 30 March 1988

H15

Memorandum of counsel for the New Zealand Fishing Industry Board and New Zealand Fishing Industry Association, dated 8 April 1988

H16

Curriculum vitae of Dr Atholl Anderson

(counsel for claimants)

H17

Submission of Tipene O'Regan on behalf of the Ngai Tahu Trust Board on mahinga kai (fisheries), (see addenda, H20)

H18

Correspondence from Hamish Ensor, chairperson of the High Country Committee, Federated Farmers, to Tipene O'Regan on South Island pastoral leases, dated 23 February 1988 (see H19)

(counsel for claimants)

H19

Correspondence from Tipene O'Regan to Hamish Ensor, dated 12 April 1988 (see H18)

(counsel for claimants)

H20

Addenda to H17, on inland waters

(counsel for claimants)

H21*

Hoani Te Kaahu "He korero mo Kati Tuhaitara", Beattie Papers 582/F/17, Hocken Library

(counsel for claimants)

H22*

(a) "He korero mo Tuteurutira raua ko Hinerongo"

(b)* "He korero mo Kati Kuri"

(counsel for claimants)

H23*

Map of Fiordland fishing marks (also J32)

(counsel for claimants)

H24*

Map of Kaikoura fishing marks (also J33)

(counsel for claimants)

H25*

Map of Banks Peninsula fishing marks (also J34)

(counsel for claimants)

H26*

Map of Foveaux Strait fishing marks (also J35)

(counsel for claimants)

H27*

Whakapapa of Wiremu Solomon

(counsel for claimants)

H28*

Map of Kaikoura, place names

(counsel for claimants)

H29*

Map of Kaikoura, kai manu and kai moana

(counsel for claimants)

H30*

Map of Kaikoura, tohu raumati

(counsel for claimants)

H31

Map of Kaikoura from Barry Brailsford The Tattooed Land (Reed, Wellington 1981)

(counsel for claimants)

H32*

Map of Kaikoura, kai awa

(counsel for claimants)

H33*

Map of Ngati Kuri kai ika

(counsel for claimants)

H34*

Key to maps H27 to H33

(counsel for claimants)

H35

Marcus Solomon "Boatman"

(counsel for claimants)

H36

Evidence of Hemi Te Rakau on mahinga kai, Arahura area (replacing that in H8)

(counsel for claimants)

H37*

Archaeological evidence of Te Tai Poutini Maori settlement

(counsel for claimants)

H38*

Map of Te Tai Poutini archaeological sites

(counsel for claimants)

H39

Photos of Chinese miners' flumes, road to Goldborough and sluicing at Manzonis, Callaghew

(H Te Rakau)

H40

Photos (see H39)

(H Te Rakau)

H41*

Map of south Westland mahinga kai areas

(counsel for claimants)

H42*

Map of features of south Westland

(counsel for claimants)

H43

Record of James M Russell's community involvement

(J M Russell)

H44

Material supplied on areas crossed by the tribunal on flight Hokitika to Christchurch, 15 April 1988

(counsel for claimants)

H45

Evidence of Montero J Daniel on Taumutu site visit, 16 April 1988

H46

Material supplied for Wairewa and Waihora site visit, 16 April 1988

(counsel for claimants)

H47

Submission of Te Ao Hurae Waaka on Arowhenua

H48

Submission of Kelvin Anglem on Timaru and Waitarakao

H49

Memorandum of Frank Scarf on south Canterbury water quality

(counsel for claimants)

H50

Booklet of photographs and documents on Opihi River pollution

(counsel for claimants)

H51

Judge Frederick Chapman, "Field notes and others relating to greenstone", Cat No MI 414, source-Tame Parata

(counsel for claimants)

H52

Submission of David M Miller on mahinga kai, Purakanui area

(counsel for claimants)

H53

Submission of Edward Ellison on mahinga kai

(counsel for claimants)

H54*

Map of mahinga kai, Murihiku area

(counsel for claimants)

H55*

List of commonly used plants

(K O'Connor)

H56

Submission of George Te Au on mahinga kai, Murihiku area

(counsel for claimants)

H57

Supporting papers to H6

(registrar)

H58

Further submission of Mervyn N Sadd, dated 26 April 1988

I

EIGHTH HEARING AT TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTON, 19 MAY 1988

Document:

I1

Draft issues raised by the evidence of the claimants

(counsel for claimants)

I2

Amendments to draft issues suggested by the tribunal (see I1)

(registrar)

I3

Memorandum of Kurahaupo Waka on draft issues, dated 19 May 1988 (see I1)

(counsel for Kurahaupo Waka)

I4

Memorandum of counsel for the Crown on draft issues, dated 20 May 1988 (see I1)

I5

Notice of Tipene O'Regan on proposed amendment of mahinga kai claim (sea fishing), received 27 May 1988

(registrar)

I6

Issues raised by the evidence of the claimants as determined by the tribunal (see I1-4)

(registrar)

I7

Deputy-chairperson's memorandum of directions on Kurahaupo Waka claim, dated 23 June 1988

(registrar)

J

NINTH HEARING, HELD AT THE TUAHIWI MARAE, 27-30 JUNE 1988

Document:

J1

Further evidence of Harry C Evison on Banks Peninsula (see A9, A13, A31, G1, G2, J3, J4)

(counsel for claimants)

J2

Further evidence of James P McAloon on the Murihiku block (see E1, E2, E3)

(counsel for claimants)

J3

Additional archive material on Banks Peninsula supplied by Harry C Evison

(counsel for claimants)

J4

Supporting papers to J2 (see E1, E2, E3)

(counsel for claimants)

J5

Submissions of the Waitaha Management Group in association with the South Westland Runanga, Tuturua Runanga, West Coast Fishermens' Association and Maruia Society

J6

Revised analysis of Maori names appearing on French and official British deeds for sale of Banks Peninsula, 1838-1856 (an enlarged copy of J1 p 38)

(counsel for claimants)

J7

Amended claim in respect of fisheries, dated 25 June 1988

(registrar)

J8

Map of Fiordland taken from an 1838 admiralty chart in Edward Shortland The Southern Districts of New Zealand (1851). Copied from A Charles Begg & Neil Begg The World of John Boultbee, including an account of sealing in Australia and New Zealand (Whitcoulls, Christchurch 1979) fig 15

J9

Copies of statutes and regulations relating to Lake Waihora

(counsel for claimants)

J10

Evidence of Henare R Tau, David Higgins, Trevor H Howse, Peter Ruka and Barry Brailsford on mahinga kai (Note: D Higgins' evidence replaces H5, B Brailsford's evidence replaces H4 and H R Tau's evidence replaces that included in H6)

(counsel for claimants)

J11*

Map of kai roto, Kaikoura

(counsel for claimants)

J12*

Map of groper grounds, Kaikoura area (1)

(counsel for claimants)

J13*

Map of groper grounds, Kaikoura area (2)

(counsel for claimants)

J14*

Map of groper grounds, Kaikoura area (3)

(counsel for claimants)

J15*

Map of major trails of 1840

(counsel for claimants)

J16*

Map of pounamu sources
(counsel for claimants)

J17*

Map of Canterbury trails before 1840

(counsel for claimants)

J18

Barry Brailsford The Greenstone Trails: The Maori Search for Pounamu (Reed, Wellington 1984)

(counsel for claimants)

J19

Barry Brailsford The Tattooed Land (Reed, Wellington 1981)

(counsel for claimants)

J20*

Map of mahinga kai, Christchurch area

(counsel for claimants)

J21*

Overlay to J20, wakawaka boundaries, Christchurch mahinga kai

(counsel for claimants)

J22*

Map of mahinga kai districts according to Matiaha Tiramorehu

(counsel for claimants)

J23

Map of archaeological sites (see H3 Fig 1)

(counsel for claimants)

J24

Map of rahua o te whenua, vegetation, 1840, New Zealand Atlas (Government Printer, Wellington)

(counsel for claimants)

J25

Overlay to J24, "Kahore i Hokona", from previous annual reports of the Ngai Tahu Trust Board

(counsel for claimants)

J26

Overlay to J24, South Island trails

(counsel for claimants)

J27

Map of rahua o te whenua, forest and saw mills, Banks Peninsula 1860

(counsel for claimants)

J28

Map of te aka o tuwhenua, wakawaka ika (fishing wakawaka North Canterbury)

(counsel for claimants)

J29*

Map of Waitaki wakawaka, collected 1897 and presented to the Native Land Court 1925

(counsel for claimants)

J30*

Map of Canterbury wakawaka, collected 1897 and presented to the Native Land Court 1925

(counsel for claimants)

J31*

Map of currents, Punakaiki to Kahurangi Point

(counsel for claimants)

J32*

Map of Fiordland fishing marks and grounds (also H23)

(counsel for claimants)

J33*

Map of Kaikoura fishing grounds (also H24)

(counsel for claimants)

J34*

Map of Banks Peninsula to Otago fishing grounds and marks (also H25)

(counsel for claimants)

J35*

Map of Foveaux Strait fishing grounds and marks (also H26)
(counsel for claimants)

J36*

Map of tuku moana, tuna heke, wakawaka for Lake Forsyth (Wairewa)

(counsel for claimants)

J37

Additional note to the evidence of Trevor H Howse on Wairewa (see J10)

(counsel for claimants)

J38

Map of Birdlings Flat, Lake Ellesmere, showing reserves, M37/8.1

(counsel for claimants)

J39

Evidence of James P McAloon on mahinga kai, Ngai Tahu-Ngati Mamoe marine property rights

(counsel for claimants)

J40*

Overlay to J28, kohanga o kaikai oara (North Canterbury fisheries)

(counsel for claimants)

J41*

Overlay to J28, maunga karanga

(counsel for claimants)

J42*

Map of South Island ocean currents

(counsel for claimants)

J43

Final statement of David Higgins on Ngai Tahu fisheries (see J10)

(counsel for claimants)

J44

Additional evidence of Peter Ruka on Ngai Tahu fisheries

(counsel for claimants)

J45

Additional evidence of Henare R Tau on Ngai Tahu fisheries (see J10)

J46

Diagram of River Dismal or Waitaki by Te Warekorari, 9 November 1848, MS 90, Hocken Library

(counsel for claimants)

J47

Evidence of Dr Peter J Tremewan on French land purchases from Ngai Tahu

(registrar)

J48

Buddy Mikaere Te Maiharoa and the Promised Land, (Heinemann, Auckland 1988)

(counsel for claimants)

J49

Information paper for tribunal on southern Maori dialect

(counsel for claimants)

J50

Map of French land purchases in Banks Peninsula

(counsel for claimants)

J51*

Map of Kaikoura to Banks Peninsula fishing marks and fishing grounds

(counsel for claimants)

J52*

Map of Taiaroa Head to Nugget Point fisheries and fishing marks

(counsel for claimants)

K

ON 30 JUNE 1988 THE CROWN OPENED ITS RESPONSE TO THE CLAIM

Document:

K1

Opening submission of Crown counsel

K2

Supporting papers to K1

L

TENTH HEARING AT THE SOUTHERN CROSS HOTEL, DUNEDIN, 25-28 JULY 1988

Document:

L1

Opening submissions of Crown counsel on Banks Peninsula

L2

Evidence of Graham J Sanders on Banks Peninsula (2 vols) (see M26, Q17) (withdrawn)

(counsel for Crown)

L3

Supporting papers to L2 (see M26, Q17)

(counsel for Crown)

L4

Opening submissions of Crown counsel on Princes Street reserve

L5

Evidence of Professor Gordon S Parsonson on Princes Street reserve (see L7)

(counsel for Crown)

(a) Arthur L Salmond First Church of Otago; and how it got there (Otago Heritage Books, Dunedin 1983)

(counsel for Crown)

L6

Supporting papers to L5

(counsel for Crown)

L7

Opening submission of Crown counsel on Kemp's purchase, part I (see M1)

L8

Evidence of Dr Donald M Loveridge on Kemp's purchase (see M2, M3, O46)

(counsel for Crown)

L9

Supporting papers to L8 (2 vols) (see Q18)

(counsel for Crown)

(a) Pages missing from L9 vols I and II

(counsel for Crown)

L10

Evidence and supporting papers of Jesse H Beard on Taiaroa Head

(counsel for Crown)

L11

Evidence of Ian R H Whitwell on Taiaroa Head

(counsel for Crown)

L12

Map of Maori land holdings, Otago Heads, produced in the Native Land Court, Port Chalmers, 28 November 1913

(counsel for Crown)

L13

Map of native reserve at Otago Heads 1897, ML135

(counsel for Crown)

L14

Aerial photograph, Taiaroa Head reserves n d

(counsel for Crown)

L15

Plan of Taiaroa Head light and pilot reserve, Pukekura, dated 2 July 1867

(counsel for Crown)

L16

B Carter "The Incorporation of the Treaty of Waitangi into Municipal Law" (1980) 4 NZULR

(counsel for Crown)

L17

Modern map of Banks Peninsula used as the base for overlays

(a) Overlay to L17, pre 1840 sales of Banks Peninsula

(counsel for Crown)

L18

A Ballara "A Re-evaluation of the Process of Land Alienation by the Maoris, 1840-1890" (1982) JPS 91(counsel for Crown)

L19

Map of the Nelson Crown grant, 1848

(counsel for Crown)

L20

Admiralty chart 1212 of 1848, including 1846 revision

(counsel for Crown)

L21

Map of part of Middle Island by Charles Kettle, 1848

L22

Photocopy of Kemp's deed

(counsel for Crown)

L23

Photocopy of map of Kemp's deed

(counsel for Crown)

L24

Map of South Island, NZMS 242, used as base for overlays for Kemp, North Canterbury and Kaikoura purchases

(a) Overlay to L24 on boundaries referred to in evidence (see L8)

(counsel for Crown)

L25

Report of 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, AJHR 1948 G-8

(counsel for Crown)

L26

Maori owned ships, "Watts Index", National Archives, Wellington

(counsel for claimants)

L27

Overlay to L17, Banks Peninsula, additional reserves requested by Ngai Tahu 1849

L28

Overlay to L17, Port Cooper, Port Levy, Akaroa and French blocks

(counsel for Crown)

L29

Overlay to L17, Kinloch and Morice estates

(counsel for Crown)

L30

Further submissions of Crown counsel on Banks Peninsula (see L1)

L31

Directions of deputy-chairperson on application of counsel for the West Coast (South Island) Maori Leaseholders' Association Incorporation and other lessees of Mawhera Incorporation for a summons to require the production of certain documents

(registrar)

L32

Summary from the submissions of ancillary and other issues raised in the Ngai Tahu claim

(registrar)

L33

Memorandum of Tipene O'Regan on the meaning of the name Otepoti, dated 3 September 1988

(registrar)

L34

Reply of claimants to deputy-chairperson's directions on Kurahaupo Waka claim (see I7), dated 21 July 1988

(counsel for claimants)

L35

Memorandum of Crown counsel on Kurahaupo Waka claim and deputy-chairperson's directions (see I7), dated 11 August 1988

(counsel for Crown)

L36

Directions and interlocutory determination of deputy-chairperson on Joe Tukupua and Kurahaupo Waka claim, dated 16 September 1988

(registrar)

M

ELEVENTH HEARING AT COLLEGE HOUSE, CHRISTCHURCH, 29 AUGUST-1 SEPTEMBER 1988

Document:

M1

Opening submission of Crown counsel on Kemp's purchase, part II (see L7)

M2

Evidence of Dr Donald M Loveridge on Kemp's purchase, part II, Walter Mantell's involvement in the Kemp purchase (see Q18)

(counsel for Crown)

M3

Supporting papers to M2 (see Q18)

(counsel for Crown)

M4

Submission of Crown counsel on the North Canterbury and Kaikoura purchases

M5

Evidence of David J Alexander on background to the North Canterbury and Kaikoura purchases

(counsel for Crown)

M6

Supporting papers to M5

(counsel for Crown)

M7

Evidence of Graham J Sanders on North Canterbury

(counsel for Crown)

M8

Supporting papers to M7

(counsel for Crown)

M9

a) Submission of Crown counsel on the Kaikoura reserves

(b) Submission of Crown counsel on Ngai Tahu and Crown policy 1850

(c) Submission of Crown counsel on land for landless natives

M10

Evidence of Dr Donald M Loveridge on the Kaikoura purchase 1859 (see Q19, O48)

(counsel for Crown)

M11

Supporting papers to M10

(counsel for Crown)

M12

Evidence of David J Alexander on the history of the Kaikoura reserves

(counsel for Crown)

M13

Supporting papers to M12

(a) A3 versions of plans contained within M13

(counsel for Crown)

M14

Evidence of Tony Walzl on Ngai Tahu reserves 1848-1890

(counsel for Crown)

M15

Supporting papers to M14

(counsel for Crown)

M16

Evidence of David A Armstrong on the Crown's reserve policy concerning Ngai Tahu 1890-1944

(counsel for Crown)

M17

Supporting papers to M16 (2 vols)

(counsel for Crown)

M18

Further papers relating to the Kaikoura reserves, DOSLI, Wellington

(counsel for Crown)

M19

Memorandum of Crown counsel on whakapapa and hapu issues

M20

Evidence of John M Barrington on schools

(counsel for Crown)

M21

Supporting papers to M20

(counsel for Crown)

M22

Submissions of Crown counsel on the Ngai Tahu Settlement Act 1944

M23

Supporting papers to M22

M24

Memorandum of counsel for Kurahaupo Waka claimants, dated 23 August 1988

M25

"Two Letters from Ngaati-Toa to Sir George Grey", translated by Bruce Biggs, (1959) JPS 68

(counsel for Crown)

M26

Observations by the claimants on the evidence of Graham J Sanders on Banks Peninsula (see L2, L3)

(counsel for claimants)

M27

(a) Colour photocopy of Kaikoura purchase deed map 1859, DOSLI, Wellington

(b) Copy of Kaikoura purchase deed 1859, DOSLI, Wellington

(counsel for Crown)

M28

Copies of plans of the Kaikoura reserves originally made by James Mackay, 1859

(a) M796

(b) M797

(c) M798

(d) M799

(e) M800

(f) M801

(g) M802

(h) M803

(i) M809

(j) M816

(counsel for Crown)

M29

Overlays to L24 of pasturage licenses relevant to Kaikoura and North Canterbury purchases, 1846-1859 (see M6)

(a) 1859

(b) 1858

(c) 1857

(d) 1846

(counsel for Crown)

M30

Overlay to L24 of Nelson, Canterbury and Marlborough provincial boundaries

(counsel for Crown)

M31

Overlay to L24 of land and fishing reserves, Kaikoura

(counsel for Crown)

M32

Overlay to L24 of boundaries of the Cheviot estate

(counsel for Crown)

M33

Department of Maori Affairs files associated with the Ngai Tahu Trust Board (see M22, M23)

(a) MA 26/2 (3 vols)

(b) MA 26/2/7 (2 vols)

(c) MA 26/2, part I

(counsel for Crown)

M34

Photocopies of various Canterbury deeds

(a) Port Levy deed, 1849

(b) Port Levy deed, 1849

(c) Colour photocopy of map attached to Port Levy deed, dated 25 September 1849

(d) Translation of Port Levy deed, dated 25 March 1871

(e) Port Cooper deed, 10 August 1849

(f) Colour photocopy of plan attached to Port Cooper deed, dated 10 August 1849

(g) Translation of Port Cooper deed, dated 9 June 1871, with table by Walter Mantell showing the way the Port Cooper purchase money was allocated

(h) "Plan to illustrate the report on Native claims, Banks Peninsula", by John Grant Johnston, dated 7 June 1856

(i) English version of North Canterbury deed, dated 5 February 1857 (includes sketch plan)

(j) Maori version of North Canterbury deed

(k) Akaroa deed 1856

(l) English version of Akaroa deed, dated 10 December 1849

(m) Receipt for œ100, final payment Kaiapoi lands, dated 6 January 1860

(counsel for Crown)

N

TWELFTH HEARING AT ASHLEY MOTOR INN, GREYMOUTH, 19-22 SEPTEMBER 1988

Document:

N1

Opening submission of Crown counsel on Arahura

N2

Evidence of Dr Donald M Loveridge on the Arahura purchase, 1860 (see O49, R4, R6)

(counsel for Crown)

N3

Supporting papers to N2

(counsel for Crown)

N4

Evidence of Crown counsel on Poutini Ngai Tahu reserves

N5

Supporting papers to N4

N6

Evidence of David A Armstrong and Tony Walzl on the origin of leasing on the West Coast

(a) Submission of Crown counsel on the West Coast leases

N7

Supporting papers to N6

(counsel for Crown)

N8

Submission of Crown counsel on Ngai Tahu rights to pounamu and gold and silver

N9

Supporting papers to N8

N10

Submissions of Edward Tamati on behalf of the Parininihi-Ki-Waitotara Incorporation

N11

Submissions of Hohepa Solomon on behalf of Wakatu Incorporation on reserved land leases

(counsel for claimants)

N12

Submission of Sir Ralph Love on behalf of the Wellington Tenths Trust and Palmerston North Maori Reserves Trust on reserved land

(counsel for claimants)

N13

Directions and interlocutory determination of deputy-chairperson, dated 16 September 1988

(registrar)

N14

Correspondence from Ian J Burgess, Valuation Department, to the secretary, Parininihi-Ki-Waitotara Incorporation on value of property vested in them, dated 15 September 1988

(counsel for Parininihi-Ki-Waitotara)

N15

Correspondence from A G Johnson, Valuation Department, to the secretary, Paraninihi-Ki-Waitotara Incorporation on values of properties vested in them, dated 23 November 1984

(counsel for Parininihi-Ki-Waitotara)

N16

Twelfth annual report and accounts for the Parininihi-Ki-Waitotara Incorporation

(counsel for Parininihi-Ki-Waitotara)

N17

Photocopy Port Nicholson deed, dated 27 September 1839

(Sir Ralph Love)

N18

Photocopy of the survey map for Port Nicholson

(Sir Ralph Love)

N19

Copies of sketch maps of the Arahura reserves by James Mackay

(a) Copy A

(b) Copy B

(counsel for Crown)

N20

(a) Photocopy of Arahura deed 1860

(b) Colour photocopy of sketch plan attached to Arahura deed

(counsel for Crown)

N21

Map of South Island showing land reserved from the Arahura purchase

(counsel for Crown)

N22

Map of Arahura River and reserve

(counsel for Crown)

N23

Maps of the Arahura riverbed, S09742, dated November 1976

(counsel for Crown)

N24

Certificates of title for the Arahura River, dated 3 February 1928

(counsel for Crown)

N25

Calculations of area in Maori reserve 30

(counsel for Crown)

N26

Certificates of title

(a) CT 3D 1382

(b) CT 3D 1383

(c) CT 3D 1384

(counsel for Crown)

N27

Overlays to the Arahura purchase, MR 13

(counsel for Crown)

N28

unallocated

N29

List of mining privileges

(counsel for Crown)

N30

Correspondence from G C Morrison, Office of the Maori Trustee to Shonagh E Kenderdine, Crown counsel, on the Greymouth reserves, dated 7 August 1987

(counsel for Crown)

N31

Evidence of Margaret Moir on behalf of the West Coast United Council

N32

Opening submission of counsel for the Maori Trustee

N33

Synopsis of N32

(counsel for Maori Trustee)

N34

Evidence of Richard T Wickens, Deputy Maori Trustee

(counsel for Maori Trustee)

N35

Supporting papers to N34

(counsel for Maori Trustee)

N36

Submission of counsel for the Maori Trustee

N37

Supporting papers to N36 (see N33)

(counsel for Maori Trustee)

N38

Papers on Maori reserve 31 (Greymouth), DOSLI, Hokitika

N39

Submission of counsel for West Coast (South Island) Maori Leaseholders' Association Incorporated and certain lessees of Mawhera Incorporation

N40

Supporting documents to N39

N41

Evidence of Thomas I Marks on valuations of land and leases on the west coast

(counsel for Crown)

N42

Evidence of Alfred M Jamieson on Mawhera leases

(counsel for West Coast (South Island) Maori Leaseholders Association)

N43

Submission of Eli T Weepu, Upoko Runanga O Tuhuru, on Maori reserved leasehold land

N44

Evidence of Garlyn I Dixon on Arahura reserve land

N45

Topographical map of Arahura River and environs

(counsel for Crown)

N46

List of those holding mining licences and applicants for licences, DOSLI, Wellington

(counsel for Crown)

N47

Correspondence from Crown counsel to the registrar on schedule of mining, prospecting and exploration licences, dated 15 September 1988

(counsel for Crown)

N48

Preliminary observations by the claimants on the evidence given by Dr Donald Loveridge on Kemp's purchase (see L8)

(counsel for claimants)

N49

Correspondence from the Maori Trustee to Crown counsel on area of Mawhera reserve freeholded and not vested in Mawhera Incorporation, dated 13 October 1987

(counsel for Crown)

N50

Submission of Elcock & Johnston on behalf of Alexander J Wallace of Hokitika, on pounamu mining rights

O

THIRTEENTH HEARING AT THE STUDENT UNION BUILDING, OTAGO UNIVERSITY, DUNEDIN, 7-10 NOVEMBER 1988

Document:

O1

Opening submission of Crown counsel on Otakou

(a) Valuation report and sales list on Princes Street reserve (no 11)

(counsel for Crown)

O2

Evidence of Dr Donald M Loveridge on the Otakou purchase

(counsel for Crown)

O3

Evidence and supporting papers of Josephine A Barnao on Taiaroa Head and Harington Point

(counsel for Crown)

O4

Map of Taiaroa Head

(counsel for Crown)

O5

Evidence of David J Alexander on history of the Kemp block reserves

(counsel for Crown)

O6

Supporting papers to O5

(a) Supporting plans to O5

(counsel for Crown)

O7

Submission of Crown counsel on Wanaka-Hawea reserve

O8

Supporting papers to O7

(counsel for Crown)

O9

Submission of counsel for the Maori Trustee on Lake Hawea fishing reserve

O10

Map of Taiaroa Head, J44/1.2

(counsel for Crown)

O11

Opening submission of Crown counsel on the Murihiku purchase

O12

Evidence of Graham J Sanders on the Murihiku and Rakiura purchases

(counsel for Crown)

O13

Supporting papers to O12

(counsel for Crown)

O14

(a) Evidence of David J Alexander on the Murihiku and Stewart Island reserves

(b) Supporting papers to O14(a)

(c) Addendum to O14(a)

(counsel for Crown)

O15

Evidence of Professor David I Pool on the adequacy of Ngai Tahu reserves, a demographic analysis

(counsel for Crown)

O16

Supporting papers to O15

(counsel for Crown)

O17

Evidence and supporting papers of Ronald D Keating on the Kaikoura, Kaiapoi (Tuahiwi) and Arahura purchases

(counsel for Crown)

O18

Evidence and supporting papers of Donn Armstrong on valuations of Kaikoura and Canterbury, the land market historically to the present day

(counsel for Crown)

O19

Evidence of Thomas I Marks on quantifying the benefits that would have accrued to Poutini Ngai Tahu had their request for a large reserve been granted

(counsel for Crown)

O20

Evidence of Tony Walzl on Mantell's promises and the provision for Ngai Tahu health

(counsel for Crown)

O21

Supporting papers to O20

(counsel for Crown)

O22

Map of Lakes Wanaka and Hawea, Maori land and Crown land at Lake Hawea

(counsel for Crown)

O23

Map of Lakes Hawea and Wanaka, G298

(counsel for Crown)

O24

Map of native reserves in the provinces of Otago and Southland

(counsel for Crown)

O25

Department of Maori Affairs file 7/6/246 (vol 1), land claims and alienations, Lakes Hawea and Wanaka

(counsel for Crown)

O26

Department of Lands and Survey file 50456, land for landless Maoris mid-Wanaka SD

(counsel for Crown)

O27

Map of South Island used as base for overlays for Kemp's purchase

(a) Overlay to O27, Maori reserves (general use and fishing)

(b) Overlay to O27, boundaries, purchase documents (lands of Crown) distinguishing general and SOE lands

(c) Overlay to O27, boundaries of various purchases

(counsel for Crown)

O28

Sketch plan of reserve no 1, Tuturau

(counsel for Crown)

O29

Sketch plan of reserve no 2, Omaui (see O13 p 27)

(counsel for Crown)

O30

Sketch plan of reserve no 3, Oue

(counsel for Crown)

O31

Sketch plan of reserve no 4, Aparima

(counsel for Crown)

O32

Sketch plan of reserve no 5, Oraka (see O13 p 28)

(counsel for Crown)

O33

Sketch plan of reserve no 6, Wakaputaputa (see O13 p 29)

(counsel for Crown)

O34

Sketch plan of reserve no 7, Ouetota (see O13 p 30a)

(counsel for Crown)

O35

(a) Murihiku deed
(b) Map of Murihiku purchase
(counsel for Crown)

O36

Map of Stewart Island showing 168øE longitude

(counsel for Crown)

O37

Stewart Island deed

(counsel for Crown)

O38

Titi Island reserves

(counsel for Crown)

O39

Stewart Island reserves

(counsel for Crown)

O40

Map of South Island used as a base map for overlays for Murihiku purchase

(counsel for Crown)

O41

Overlay to O40, boundary of Murihiku purchase

(counsel for Crown)

O42

Overlay to O40, Maori reserves

(counsel for Crown)

O43

Evidence of Professor David I Pool

(a) Audit Table Locality Totals Ratio 1844-1896 Canterbury

(b) Audit Table Sex Totals Ratio 1844-1896 Canterbury

(c) Audit Table Age Totals Ratio 1844-1896 Canterbury

(d) Audit Table Sex-Age Totals Ratio 1844-1896 Canterbury

(e) Provincial Totals 1844-1896 Table 1

(f) County Totals 1844-1896 Table 2

(g) Provincial Sex Ratio 1844-1896 Table 3

(h) County Sex Ratio 1844-1896 Table 4

(counsel for Crown)

O44

Evidence of Ronald Keating

(a) Map of Kaikoura reserve and the study block

(b) Map of Canterbury study area

(c) Map of Arahura study area

(d) Map of Tuahiwi reserve

(e) Map of Kaikoura study block sales and overlay

(counsel for Crown)

O45

Base map of Otago Peninsula and overlays (a)-(h) of Otakou Maori reserve

(counsel for Crown)

O46

Observations by the claimants on Crown evidence of Dr Donald M Loveridge on Kemp's purchase (L8 and L9) (see M2, M3, Q18, R1, R2)

(counsel for claimants)

O47

Observations by the claimants on Crown evidence of Graham J Sanders on the North Canterbury purchase (M7 and M8) (see R5)

(counsel for claimants)

O48

Observations by the claimants on Crown evidence of Dr Donald M Loveridge on the Kaikoura purchase (M10 and M11) (see Q19, R3)

(counsel for claimants)

O49

Preliminary memorandum of the claimants on Crown evidence of Dr Donald M Loveridge on the Arahura block (N2 and N3) (see R4)

(counsel for claimants)

O50

Preliminary memorandum of the claimants on Crown evidence of David A Armstrong and Tony Walzl on the Arahura block

(counsel for claimants)

O51

Curriculum vitae of Professor David I Pool (see O15 and O16)

(counsel for claimants)

O52

Memorandum of deputy-chairperson on mahinga kai - sea fisheries claims, dated 10 November 1988 (see O53)

(registrar)

O53

Memorandum of deputy-chairperson amending memorandum dated 10 November 1988, dated 14 November 1988 (see O52)

(registrar)

O54

Memorandum of deputy-chairperson concerning state owned enterprises, dated 11 November 1988

(registrar)

P

FOURTEENTH HEARING AT COLLEGE HOUSE, ILAM, CHRISTCHURCH, 5-9 DECEMBER 1988

Document:

P1

Opening submission of Crown counsel on the Otakou "tenths"

P2

Evidence of Dr Donald M Loveridge on the Otakou purchase of 1844

(counsel for Crown)

P3

Supporting papers to P2

(counsel for Crown)

P4

Evidence of Professor Gordon Parsonson on the Otakou tenths, overview

(counsel for Crown)

P5

Supporting papers to P4

(counsel for Crown)

P6

Supporting papers to P7

(counsel for Crown)

P7

Evidence of David J Alexander on Otakou, Murihiku and Rakiura reserves

(counsel for Crown)

P8

Opening submission of Crown counsel on Titi Islands

(a) Evidence of Ronald Tindal

(b) Evidence and supporting papers of Ronald Tindal

(counsel for Crown)

P9

(a) Submissions of Crown counsel on mahinga kai

(b) Supporting documents to P9(a)

(c) Documents relating to fishery easements

(d) Key to maps of Banks Peninsula, the Kaikoura coast and Kemp's purchase

(counsel for Crown)

P10

Evidence of Anthony Walzl on mahinga kai (see O48, Q19, Q21)

(counsel for claimants)

P11

Supporting papers to P10

(counsel for claimants)

P12

Evidence of Robert D Cooper, MAFFish, on records of Maori fisheries in government archives since 1840

P13

Supporting paper to P12

P14

(a) Evidence of Josephine A Barnao on Kaitorete Spit

(b) Supporting papers of Josephine A Barnao on Waihora (Lake Ellesmere) (see P14(a), Q20, Q22)

(c) Submissions of Crown counsel on Taumutu commonage reserves

(counsel for Crown)

P15

(a) Evidence of Ronald W Little, MAFFish, on the nature of the land during the period of early habitation and what has happened to the South Island and its fishery habitat since then

(b) Evidence of B Johnson, national executive of the New Zealand Acclimatisation Societies, on the acclimatisation societies and their relationship with freshwater fisheries and wildlife

(counsel for Crown)

P16

(a) Evidence of Ronald W Little, MAFFish, on the physical nature of Lakes Ellesmere and Forsyth

(b) Evidence of Dr Peter Todd, MAFFish, on eel and lamprey biology and the eel fisheries in Lakes Ellesmere and Forsyth

(c) Evidence of Professor Walter C Clark on Maori involvement in management of freshwater fisheries and game resources in the North Canterbury acclimatisation district, with specific reference to Lake Ellesmere

(d) Evidence of Paul Sager, MAFFish, on the Opihi River-potential effects on fish of flow augmentation

(counsel for Crown)

P17

Map of Otakou purchase

(a) Overlay of Maori reserves

(b) Overlay of Crown and SOE land

(counsel for Crown)

P18

Further evidence of David A Armstrong on the Murihiku purchase

(counsel for Crown)

P19

Supporting maps to P2

(a) Sketch of the lands to be annexed to the settlement of New Edinburgh, 15 June 1844

(b) Survey of part of the harbour of Otago, 1844

(c) Sketch showing New Edinburgh purchase and reserve of "natives"

(d) A survey of part of the harbour of Otago (New Edinburgh settlement)

(e) Deed of purchase after the Native Land Court at Dunedin 17 May 1868

(counsel for Crown)

P20

unallocated

P21

Map of South Island land tenure

(counsel for Crown)

P22

(a) Submissions of counsel for Federated Farmers on behalf of Crown pastoral lessees

(b) Evidence of Hamish R Ensor on behalf of Crown pastoral lessees

(c) Evidence of Donald McKenzie on tenure of land subject to specific claims

(d) Evidence of Jim Morris on relationship to the land

(e) Supplement to the evidence of Hamish R Ensor (see P22(b))

P23

Submission of J A Glennie on behalf of the North Canterbury Catchment Board and Regional Water Board

P24

(a) Submissions of counsel for Telecom Corporation of New Zealand Ltd

(b) Supporting documents to P24(a)

P25

Submissions of counsel for Land Corporation Ltd

P26

Schedules of unallocated former state forest lands and Crown lands, Westland land district

(counsel for claimants)

P27

Map of the South Island, sections highlighted in green

(counsel for Crown)

P28

Map of South Island showing pastoral, freehold, army, forest park, special lease, university lease, and land once grazed

(counsel for Crown)

P29

Evidence of Edwin D Lyttle on behalf of Otago Federated Farmers

P30

Evidence of Ronald W Little, MAFFish, line graph of vegetation cover of New Zealand

P31

Evidence of Ronald W Little, MAFFish, bar graph of native forest land area

P32

(a) Map of Christchurch land drainage, present day

(b) Map of Christchurch land drainage, c 1855

(c) Long term planning for the Avon-Heathcote estuary, Christchurch City Council, 1980

(counsel for Crown)

P33

Map of South Island used to point out Otumatua

(counsel for Crown)

P34*

Map of Maori place names of Lake Ellesmere presented by Ricki Ellison to Duncan McIntyre

(counsel for Crown)

P35

Correspondence from Reverend J F H Wohlers to Frederick Tuckett, 1849-1856, MS 41, Hocken Library

(registrar)

Q

FIFTEENTH HEARING AT MANCAN HOUSE, CHRISTCHURCH, 7-9 FEBRUARY 1989

Document:

Q1

Submission of counsel for the claimants on deputy-chairperson's memorandum of 10 November 1988 on sea fisheries claims (see O52)

Q2

Submission of Mervyn N Sadd on deputy-chairperson's memorandum of 10 November 1988 on sea fisheries claims (see O52)

Q3

Further evidence of James P McAloon on Murihiku and Rakiura

(counsel for claimants)

Q4

Observations of claimants on the evidence of David A Armstrong on Murihiku (P18)

(counsel for claimants)

Q5

Observations of claimants on the evidence of Graham J Sanders on Murihiku and Rakiura (O12 and O13)

(counsel for claimants)

Q6

Preliminary observations of the claimants on the evidence of Anthony Walzl on Mantell's promises and the provision for Ngai Tahu health (O20)

(counsel for claimants)

Q7

Submission of Crown counsel on Ngai Tahu sea fisheries

Q8

Evidence of Anthony Walzl on economy of Ngai Tahu

(counsel for Crown)

Q9

Supporting papers to Q8

(counsel for Crown)

Q10

Evidence and supporting papers of David J Alexander on Lake Forsyth and Lake Ellesmere reserves

(counsel for Crown)

Q11

Evidence of Anthony Walzl on Native Land Court minute book

(counsel for Crown)

Q12

Submissions of counsel for the New Zealand Fishing Industry Association

Q13

Submissions of counsel for the New Zealand Fishing Industry Board

Q14

Evidence of Malcolm R Hanna on valuation and the evidence of Thomas I Marks (see O19)

(counsel for claimants)

Q15

Submission of Dr R S Deane, Electricity Corporation of New Zealand Ltd, on the role of the Electricity Corporation in relation to Maori claims

Q16

Submission of J P F Robinson, Electricity Corporation of New Zealand Ltd, on South Island hydro power stations

(a) Topographical map showing Electricity Corporation of New Zealand Ltd's power stations in the South Island

(counsel for Electrocorp)

Q17

Salient points in the claimants' observations (M26) on the evidence of Graham J Sanders on Banks Peninsula (see L2, L3)

(counsel for claimants)

Q18

Salient points in the claimants' observations (O46) on the evidence of Dr Donald M Loveridge on Kemp's purchase (see L8, L9, M2, M3)

(counsel for claimants)

Q19

Salient points in the claimants' observations (O48) on the evidence of Dr Donald M Loveridge on Kaikoura (see M10, M11)

(counsel for claimants)

Q20

Observations of the claimants on the evidence of Josephine Barnao on the alleged French "purchase" of Banks Peninsula (see P14(a))

(counsel for claimants)

Q21

Observations of the claimants on the evidence of Anthony Walzl on mahinga kai (see P10, P11)

(counsel for claimants)

Q22

Observations of the claimants on the evidence of Josephine Barnao on Kaitorete (see P14(a) and (b))
(counsel for claimants)

Q23

Memorandum on the Treaty of Waitangi in the South Island

(a) Map A, nineteenth century Banks Peninsula

(b) Map B, eastern Canterbury and Banks Peninsula Ngai Tahu land sales 1840-1856

(counsel for claimants)

Q24

Interlocutory determination of deputy-chairperson on procedure relating to hearing of sea-fisheries claim,

dated 10 February 1989

(registrar)

Q25

Submissions of Crown counsel in reply to memorandum of deputy-chairperson concerning an interim recommendation to the Crown sought by Ngai Tahu Trust Board for reimbursement of expenses

(counsel for Crown)

Q26

Submission of claimants in support of application for interim order for reimbursement of claimants' expenses

(counsel for claimants)

Q27

Submissions of the Wellington District Law Society to the chairperson of the Maori Fisheries Committee, House of Representatives, Wellington on the Maori Fisheries Bill 1988

Q28

Memorandum of David J Alexander on ancillary claims, received 13 March 1989

(counsel for Crown)

Q29

Memorandum of Thomas I Marks on the evidence of Malcolm R Hanna on the valuation of rentals for Mawhera leasehold land (see Q14)

(counsel for Crown)

Q30

Memorandum of deputy-chairperson on procedure and case to be stated to the Maori Appellate Court, dated 27 February 1989

(registrar)

Q31

Memorandum of Crown counsel on Ngai Tahu sea fisheries, dated 13 March 1989

(registrar)

Q32

Memorandum of deputy-chairperson giving directions on timetabling and hearing dates for sea-fisheries portion of the claim, dated 16 March 1989

(registrar)

Q33

Case stated to the Maori Appellate Court on a question to determine Maori land and fisheries tribal boundaries

(registrar)

R

SIXTEENTH HEARING AT THE CHATEAU REGENCY, CHRISTCHURCH, 10-13 APRIL 1989

Document:

R1

Crown responses to preliminary observations by the claimants on the evidence of Dr D M Loveridge on Kemp's purchase (L8 and L9) (see O46)

(counsel for Crown)

R2

Crown responses to preliminary observations on the evidence of Dr D M Loveridge on Kemp's purchase (M2 and M3) (see O46)
(counsel for Crown)

R3

Crown responses to observations by the claimants on the evidence of Dr D M Loveridge on the Kaikoura purchase (M10 and M11) with additional documents (see O48)

(counsel for Crown)

R4

Crown responses to preliminary memorandum by the claimants on the evidence of Dr D M Loveridge on the Arahura block (N2 and N3) (see O49)

(counsel for Crown)

R5

Crown responses to observations by the claimants on the evidence of G J Sanders on the North Canterbury purchase (M7 and M8) (see O47)

(counsel for Crown)

R6

Crown responses to preliminary memorandum by the claimants on evidence of D A Armstrong and A Walzl on the Arahura block (N6 and N7) (see O50)

(counsel for Crown)

R7

Crown responses to preliminary observations by the claimants on evidence of A Walzl on Mantell's promises and the provision for Ngai Tahu health (O20 and O21)

(counsel for Crown)

R8

Evidence of David A Armstrong on Banks Peninsula

(counsel for Crown)

R9

Opening submission of Crown counsel on Ngai Tahu sea fisheries

R10

Submission of Crown counsel on legislation concerning fisheries

R11

Evidence of John A Colman, MAFFish, on marine fish and the environment

(counsel for Crown)

R12

Evidence of John D Booth, MAFFish, on rock lobster fishery

(counsel for Crown)

R13

Evidence of Talbot Murray, MAFFish, on South Island paua fishery

(counsel for Crown)

R14

(a) Evidence of Jacqui Irwin, MAFFish, on shallow water fin fisheries of the South Island

(b) Evidence of Tony Avery, MAFFish, on shoreline and shallow-water shellfisheries of the South Island

(c) Evidence of Graeme McGregor, MAFFish, on South Island blue cod fishery

(d) Evidence of Lawrence J Paul, MAFFish, on South Island shark fisheries

(counsel for Crown)

R15

(a) Evidence of Rosemary J Hurst, MAFFish, on South Island barracouta fishery

(b) Evidence of John B Jones, MAFFish, on South Island blue warehou fishery

(c) Evidence of Alistair B MacDiarmid, MAFFish, on South Island red cod fishery

(counsel for Crown)

R16

Evidence of Lawrence J Paul, MAFFish, on South Island groper, tarakihi and bluenose fisheries

(a) Evidence of Robert H Mattlin, MAFFish, on South Island squid fishery

(counsel for Crown)

R17

Evidence of Mary E Livingston, MAFFish, on South Island silver warehou fishery

(a) Evidence of John A Colman, MAFFish, on South Island hake fishery

(b) Evidence of John A Colman, MAFFish, on South Island ling fishery

(counsel for Crown)

R18

Evidence of Kevin J Sullivan, MAFFish, on hoki fishery

(counsel for Crown)

R19

Evidence of Donald A Robertson, MAFFish, on orange roughy fishery

(a) Evidence of Peter McMillan, MAFFish, on South Island oreo fishery

(counsel for Crown)

R20

Evidence of Robin Allen, MAFFish, on the role of fisheries research

(counsel for Crown)

R21

Evidence of Ian N Clark, MAFFish, on development of the quota management system

(a) Economic Review of the New Zealand Fishing Industry 1987-88 (NZFIB, February 1989)

(counsel for Crown)

R22

Evidence of Bruce Shallard, MAFFish, on the quota management system

(counsel for Crown)

R23

Evidence of Robert D Cooper, MAFFish, on the effect of fishery management policies on Maori involvement in fishing

(counsel for Crown)

R24

Evidence of Grant Thomas Crowthers, MAFFish, on fisheries compliance

(counsel for Crown)

R25

Evidence of Ian N Clark, MAFFish, on the economics of the South Island fishery

(counsel for Crown)

R26

Evidence of Robert D Cooper, MAFFish, on local control and management of coastal fisheries by Maori

(counsel for Crown)

R27

Audiovisual aids to MAFFish evidence, book of slide copies

(counsel for Crown)

R28

Audiovisual aids to MAFFish evidence, box of slides used in presentation

(counsel for Crown)

R29

Memorandum of Crown counsel on Banks Peninsula asking for the withdrawal from the record of their submissions and evidence L1, L2 and L30

R30*

"Mahinga Kai List 1880" presented to Tipene O'Regan by MAFFish

R31

Question from the tribunal to MAFFish on the nature and extent of Ngai Tahu fishing in traditional times in relation to specific fish and shellfish

(registrar)

R32

Further evidence in support of R23 on exclusion of part-time fishers

(counsel for Crown)

R33

Statement of George Clarke Jr to the Smith-Nairn commission on the Otakou purchase, MA 67, National Archives, Wellington

(counsel for Crown)

R34

Correspondence from H T Kemp referring to the termination of his services with the New Zealand government, GNZ MSS 201, Auckland Public Library

(counsel for Crown)

R35

Further evidence of Dr Ann R Parsonson on the Otakou tenths
(counsel for claimants)

R36

(a) Supporting papers to R35, vol 1

(b) Supporting papers to R35, vol 2

(counsel for claimants)

R37

Memorandum of counsel for NZFIB and NZFIA on timetabling and hearing dates for sea-fisheries portion of claim

R38

(a) Evidence of John A Colman, MAFFish, on marine fish and the environment, supplement to R11

(b) Curriculum vitae of Alan Coakley, supplement to R14(a)-(d)

(c) Evidence of Kevin J Sullivan, MAFFish, on hoki fishery, supplement to R18

(d) Evidence of Rosemary J Hurst, MAFFish, on barracouta, blue warehou and red cod, supplement to R15(a)-(c)

(e) Evidence of Mary E Livingston, MAFFish, on silver warehou and red cod, supplement to R17, 17(a)-(b)

(f) Evidence of Neil Martin, MAFFish, on effect of fisheries management policies on Maori involvement in fishing, supplement to R23

(g) Evidence of Robert D Cooper, MAFFish, on local control and management of coastal fisheries by Maori, supplement to R26

(h) Evidence of Ian N Clark, MAFFish, additional data on TAC's catch values and valuation definitions, supplement to R25

(i) Evidence of Henry J Cranfield, MAFFish, on dredge oysters

(j) Evidence of Ron Blackwell, MAFFish, on gurnard

(k) Evidence of Graeme McGregor, MAFFish, on stargazer

(l) Evidence of Rosemary J Hurst, MAFFish, on gemfish

(m) Evidence of John A Colman, MAFFish, on southern blue whiting

(n) Evidence of Talbot Murray, MAFFish, on tuna

(o) Evidence of Lawrence J Paul, MAFFish, on species composition of the modern commercial fishery for marine finfish in the Ngai Tahu region of the South Island

(p) Evidence of Lawrence J Paul, MAFFish, on South Island marine fisheries bibliography

(counsel for Crown)

R39

Evidence of James P McAloon on new translations of the Murihiku and Arahura deeds

(counsel for claimants)

R40

Letter from J Thomas, agent and chief surveyor, Canterbury Association, dated 28 February 1849, 1/49A, 3/1 letterbook 1848-1851, Canterbury Association Records, Lands and Survey Collection, Canterbury Museum Archives

S

THE SEVENTEENTH HEARING AT THE CHATEAU REGENCY, CHRISTCHURCH, 29 MAY-2 JUNE 1989

Document:

S1

Evidence of Robert D Cooper, MAFFish, on history of the New Zealand paua fishery 1860-1973

(counsel for Crown)

S2

(a) Evidence of Dr Murray A Bathgate on the archaeological and early documentary record concerning Maori fishing in the South Island including reference to two reports by Dr Foss Leach (S4 and S5)

(counsel for Crown)

(b) Curriculum vitae of Dr Murray A Bathgate

(c) Curriculum vitae of Dr Foss Leach

S3

Supporting papers to S2 (2 vols)

(counsel for Crown)

S4

Report of Dr Foss Leach on the archaeology of Maori marine food harvesting (see S2)

S5

Report of Dr Foss Leach on archaeological time trends in South Island Maori fishing (see S2)

S6

(a) Evidence of David J Alexander on history of sealing and whaling in southern New Zealand

(b) Supporting papers to S6(a)

S7

Evidence of Anthony Walzl on Ngai Tahu fishing 1840-1908

(counsel for Crown)

S8

Supporting documents to S7

(counsel for Crown)

S9

Evidence of David A Armstrong on Ngai Tahu fishing in the twentieth century, overview

(counsel for Crown)

S10

Supporting papers to S9 (2 vols)

S11

(a) Evidence of counsel for Tane Moana Runanga Trust Incorporated on Ngai Tahu fishing

(b) Evidence of John Solomon on Ngai Tahu fishing (including evidence of William Pacey)

(c) Evidence of Morris Jacobs on Ngai Tahu fishing (including the evidence of Charles B Harvey, Raymond F Harvey, Stewart C Harvey, Graham D Harvey)

(d) Evidence of James N Pohio on Ngai Tahu fishing (including the evidence of T M Taiaroa and Beresford Davis)

(counsel for Tane Moana Runanga Trust)

S12

Maori language documents selected from the Taiaroa papers, Canterbury Museum Library, and their translations by Sarah M Williams

(counsel for Crown)

S13

Evidence of Lawrence J Paul, MAFFish, on the use of "marks" to locate fishing grounds

(counsel for Crown)

S14

Evidence of Lawrence J Paul, MAFFish, on the likely capture and use of fish species by Ngai Tahu fishing people in traditional times (see R31)

(counsel for Crown)

S15

J R Goodwin "Some Examples of Self-Regulatory Mechanisms in Unmanaged Fisheries" FAO Fisheries Report (289) Suppl 2

(counsel for Crown)

S16

Evidence of Professor Ian A Gordon on the meaning of "fisheries" particularly in the Treaty of Waitangi

(counsel for NZFIB and NZFIA)

S17

Evidence of Richard N Holdaway on Maori conservation of natural resources in the pre-European and proto-historic periods of New Zealand history

(counsel for NZFIB and NZFIA)

S18

Submission on behalf of the Federated Mountain Clubs of New Zealand Incorporated

S19

Evidence of Alison F Mannell, partner in crayfishing venture

(counsel for NZFIB and NZFIA)

S20

Evidence of Ralph E Brown, crayfisherman and marine farmer

(counsel for NZFIB and NZFIA)

S21

Evidence of Steven J Anderson, crayfisherman

(counsel for NZFIB and NZFIA)

S22

Evidence of Patrick King on the meaning of mahinga kai

(counsel for Crown)

S23

Opening submission of counsel for the NZFIA and NZFIB

S24

Memorandum of claimants on Kemp's purchase and on the Treaty of Waitangi

T

THE EIGHTEENTH HEARING AT THE CHATEAU REGENCY, CHRISTCHURCH, 12-16 JUNE 1989

Document:

T1

Professor Alan D Ward "A Report on the Historical Evidence: The Ngai Tahu Claim Wai 27", May 1989, commissioned by the Waitangi Tribunal (see U10 and U11)

(a)-(f) Amendments and additions to T1

(registrar)

T2

Supporting papers to T1

(registrar)

T3

Dr Peter J Tremewan "Kai Tahu Land Sales to Captain Langlois and the Nanto-Bordelaise Company on Banks Peninsula", May 1989, commissioned by the Waitangi Tribunal

(registrar)

T4

Dr George Habib "Ngaitahu Claim to Mahinga Kai", June 1989, commissioned by the Waitangi Tribunal

(a) Report on Ngai Tahu fisheries evidence

(b) Report on the mahinga kai lists 1880 (see R30)

(c) Assessment of Crown evidence on the mahinga kai fisheries aspects of the Ngai Tahu claim

(d) Report on evidence on sealing and whaling by the Crown and fishing industry

(e) Curriculum vitae of Richard O Boyd, Ika Venture Corp Ltd

(registrar)

T5

(a) Nelson Crown grant to the New Zealand Company, August 1848

(b) Plan 1 of Nelson grant from the Crown to the New Zealand Company, Heaphy, 1848, SO 1053, DOSLI, Nelson

(c) Schedule to plan 1 showing the Nelson Crown Grant to the New Zealand Company, 1848, SO 1054, DOSLI, Nelson

(registrar)

T6

Evidence of Kemp to the Smith-Nairn Commission, 1879, MA 67/8, National Archives, Wellington

(registrar)

T7

Correspondence from Mantell to Topi, 16 February 1858, MS paper 83, folder 166, Alexander Turnbull Library, Wellington
(registrar)

T8

T W Downes Old Whanganui (W A Parkinson & Son, Hawera 1915) pp 320-326

(registrar)

T9

Coloured copy of the Murihiku deed map, 17 August 1853

(counsel for Crown)

T10

(a) Replacement of T1 p 399

(b) Replacement of T2 p 398

(registrar)

T11

Map of the Wairau purchase, 1847, Compendium, vol 1 p 206

(registrar)

T12

Archival material in the registers of Native Affairs Department and the Canterbury Provincial Council, prepared by Jenny Murray

(registrar)

T13

A G Bagnall Wairarapa, An Historical Excursion (The Masterton Trust Lands Trust, Masterton 1976) pp 86-87

(registrar)

T14

Correspondence from George Clarke Sr, chief protector of aborigines, to the colonial secretary, dated 17 October & 1 November 1843, BPP/CNZ (IUP) vol 2 appendix pp 356-360

(registrar)

U

THE NINETEENTH HEARING AT THE CHATEAU REGENCY, CHRISTCHURCH, 3-6 JULY 1989

Document:

U1

Evidence of Dr Harry Morton on sealing and whaling

(counsel for NZFIA and NZFIB)

U2

Evidence of Kevin P Molloy on sealing and whaling

(a) "The Range and Magnitude of the European Sealing Effort in New Zealand Waters, 1790-1830"

(b) "Whaling and Land Based Resources - A Study of Impact and Interaction within the Boundaries of South Island Ngai Tahu Occupation"

(counsel for NZFIA and NZFIB)

U3

Evidence of Deborah Montgomerie on the Rakiura purchase

(registrar)

U4

Submission of counsel for Tane Moana Runanga Trust

U5

Evidence of Morris Jacob

(counsel for Tane Moana Runanga Trust)

U6

Submission of John Solomon

(counsel for Tane Moana Runanga Trust)

U7

(a) Submission of James N Pohio

(b)* Whakapapa tipuna of James N Pohio

(counsel for Tane Moana Runanga Trust)

U8

Evidence of William Pacey
(counsel for Tane Moana Runanga Trust)

U9

Submission of Robert Pacey

(counsel for Tane Moana Runanga Trust)

U10

(a) Observations of the claimants on the report of Professor Alan Ward (T1) on the Murihiku and Arahura claims

(b) Observations of the claimants on the reports by Professor Alan Ward and Dr Peter Tremewan with respect to Kemp's purchase, Banks Peninsula, North Canterbury and Kaikoura (T1, T2, T3)

(c) Observations of the claimants on the report of Professor Alan Ward (T1) on the Otago purchase

(d) Further observations by the claimants on the reports by Professor Alan Ward and Dr Peter Tremewan (T1, T3)

(counsel for claimants)

U11

(a) Submission of Anthony Walzl on the Ward report (T1), Mantell's promises, especially those relating to health (summary of O20)

(b) Submission of Anthony Walzl on the Ward report (T1), mahinga kai

(c) Some observations of Anthony Walzl and David A Armstrong on the evidence of Deborah Montgomerie on the Greymouth leases (T1)

(d) Some comments of David A Armstrong on the evidence of Jenny Murray, Dr Peter Tremewan and Professor Alan Ward on Banks Peninsula (T1)

(counsel for Crown)

V

THE TWENTIETH HEARING AT TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTON, 1-2 APRIL 1989

Document:

V1

Submissions of counsel for NZFIB and NZFIA

V2

Evidence of Dr Michael Belgrave on Waihora (Lake Ellesmere) and Kaitorete

(registrar)

V3

Additional evidence of James P McAloon on the Arahura river reserves

(counsel for claimants)

V4

Transcript of Tipene O'Regan's oral submission to the Waitangi Tribunal, 1 June 1989

(registrar)

V5

Comments of Dr Murray A Bathgate on the evidence of Dr Harry Morton and Kevin P Molloy relating to sealing and whaling (see U1, U2)

(counsel for Crown)

V6

Comments of Dr Murray A Bathgate on the reports of Dr George Habib

(a) Report on Ngai Tahu fisheries evidence, June 1989 (see T4(a))

(b) Assessment of Crown evidence on the mahinga kai fisheries aspects of the Ngai Tahu claim (see T4(c))

(counsel for Crown)

V7

"Mythical topographic features in the early mapping of Otago and Southland 1823-51" New Zealand Geographer 2432 (October 1968) pp 206-213

(counsel for Crown)

V8

Further submissions of counsel for NZFIB and NZFIA on the question of the meaning and effect of "exclusive...possession of their...fisheries"

V9

Comments of Professor Alan Ward in response to observations by the claimants on his report on the Otago purchase (U10(c))

(registrar)

V10

Correspondence from Brian L McIntosh on behalf of the Taumutu Residents Association, Leeston, Canterbury received 17 July 1989

W

THE TWENTY FIRST HEARING AT TUAHIWI MARAE, 14-17 AUGUST 1989

Document:

W1

(a) Closing address of counsel for the claimants

(b) Supplement to W1(a)

(counsel for claimants)

W2

Observations of the claimants on the report by Professor Alan Ward (T1) on the Princes Street reserve (appendix D) with additional documents

(counsel for claimants)

W3

Claimants' summary of grievances on Banks Peninsula

W4

Claimants' summary of grievances on Kemp's block

W5

Claimants' summary of grievances on North Canterbury and Kaikoura blocks

W6

Claimants summary of grievances on Otakou, Murihiku, Rakiura, Arahura, mahinga kai

W7

Memorandum on statement by Henry Sewell (premier of New Zealand) quoted by P Temm in his closing address

(counsel for claimants)

W8

Comments of MAFFish on report on Crown fisheries evidence by Dr George Habib (see T4(c))

(counsel for Crown)

W9

Correspondence from Ellesmere County Council to counsel for the claimants on Fisherman Point reserve

(registrar)

W10

Correspondence from the District Land Registrar's Office, Nelson to the Office of the Public Trustee, Wellington, on Westport leases

(counsel for Maori Trustee)

W11

Submission of Trevor H Howse on signatories of certain deeds of sale to the Crown

(counsel for claimants)

W12

Transcript of examination of Professor Alan Ward, 12-16 June 1989

(registrar)

X

THE TWENTY SECOND HEARING AT TUAHIWI MARAE, 11-15 SEPTEMBER 1989

Document:

X1

Closing address of Crown counsel, vol 1

X2

Closing address of Crown counsel, vol 2

X3

Closing address of Crown counsel, vol 3

X4

Closing address of Crown counsel, vol 4

X5

(a) Map of Te Wai Pounamu giving Maori locations (see X2)

(b) Map of Te Wai Pounamu giving Maori locations

(counsel for Crown)

X6

Evidence of David A Armstrong and Tony Walzl on endowments

(counsel for Crown)

X7

Correspondence from Eyre to Grey, 1 May 1848, NM4/1, pp 169-171, National Archives, Wellington

(counsel for Crown)

X8

(a) Questions from the tribunal to the Crown on Kemp's purchase (see X1)

(b) Memorandum from the Crown in response to X8(a)

(counsel for Crown)

X9

Correspondence from New Zealand Deerstalkers Association, to the registrar, received 11 September 1989

X10

unallocated

X11

Memorandum of Crown counsel providing answers to "issues" (see I6)

X12

(a) Extracts from Mantell's Sketchbook No 3, MS Mantell 1848-1849, Alexander Turnbull Library, Wellington

(b) Transcript of X12(a)

(registrar)

X13

(a) Map of South Island by Mantell, C103, photographs and prints, Alexander Turnbull Library, Wellington

(b) Map of Middle Island by Mantell, C103, photographs and prints, Alexander Turnbull Library, Wellington

(registrar)

Y

THE TWENTY THIRD HEARING AT TUAHIWI MARAE, 9-10 OCTOBER 1989

Document:

Y1

Reply of claimants' counsel to the Crown's closing address

Y2

Deputy-chairperson's concluding statement

(registrar)

Y3

Correspondence from the Minister of Energy to the deputy-chairperson on the tribunal's recent submission on the question of restricting mining licences for pounamu, received 16 October 1989

(registrar)

Z

TWENTY FOURTH HEARING AT TRIBUNALS DIVISION, DATABANK HOUSE, WELLINGTON, 28 JUNE 1990

Document:

Z1

Application by NZFIB and NZFIA for leave to adduce further evidence, received 22 May 1990

(registrar)

Z2

Memorandum of counsel for NZFIB and NZFIA in support of Z1, received 22 May 1990

Z3

Directions of deputy-chairperson as to hearing of application by NZFIB and NZFIA for leave to adduce further evidence, dated 29 May 1990

(registrar)

Z4

Memorandum of Crown counsel in response to deputy-chairperson's directions dated 29 May 1990, received 15 June 1990 (see Z3)

Z5

Memorandum of counsel for NZFIB and NZFIA, received 28 June 1990

Z6

Submissions of Crown counsel in respect of questions raised in the deputy-chairperson's directions dated 29 May 1990, received 28 June 1990 (see Z3)

Z7

List of affidavits of first and second defendants filed in High Court proceedings (CP 559/87) requested by the deputy-chairperson's directions dated 29 May 1990

(counsel for Crown)

Z8

Maps of Murihiku, 1851, 834-836 qbbd, 1851, Acc 3261, cartographic collection, Alexander Turnbull Library, Wellington

(a) Maps

(b) Direction of presiding officer, dated 29 June 1990

Z9

Interlocutory determination by Tribunal on an application for leave to adduce further evidence, dated 2 July 1990

(registrar)

Z10

Translation and synopsis of Ngai Tahu letters from the Grey collection, Auckland Public Library and Mantell collection, Alexander Turnbull Library, Wellington, by Lindsay Head, dated 14 July 1990

(registrar)

Z11

Memorandum of Crown counsel, received 27 July 1990

(a) Comments on the Murihiku maps, received 27 July 1990

(counsel for Crown)

Z12

Memorandum of Crown counsel on translation of Ngai Tahu letters, received 14 August 1990

Z13

(a) Memorandum of counsel for the claimants on Z10, received 16 August 1990

(b) Comments on Otakou letters, received 16 August 1990 (see Z10)

(c) Comments by the claimants on maps of the Murihiku block by Walter Mantell, 1851, dated 29 June 1990

(counsel for claimants)

Z14

(a) Memorandum of counsel for the claimants on Kemp, received 16 August 1990

(b) Correspondence attributed to Teoti Wiremu Metehau about Kemp's deed, received 16 August 1990

Z15

Evidence of Professor Peter Munz on the interpretation of historical documents, with reference to Magna Carta

(counsel for NZFIB and NZFIA)

Z16

Evidence of Graham V Butterworth summarising conclusions reached on the impact of the speeches of the Maori members of parliament on the 1907 Fisheries Amendment Bill in the House of Representatives

(a) Evidence of Graham V Butterworth on the Maori political system of the 1890s and 1900s

(b) Supporting papers to Z16(a)

(counsel for NZFIB and NZFIA)

Z17

Evidence of Susan M Butterworth on the history of the New Zealand fishing industry 1840-1923

(a) Supporting papers to Z17

(counsel for NZFIB and NZFIA)

Z18

Evidence of Gregory C Billington, NZFIB, on the history of the New Zealand fishing industry 1963-1989

(a) Reports of the Fishing Industry Board 1965-1975 (see Z18)

(b) Reports of the Fishing Industry Board 1976-1989 (see Z18)

(counsel for NZFIB and NZFIA)

Z19

Evidence of Gary Bevin, NZFIB, on the quota management system and the economic implications of the Maori Fisheries Act 1988

(counsel for NZFIB and NZFIA)

Z20

Evidence of David G Anderson, NZFIA, with attachment of Paul Titchener The Story of Sanford Ltd: The first one hundred years (1980?) and lists of shareholders and directors of Otakou Fisheries Ltd

(counsel for NZFIB and NZFIA)

Z21

Evidence of Peter J Stevens, New Zealand Federation of Commercial Fishermen, with attachment of rules of the federation as at 1 August 1986

(counsel for NZFIB and NZFIA)

Z22

Evidence of Neville L Climo on the quota management system and Lake Ellesmere

(counsel for NZFIB and NZFIA)

Z23

Evidence of Kenneth J Nordstrom, fisherman, on the individual transferable quota system and Lake Ellesmere

(counsel for NZFIB and NZFIA)

Z24

Evidence of Trevor J Gould, fish processor, on the Lake Ellesmere fishery

(counsel for NZFIB and NZFIA)

Z25

Evidence of Clem G Smith, fisherman, on the history of the Lake Ellesmere fishery and in the individual transferable quota system

(counsel for NZFIB and NZFIA)

Z26

Evidence of William D Wards on Lake Ellesmere

(counsel for NZFIB and NZFIA)

Z27

Evidence of Clifford Broad on the quota management system in relation to Stewart Island

(counsel for NZFIB and NZFIA)

Z28

Evidence of Ian J Munro, fisherman, on the individual transferable quota system in relation to Stewart Island

(counsel for NZFIB and NZFIA)

Z29

Evidence and supporting papers of Peter I Talley, Talleys Fisheries Limited

(counsel for NZFIB and NZFIA)

Z30

Evidence of David C Sharp, Wilson Neil Limited

(counsel for NZFIB and NZFIA)

Z31

Evidence of Antony D Threadwell, Pegasus Bay Fishing Company on the quota management system

(counsel for NZFIB and NZFIA)

Z32

Evidence of Ronald T Mackay, Big Glory Seafoods Limited

(counsel for NZFIB and NZFIA)

Z33

Evidence of Lewis L Miller, Bapods Limited

(counsel for NZFIB and NZFIA)

Z34

Evidence of Ronald E Caughey, Mossburn Enterprises Limited

(counsel for NZFIB and NZFIA)

Z35

Evidence of Bruce W Urwin, Urwin and Co Limited

(counsel for NZFIB and NZFIA)

Z36

Evidence of Ben L Calder, Johnsons Oysters Limited on the quota management system
(counsel for NZFIB and NZFIA)

Z37

Evidence of Kypros Kotzikas, United Fisheries Limited, on the quota management system

(counsel for NZFIB and NZFIA)

Z38

Evidence of Cameron A McCulloch, Johnson & de Rijk Packing Company Limited

(a) Evidence of Cameron A McCulloch, Riverton Fishermens Co-operative

(b) Evidence of Cameron A McCulloch, Southfish Co-operative Limited

(counsel for NZFIB and NZFIA)

Z39

Evidence of Eric F Barratt, Sanford (South Island) Limited, on the history of the New Zealand fishing industry and the individual transferable quota system

(counsel for NZFIB and NZFIA)

Z40

Memorandum of deputy-chairperson giving directions as to filing of evidence, responses thereto and timetabling of further hearings, dated 3 September 1990

(registrar)

Z41

Further memorandum of the claimants on Z10, dated 12 September 1990

(counsel for claimants)

Z42

unallocated

Z43

Evidence of Donald M Loveridge, commentary on evidence of Professor Ian Gordon (see S16)

(counsel for Crown)

Z44

Evidence of Donald M Loveridge on the deeds of sale

(counsel for Crown)

Z45

Evidence of Robert D Cooper on the development of consultation channels and the development by MAFFish

(counsel for Crown)

Z46

Evidence of Robin L Allen on the MAF involvement in the latest developments in Maori fisheries

(counsel for Crown)

Z47

Evidence of John L McKoy on the definition of inshore, offshore and deepwater fisheries

(counsel for Crown)

Z48

Evidence of Ian N Clark on the history of New Zealand's deepwater fishery: discovery and development

(counsel for Crown)

Z49

Evidence of Tony Walzl on the Crown/Maori relationship over fisheries 1840-1900, and the Crown management of the fisheries

(a) Supporting papers to Z49

(b) Supporting papers to Z49

(counsel for Crown)

Z50

Maori Appellate Court decision on case stated re cross claim

(registrar)

AA

THE TWENTY FIFTH HEARING AT DATABANK HOUSE, WELLINGTON, 20 DECEMBER 1990

AA1

Evidence of Paul R Roberts on the Ngai Tahu Trust Board claim to the deep water fisheries resource

(counsel for NZFIB and NZFIA)

AA2

Evidence of Lee G Anderson on the Quota Management System.

(counsel for NZFIB and NZFIA)

AA3

Evidence of Peter I Talley on the Quota Management System by which the fisheries resources of New Zealand are managed

(counsel for NZFIB and NZFIA)

AA4

Submissions of counsel for Te Runanganui

AA5

Notice of application for order of stay from Mr Corkill representing Te Runanganui O Te Tau Ihu O Te Waka A Maui

AA6

Notice of application for order of stay from Mr M N Sadd representing Rangitane-ki-Wairau

AA7

Affidavit of Michael John Switzer

NOTE: Documents Z15-Z39, Z43-49 and AA1-7 were not considered for this report and will be dealt with in a subsequent hearing and report on the sea fisheries claim. Other documents in this list relating to sea fisheries and ancilliary claims, although already in evidence, have also not been considered.

Ngai Tahu Land Report

Appendix 07 Record of Inquiry

7.1 Notice of Claim

Appendix 7

RECORD OF INQUIRY

8.1 Notice of Claim

Notice of the claim and first hearing at Tuahiwi Marae Rangiora was sent to the following:

1 Minister of Lands
2 Minister of Forests
3 Minister of Fisheries and Agriculture
4 Minister of Conservation
5 Minister of the Environment
6 Minister of Maori Affairs
7 Minister of Agriculture
8 Director General, Land Corporation, Wellington
9 District Solicitor, Land Corporation, Christchurch
10 Counsel for claimants, Mr Weston Ward and Mr Lacelles, Christchurch
11 Crown Solicitor, Crown Law Office, Wellington
12 Mr A Hearn QC, Christchurch
13 Ngai Tahu Maori Trust Board, Christchurch
14 Federated Farmers of New Zealand, Mr E Chapman, Wellington
15 Mr P Temm QC, Auckland
16 Mr M Knowles, Christchurch
17 Office Solicitor, Royal Forest and Bird Protection Society
18 Office Solicitor, Minister of the Environment
19 Office Solicitor, Residual Department of Lands
20 Office Solicitor, Minister of Agriculture and Fisheries
21 Office Solicitor, Federated Mountain Clubs of New Zealand
22 Office Solicitor, Minister of Conservation
23 Maori Trustee, Maori Affairs Department
24 Such other parties as have notified representation
25 All members of the tribunal

Copies of the claim were also sent to those on the schedules below who either notified the tribunal of their interest, or who the tribunal considered might be affected by the claim.

Schedule A

1 New Zealand Maori Council
2 Department of Survey and Land Information
3 New Zealand Deerstalkers Association
4 National Water and Soil Conservation Authority, MOWD
5 Electricity Corporation of New Zealand
6 University of Canterbury
7 North Canterbury Hospital Board
8 Municipal Association (for distribution to members in the South Island)
9 Counties Association (for distribution to members in the South Island)
10 New Zealand Historic Places Trust
11 Te Maukanui o Te Maru, Kokiri Trust Managing Agency
12 Te Runaka o Katiwaewae
13 West Coast United Council
14 City of Dunedin
15 Kurahaupo Waka Society
16 Marlborough Catchment and Regional Water Board
17 Akaroa Fisherman's Association
18 North Canterbury Catchment Board and Regional Water Board
19 Crown Pastoral Lessees and Licensees
20 All mining license, right or leaseholders concerned in South Island mines or prospects
21 All leaseholders concerned in Mawhera Incorporation
22 Coal Corporation (for distribution to South Island licensees
23 Department of Justice, Christchurch: Commercial Affairs Division, High Court, District Court, Probation Service, Ad dington Prison, Christchurch Women's Prison, Paparua Prison, Tribunals Division
24 Housing Corporation of New Zealand, Nelson
25 Aparima Maori Committee (Inc), Riverton
26 Otago Acclimatisation Society
27 Southland Acclimatisation Society

Schedule B

Private individuals expressing interest in the claim.

1 Rangimarie Te Maiharoa
2 Otene Kuku George Karatiana
3 Jean Jackson
4 Anne Waipapa
5 Rewa Dick
6 J M Russell
7 Alison Whiting
8 Marg Hewlett
9 Fred Overmars
10 Lynne Smith
11 Mary King
12 James Tehau Donaldson

13 Mervyn Sadd
14 Irene F Edwards
15 E J Mould
16 I J Rogers
17 John Arther Nutira II
18 M Stonely
19 H A Radford
20 P L and L F Coughlan
21 G M Chapman
22 Te Whe Ariki Hutana
23 S R Gilmore
24 A C Brownie
25 Allen L Gillespie
26 P N Gould
27 Ernst & Whinney, Chartered Accountants
28 Tamati Paku Teweehi

Public notice was given in The Dominion on 8 June and 13 June 1987, and, it appears, in thePress, the Marlborough Express, the Otago Daily Times, the Timaru Herald on the 8 June 1987, and in the Hokitika Guardian on 13 June 1987.

On 7 August 1987 a further press release was distributed to the NZPA, the Evening Post, the Dominion, TVNZ-Christchurch, Radio Avon, Radio Ashburton, Radio 3ZB, the Ashburton Guardian, Christchurch Star, and the Press.

Ngai Tahu Land Report

Appendix 07 Record of Inquiry

7.2 Appointments

8.2 Appointments

The tribunal was constituted to comprise:

Judge Ashley G McHugh (presiding officer)
Bishop Manuhuia A Bennett
Sir Monita E Delamere
Sir Hugh Kawharu
Professor Gordon Orr
Sir Desmond Sullivan
Georgina Te Heuheu

- Paul Temm QC, David Palmer and Michael Knowles were appointed as counsel to assist the claimants.

- Professor Alan Ward of the University of Newcastle, New South Wales was appointed to prepare a report on historical aspects of the claim.

- Doctor George Habib, fisheries consultant of Auckland, was commissioned to investigate and report on fisheries aspects of the claim.

- Doctor Peter Tremewan of the University of Canterbury was commissioned to prepare a report on aspects of the claim relating to Banks Peninsula.

- Doctor Jane McRae of the University of Auckland was commissioned to prepare a report on archival Maori sources relating to the claim.

- Lena Manuel assisted the tribunal as interpreter.

Ngai Tahu Land Report

Appendix 07 Record of Inquiry

7.3 Hearings and Appearances

8.3 Hearings and Appearances

1 TUAHIWI MARAE AND RANGIORA HIGH SCHOOL, 17-20 AUGUST 1987

For the claimants:

Paul B Temm QC
David M Palmer
Michael J Knowles

For the Crown:

Anthony Hearn QC
Shonagh Kenderdine
Peter Blanchard

Also Appearing:

Evan T Alty-Department of Conservation
Ray M Budhia-Department of Maori Affairs
Ewan J Chapman-Federated Farmers of New Zealand, South Island
High Country Committee Crown Renewable Lessees Association
L G Fergusson-Ministry of Agriculture & Fisheries
Ronald W Little-Ministry of Agriculture & Fisheries
M Maniapoto-Department of Maori Affairs
Christopher D Mouat-Land Corporation Ltd
J Paki-Department of Maori Affairs
J M Russell-Te Runanga o Katiwaewae
John G Stevens-Interim Committee of the Kurahaupo Waka Trust
Hilary L Talbot-Electricity Corporation of New Zealand Ltd
Richard T Wickens-Office of the Maori Trustee

Submissions and evidence were received from:

Tipene O'Regan (A27), Otene Kuku G Karatiana, Henare R Tau(A17), Te Wharetutu Te A Stirling (A18) Wiremu Torepe, Joe Tukupua, MacCully Matiu, Hon Matiu Rata, Robert A Whaitiri, Magdaline Walscott, George N Te Au, Harold Ashwell, Aroha H Reriti-Crofts (A20), Rewi Brown, Rangimarie Te Maiharoa (A19), Mori Pickering, Montero J Daniels, Tiny M K Wright, Sydney Cormack (A22-A23), Runa Pihama-Bell, Freda D Brown, Eruera Te M I Te Aika (A25), Trevor H Howse (A12), Harry C Evison (A9, A13, A28-A35), Patrick McGloin

Documents A1 to A54 were admitted to the record

2 TUAHIWI MARAE, 21-23 SEPTEMBER 1987

For the claimants:

Paul B Temm QC
David M Palmer
Michael J Knowles

For the Crown:

Anthony Hearn QC
Shonagh Kenderdine
Peter Blanchard

Also appearing:

Evan T Alty-Department of Conservation
Ray M Budhia-Department of Maori Affairs
Ewan J Chapman-Federated Farmers of New Zealand, South Island
High Country Committee Crown Renewable Lessees Association
Fay Collins-Department of Conservation
Ronald W Little-Ministry of Agriculture & Fisheries
Christopher D Mouat-Land Corporation Ltd
John G Stevens-Interim Committee of the Kurahaupo Waka Trust
Hilary L Talbot-Electricity Corporation of New Zealand Ltd
Richard T Wickens-Office of the Maori Trustee

Submissions and evidence were received from:

Mervyn N Sadd (B6), Harry C Evison (B2-B3), Professor J T Ward (B4), Jean Jackson (B10), Henare R Tau.

Documents B1 to B17 were admitted to the record.

3 OTAKOU MARAE, 2-4 NOVEMBER 1987 AND TUAHIWI MARAE, 5 NOVEMBER 1987

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Ray M Budhia-Department of Maori Affairs
Ewan J Chapman-Federated Farmers of New Zealand, South Island
High Country Committee Crown Renewable Lessees Association
Fay Collins-Department of Conservation
Phillip Green-Office of the Maori Trustee
Edward Moses-Department of Maori Affairs
Christopher D Mouat-Land Corporation Ltd
John G Stevens-Interim Committee of the Kurahaupo Waka Trust
Richard T Wickens-Office of the Maori Trustee

Submissions and evidence were received from:

George Ellison, Magdaline Walscott, Mori M C M Ellison (C4), Wharerua K Ellison, Emma P Grooby-Philips (C5-C6), Tiny Wright, Moira M Reiri, Dorothy Walsh, Vivian B Russell, Martin Taiaroa, Kuao Langsbury (C9), Tatani Wesley, Tipene O'Regan (C10), Edward Ellison (C12), Riwai Karetai, Craig Ellison (C13), Dr Atholl Anderson (C8), Dr Ann R Parsonson (C14-C19), Andrew M Mason (C21), Harry C Evison (C22)

Documents C1 to C24 were admitted to the record.

4 ARAHURA MARAE AND ASHLEY MOTOR INN, GREYMOUTH, 30 NOVEMBER-3 DECEMBER 1987

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Evan T Alty-Department of Conservation
Ray M Budhia-Department of Maori Affairs
Phillip Green-Office of the Maori Trustee
Ronald W Little-Ministry of Agriculture and Fisheries
W F Morgan-Dingwall & Paulger Ltd and Ballie Neville & Co Ltd
Christopher D Mouat-Land Corporation Ltd
Sandra Te Hakamatua Lee-For the families and descendants of Iri Te Amokura Pihawai Lousich-Feary, Nikau Te Kiwha Pihawai-Tainui, Roka Te Hakamatua Pihawai-Johnson, Wiremu Welch, Metapere Ngawini Barrett
Richard T Wickens-Office of the Maori Trustee
Dr Willie Young-West Coast South Island Leaseholders Association, Greymouth Borough Council, Dominion Breweries Ltd, Campbell Renton Hardware Ltd and J E Thorn and Sons.

Submissions and evidence were received from:

Kelly R Wilson (D10), Ihaia B Hutana, Alan L Russell, Aroha H Reriti-Crofts (D13), Iri Barber, (D12), Dorothy M Fraser (D14, D15), James M Russell (D17), Tipene O'Regan (D18), Barry M Dallas (D24-D26), Andrew M Mason (D4, D20), James P McAloon (D3, D22-D23), Mayor Barry Dallas (D24-D26), John Duncan, Sydney B Ashton (D4)

Documents D1 to D30 were admitted to the record.

5 TE RAU AROHA MARAE, AWARUA, BLUFF, 1-3 FEBRUARY 1988

The tribunal and parties made a site visit to Lakes Hawea and Wanaka on 3 February 1988.

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Tony Avery-Ministry of Agriculture and Fisheries
Jesse H Beard-Department of Conservation
Ray M Budhia-Department of Maori Affairs
Fay Collins-Department of Conservation
Robert D Cooper-Ministry of Agriculture and Fisheries
Alexander P Laing-Estate of R G Selbie
Ronald W Little-Ministry of Agriculture and Fisheries
Edward Moses-Department of Maori Affairs and the Office of the Maori Trustee
Christopher D Mouat-Land Corporation Ltd
Hilary L Talbot-Electricity Corporation of New Zealand Ltd

Submissions and evidence were received from:

Robert A Whaitiri (E1), Trevor H Howse (E5), George N Te Au (E6), Wiremu B Davis (E7), Taare H Bradshaw (E8), Eva Wilson (E9), Sydney Cormack (E1, E16), Teriana Nilsen, Naomi A Bryan (E11-E12), Rena N P Fowler (E13-E15), James P McAloon (E1, E17-E19), Tipene O'Regan, Harold Ashwell (E3), Jane K Davis (E31)

Documents E1 to E35 were admitted to the record.

6 OTAKOU MARAE, 22-23 FEBRUARY 1988

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Evan T Alty-Department of Conservation
Ray M Budhia-Department of Maori Affairs and the Office of the Maori Trustee
Jesse H Beard-Department of Conservation
Edward Moses-Department of Maori Affairs and the Maori Trustee
Christopher D Mouat-Land Corporation Ltd

Submissions and evidence were received from:

Dr Ann R Parsonson (F1-F10), George Ellison (F12), Bill Dacker (F11)

Documents F1-F13 were admitted to the record.

TUAHIWI MARAE, 24-25 FEBRUARY 1988

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Ray M Budhia-Department of Maori Affairs and the Office of the Maori Trustee
Fay Collins-Department of Conservation
Edward Moses-Department of Maori Affairs and the Office of the Maori Trustee
Christopher D Mouat-Land Corporation Ltd
Hilary L Talbot-Electricity Corporation of New Zealand Ltd

Submissions and evidence were received from:

Harry C Evison (G1, G3-G7), Ken Piddington (G8)

Documents G1 to G9 were admitted to the record.

7 TUAHIWI MARAE; KIWI RUGBY FOOTBALL CLUB ROOMS, HOKITIKA; TAUMUTU MARAE; AROWHENUA MARAE; AND TE RAU AROHA MARAE, AWARUA, 11-20 APRIL 1988

The tribunal and parties also made visits to the Canterbury Museum, Wairewa, Waihora, the Arowhenua area, inland lakes, Aomarama, and the Wainono area.

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Evan T Alty-Department of Conservation
Ray M Budhia-Department of Maori Affairs and the Office of the Maori Trustee
Tim Castle-NZFIA
L G Fergusson-Ministry of Agriculture and Fisheries
John L Marshall-NZFIB
Edward Moses-Department of Maori Affairs and the Office of the Maori Trustee
Christopher D Mouat-Land Corporation Ltd
J Paki -Department of Maori Affairs and the Office of the Maori Trustee
Bruce Scott-NZFIA
John G Stevens-Interim Committee of the Kurahaupo Waka Trust
Hilary L Talbot-Electricity Corporation of New Zealand Ltd
Carrie Wainwright-NZFIB

Submissions and evidence were received from:

Dr Atholl Anderson (H1-H3), Rawiri Te M Tau (H6), Tipene O'Regan (H17-H19), David T Higgins (H5), William A G Goomes (H5), Wiremu T Solomon (H7), Ray Hooker (H8, H37-H38), Hemi Te Rakau (H36, H39-H40), Iris Climo (H8), Albert K Te Naihi-McLaren (H8), Gordon McLaren (H8, H41-H42), Kelly R Wilson (H8), James M Russell (H8, H43), Alan L Russell (H8), Rewi Brown (H9), Donald R Brown (H9), Catherine E Brown (H9), Mere K E Teihoka (H9), Morris T Love (H9), Jack T Reihana (H10), Wiremu Torepe (H10, H49-H50), Kelvin Anglem (H10, H48), Murray E Bruce (H10), Kelvin T A D Te Maire (H10), Rangimarie Te Maiharoa (H10), Te Ao H Waaka (H10), Allan S Evans, Edward Ellison (H12), Matt Ellison (H11), Robert A Whaitiri (H13), Harold F Ashwell (H13), Taare H Bradshaw (H13, H54), Terence P Gilroy (H13), Kevin O'Connor (H13, H55), Huhana P Bradshaw (H13)

Documents H1 to H58 were admitted to the record.

8 TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTON, 19 MAY 1988

For the claimants:

Tipene O'Regan

For the Crown:

Shonagh Kenderdine

Documents I1 to I7 were admitted to the record.

9 TUAHIWI MARAE, 27-30 JUNE 1988

On 29 June 1988 members of the tribunal visited Kaiapoi pa site. On 30 June 1988 the Crown opened its response to the claim.

For the claimants:

David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard
Anthony Hearn QC

Also appearing:

Ray M Budhia-Department of Maori Affairs and the Office of the Maori Trustee
Ewan J Chapman-Federated Farmers of New Zealand, South Island
High Country Committee Crown Renewable Lessees Association
Fay Collins-Department of Conservation
Robert D Cooper-Ministry of Agriculture and Fisheries
Hamish R Ensor-Federated Farmers
Ronald W Little-Ministry of Agriculture and Fisheries
John L Marshall-New Zealand Fishing Industry Board
Bruce Scott-New Zealand Fishing Industry Association
John G Stevens-Interim Committee of the Kurahaupo Waka Trust
Carrie Wainwright-New Zealand Fishing Industry Board.

Submissions and evidence were received from:

R R Karaitiana (J5), William W Tipa (J5), Brian J Piner (J5), M Jones (J5), Harry C Evison (J1, J6), Tipene O'Regan (J7), James P McAloon (H9, J2, J8, J39), Wiremu Solomon (H7, J12-J14), Barry Brailsford (J10, J15-19, J46), Henare R Tau (J10, J20-J30, J45), David Higgins (J10, J31-J35), Trevor H Howse (J10, J36-J38), Peter R Korako (J10, J40-42, J44), Montero J Daniels, Dr Peter J Tremewan (J47)

Documents J1 to J52 and K1 to K2 were admitted to the record.

10 SOUTHERN CROSS HOTEL, DUNEDIN, 25-28 JULY 1988

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Ray M Budhia-Department of Maori Affairs and the Office of the Maori Trustee
Jesse H Beard-Department of Conservation
J Burdon-Federated Farmers of New Zealand, South Island High Country Committee
P Garden-Federated Farmers of New Zealand, South Island High Country Committee
L Iosefa-Department of Maori Affairs and the Office of the Maori Trustee
Edwin D Lyttle-Federated Farmers, Otago
J Paki-Department of Maori Affairs and the Office of the Maori Trustee
I E Vercoe-Federated Farmers, Otago

Submissions and evidence were received from:

Professor Gordon S Parsonson (L5), Ian R H Whitwell (L11), Graham J Sanders (L2-L3, L17-L18, L26-L29), Dr Donald M Loveridge (L8-L9, L19-L24)

Documents L1 to L36 were admitted to the record.

11 COLLEGE HOUSE, CHRISTCHURCH, 29 AUGUST-1 SEPTEMBER 1988

For the claimants:

Paul B Temm QC

For the Crown:

Anthony Hearn QC
Shonagh Kenderdine
Peter Blanchard

Also appearing:

Christopher D Mouat-Land Corporation Ltd

Submissions and evidence were received from:

David J Alexander (M5, M6), Graham J Sanders (M7, M8, M10, M27), Dr Donald M Loveridge (M2, M10, M11), Trevor H Howse, Dr John M Barrington (M20, M21), Anthony Walzl (M14, M15), David A Armstrong (M16, M17)

Documents M1 to M34 were admitted to the record.

12 ASHLEY MOTOR INN, GREYMOUTH, 19-22 SEPTEMBER 1988

For the claimants:

David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Graham Allan-Wakatu Incorporation
Ray M Budhia-Department of Maori Affairs
Preston E Bulfin-Parininihi-ki-Waitotara Incorporation
L Iosefa-Department of Maori Affairs
Steve Marshall-Wakatu & Combined Authorities
Tom Woods-Office of the Maori Trustee
J M Russell-Arahura Maori Komiti
Richard T Wickens-Office of the Maori Trustee
Dr Willie Young-West Coast Leaseholders

Submissions and evidence were received from:

Edward Tamati (N10), Peter Charleton, Sir Ralph Love (D1, N12, N17-N18), Hohepa Soloman (N11), Tipene O'Regan, Dr Donald M Loveridge (N2, N19-N21), Barry W Bone (N24, N27-N29), David Armstrong (N6), Anthony Walzl, Margaret Moir (N31), Catherine J Nesus (N33), Thomas I Marks (N41), Alfred M Jamieson (N42), Garlyn I Dixon (N44), E T Weepu, Ian S Marshall (D7)

Documents N1 to N50 were admitted to the record.

13 STUDENT UNION BUILDING, OTAGO UNIVERSITY, DUNEDIN, 7-10 NOVEMBER 1988

The tribunal and parties visited the Otago Museum where they were shown the Maori collection and the plans for the new Maori display area. There was also a visit to the Otago Settlers Museum which was followed by a site visit to Waikouaiti and the Puketeraki marae at Waikouaiti.

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Ray M Budhia-Department of Maori Affairs
John Crook-Telecom Corporation of New Zealand Ltd
R Young-Telecom Corporation of New Zealand Ltd

Submissions and evidence were received from:

Dr Donald M Loveridge (O2), Paul Hellebrekers, Josephine Barnao (O3, O22, O24-O26, O32, O45), David J Alexander (O5, O14, O27, O44), Graham J Sanders (O13, O28, O32-O34, O36-O37), Anthony Walzl (O16, O20-O21, O43), Professor David I Poole (O15-O16), Ronald D Keating (O17, O44), Donn Armstrong (O18, O44), Thomas I Marks (O19, O44), Mora Pickering, Ian R H Whitwell (O14)

Documents O1 to O54 were admitted to the record.

14 COLLEGE HOUSE, ILAM, CHRISTCHURCH, 5-9 DECEMBER 1988

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Annsley Kerr

Also appearing:

Ewan J Chapman-Federated Farmers of New Zealand, High Country Association
John Crook-Telecom Corporation of New Zealand Ltd
Edwin D Lyttle-Federated Farmers, Otago
Christopher D Mouat-Land Corporation
R Young-Telecom Corporation of New Zealand Ltd

Submissions and evidence were received from:

Dr Donald M Loveridge (P2, P3, P19), Professor Gordon S Parsonson (P4, P5), David A Alexander (P7), Ronald Tindal (P8), Anthony Walzl (P10-P11, P21), Trevor H Howse, John A Glennie (P23), B Johnson (P15), Robert D Cooper (P12, P13), Hamish R Ensor (P22, P28), Iris Scott (P21), Donald M Cochrane (P22), Jim Morris

(P22), Ronald W Little (P15-P16), Dr Peter Todd (P16), Paul Sagar (P16), Professor W Clark (P16), Josephine Barnao (P14, P33), David A Armstrong (P18)

Documents P1 to P34 were admitted to the record.

15 MANCAN HOUSE, CHRISTCHURCH, 7-9 FEBRUARY 1989

For the claimants:

Paul B Temm
David M Palmer

For the Crown:

Shonagh Kenderdine

Also appearing:

Tim Castle-NZFIA
John L Marshall-NZFIB
Hilary L Talbot-Electricity Corporation of New Zealand Ltd

Submissions and evidence were received from:

Malcolm R Hannah (Q14), James P McAloon (Q3, L8), David J Alexander (Q10, O17), Anthony Walzl (Q8-Q9, Q11), Harry C Evison (Q22-Q23), Mrs Baumann (Q15), Mark France (Q16)

Documents Q1 to Q33 were admitted to the record.

16 CHATEAU REGENCY, CHRISTCHURCH, 10-13 APRIL 1989

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Carrie Wainwright-NZFIB

Submissions and evidence were received from:

David A Armstrong (R8), Dr R Allen (R20), Ian N Clark (R21, R24-R25), Robert D Cooper (R23, R26), John A Colman (R11), John D Booth (R12), Dr Talbot Murray

(R13), Jacqui Irwin (R14), A Coakley (R14), Tony Avery (R14), Lawrence J Paul (R14, R16), Donald A Robertson (R16, R19), Graeme McGregor (R14), Dr Rosemary J Hurst R15), John B Jones (R15), Alistair B MacDiarmid (R15), Robert H Mattlin (R16), Peter McMillan (R19), Dr Mary E Livingston (R17), Dr Kevin J Sullivan (R18), Bruce Shallard (R22), Neil Martin (R23, R32), Dr Donald M Loveridge (R33-R34), Dr Ann R Parsonson (R35)

Documents R1 to R40 were admitted to the record.

17 CHATEAU REGENCY, CHRISTCHURCH, 29 MAY-2 JUNE 1989

For the claimants:

David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard
Annsley Kerr

Also appearing:

John L Marshall-NZFIA
Bruce Scott-NZFIA
Carrie Wainwright-NZFIB.

Submissions and evidence were received from:

David Henson (S18), Grant T Crothers (R24), Robert D Cooper (S1), Dr Murray A Bathgate (S2), Anthony Walzl (S7-S8), David J Alexander (S6), David A Armstrong (S9-S10), Anthony T R Corcoran (S11), Patrick King (S22), James P McAloon (R39), Professor Ian A Gordon (S16), Richard N Holdaway (S17), Alison F Mannell (S19-S21), Ralph E Brown (S20), Steven J Anderson (S21)

Documents S1 to S24 were admitted to the record.

18 CHATEAU REGENCY, CHRISTCHURCH, 12-16 JUNE 1989

For the claimants:

Paul B Temm QC

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Submissions and evidence were received from:

Professor Alan Ward (T1-T2, T5-T8, T13), Dr Peter J Tremewan (T1, T3), Jenny Murray (T1, T10, T12)

Documents T1 to T14 were admitted to the record.

19 CHATEAU REGENCY, CHRISTCHURCH, 3-6 JULY 1989

For the claimants:

Paul B Temm QC

For the Crown:

Shonagh Kenderdine

Also appearing:

Tim Castle-NZFIA
John L Marshall-NZFIA
Bruce Scott-NZFIB

Submissions and evidence were received from:

Dr Harry Morton (U1), Kevin P Molloy (U2), Deborah Montgomerie (U3), Dr George Habib (T4), Rick Boyd (T4)

Documents U1 to U11 were admitted to the record.

20 TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTOn

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Annsley Kerr

Also appearing:

Tim Castle-NZFIA
John L Marshall-NZFIA
Bruce Scott-NZFIB
Carrie Wainwright-NZFIB

Submissions and evidence were received from:

Dr George Habib (T4)

Documents V1 to V10 were admitted to the record

21 TUAHIWI MARAE, 14-17 AUGUST 1989

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Christopher D Mouat-Land Corporation Ltd

Documents W1 to W12 were admitted to the record.

22 TUAHIWI MARAE, 11-15 SEPTEMBER 1989

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Fay Collins-Department of Conservation
John L Marshall-NZFIB and NZFIA

Documents X1 to X13 were admitted to the record.

23 Tuahiwi Marae, 9-10 October 1989

For the claimants:

Paul B Temm QC
David M Palmer

For the Crown:

Shonagh Kenderdine
Peter Blanchard

Also appearing:

Ewan J Chapman-Federated Farmers of New Zealand, South Island
High Country Committee Crown Renewable Lessees Association
Christopher D Mouat-Land Corporation Ltd

Documents Y1 to Y3 were admitted to the record.

24 TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTON, 28 JUNE 1990

For the claimants:

Paul B Temm QC

For the Crown:

Annsley Kerr
Harriet Kennedy

Also appearing:

Tim Castle-NZFIA and NZFIB

Documents Z1 to Z9 were admitted to the record.

25 TRIBUNALS DIVISION BOARDROOM, DATABANK HOUSE, WELLINGTON, 20 DECEMBER 1990

For the claimants:

Paul B Temm

For the Crown:
Jennifer Lake
Annsley Kerr

Also appearing:
John Stevens and Bruce A Corkill-Te Runanganui O Te Tau Ihu O Te Waka A Maui
Deborah A Edmonds-Ngati Toa Rangatira
Robert J Harte-Rangitane-ki-Wairau
John Marshall-NZFIA and NZFIB

Documents AA1 to AA7 were admitted to the record.

Ngai Tahu Land Report

Appendix 08 Presiding Officer's Closing Address

8.1 Presiding Officer's Closing Address

Appendix 8

PRESIDING OFFICER'S CLOSING ADDRESS

After a hearing that commenced here on this marae at Tuahiwi on 17 August 1987 and continued in various places at almost regular monthly intervals over the next two years we have now come to the end.

It has been a marathon in every sense of the word. As participants in that marathon we are all exhausted by the effort. By "we" I mean the claimants, the Crown, and this tribunal. But behind these three principal participants there also lies a host of supporting people who have taken part. If I could magically switch on a movie screen and display the record of this inquiry it would take an hour to acknowledge the credits.

It was decided at the outset of this claim that the tribunal would endeavour to receive as much evidence as possible in written form. That procedure was followed and apart from some oral testimony of kaumatua and other witnesses which, with all other evidence was recorded on tape for later transcription, the bulk of the evidence was presented in writing. The result is that the tribunal has before it a huge written record 8.5 metres high which documents the Ngai Tahu case and the Crown response. It also includes numerous other submissions made to the tribunal by persons and bodies interested in or affected by the claim.

The tribunal notified and timetabled its hearings in such a way as to allow the claimants and the Crown and other bodies to use the three weeks between each week of hearing to prepare for the fourth week of hearing. This procedure thrust a great burden on counsel as they co-ordinated and supervised the preparation of material by the researchers and experts involved. It was continually, over 25 weeks of hearings, a battle against time, but almost without exception the tribunal as a result was able methodically to work through that evidence. In the course of this inquiry the tribunal travelled all over the South island in order to hear and see the facts and issues arising from the claim.

The record shows a total of over 900 submissions and exhibits were presented to the tribunal, some containing as many as 700 pages each. The document evidence tendered to the tribunal comprised thousands of different items. The presentation of written evidence and submission gave rise to another helpful procedure adopted by the tribunal. In many cases the evidence given was detailed historical or other expert fact. After presentation at the hearing opportunity was given to the parties and tribunal to question the witness to clarify the evidence, but in addition each party was permitted to file a written memorandum commenting on the evidence and expressing

any contrary view. By this method the tribunal not only avoided unnecessary and often time wasting oral examination, but allowed both the Crown and the claimants the necessary time to give considered and researched response.

During the course of hearing, 20 memoranda of directions and interlocutory matters were issued by the tribunal and responded to by counsel. The record of documents in this claim is a large report in itself although it only lists the subject headings and author of each piece of evidence presented. Throughout this extensive inquiry of fact the tribunal has been helped considerably by the cooperative, constructive attitude of counsel appearing for the claimants and for the Crown. I will refer later to their participation in this inquiry.

When Mr Temm opened his case for the claimants he explained that although it was a single claim it nevertheless covered nine separate grievances which he referred to as "The Nine Tall Trees of Ngai Tahu". We have heard this expression many times over the past two years. We have also found as the hearing progressed that on each of the nine tall trees there were a varying number of branches each of which represented a claim within the claim. So that we are not facing nine separate claims, but in fact a total of 73 grievances arising out of the eight Ngai Tahu Crown purchase deeds, and mahinga kai. Each of these grievances requires comprehensive research and inquiry. But that is not all. Underneath the nine tall trees lie considerable undergrowth- representing over one hundred smaller grievances mainly raised by the people as the tribunal moved through the different districts to hear the main claims.

This will give some indication of the huge task that now confronts this tribunal as it commences to assess the merits of each of the claims and to determine the issues.

The tribunal proposes to report in two parts on this claim and the completion of counsel's submissions today ends the first phase. The tribunal in its first report will generally and comprehensively review the claim, examining and determining the facts and issues and reaching findings of fact. The tribunal will also define the principles of the Treaty of Waitangi which governed the relationship between Ngai Tahu and the Crown. Necessarily the report will contain the findings of this tribunal on the question of whether the Crown has acted in breach of those principles as that is the primary and statutory requirement of this tribunal. This first report will not contain specific recommendations as to the quantum of compensation payable or parcels of land that should be returned to Maori ownership. The tribunal proposes, and counsel for both the claimants and Crown respectively agree, that the question of remedies should be held over and dealt with at a later stage and, if necessary, by a further tribunal report. This is not a new approach by the tribunal. It was followed in the Muriwhenua Report (1988). It will no doubt be followed by other tribunals and is a sensible move which will save considerable time and expense. It will allow the claimants and the Crown to negotiate and even hopefully mediate settlement of remedies after both parties have had an opportunity to consider the tribunal's findings. The tribunal is, of course, mindful that its report should be sufficiently declaratory of the extent of its findings of grievance so that the Maori claimants, the Crown and indeed the public at large may have some perception of the quantum of any settlement that may be needed.

Having explained that the tribunal proposes to defer recommendations on remedies it should also be mentioned that if the parties cannot reach a settlement on remedies

further formal hearings may be required to hear submissions from counsel on the nature and extent of remedies sought.

Although the question of general remedies will be deferred it is quite possible the tribunal may include specific recommendations in its first report where it is seen by the tribunal that urgent action is required to deal with a matter or that it may be desirable and convenient in the report to advise a certain course of action. This may arise in the case of some of the undergrowth claims.

The tribunal is anxious to avoid fragmentation of its reports but it is also very conscious of the fact that this claim has been proceeding over a period of two years and has been a considerable drain on the resources of the claimants. It is possible that the tribunal may have to consider this question as a matter of immediate concern and act accordingly. I now come back to the tasks in hand-the compilation of the report on this immense and complex claim.

May I say that the tribunal has drawn together the draft plan and profiles of the report. It is daunting to contemplate the work that is now required to fill in the framework and build the report. It will take some time and will require patience and tolerance on all sides. But that is what this tribunal has been commissioned to do and will do it. Each grievance will require separate analysis of the arguments for and against. Behind the arguments for and against each grievance lie masses of historical, legal, archaeological, biological, geographical and other scientific, social, economic facts and submissions. This tribunal has undoubtedly had placed before it every discoverable piece of information relevant to the wide range of facts surrounding the many and varied topics covered in this claim. Only those who have been present throughout can fully understand the mammoth mountain of evidence and submission that has accumulated and now has to be broken down and sifted and sorted and pigeonholed into each of the respective claims before each issue can be decided.

But it can also be said that those who have been present throughout have shared a learning process. And out of this learning process, and as a result of concessions that the Crown have made during the course of this hearing, it is clear indeed that underlying the whole of the Crown dealings with Ngai Tahu in the South Island there was a failure of the Crown to provide adequate reserves for the present and future needs of the Ngai Tahu people when the various purchases took place.

This failure of the Crown to ensure Ngai Tahu were left with a sufficient endowment for their own present and future needs has impacted detrimentally on the economic circumstances of Ngai Tahu. It also has resulted in the denial of access to traditional food resources.

The tribunal will deal fully with this breach of Treaty principles in its report, but the evidence presented to this tribunal throughout this inquiry and acknowledged by the Crown is so cogent and clear that the tribunal would be remiss in its duty if it failed to comment on it at this point. There are a number of issues that require considerable study by the tribunal before it makes a finding-some of these issues are substantive matters. These include:

i) whether or not Ngai Tahu should have been awarded tenths in the Otakou purchase;

ii) whether Ngai Tahu sold 'the hole in the middle' in the Kemp purchase; and

iii) whether the land west of the Waiau river (the Fiordland area) was sold under the Murihiku deed.

There are others. Persuasive argument and considerable evidence on these disputed questions has been put to the tribunal by both the claimants and the Crown. They require careful investigation. But not so the inadequacy of reserves and the lack of land resource for Ngai Tahu. The Crown's failure to apply its stated policy that the agents of the Crown "were not to purchase from the Maori any land the retention of which would be essential or highly conducive to their own comfort, safety or subsistence" is plainly and abundantly clear to this tribunal and to all who heard and took part in these proceedings.

It is important that the tribunal notify this finding; albeit expressed today in a preliminary way and to be enlarged upon and perhaps quantified in the full report; for this reason.

The claimants have indicated that as part of any remedy they seek return of land. There can be no doubt whatsoever that Ngai Tahu, in any subsequent negotiations with the Crown to settle remedies, will be asking the Crown to return to them Crown land or land vested in state owned enterprises. Ngai Tahu have stated their desire for land as compensation to this tribunal and publicly on several occasions. Until this tribunal has completed its investigations and reached its findings on each grievance it cannot with any certainty indicate the extent of grievances and thereby allow the parties to treat with each other on the question of recompense. That the tribunal is able to say today however that Ngai Tahu were inadequately endowed with land at the time of the Crown purchases must surely indicate that Crown land or state owned enterprise land may be resorted to as compensation.

Unfortunately the proceedings before this tribunal have not always been as fully reported as one might have wished in order to apprise the nation of the extent of the grievances in the Ngai Tahu claim. Indeed this situation has also occurred in the North Island in respect of other claims.

The president of the Court of Appeal, Sir Robin Cooke, in the decision given on 3 October 1989 in the Tainui coal case said this:

it is obvious that, from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip-service disclaimers of racial prejudice and token acknowledgements that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured. On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is

useless. The principles of the Treaty have to be applied to give fair results in today's world.

The learned judge in making that statement was referring to the possible award of Crown surplus lands in settlement of confiscation claims.

The Court of Appeal declared in the Tainui case that the Crown should take no action either directly or by its agents to dispose of Crown lands until such time as a protective scheme had been worked out for the Tainui claimants.

As land will be an essential ingredient of remedial settlement in the Ngai Tahu claim the tribunal urges government to follow the clear principle stated in the Tainui case and take no action to dispose of surplus South Island Crown land pending the completion of the Ngai Tahu report and the tribunal recommendations. Following the unequivocal view of the Court of Appeal, that any attempt to shut out in advance any claim to surplus land is not consistent with the Treaty this tribunal would expect government and its agents to abide by this declaration and hold back from land disposal.

I now wish to make some acknowledgements.

The tribunal wishes to thank the claimants, Mr Tau and the Ngai Tahu Trust Board for the dignity, patience and courtesy which in every way have been so much a part of the way in which these proceedings have been initiated and conducted. At all the hearings the quiet restraint and politeness of the kaumatua and people have impressed this tribunal. There have been many occasions when the witnesses including professional and expert persons have been just unable to control strong emotional stress as they have recounted history and its effect on Ngai Tahu people. However strong, feelings of frustration and anger have been carefully restrained. This has not been an easy process as there has been much to be angry about. Lurking constantly and there to step in and moderate strong language has been the great ally of Maori people-their constant companion-their sense of humour.

There has not been much to laugh about in the evidence apart form the irony of some of it and the many misjudgments of Maori and their future in much of it. This nation is fortunate that its tangata whenua can still laugh.

What Ngai Tahu can well be proud of is that they as a people have found themselves as a people and a tribe. As importantly, they have more than adequately honoured their promise to their tipuna in the presentation of this claim, this 'take' to the Waitangi Tribunal. Ngai Tahu have followed the processes laid down by law. They have always done that but without much success. There is no doubt that with the passing of years it is not always possible to retain the accuracy of record, particularly of the spoken and handed down word. It cannot be said of Ngai Tahu that they have not persevered in their search for justice. I hope their wairua can now rest.

The claimants, Mr Tau, the trust board and all Ngai Tahu who have supported this claim have upheld the mana of Ngai Tahu They have discharged the heavy responsibility which has burdened Ngai Tahu shoulders and hearts and minds for so long.

Heading the presentation of the Ngai Tahu claim has been their counsel, Mr Paul Temm QC. The tribunal thanks Mr Temm for the courteous, constructive and very able way in which he has presented this very wide ranging claim. The tribunal has appreciated very much indeed counsel's helpful procedural suggestions which have certainly allowed the proceedings to flow smoothly yet enabled the tribunal to allow adequate response on all evidential matters. The tribunal extends also to Mr David Palmer its gratitude for the assistance he has given during this claim. The tribunal has asked me also to thank Crown counsel Mrs Kenderdine and Mr Blanchard. I believe it is important to record at the end of this arduous inquiry, not only the most competent way in which the Crown has responded to the claim, but more particularly the way in which it has been done. Crown Counsel saw the Crown's role in this matter as presenting to the tribunal every relevant fact uncovered by the team of researchers and professionals engaged in this massive task. And they did so.

In my respectful view, Crown counsel have acted in every way to protect the Crown's position, yet more importantly to uphold the honour of the Crown. The Crown did not see itself in an adversarial role, though it did not hesitate to challenge disputed grounds; it rather saw itself almost in an amicus curiae role which required it to bring to the tribunal's notice all discovered material and opinion whether against or for the claim. The background researching by Crown officers and professional consultants has covered every facet, every nook and cranny of not only the nine tall trees and the related claims but also the large number of small claims. The result is that the record before this tribunal contains a most comprehensive and valuable taonga that will provide future generations with a priceless data base. This has resulted from the combined efforts of the claimants, the Crown and the tribunal's research teams. They are all to be thanked and congratulated for their diligence and scholarship. Before passing from the subject of the Crown's participation in this inquiry may I venture to suggest that if those Crown officials attending the South Island land sales 140 years ago had regarded the Crown's honour in the way these proceedings have been conducted by Crown officers this tribunal would not have been here today.

In conclusion, but not least of all, the tribunal expresses it thanks to the band of loyal and dedicated staff of the Ngai Tahu Trust Board and tribunal, and as well the trustees and marae committees of marae we visited, and the people, for all the arrangements made to ensure our hearings ran smoothly and that we were comfortable.

It now only remains to be said that the tribunal reserves its findings which will be reported to the minister in due course.

The tribunal now stands adjourned.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.1 Ashley George McHugh, Presiding Officer

Appendix 9

MEMBERS OF THE NGAI TAHU TRIBUNAL

9.1 Ashley George McHugh, Presiding Officer

Ashley McHugh is acting chief judge of the Maori Land Court and has served as deputy chairperson of the Waitangi Tribunal. Born in Wellington in 1927 and educated at St Patricks College, Wellington, he later served in the RNZAF towards the end of World War II and then completed his law studies at Victoria University. For the next 25 years he practised law in Gisborne, specialising in tribunal work, and during that time he developed a knowledge of Maori issues and law.

In 1980 Judge McHugh was appointed to the bench of the Maori Land Court at Whangarei. He later sat at Wanganui and in 1987 was appointed deputy chief judge of the Maori Land Court.

For many years Judge McHugh has been involved in a number of charitable, sporting and commercial organisations. In particular he played a major role in trustee banking administration.

He was awarded MBE in 1980 for community services and for his contribution to the banking industry.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.2 Bishop Manuhuia Tutewehiwehi Augustus Bennett

9.2 Bishop Manuhuia Tutewehiwehi Augustus Bennett

Bishop Bennett of Te Arawa was born in 1916 at Ohinemutu, Rotorua. He attended theological college at Te Aute and was ordained into the Anglican ministry in 1940. From 1944-45 he served in the RNZ Chaplains' Department of the 2nd New Zealand Expeditionary Force in the Middle East and Italy, attached to 28th NZ (Maori) Battalion. On his return to New Zealand he served in a number of parishes before being consecrated as Bishop of Aotearoa in 1986. During his parish ministry he completed a BSc from the University of Hawaii and also holds a Doctorate of Divinity.

Bishop Bennett retired as Bishop of Aotearoa in 1981 and was appointed to the Waitangi Tribunal in 1986. Throughout his life he has been involved in a wide range of community and church affairs, and particularly with Maori and bicultural projects.

He continues to be actively involved in community organisations and was awarded the Order of Companion of St Micheal and St George (C.M.G) in 1981 and the Special Order of New Zealand (O.N.Z) in 1989.

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Appendix 09 Members of the Ngai Tahu Tribunal

9.3 Monita Eru Delamere

9.3 Monita Eru Delamere

Sir Monita was born at Omaio, Te Kaha in 1921 and is a member of Te Whanau a Apanui, Whakatohea, Ngai Tahu and Ngati Mamoe. He served in the Maori Battalion during World War II, was a Maori All Black 1946-49, and farmed for a number of years at Opotiki. In 1954 Sir Monita established a small dry cleaning business at Kawerau which he ran for the next 25 years. He has been involved in community activities for many years, becoming a rotarian, a justice of the peace and councillor on the Kawerau Borough Council. He established the first of the Kawerau region's three credit unions and continues to play an active role in organising or advising other North Island credit unions. The creation of credit unions has been an important aspect of Sir Monita's work, as he regards them a practical application of Maori concepts of community co-operation, support and self sufficiency.

In 1979 Sir Monita retired from business and returned to Opotiki where he was secretary of the Whakatohea Trust Board. He was appointed to the Waitangi Tribunal in 1986 and has served on the hearings of the Orakei, Taipa and Muriwhenua claims. He has been a member of the New Zealand Maori Council since 1962. A Ringatu spiritual leader and minister since the early 1950s, Sir Monita is a recognised authority in Maori law, custom, history and religion.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.4 Georgina Manunui Te Heuheu

9.4 Georgina Manunui Te Heuheu

Georgina Te Heuheu is Ngati Tuwharetoa with kinship links to Te Arawa and Tuhoe. Born and raised at Taurewa, beneath Mount Tongariro, she is married and has two sons. She attended Turakina Maori Girls College and Auckland Girls Grammar School and after completing her BA and LLB degrees at Victoria University practised law in Wellington and Rotorua.

In 1974 Mrs Te Heuheu served on the Commission of Inquiry into Maori Reserved Land.

Currently involved in iwi development with the Tuwharetoa Maori Trust Board, Mrs Te Heuheu is also a director of the Maori Development Corporation and serves on the board of the Poutama Trust.

She is also involved in the area of legal services and law reform as a member of the Courts Consultation Committee and an advisor to the Evidence Reference Committee of the Law Commission.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.5 Ian Hugh Kawharu

9.5 Ian Hugh Kawharu

Professor Sir Hugh Kawharu belongs to Ngati Whatua and is head of the anthropology department at Auckland University. He holds a BSc (New Zealand) MA (Cambridge) and D.Phil (Oxford) as well as being an authority on traditional and contemporary Maori land law. From 1953 to 1965 he worked for Maori Affairs in housing, welfare and trust administration. He held a personal chair in social anthropology and Maori studies at Massey University from 1970 before taking up his Auckland appointment. He has been a member of the Royal Commission on the Courts, the Council of the Auckland Institute and Museum, and chairperson of the Ngati Whatua of Orakei Maori Trust Board. Recently he has set up Te Runanga o Ngati Whatua, a unifying body for all his tribe.

He has acted as a consultant for UNESCO, FAO, the NZMC and NZCER and has written or edited a number of books on Maori issues and race relations; most recently he has edited Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi (Oxford University Press, 1989)

Sir Hugh received his knighthood in 1989.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.6 Gordon Stewart Orr

9.6 Gordon Stewart Orr

Gordon Orr has had a three-cornered career in the practice, administration and teaching of law. Born in 1926, Professor Orr grew up in Masterton and completed BA and LLM degrees at Victoria University. Later he gave up a successful law partnership in Wellington and moved to the Crown Law Office where for several years he was senior Crown counsel. He then became deputy chairperson of the State Services Commission and later Secretary for Justice. In 1978 he was appointed professor of constitutional law at Victoria University teaching principally New Zealand constitutional law and legal history, including 19th century Maori land issues.

His publications include a book on administrative justice in New Zealand, written while he was a Harkness Fellow at the Harvard University Law School.

He was appointed emeritus professor in 1987 on retiring from Victoria University. Since joining the tribunal he has been one of its two full-time members, principally engaged in the Orakei and Ngai Tahu claims.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Appendix 09 Members of the Ngai Tahu Tribunal

9.7 Desmond John Sullivan

9.7 Desmond John Sullivan

Sir Desmond was appointed to the Waitangi Tribunal in 1987, following a distinguished career as a lawyer and judge. He was born in 1920 at Waimate and was educated at Timaru Boys High School. After service in the New Zealand Army and Navy for the duration of World War II he graduated LLB from Canterbury University. He practised law in Westport for some years and later in Palmerston North. In 1966 he was appointed a stipendiary magistrate in Wellington and in 1979 was made chief judge of the District Court. In this capacity he implemented the wide ranging reforms recommended by the Royal Commission on the Courts.

Sir Desmond has been chairperson of the New Zealand Council for Recreation and Sport and Film Industry Board, and was executive director of the World Rugby Cup in 1987. He is active in the Catholic Church. Since retirement he has conducted several inquiries, including those on lotto, casinos, gambling and excise revenue.

Sir Desmond was knighted in 1984. He resigned from the Waitangi Tribunal on 1 July 1989 but remains a member for this Ngai Tahu claim.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

Glossary

Glossary

Glossary

ahi ka roa long burning fires ie occupation justifying title to land

akeake species of tree

anihe fernroot

arore fungus

aruhe fernroot

atua god, supernatural being

aua yellow-eyed mullet or herring

hapu sub-tribe

hapuku groper

harakeke flax

hau wind

haumata snow grass

heke migration, journey

hinaki wicker eel-pot

hinau species of tree

hoko barter, buy, sell

hua rakau produce of trees, fruit

hua whenua produce of the land, vegetables

hue gourds

hui gathering, meeting

ika fish

inanga, inaka whitebait

inangi smelt

iwi tribe, people

kahawai species of fish

kahikatea white pine tree

kai food

kaihaokai a feast to reciprocate past hospitality

kai awa food from rivers

kai ika food from fish

kai manu food from birds

kai moana seafood

kai rakau food from trees

kai raro food from the ground

kai roto food from the interior

kainga nohoanga place of residence

kainga,kaika village, settlement, home

kaio species of shellfish

kaitiaki guardian, trustee, protector

kaka bittern; native parrot

kakapo ground parrot

kakapu species of fish

kanakana lamprey

karaka species of tree

karakia prayer, spiritual incantation

karamu species of tree

karoro black-backed gull

katoke species of tree

katote a tree fern

kaumatua elder

kauri species of tree

kauru stem of cordyline

kawa protocol, custom

kawanatanga governance, government

kawau cormorant, shag

kerema claim

kereru wood pigeon

kete basket

kiekie a climbing plant

kina sea egg

kiore native rat

kiwi flightless bird

koaro mountain trout

koha present, gift

kohikohi to gather, to collect

koko parson bird

kokomuka species of plant

kokopu native trout

konini type of fruit

kono small basket

korau wild turnip

korero discussion, speech, to speak

korimako bellbird

korokoro lamprey

koromiko a shrub

korowai cloak ornamented with black twisted thrums

kotukutuku a female totara

koukoupara native trout

koura crayfish

kowhai species of tree

kuku pigeon

kuta species of rush

mahinga kai, mahika kai places where food is procured or produced

mahoe species of tree

maka barracouta

makomako species of tree; bellbird

mamaku fernroot

mana authority, control, influence, prestige,
power

manawhenua customary rights and authority over land

maneanea smelt

manuka tea-tree

marae community meeting-place or surrounds

mata species of herring

matai species of tree

mataitai seafood

miro species of tree

moki species of fish; raft

motu island

moutere island

muru to plunder

nanao beginning of the titi catching season

ngaio species of tree

ngakinga cultivation

nui big, great, many

pa fortified village, or more recently any village

pakiki freshwater fish

panako a fern

paraerae a sandle made of leaves of flax or ti twisted into apad

paraki smelt; fresh-water fish

parariki smelt

parera grey duck

parohe smelt

pataka food storehouse raised on posts

pateke species of duck, shoveller

patete a small fresh-water fish

patiki flounder

paua abalone

pawhara fish opened and dried

piharau lamprey

pikopiko a fern

pingao, pikao native sedge

pipi cockle

pipiki smelt

pito navel

poha food storage container

pounamu greenstone

puha species of plant

pukeko swamp hen

pukorero oratory

puna spring of water

purau sea urchin; shrub

puru plug

putakita paradise duck

putakitaki paradise duck

raepo species of duck

rahui a restriction on access, prohibition

rakiraki ducks

rama to torch

rangatira chief

rangatiratanga authority, chieftainship

raupo bullrush

raureka species of tree

rimu species of tree; seaweed, kelp

rohe boundary, tribal region

rua hole

runanga assembly, council

taiapure local fishing patches

takapu gannet

take issue, grievance; cause, reason

takiwa district, region

tangata whenua people of a given place

tangi to cry; sound; funeral

taonga prized possession, property

tapu under religous, spiritual restriction; sacred

tapuke bury, cover with earth

taramea spear-grass

tarapunga red-billed gull

tata flock, used of certain birds

tatau species of plant

tatoa brown ducks

taua war party

tawai general name for beech-tree species

te ao hou the new world

teteaweka species of shrub

ti cabbage tree

tikanga custom

tikihemi smelt

tikumu species of plant

tino rangatiratanga full authority

titi mutton bird

toetoe grass, sedge

tohunga specialist

torea oyster catcher; pied stilt

toroa albatross

totara a forest tree

tui parson bird

tukutuku panel work

tuna eel

tupare species of shrub

tupuna grandparents, ancestors

tutu hoki flax stem juice

umu oven

urupa cemetery, burial ground

utu recompense, revenge, response, price,

waharoa horse mussel

wahi tapu sacred place

wai kakahi shellfish, a freshwater bivalve mollusc

wai water

waiata song

wairua spirit

waka canoe, tribal confederation (based on common canoe traditions)

wakawaka share, marked out division based on rights throughgenealogy

weka wood hen

whakapapa genealogy

whanau family

whanui wide, extended

whare house, building

wharerau house, building unique to Rakiura Maori

whariki anything spread on the ground ie floormat
etc

whenua, wenua land

whio blue ducks

wiwi tussock grass; rushes