

TE TAU IHU
O TE WAKA A MAUI

TE TAU IHU
O TE WAKA A MAUI

PRELIMINARY REPORT
ON CUSTOMARY RIGHTS IN THE
NORTHERN SOUTH ISLAND

WAI 785

WAITANGI TRIBUNAL REPORT 2007



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

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The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON



The Waitangi Tribunal
141 The Terrace
WELLINGTON

19 March 2007

E te Minita Māori

Tēnā rā koe e te rangatira e noho mai na i runga i tēnā taumata whakahirahira, e whakatutuki nei i ngā kaupapa me ngā moemoeā a te iwi Māori. Tēnā hoki koe e whai ake ana i ngā tapuwae o te hunga rongonui i mua atu i a koe. Ara hoki ko Tā Te Rangihiroa, Tā Maui Pomare, Tā Timi Kara, te matua i a Tā Apirana Ngata me ngā mea no muri ake nei, i a Matiu Rata, a Koro Wetere me etahi atu.

He mihi he tangi hoki ki te hunga kua mene atu ki te po otirā kua huri atu ki tua o te arai. Takoto mai koutou i te urunga e kore e nekehia, i te moenga e kore e hikitia.

Kāti ka hoki mai ki a tatau o te ao tangata e takatu nei i roto i te ao hurihuri. Tēnā tātou katoa.

E rua ngā wāhanga whānui o ēnei kerēme.

Tuatahi ko ngā uri o te waka Kurahaupō ara a Rangitāne, Ngāti Apa me Ngāti Kuia. Ko ēnei iwi te tangata whenua o Te Tau Ihu o te Waka o Maui i mua i te taenga atu o ngā iwi o Kāwhia/Taranaki.

Tuarua ko Ngāti Toa Rangatira, Ngāti Rārua, Ngāti Koata, Ngāti Tama me Te Ātiawa ngā iwi i heke ngatahi mai i ngā rohe o Kāwhia me Taranaki.

At the request of the claimants, we have completed a preliminary report on customary rights in Te Tau Ihu o te Waka a Maui (the northern South Island). The purpose of the report is to assist claimants and the Crown with their negotiations by providing early findings on customary rights and their treatment by the Crown. Our findings on Treaty breach are final. Nonetheless, we have not dealt with all the relevant issues, so we have not made full findings on prejudice, nor made recommendations on how to remove the prejudice. These matters will be dealt with in full in our final report.

We are satisfied that all eight iwi of Te Tau Ihu – Ngati Apa, Rangitane, Ngati Kuia, Ngati Toa Rangatira, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata – had valid customary rights when the Treaty was signed in 1840 (see ch 2). Those rights, and the customary law from which they were derived, were protected and guaranteed by the Treaty. This was acknowledged by the British Government of the day (see ch 3).

Despite this acknowledgement, the Crown acquired the great bulk of Te Tau Ihu lands and resources very quickly, without finding out the correct right-holders or obtaining their full and free consent. Partly as a result, the Crown's massive purchases of millions of acres were invalid in both British and Maori law, and inconsistent with the Treaty (see chs 3, 5).

In 1847, the Government purchased the Wairau block (around three million acres) from just three Porirua chiefs, chosen by itself, thus disenfranchising all the other Ngati Toa, Ngati Rarua, and Rangitane people. Then, in 1853, the Government extorted a cession of all Ngati Toa's interests in the South Island by an unfair manipulation. From 1854 to 1856, it used this cession (the Waipounamu purchase) to obtain the interests of all the other tribes without their free and full consent. These actions were in plain breach of the Treaty and its principles (see ch 5). As a result, Te Tau Ihu Maori lost almost all of their land by 1860.

We draw your particular attention to the point that one tribe – Ngati Apa – never gave even belated consent to these purchases, nor were they paid or allocated reserves, even though the Government was aware of their claims in Te Tau Ihu. They received a tiny reserve much later from the Native Land Court. This tribe has a unique grievance (see ch 5).

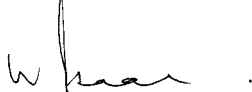
The Crown also granted land in Tasman and Golden Bays to the New Zealand Company and settlers in the 1840s, the Maori title to which had not been extinguished. This was in breach of the Treaty. It happened as a result of the Government's failure to inquire properly into the company's alleged title, a failure which the Crown admitted in our inquiry (see ch 4).

All the iwi of Te Tau Ihu suffered prejudice as a result of these and other Treaty breaches. Our findings are summarised in chapter 6.

We were assisted by a number of key admissions by the Crown. In particular, it conceded that it had failed to inquire properly into customary rights before buying land or confirming the New Zealand Company's title. It also admitted that its governors and officials had acted with a ruthless pragmatism that sidelined the Treaty and deliberately advantaged settlers over Maori. As a result, the Crown's purchases left Te Tau Ihu Maori in poverty, with insufficient land for them to farm or use their customary resources, foreclosing their options for either developing in the new economy or maintaining their customary way of life. These admissions were helpful in our deliberations.

We hope that you can negotiate an appropriate settlement with Te Tau Ihu Maori, in order to mitigate the prejudice and restore a proper Treaty relationship.

Heoi anō, nākū nā



W W Isaac

Deputy Chief Judge

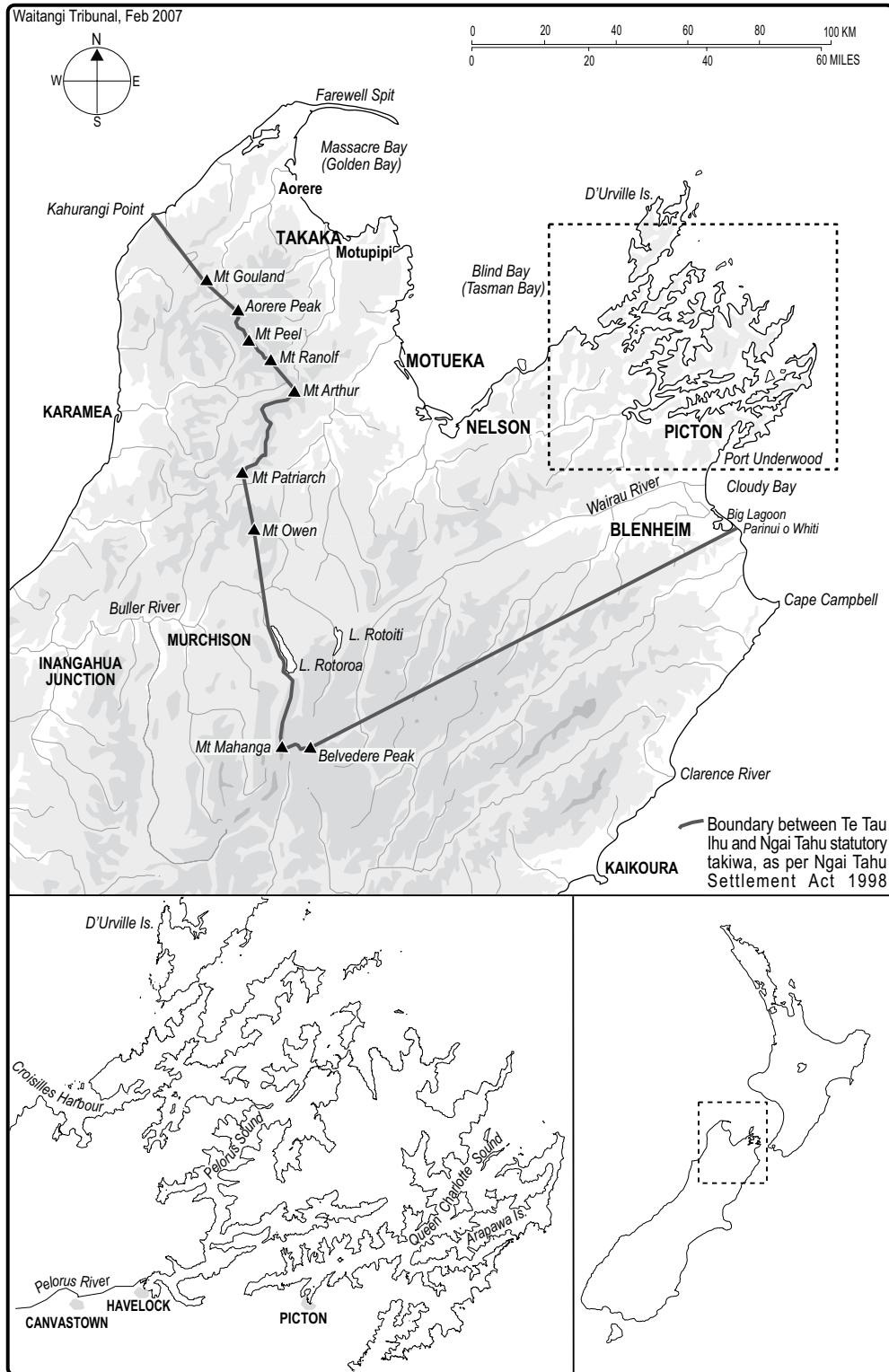
ABBREVIATIONS

AJHR	<i>Appendix to the Journals of the House of Representatives</i>
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> (17 vols, Shannon: Irish University Press, 1968–69)
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document (on the Waitangi Tribunal's record of inquiry)
ed	edition, editor
fol	folio
fn	footnote
no	number
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
para	paragraph
pt	part
ROI	record of inquiry
sec	section (of this report)
sess	session
trans	translator
v	and (as used in titles of court cases)
VHS	video home system
vol	volume

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

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 785 (Te Tau Ihu) record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

Unless otherwise stated, footnote references to Archives NZ are to the Wellington branch.



Map 1: Location map

CHAPTER 1

INTRODUCTION

The Wai 785 (Te Tau Ihu) inquiry completed its hearings in 2004. In January 2006, the claimants requested a preliminary report on issues relating to their customary rights in order to assist the negotiation process. At that time, the Tribunal preferred to write a report on the claims as a whole, because the issues relating to customary rights were inextricable from other aspects of the claims. We have now completed sufficient material for our final report to meet the parties' request for a preliminary one, whilst addressing the substantial overlap between claim issues. We publish this report in the expectation that it will assist negotiations between the claimants and the Crown. It is a preliminary report, and does not deal with all matters at issue between the parties.

1.1 THE TE TAU IHU INQUIRY

The tangata whenua call the northern South Island by the name of Te Tau Ihu o te Waka a Maui. This name refers to the prow (te tau ihu) of the canoe (o te waka) of Maui (a Maui) and commemorates the fishing up of the North Island by Maui from his canoe (the South Island – Te Waka a Maui).¹ In this report, we have used the name Te Tau Ihu for our northern South Island inquiry district, which constitutes the region north of the statutorily defined Ngai Tahu takiwa (see map 1). Maori iwi, hapu, whanau, and individuals of that district have filed 31 claims, which overlap with each other in terms of geography, common actions of the Crown and their effects, and iwi rohe. These claims were grouped together for concurrent inquiry by the Waitangi Tribunal.

The Te Tau Ihu Tribunal panel was appointed in 1999. Its presiding officer is Wilson Isaac, Deputy Chief Judge of the Maori Land Court. The other members are Rangitihi Tahuparae, Professor Keith Sorrenson, Pamela Ringwood, and John Clarke. Mr Clarke was appointed to this Tribunal in 2003, after the resignation of Roger Maaka. We began hearing the claims in August 2000, after the compilation of the casebook of evidence, and we completed our hearings in March 2004 (see the appendix).

1. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o Te Tau o Te Waka a Maui, 1992 (doc A9), vol 1, ch 1, pp 4–6

TE TAU IHU O TE WAKA A MAUI

1.1.1

Under the Treaty of Waitangi Act 1975 and its amendments, we have the task of conducting an inquisitorial process to ascertain whether certain acts or omissions of the Crown have breached the principles of the Treaty of Waitangi. If we find that Treaty breaches have taken place, we must then determine whether the claimants have suffered prejudice. If we find the claims to be well founded and the claimants to have been prejudiced, we may then make recommendations for the removal of the prejudice and the prevention of its recurrence. This process is dedicated to healing the nation's past and restoring the Treaty relationship between the Crown and Maori. The Crown acknowledged in our inquiry that it had breached the Treaty in respect of some of the claims made by the Te Tau Ihu tribes and that appropriate redress should be negotiated in those cases. These negotiations have commenced since the completion of our hearings. The purpose of this preliminary report is to aid the parties in their negotiations and to assist in an early resolution of the grievances that Te Tau Ihu iwi have against the Crown.

1.1.1 The claims

The Maori iwi and hapu of Te Tau Ihu have described their identity in the following terms:

- ▶ Rangitane, Ngati Apa, and Ngati Kuia are descendants of the captain and crew of the Kurahaupo waka. They were the tangata whenua of Te Tau Ihu in the 1820s and 1830s, when the Kawhia–Taranaki tribes migrated to the district.
- ▶ Ngati Toa Rangatira, Ngati Rarua, Ngati Koata, Ngati Tama, and Te Atiawa migrated to Te Tau Ihu in the 1820s and 1830s. Their original rohe are located in the Kawhia and Taranaki districts. Some have affiliations to the Tainui waka, others to the Tokomaru waka. Ngati Koata settled as a result of a tuku from Tutepourangi, an ariki of the Kurahaupo tribes. The other northern iwi migrated after a series of battles and victories, and settled alongside Ngati Koata and the defeated Kurahaupo peoples.

There has been intermarriage between all eight iwi, and they are bound together by whakapapa, co-residence, and overlapping customary rights. One registered claim, Wai 102, was presented on behalf of all of them to ensure that all descendants of the eight tribes are included in the claims process. In addition, the relationships are complex and there is some competition between the iwi, each of which has filed their own overarching claim as follows: Wai 44, on behalf of Rangitane; Wai 207, on behalf of Ngati Toa Rangatira; Wai 521, on behalf of Ngati Apa; Wai 561, on behalf of Ngati Kuia; Wai 566, on behalf of Ngati Koata; Wai 594, on behalf of Ngati Rarua; Wai 607, on behalf of Te Atiawa; and Wai 723, on behalf of Ngati Tama.²

These claims concern many actions or omissions of the Crown in alleged breach of the

2. In October 2003, we ruled that the 'Ngati Awa' claim of Edward Chambers (Wai 469) was not in fact for a separate or different kin group from that of Te Atiawa, by which name the iwi is known today. We declined to inquire further into Wai 469: Tribunal, memorandum concerning status of Wai 469 claim, 17 October 2003 (paper 2.736).

principles of the Treaty of Waitangi. Our preliminary report focuses on the claim that the Crown has breached the Treaty by:

- ▶ failing to inquire properly into the customary rights of Te Tau Ihu Maori before purchasing land or confirming purchases;
- ▶ failing to respect, provide for, or permit their exercise of tino rangatiratanga while purchasing land or confirming purchases;
- ▶ failing to obtain the consent of the correct customary right-holders, expressed according to their own customary mechanisms, before purchasing land or confirming purchases;
- ▶ failing to carry out correct or legitimate purchases of land and wrongly confirming New Zealand Company purchases as correct or legitimate; and
- ▶ as a result, wrongly and unfairly depriving Te Tau Ihu Maori of their customary resource-use and land entitlements, to their great and lasting social, cultural, and economic prejudice.

In addition, there is a claim on behalf of the shareholders of the Wakatau Incorporation and also various hapu, whanau, and specific claims filed by Te Tau Ihu Maori which are not the subject of this preliminary report. Those claims will be addressed in our final report.

1.1.2 Te Tau Ihu claims in the Ngai Tahu statutory takiwa

In August 2000, Ngai Tahu challenged the Tribunal's jurisdiction to consider components of any Te Tau Ihu claim that fell inside Ngai Tahu's statutorily-defined takiwa or district (see map 1). After lengthy litigation during our hearing process, the courts resolved that the Tribunal has jurisdiction to report on Te Tau Ihu claims south of that boundary and that Ngai Tahu should have third-party status and be accorded a hearing in our inquiry. Matters with regard to the alleged customary rights of Te Tau Ihu tribes inside Ngai Tahu's statutory takiwa will not be dealt with in this report.

1.2 THE PRELIMINARY REPORT

During the course of our inquiry, the respective customary rights and interests of the eight iwi, and the treatment of those interests by the Crown, emerged as a key issue. In January 2006, after making progress towards negotiations, counsel for Rangitane, Ngati Apa, and Ngati Kuia requested a conference to consider their application for a preliminary report. The claimants argued that an early report on their customary rights would be of great benefit to the negotiations.³ Their request was supported by a letter from Tainui Taranaki

3. Counsel for Ngati Apa, Rangitane, and Ngati Kuia, joint memorandum requesting procedural conference on timing of release of Tribunal's findings, 20 January 2006 (paper 2.799)

ki te Tonga Limited on behalf of Ngati Koata, Ngati Rarua, Ngati Tama, Te Atiawa, and the Wakatu Incorporation. We considered this request but turned it down. In our view, the Crown's treatment of customary rights permeated the whole report, and it would have been premature to disentangle those matters for a separate report. We also anticipated the completion of our full report in December of that year.⁴

In October 2006, we reviewed progress towards the completion of our report. It became clear that further time was required to address the complex issues before us but that sufficient material was ready for us now to meet the claimants' request for a preliminary report on customary rights. Inevitably, this required us to address related issues in that report. We have done so where necessary, reserving other matters for our final report. In so far as issues are dealt with comprehensively in this preliminary report, our discussion and findings are final. It is not, however, a complete report on all issues raised by the Te Tau Ihu claimants, so we make no final findings as to prejudice, nor recommendations for redress. We trust that this is sufficient to assist the claimants and Crown in their negotiations.

One major area of relevance to the issue of customary rights, and the Crown's treatment of them, has been reserved for our final report. We have not considered here the Native Land Court's treatment of customary rights, nor the claims against the Crown arising from that treatment.

In chapter 2, we provide our interpretation of the customary history and rights of the claimants, as described to us in the evidence of their tangata whenua experts, their historians, and other historians. We outline both our view of customary law as it relates to the rights of conquerors and of still-occupant defeated peoples and our findings as to the nature and distribution of customary rights among the claimant iwi.

In chapter 3, we address generic aspects of the claims against the Crown, in terms of the Crown's Treaty duty to purchase land or to confirm purchases from the correct right-holders (according to Maori customary law) and through the correct leaders and institutions (according to the operation of tino rangatiratanga). Having established the foundations of the Crown's Treaty duty and the standards appropriate at the time, we then consider the detailed actions of the Crown in terms of confirming the New Zealand Company purchases via the Spain commission (ch 4), and the Crown's own purchases of land (ch 5). Our conclusions and findings are summarised in chapter 6.

1.3 TREATY PRINCIPLES

The Tribunal evaluates claims in light of the plain meaning of the terms of the Treaty and of the overarching principles which arise from the Treaty relationship forged between the

4. Presiding officer, memorandum declining request for procedural conference and advising of anticipated release date of report, 21 April 2006 (paper 2.801)

Crown and Maori in 1840. The articles and principles of the Treaty have been explained in detail in previous reports of the Tribunal, and we rely on those reports, without duplicating their detailed explanations here. In brief, the following principles – partnership, reciprocity, autonomy, active protection, options, equity, and equal treatment – apply to the Te Tau Ihu claims.

1.3.1 Partnership

In the words of the president of the Court of Appeal, ‘the Treaty signified a partnership between the races’ and each partner had to act towards the other ‘with the utmost good faith which is the characteristic obligation of partnership’⁵ The obligations of partnership included the duty to consult Maori and to obtain the full, free, and informed consent of the correct right-holders in any transaction for their land.

1.3.2 Reciprocity

Above all, the partnership is a reciprocal one, involving fundamental exchanges for mutual advantage and benefits. Maori ceded to the Crown the kawanatanga (governance) of the country, in return for the guarantee and protection of their tino rangatiratanga (full authority) over their land, people, and taonga. Maori also ceded the right of pre-emption over their lands, on the basis that this would be exercised in a protective manner and in their own interests, so that the settlement of the country would then proceed in a fair and mutually advantageous manner.⁶

1.3.3 Autonomy

In the mutual recognition of kawanatanga and tino rangatiratanga, the Crown guaranteed to protect Maori autonomy, which the Turanga Tribunal defined as ‘the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants’⁷ Inherent in Maori autonomy and tino rangatiratanga is their own customary law and institutions, and the right to determine their own decision-makers and land entitlements.

5. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665 (CA) (the *Lands* case)

6. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 238–245

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

1.3.4

1.3.4 Active protection

The Crown's duty to protect the just rights and interests of Maori arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure its acceptance, and the principles of partnership and reciprocity. This duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. The Crown's responsibilities are 'analogous to fiduciary duties'.⁸ Active protection requires honourable conduct and fair processes from the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.

1.3.5 Options

The Treaty envisaged a place in New Zealand for two peoples with their own laws and customs in which the interface was governed by partnership and mutual respect. Inherent in the Treaty relationship was that Maori, whose laws and autonomy were guaranteed and protected, would have options when settlement and the new society developed. They could choose to continue their tikanga and way of life largely as it was, to assimilate to the new society and economy, or to combine elements of both and walk in two worlds. Their choices were to be free and unconstrained.⁹

1.3.6 Equity

The obligations arising from kawanatanga, partnership, reciprocity, and active protection required the Crown to act fairly as between settlers and Maori. The interests of settlers could not be prioritised to the disadvantage of Maori.¹⁰ Where Maori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires active measures to restore the balance.

1.3.7 Equal treatment

The principles of partnership, reciprocity, autonomy, and active protection required the Crown to act fairly as between Maori groups. It could not unfairly advantage one group of Maori over another where their circumstances, rights, and interests were broadly the same.¹¹

8. *New Zealand Maori Council v Attorney-General*, p 665

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

10. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 61–64

11. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 24–25

1.4 OVERVIEW OF RELEVANT HISTORICAL EVENTS, 1825–56

The focus of chapters 3 to 6 of this report is on the actions of the Crown, and their consistency with the Treaty, in the period from 1840 to 1856. This section provides a very brief overview of relevant historical events in order to provide a factual context for later chapters. Fuller detail on various events will be contained in our final report.

There are some difficulties with attaching an exact chronology to events prior to 1839. The occupation of Te Tau Ihu by the Kurahaupo iwi (Rangitane, Ngati Kuia, and Ngati Apa) was disturbed by the arrival of tribes from Kawhia and Taranaki in the 1820s. In about 1825–27, Tutepourangi made a tuku (customary gift) of land on the western side to some of the northern migrants, after the defeat of his people at the battle of Waiorua (at Kapiti Island). A series of taua (war expeditions) from around 1827 to 1832 engaged and defeated the Kurahaupo peoples and struck south, deep into Ngai Tahu territory. These taua were followed by both skirmishes and marriages. Ngati Toa, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata migrated to and settled at various sites in Te Tau Ihu. Tributary Kurahaupo communities survived under their own chiefs, as did small, unsubdued groups in the interior.

1839

The New Zealand Company dispatched Colonel Wakefield to purchase land for its settlements. He signed deeds with Ngati Toa leaders, including Te Rauparaha, at Kapiti and with Te Atiawa leaders in Queen Charlotte Sound, purportedly conveying about 20 million acres to the company (see map 2).

Lord Normanby sent Captain Hobson to treat with Maori for the sovereignty of part or all of New Zealand, based on key instructions as to how his Government should conduct itself towards Maori.

1840

Hobson issued proclamations forbidding the private purchasing of land from Maori. Henry Williams and Major Bunbury brought copies of the Treaty to Raukawa Moana, where it was signed by various Te Tau Ihu leaders on both sides of the straits.

In November, the British Government and the company signed an agreement (referred to as the November Agreement). The New Zealand Company was awarded four acres for every pound it had spent on colonisation (this arrangement was referred to as the Pennington award, named for the accountant who made it).

1841

The Legislative Council passed the Land Claims Ordinance, which authorised commissioners to inquire into the validity of pre-1840 transactions and to recommend grants to the Governor.

1841—continued

The British Government dispatched Commissioner William Spain to inquire into the New Zealand Company's titles. Lord John Russell (the Secretary of State for the Colonies) ordered a registration of Crown, private, and Maori land titles.

The New Zealand Company decided to establish a settlement in Te Tau Ihu, based on its Kapiti (and Queen Charlotte Sound) deeds. Captain Wakefield held a hui with the Maori leaders of Tasman Bay and gave them 'presents upon settling', since private purchases were illegal. The Nelson settlement was thus established.

1842

Captain Wakefield met with Golden Bay rangatira and made additional 'presents upon settling' in that district. Surveying in Golden Bay and the removal of coal was followed by the use of police powers against Maori who protested.

The Government enacted a revised Land Claims Ordinance, adopting the November Agreement formula of four acres per pound spent, but this was disallowed in London. The 1841 ordinance therefore remained in force.

Commissioner Spain began his Port Nicholson inquiry and advised the Government that, if a compensation approach was not adopted, the New Zealand Company would have very little in the way of a valid title. (Acting Governor Shortland and Governor FitzRoy later approved this change of approach.)

1843

The New Zealand Company's attempt to survey the Wairau district, and to use police powers against Ngati Toa leaders, resulted in armed confrontation. Upon inquiry, Governor FitzRoy was satisfied that Maori were not in the wrong, and he took no action. (Governor Grey later reversed this decision.)

1844

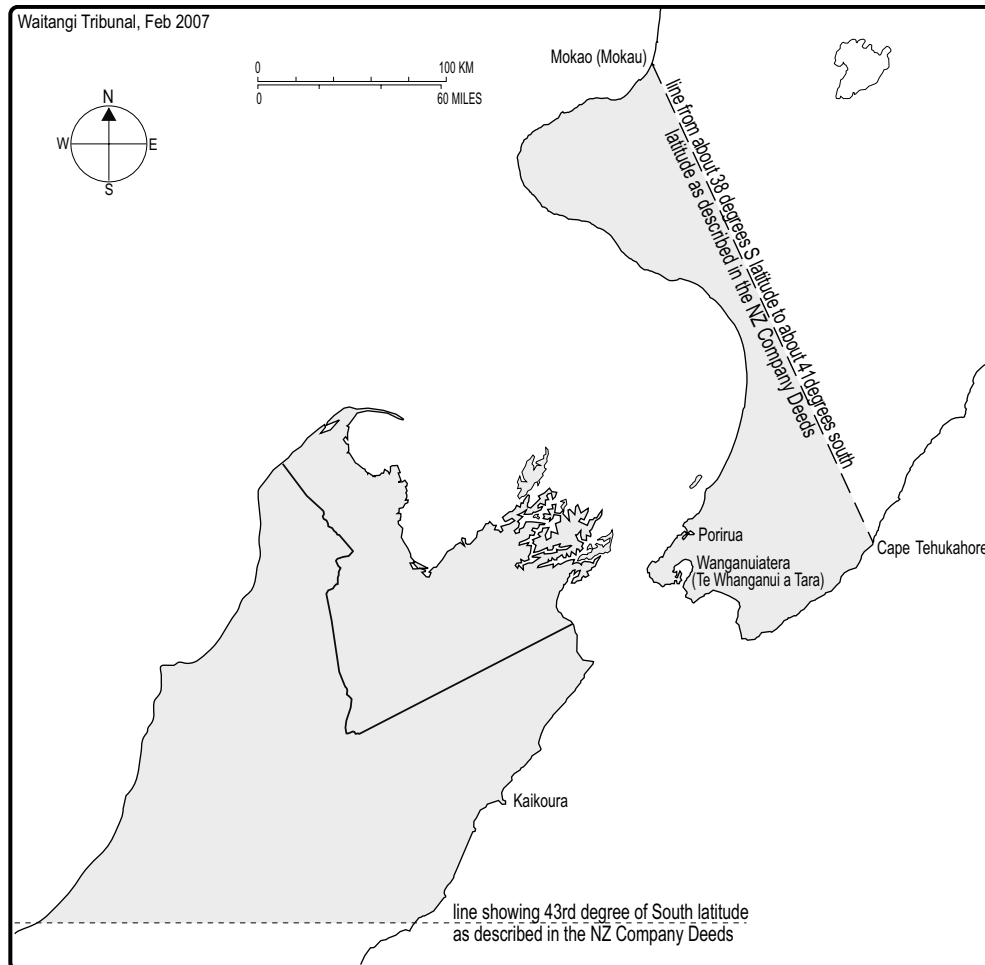
A House of Commons committee chaired by Lord Howick (later Earl Grey) condemned the way in which the Treaty of Waitangi had been made and interpreted, and recommended that its article 2 guarantees be confined to land on which Maori actually had homes and cultivations (the waste lands theory). The Colonial Office rejected this influential perspective on the Treaty. Lord Stanley confirmed that Maori customary rights were guaranteed as and how they existed under Maori law.

Commissioner Spain sent an interpreter, Edward Meurant, to hold a brief preliminary inquiry with Te Tau Ihu Maori. Meurant visited Nelson and coastal parts of Tasman Bay.

Spain's subsequent arrival in Nelson resulted in a two-day hearing of evidence, with five company witnesses and one rangatira (Te Iti of Ngati Rarua) appearing. In the

INTRODUCTION

1.4



Map 2: The area covered by the 1839 Kapiti deed. Source: Alexander Mackay, comp, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols (Wellington: Government Printer, 1872–73), vol 1, pp 64–65.

1844—continued

middle of Te Iti's evidence, both Colonel Wakefield and Protector Clarke applied for an adjournment, on the grounds that Te Iti had been untruthful and that further Maori evidence could not be called without additional consultation. On the following day (22 August), Wakefield applied for a suspension of the inquiry and offered to pay compensation instead. Spain and Clarke agreed, without consulting or seeking agreement from Maori. Clarke acted on behalf of Maori (as the Government's representative, not theirs) and negotiated £800 compensation.

Two days after the suspension of the inquiry, those Maori present apparently agreed to accept £500 and signed deeds of release. The remainder was reserved for the Golden Bay hapu, who were not present and later refused to take it. However, their refusal was not accepted and the money was banked on their behalf.

1845

Spain issued his report, awarding 151,000 acres in Tasman and Golden Bay to the New Zealand Company, excepting one-tenth and all Maori pa, urupa, and cultivations. After Governor FitzRoy accepted Spain's recommendation and issued a Crown grant to the company (see map 3), some Golden Bay Maori gave in and accepted a share of Spain's money, signing their own deeds. (The money was not paid until 1846, and it would later emerge that it was not distributed properly and that some Ngati Tama communities neither signed a deed nor received payment.)

Lord Stanley instructed the new Governor, George Grey, to scrupulously uphold the Treaty; to purchase land for the New Zealand Company (and to take care to ensure that he did so from the correct people); and to register Crown and Maori land titles, ascertaining if there was any unowned 'waste land' under Maori law.

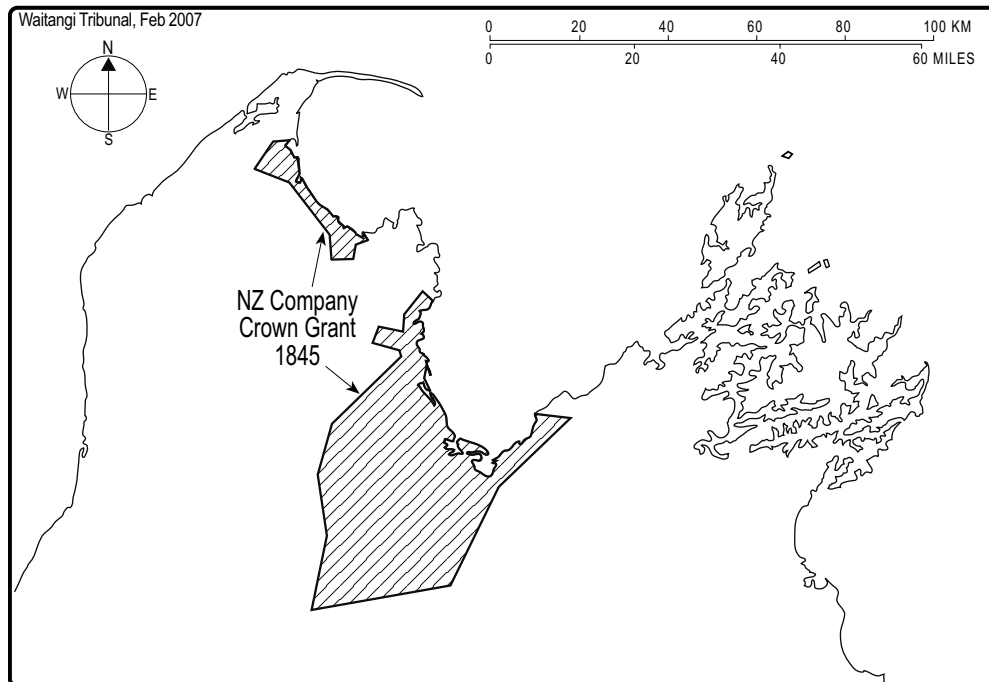
1846

Governor Grey moved against Ngati Toa, arresting and holding Te Rauparaha and other leaders without trial for some 18 months, while at the same time fighting Te Rangihaeata's forces. Grey developed a strategy of pacifying and bringing the tribe under his influence by removing its leaders, crushing opposition by force, and pensioning the younger leaders by means of land purchase instalment payments.

Earl Grey became Secretary of State for the Colonies. In December, he instructed the Governor to register all Maori land, not according to Maori law but under the British 'waste lands' theory that indigenous people owned land they occupied only by building on it or cultivating it. Intangible associations with a place, as well as hunting, fishing, and other forms of resource-use or ahi ka, were not considered to confer any title on Maori. (Governor Grey did not receive these instructions until mid-1847.)

1847

Lieutenant-Governor Eyre sent a surveyor, C W Ligar, to explore the Wairau district and report on its nature, extent, and Maori ownership. Ligar reported that there were 13 principal leaders whose authority was required for any purchase but there were 'many others' who had rights as well. He argued that Rangitane did not retain rights. Governor Grey purchased the Wairau and Kaikoura districts from three of the younger Ngati Toa leaders – Tamihana Te Rauparaha, Rawiri Puaha, and Matene Te Whiwhi – without the consent of Ngati Rarua, Rangitane, or the wider community of Ngati Toa Rangatira and right-holders, and without regard to the information in the Ligar report. Grey agreed to Maori retaining a reserve of some 117,000 acres, reporting to the Secretary of State that the company's waste lands theory could not stand *in one respect*; Maori required extensive 'waste' land for customary resource use (see map 4).



Map 3: The 1845 Crown grant. This map is based on Alexander Mackay's delineation of the boundaries, as given in AJHR, 1874, C-6. However, the area encompassed in Mackay's map was considerably more than the 151,000 acres that was in fact granted by the Crown on 29 July 1845. FitzRoy's grant stipulated the area as '151,000 acres of land, situate, lying and being in the several districts of the settlement of Nelson . . . that is to say, Wakatu or Nelson district, 11,000 acres; Waimea district, 38,000; Moutere district, 15,000 acres; Motueka district, 42,000 acres . . . and Massacre Bay district, 45,000 acres' (BPP, vol 5, p 124). In the absence of a more accurate map, we are reliant on Mackay's approximation.

1848

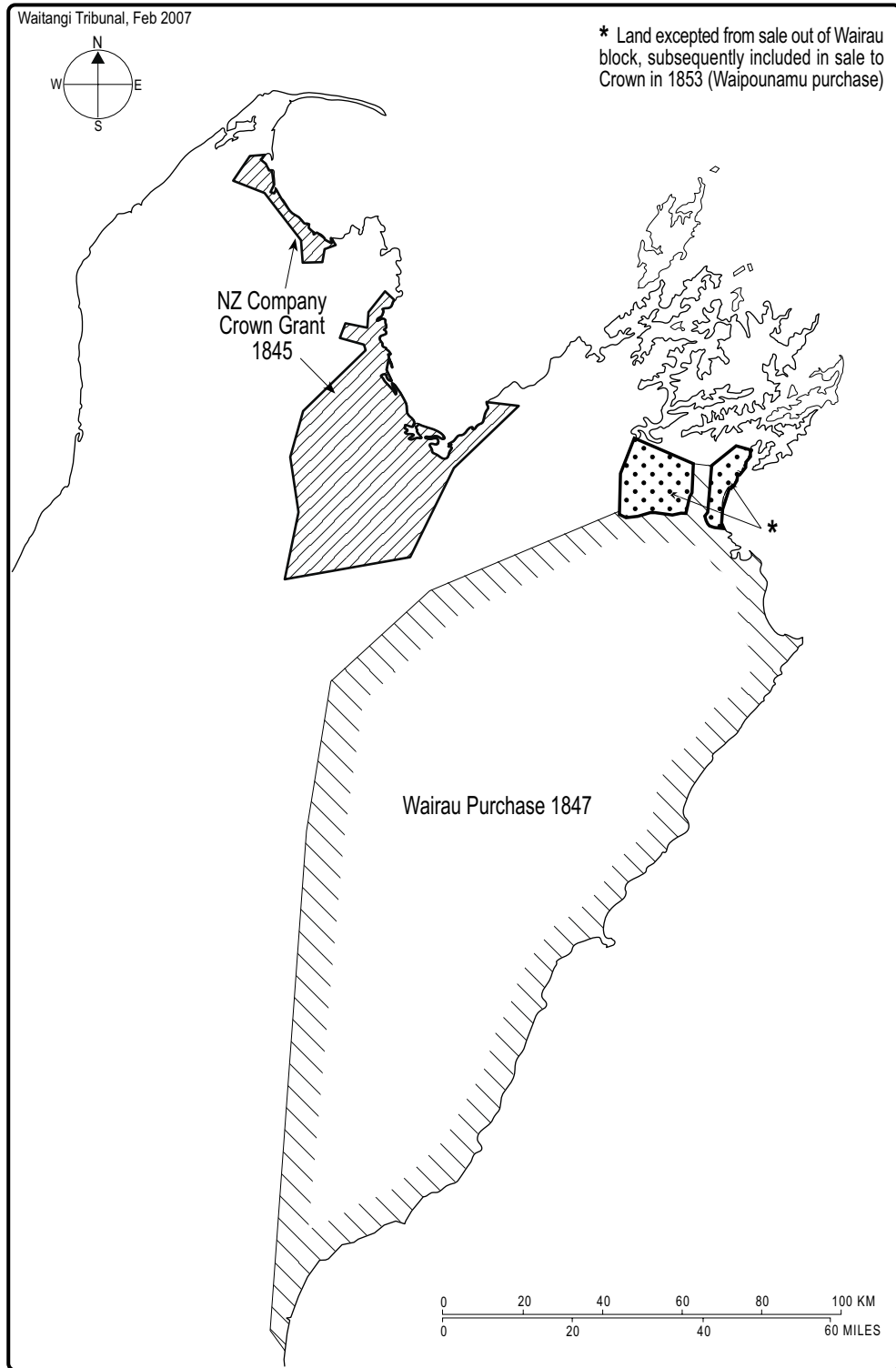
The Government and the New Zealand Company commenced their purchase of Waitohi as a port for the Wairau settlers. (Officials dealt with local right-holders Te Atiawa in a series of transactions until 1850. Ngati Toa claims to be included were ignored.) Governor Grey informed Earl Grey that his waste land instructions could not be carried out without bloodshed but that they could be given effect by the 'nearly allied principle' of purchasing the waste lands for a nominal sum and then registering Maori interests in small occupation reserves. Earl Grey approved this compromise. He confirmed that, under the Treaty, Maori owned whatever land they were entitled to under their own law.

1850-52

Not recognising the extinguishment of their own rights, resident Maori occupied settler sections in various parts of Te Tau Ihu. In all cases, this was ultimately met by insistence on their removal rather than by additional deeds or compensation.

TE TAU IHU O TE WAKA A MAUI

1.4



Map 4: The 1845 Crown grant and 1847 Crown purchase of Wairau.

Source: Alexander Mackay's plan, AJHR, 1874, G-6. As we noted for map 3, Mackay's delineation of the boundaries of the 1845 Crown grant was not accurate, but it is the closest available approximation.

INTRODUCTION

1.4

1850–52—continued

Mathew Richmond, the Superintendent of Nelson, negotiated with western Te Tau Ihu Maori for the purchase of the Pakawau block and the entire west coast of the island. Overlapping claims to Pakawau were resolved by a large hui of 500 Maori at Nelson, after which a deed was signed and the money distributed as agreed by the tribes. Agreement could not be reached, however, on the purchase of the west coast, which Richmond abandoned with Grey's approval.

1853

As he was preparing to depart New Zealand, Governor Grey met with the Ngati Toa leaders in the North Island and pressed them to sell him all their interests everywhere in Te Tau Ihu. A deed was signed for this blanket purchase which recognised that resident rights-holders with 'conjoint' claims would need to have reserves made for them. The nature and extent of the reserves was to be up to the Government, and a hui would be held in Nelson to resolve matters. This was the beginning of the three-year Waipounamu purchase (see map 5).

1854

Land Purchase Commissioner McLean did not hold the promised hui at Nelson. He did visit briefly but left after signing a deed with two Ngati Hinetuhi chiefs (of Te Atiawa). Instead, he signed a second deed with Ngati Toa in the North Island and paid them the remainder of the purchase money, apart from what he had already paid to Te Atiawa living in Taranaki.

Richmond reported that resident Maori might reject the purchase, and he pleaded with McLean to come to Nelson and sort things out. Instead, McLean sent a surveyor and interpreter (Brunner and Jenkins) to eastern Te Tau Ihu to tell the resident rights-holders that their land was sold, and to lay out (small occupation) reserves for them. This mission was largely unsuccessful, especially after the second Ngati Toa deed was signed.

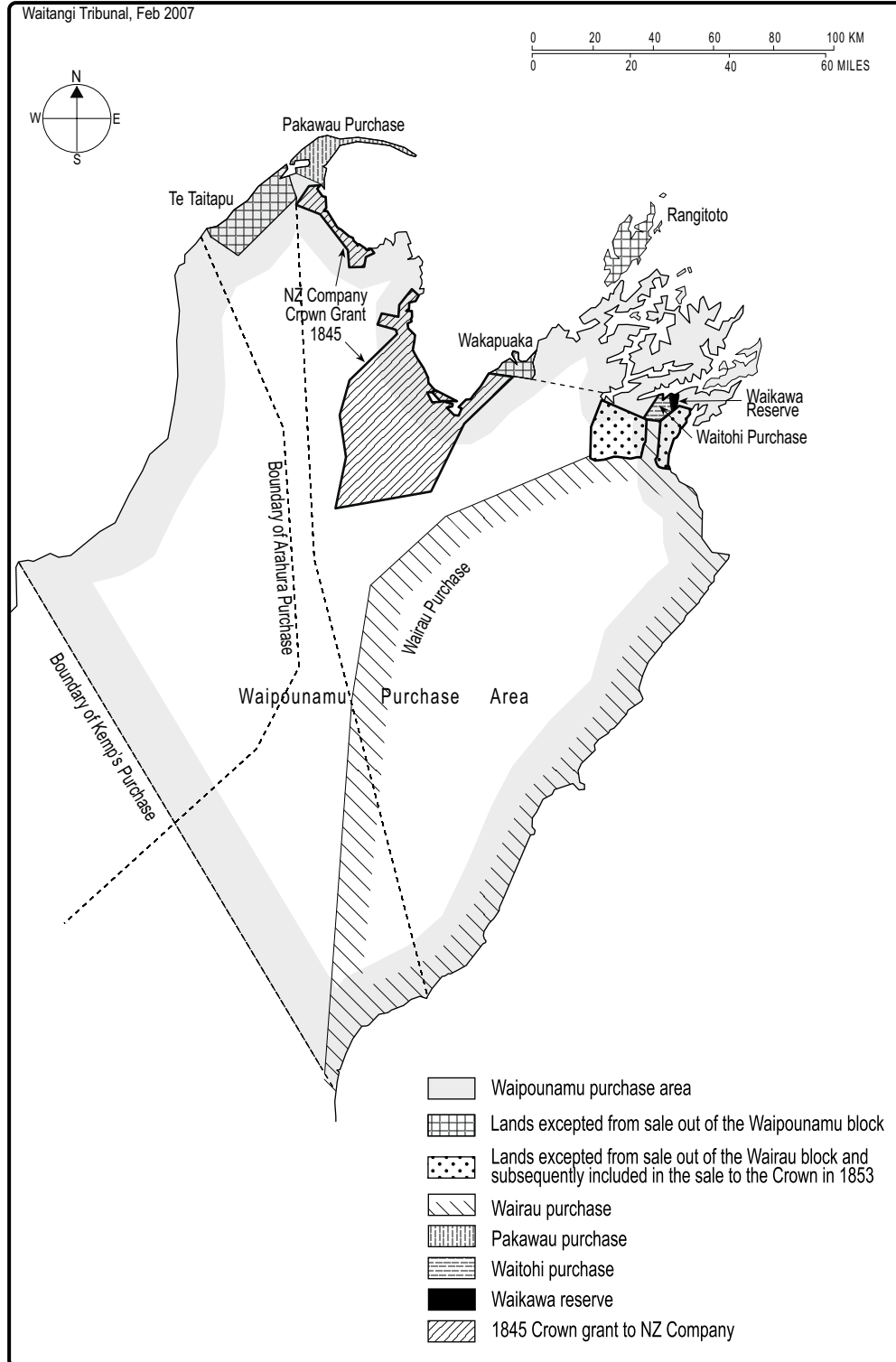
1855–56

On his arrival in New Zealand, the new Governor (Gore Browne) discovered that the reportedly completed purchase was still unresolved. He and McLean finally went to Nelson to begin negotiations in late 1855.

In November 1855, McLean negotiated with western Te Tau Ihu tribes in Nelson, then travelled east to various centres of Maori occupation. A series of deeds were signed, with McLean inflexible on paying much lower prices than he had paid to Ngati Toa. He did agree, though very reluctantly, to the exclusion of three places – Taitapu, Wakapuaka, and Rangitoto – from the purchase.

TE TAU IHU O TE WAKA A MAUI

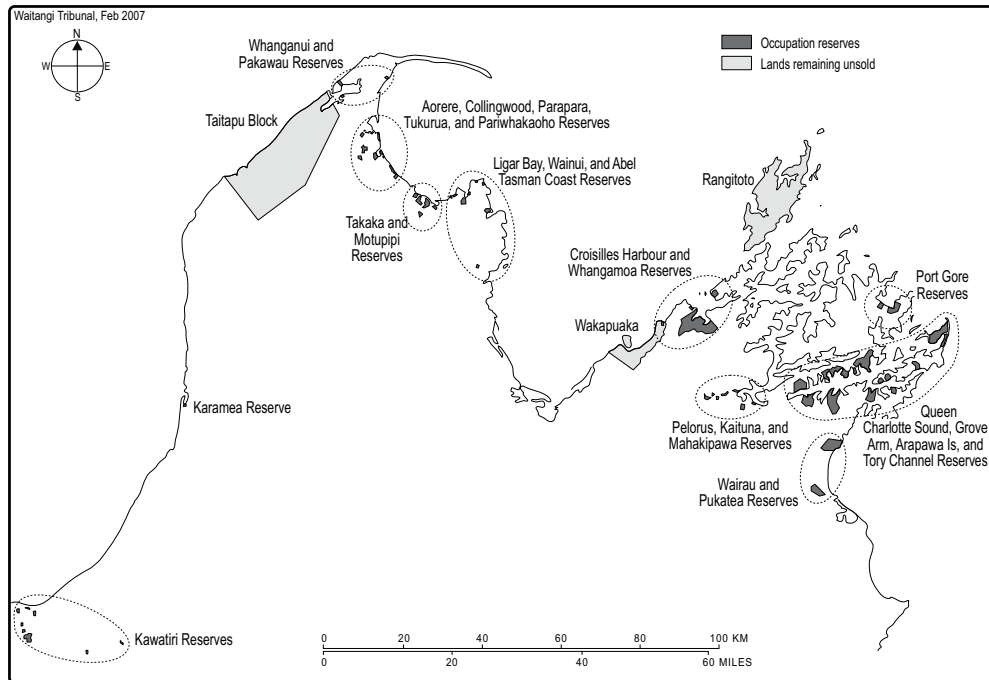
1.4



Map 5: The Waipounamu purchase. Source: Alexander Mackay's plan, AJHR, 1874, G-6.

INTRODUCTION

1.4



Map 6: Occupation reserves and land remaining unsold, 1860. Source: Moira Jackson, 'Te Tau Ihu o Te Waka a Maui Overview Maps', maps commissioned by the Crown Forestry Rental Trust, 2000 (doc A81), map 13.

1855–56—continued

By the end of this process in 1856, which also involved compensating interests from the earlier Spain process, the Crown claimed to have extinguished all Maori customary interests in Te Tau Ihu, apart from those in Taitapu, Wakapuaka, Rangitoto, the tenths, and the new, Government-made, occupation reserves (see map 6).

CHAPTER 2

MAORI CUSTOMARY OCCUPATION IN TE TAU IHU

2.1 INTRODUCTION

This chapter examines Maori occupation of, and customary rights to Te Tau Ihu. It provides a narrative of the movement of Maori groups into and out of the region and of the interaction between these different peoples (for Maori place names, see map 7). We discuss different views on the nature of customary title, more especially with reference to the relative importance of ancestral association and conquest. Finally, we reach general conclusions on the rights held by different groups within the inquiry area. Sometimes, 1840 has been taken as the date at which to assess rights in the land. We disagree with that approach and have extended our discussion of custom into the next decade because settlement patterns and rights in the land continued to evolve, and because our knowledge of the district is reliant in part on the records of European observers and officials. Sorting out what was universally accepted custom and what had been modified by the introduction of Western technology, ideas, and laws, after 1840, is one of the purposes of the discussion that follows. The question then arises whether the Crown rightly or wrongly took account of those changes in its dealings with the different groups of Maori living at Te Tau Ihu.

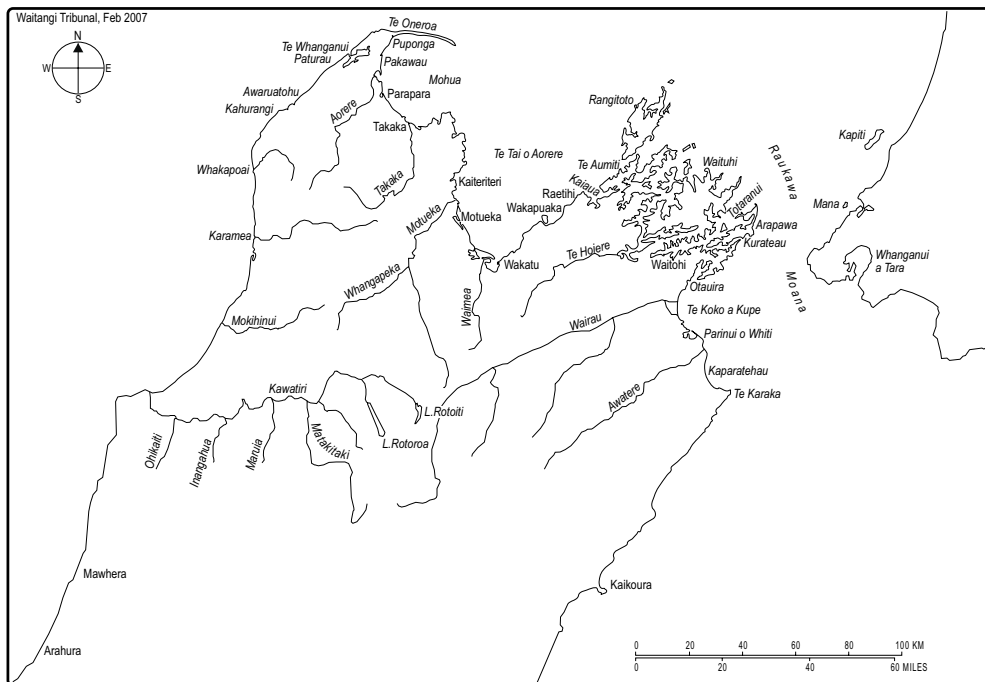
The Tribunal is not, primarily, an arbiter of custom and customary rights, and the various claimant groups were encouraged to come to an agreement amongst themselves as to who held lands in the Te Tau Ihu district and where their rights were situated. In some instances, these issues proved intractable, and they could not be resolved in the customary domain by discussion and agreement of all the parties involved. As a result, the claimants themselves requested the Tribunal to make findings as to the rights held by each different group in the inquiry district. All parties agreed that it was important for the Tribunal to make a clear finding on what customary principles applied and who held rights according to those principles in order to provide certainty in future negotiations with the Crown.¹

While the Tribunal is not a judge of customary rights per se, it is expected to judge what the Crown's duties were with reference to issues of customary usage and ownership and whether it fulfilled them under the Treaty of Waitangi. We will consider that question in some detail in the following chapters. An understanding of customary issues is, therefore,

1. See counsel for Ngati Rarua, memorandum in response to opening submissions of Crown counsel and directions of presiding officer, 19 December 2003 (paper 2.755)

TE TAU IHU O TE WAKA A MAUI

2.1



Map 7: Maori place names

integral to our assessment of Crown actions and the Tribunal is obliged to form an opinion on who held rights in which places at any given time. Our responsibility in this regard is to look at the different evidence and arguments, weigh their merits and their application in the circumstances of our inquiry area, and attempt to describe its customary patterns with as much precision as that evidence permits. Our decisions are informed by evidence of custom; however, they are not bound by that alone. It may be that the Tribunal will decide that the Crown should not have endorsed all aspects of customary usage and that other Treaty principles should have superseded.

Eight different iwi have brought claims within our inquiry district; Ngati Apa, Ngati Kuia, Rangitane, Ngati Koata, Ngati Rarua, Ngati Tama, Ngati Toa, and Te Atiawa.² These iwi may be very broadly classified as falling into two different descent categories. The first three iwi mentioned – Ngati Apa, Ngati Kuia, and Rangitane – are, in this report, often described as descendants from the crew of the Kurahaupo waka. This description serves as a kind of short-hand for a complex genealogical history which includes ‘original peoples’ whom these three iwi had found on their first arrival in Te Tau Ihu in the seventeenth century. Their control of the wider Cook Strait (Raukawa Moana) region was disturbed by migrations from the north of Ngati Koata, Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa, who arrived in Te Tau Ihu from the mid-1820s onwards, but more intensively after 1832.

2. The name ‘Ngati Awa’ was commonly used in the historical record. ‘Te Atiawa’ became more commonly used in the documentary record from the 1860s onwards. It is the name Te Atiawa call themselves today and for this reason the one we use in this report. However, some sources quoted in this report do use ‘Ngati Awa’.

These peoples were originally based at Kawhia and Taranaki, and are associated with the Tainui and Tokomaru waka.

In each of these major descent categories, the constituent iwi were closely linked to each other and the inclusive nature of whakapapa does not permit precise, taxonomic definition between the three different Kurahaupo iwi, or the five tribes from Kawhia and Taranaki. It is not always possible to classify rangatira or their people as 'ngati this' or 'ngati that', with exclusivity or any certainty, in the early to mid-nineteenth century.

This is perhaps more particularly the case for the peoples we have loosely described as 'Kurahaupo', whose whakapapa and interests had intertwined over the preceding generations of relatively stable occupation, and who were rendered largely 'voiceless' by their defeat by the northern tribes. That merging of identities (or identification of) Ngati Apa, Rangitane, and Ngati Kuia was further promoted by the need to consolidate their whakapapa lines after their losses during the invasion of their territory in the 1830s, and by subsequent defeats in the Native Land Court in the 1880s. Dismissal of claims under one whakapapa line promoted the use of different iwi descriptions in later cases.³ All claimant groups emphasise that they have distinct hapu/iwi identities notwithstanding the close links to others within their respective genealogical lines. Nonetheless, close whakapapa connections, the mobility of population, and the tendency of outsiders to use generic tribal ascriptions of 'Rangitane' or 'Ngati Toa' for people who might more readily identify themselves as 'Ngati Kuia' or 'Ngati Rarua' respectively, often precludes absolute precision when it comes to identification of historical areas of tribal dominance. Indeed, for some claimant groups this is an aspect of their complaint against the Crown – that its failure to properly inquire into and identify who people were, ascribing other tribal names to them, meant that their customary rights were lost to others in particular areas.

Questions of occupation and customary right are particularly important to this inquiry because of the impact of migrations into the district in the 20 years preceding the signing of the Treaty of Waitangi. The story of the migration from the north, resulting in the displacement of the peoples who had been living there at 1820, is inextricably tied to questions of who held rights in the land. This is because of the argument that such rights can only accrue with time and, in the case of this district, that insufficient time had elapsed for these late arrivals to have acquired such rights by 1840. We heard in counter-argument, however, that this is a misrepresentation of the real customary understanding; that rights in the land could exist from the moment of conquest, and thereafter, were only strengthened by occupation. This leads us, in turn, to questions of what constituted a 'conquest', or 'occupation'. Was it necessary to show complete extermination of a people to demonstrate conquest? What acts were required to show occupation and how many years, planting seasons, or even generations had to pass before a migrant people's rights were considered fully established?

The recent migrations to the inquiry district, the impact on occupation patterns, and the

3. See Kath Hemi, brief of evidence, 25 March 2003 (doc N9), p14

questions raised relative to customary practice in such circumstances, create a further series of issues for the Tribunal's consideration. These relate to the use of the year 1840, by a variety of Crown agents and Crown-created bodies, as a date from which to judge rights in the land. We must decide whether the Crown should have adhered to that date as one at which ownership was fairly fixed. In some parts of the country, where settlement patterns had been relatively stable for a number of generations, the idea that the people in possession at 1840 were the 'real owners' is not problematic. But this was not the case at Te Tau Ihu.

The decade prior to the Crown's acquisition of sovereignty was characterised by the displacement (but not entire extinguishment) of one set of tribes by another. The very next decade, however, saw the revival of rights of groups that had been defeated in the battles that had established the *starting point* of the claims of the newcomers. The tribal balance shifted, partly because of the impact of Christianity and Crown policies, and partly because customary rights continued to be worked out on the ground. The passage of time and the conditions of greater peace, which Maori themselves sought to achieve through the acceptance of Christianity and the Treaty, enabled defeated peoples to reassert their rights and the primacy of their ancestral association in lands which they had perforce given over, or shared with, those who had gained control through raupatu. Slaves were released, those who had fled returned, lands were resettled, and some of the migrants departed again. Also, Europeans began to bring their own perceptions and interests to bear upon the customary mix further complicating the picture (of who were the leading rangatira and who was resident in the district, their names and their numbers, what was their status, and what was the nature of their rights).

Part of the problem faced by this Tribunal is deciding at what date we judge custom to apply to our decisions regarding Crown treatment of various Te Tau Ihu iwi. In general, both the Crown and the Native Land Court have set 1840 as the date by which to judge who held rights in the land and thus, the people to whom the Crown held responsibility. Although allowance was made for the peaceful recovery, or creation of rights after the founding of the colony, the bottom line was that the dominant owners at 1840 had to give their consent to any such change. We are not, however, bound by that dictum and may choose to judge customary ownership in wider terms, contemplate the possibility that rights have revived in the face of the opposition of those who were dominant at 1840, and use that date as a marker only. We follow the reasoning of the Rekohu Tribunal in this regard: that to freeze rights at that point prevented the natural emergence of rights as they would have otherwise evolved and was in itself uncustomary. In that Tribunal's view, a more flexible approach, which looked at competing claims and how their balance had changed over time, would be a closer approximation of what custom was about; that is, an evolving community understanding of what was acceptable and right.⁴

4. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 131–135

In allowing, however, for the possibility that defeated people retained rights under custom (and that perceptions that all rights were lost on conquest were incorrect), we must make sure that we do not undervalue the rights of newer arrivals to whom *raupatu* had given the opportunity to develop their own rights and interests in the land. The support of the Rekohu Tribunal for the rights of a ‘conquered people’ did not extend to a denial of the right of ‘conquerors’ who had only just arrived before 1840, but remained in occupation thereafter. Their rights also had to be assessed as they had evolved over time.

First, let us turn briefly to the nature of the evidence on which we must base our assessment. The following account of the occupation, *taua*, and subsequent settlement of Te Tau Ihu is intended to provide a background on which to base an analysis of customary issues. It is drawn from the evidence presented by claimant and independently commissioned witnesses. (The Crown declined to offer evidence on the customary history of the area on the grounds that it did not have the relevant expertise, that rights were in an ‘evolving state of flux’ at 1840, and that this issue was best dealt with by the claimants themselves.⁵) The evidence presented to us, in turn, represents the oral traditions and assessments of customary rights of different *iwi*, *hapu*, and *whanau*, and has been drawn from a variety of sources:

- ▶ the *korero* of claimants who appeared before us;
- ▶ the notes of Crown purchase officers;
- ▶ letters from *rangatira*;
- ▶ the testimony of witnesses before the Native Land Court;
- ▶ nineteenth-century accounts by European ethnographers, explorers, and scholars (in particular, Stephenson Percy Smith, Alexander Mackay, and Thomas Brunner);
- ▶ work by early twentieth-century authors, such as J D Peart and W Elvy, who collected Maori local traditions; and
- ▶ research specifically commissioned for this inquiry.

Often there is considerable agreement between sources, but it is also possible for traditions held by different tribal groups to be in disagreement with each other, each sincerely held and yet not always reconcilable. It is not always possible, necessary, or even appropriate to decide which version is right and which is wrong. An important element to consider in the circumstances of our inquiry district is the relative voicelessness of defeated tribes in the early years of the colony. It was only as Europeans began to engage more fully with the local people that their names began to emerge in the written record, where they were invariably described as ‘slaves’, ‘vassals’, or ‘fugitives’. This raises important questions for us to consider. Were those European observations, on which we must now partly rely, distorted by their views about Maori society, that it operated solely on the precept of ‘might is right’? Was there a failure to ascertain the views of those considered to be conquered and did this have an impact on our subsequent views on who held ownership? If, in fact, the

5. See Crown counsel, closing submissions (doc T16), pp 8–16

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2.2

Kurahaupo people were too frightened to assert their claims in the early years of the colony does this mean that they had lost all rights to their former lands? Conversely, is it possible that the willingness of both Crown officials and former conquerors to make provision for a resurgent people, even though they were thought to be without rights at 1840, has left a false impression as to the reality of their situation under customary law?

A particularly problematic feature of the Te Tau Ihu case is the long delay before detailed evidence on the customary history of the region was heard in the 1880s and 1890s, in the context of the investigation into the ownership of reserves and Maori land left from earlier New Zealand Company and Crown purchases. We note the usual cautions about the integrity of evidence distanced in time from the events under examination, and about Native Land Court testimony (that it distorted customary evidence to conform with European perceptions of what gave rights). In addition, Dr Ballara alleges that one of the most influential commentators on the traditional history of the region – a key Crown officer who appeared as a Native Land Court witness and was eventually himself appointed as a judge – deliberately suppressed evidence in favour of certain tribal groups.⁶ We discuss these allegations in our final report. Here, it is important merely to note that in considering the evidence, we should bear in mind that both Maori and Pakeha brought their own prejudices and interests to interpretations of custom and ownership in the land, and that even within Maori society there was not necessarily a universally accepted view as to exactly what customary principles applied.

We may ourselves be accused of ‘reading back into history’, of bringing our own prejudices and passions to our assessment of the evidence, and of creating ‘new orthodoxies’ and new entrenched divisions. Overlapping and competing claims, involving as they do, issues of mana and territorial rights, must be handled with care; all legitimate interests should be identified and any redress for the loss of those interests delivered in such a way as not to prejudice the rights of others. It is with considerable caution, therefore, that we embark upon the following discussion.

2.2 CUSTOMARY RIGHTS IN TE TAU IHU

One of the key questions to be determined by the Tribunal is where the balance lay between the rights of the Kurahaupo people and those who had defeated them and had taken control of much of their territory.

6. See Angela Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu (Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)’, report commissioned by the Crown Forestry Rental Trust, 2001 (doc 01), pp 286–287

Maori customary rights to land, and to associated waterways, sea, and foreshore, were multi-faceted and complex. We find the concept of a 'bundle of rights' a useful one when thinking about the nature of customary tenure. Although there was wide agreement in the Maori world about what elements might be contained in that bundle, there was far more room for dispute about how important each of those elements was in any particular case. Physical occupation and cultivation constituted a key element of that bundle, but other sorts of actions could also create rights in the land. Included here were tangible acts of resource-use, such as birding, gathering berries, collecting flax and firewood, taking trees for waka, digging ochre for dyes, or collecting plants for rongoa (medicines). Evidence of rights in the ownership of the land could also be of a more spiritual nature – the birth and death of kin there – and less tangible, as in the naming of particular features, or an ancient association through long historical occupation even though those people had since departed. Ancestral association was an element that could never be removed; as the Tribunal has pointed out in its Rekohu inquiry, 'Maori regarded the right of recovery of ancestral lands as good as a right by possession.'⁷

The 'ancestral rights' of a group could, however, be pushed to one side, in a practical sense, by those who had arrived more recently and who occupied by 'take raupatu', or by 'right of conquest'. What importance was attached to raupatu depended greatly on the timing; the nearer to the date of conquest, the greater was its importance in the perceptions of that people. In our view, raupatu provided the opportunity for rights to be developed until that group could also claim ancestral association by reason of long-term occupation.

Much depended on the circumstances of the case. This is demonstrated by the different emphases that Tribunals have placed on different aspects of customary rights. In examining the case of Rekohu, where Moriori had been defeated and killed or enslaved by tribes from the mainland but had also survived and endured, the Tribunal has stressed the primacy of ancestral association and rejected claims based in conquest except in so far as this was followed by permanent occupation. In its view, the invasion of Rekohu was uncustomary, influenced by ideas of 'blackfellas' brought by Europeans, facilitated by muskets, and not followed by the usual practice of intermarriage.⁸ Even so, the conquerors who stayed eventually developed their own set of rights. At Te Whanganui a Tara, where the Tribunal looked at a district from which almost all the former inhabitants had been driven, more weight was placed upon rights derived from conquest in its assessment of what custom meant. There, the Tribunal concluded that:

The ability to defend one's territory was fundamental to the possession of rights to land, for without this ability, all other rights were lost. Conversely, the ability to take another's

7. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, p143

8. *Ibid*, p 45

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2.2

rights or lands was also fundamental, for by this action, rights were won. Conquest gave mana and take raupatu to conquering chiefs and tribes.⁹

Still, for newcomers to sustain their rights to lands gained by conquest they had to create 'other layers of rights, such as use-rights, kin links, and physical occupation'. Only by such actions could they be said to have ahi ka, or to have lit the fires of occupation. As time passed, those other layers of right – the other sticks in the bundle – became increasingly important and, ultimately, would replace those based on conquest. Thus, rights based on conquest were regarded as less satisfactory than ancestral rights created over several generations, but they took precedence in the circumstances described in the Whanganui a Tara case.

The situation at Te Tau Ihu was different from both Te Whanganui a Tara and Rekohu. The balance of rights was more evenly distributed between those who had been defeated but had lived on the land for many generations, and those who had defeated them and were clearly in control but were recent arrivals. In our inquiry area, similar conquests had taken place as at Te Whanganui a Tara, but far more of the earlier inhabitants remained on the ground, and the argument for the precedence of ancestral rights over those of conquest was that much stronger. Nor was there an exact parallel with Rekohu. Much of the Tribunal's criticism in the Rekohu case was for the disproportionate weighting given in 1870 to the rights of conquerors who had been completely dominant at 1840, but had since departed the island and had no apparent intention of returning. In Te Tau Ihu, however, the conquerors (or many of them) had stayed, had allowed tributary communities to remain, and had married into them in the customary way. They had not long been in occupation (at 1840), but their rights were accumulating as the years passed.

Thus, we are faced with two opposing views:

- ▶ 'conquered groups' argue that ancestral rights always remained unless a people were utterly exterminated, or entirely enslaved and removed from the land, never to return; and
- ▶ 'conquering groups' argue that the total annihilation of their enemy was not required for the latter's utter subjugation and complete loss of independent rights. In the conquerors' view, the 'fires' maintained by the people they had defeated were not of a nature to prove an ongoing right on their part.¹⁰

We explore these ideas further, later in the chapter, but first we turn to a description of the settlement pattern of the region and discuss how it was affected by successive waves of taua and heke in the 20 years prior to the signing of the Treaty.

9. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 33

10. See, for example, Ngarongo Iwikatea Nicholson, brief of evidence, 11 June 2003 (doc P4), pp 22–24

2.3 OCCUPATION OF TE TAU IHU AT 1820

Fragmented traditional narratives of the Kurahaupo iwi and their predecessors with whom they merged (Ngati Tumatakokiri, Ngati Wairangi, Ngai Tara), difficulties in ascribing tribal affiliations to individuals in the late eighteenth and early nineteenth centuries, the differing perspectives of the northern migrants on their settlement histories, and the competing interests of neighbouring iwi Ngai Tahu; all preclude any single account of the traditional history of the region from gaining universal acceptance. We are conscious of the dangers of trying to create one seamless narrative out of different versions of events. Still, it is necessary to provide an account of that sequence of conflict and accommodation if our later discussion of customary right-holding is to be fully understood. The following narrative represents our general understanding of the history of the occupation of the region, but we identify instances in which differences in account, and in interpretation, affect our perception of the state of customary tenure.

We start by describing the occupation of the region in the early nineteenth century from the perspective of the Kurahaupo claimants. The choice of that starting date obscures their viewpoint, which looks back further to the intermarriage between ‘original peoples’ and the peoples of the Kurahaupo waka, who had slowly migrated from the Mahia Peninsula, and a connection with the land that extends to the seventeenth and eighteenth centuries. The traditional memories of these people were to be fractured by taua from the north in the 1820s and 1830s and, as a result, were rarely recorded other than in the testimony of descendants in the Native Land Court, which focused on the events of that later period. The knowledge of an earlier history that has survived was voiced in the names of ancestors that were fixed to the land, such as Te Hoiere (the waka of Ngati Kuia ancestor, Matuahautere), Moeawhiti, Puhikeru, Hinepopo, and Tarakaipa. There were also whakapapa and waiata remembered by the handful of rangatira who had escaped the war parties that overwhelmed their people. Mr Ngata, who compiled a traditional historical report for Ngati Kuia, referred us to the whakapapa recorded in the 1860s and 1870s by Tahuariki Meihana and Pirimona Pokihi, amongst others, and brought to our particular attention a series of karakia that had been related to Stephenson Percy Smith by EW Pahauwera in the 1890s.¹¹ Claimant witnesses such as Mr Mark Moses of Ngati Kuia spoke of his own continuing schooling in whakapapa and knowledge of nga karangatanga maha (the many relationships).¹²

For a narrative of the early settlement of Te Tau Ihu, however, we turn to the evidence given by John and Hilary Mitchell, who have made the tribal history of the region their particular study. Their account relates how Ngati Mamoe, Ngai Tara, Ngati Tumatakokiri, and Ngati Kuia had established themselves in the northern South Island in the seventeenth

11. Eruera Wirihana Pakauwera, ‘The Story of Hinepopo’, translated by Stephenson Percy Smith, *Journal of the Polynesian Society*, vol 3 (1893), pp 98–104; Wayne Ngata, ‘Nga Korero Mo Ngati Kuia’, report commissioned by the Crown Forestry Rental Trust, undated (doc L8), p 65–66

12. Mark Moses, brief of evidence, 25 March 2003 (doc L5), pp 5, 24–26

century. In the mid to late seventeenth century, elements of both Rangitane and Ngai Tahu (with whom they had close whakapapa relationships) also crossed to the Sounds. Rangitane occupied Te Whanganui (Port Underwood) and fought with Ngati Mamoe for the control of the Wairau, while Ngati Kuri fought with Ngai Tara in Te Hoiere (Pelorus Sound). Both Rangitane and Ngati Kuri sought to expand into the Wairau and a period of intermittent fighting followed. Ngati Mamoe were pushed further southwards to the Kaikoura Coast and were ultimately displaced by Ngati Kuri. A similar process took place on the western side of the island in the late eighteenth and early nineteenth centuries. The Mitchells describe how Ngati Tumatakokiri, who had been in control of the Tasman and Golden Bay area and down the west coast (in their view) as far south as Mawhera, were largely displaced by Ngati Apa, and were also under attack from Ngati Kuia and Rangitane from the east, and Ngai Tahu from the south.¹³

The linking of whakapapa was an essential element in this narrative of settlement. The successive migrations, boundary adjustments between different hapu, proximity to each other, and marriage over several generations had intertwined the descent lines. Mr Moses told us that intermarriage 'between Ngati Tumatakokiri, Ngai Tara, Ngati Mamoe, Ngati Wairangi, Ngati Apa and Te Aitanga a Matua Hautere (the descendants of Matuahautere) created a number of separate hapu', and the 'descendants of these hapu can be seen in the whakapapa of all our Ngati Kuia witnesses.' Important marriages had also been made with Rangitane dating back to their migrations through the Wairarapa and weaving together their shared Ngai Tara whakapapa.¹⁴

Certain parts of the region were shared along with whakapapa. Thus, peoples tracing different descent lines lived together in some locations, and settlements belonging to one group could be found interspersed within a general locality dominated by another. Still, by 1820, certain rangatira had become identified with particular areas, and the people living there with particular iwi. Thus, Rangitane were associated with Totaranui, Wairau, Cloudy Bay and the east coast, possibly as far south as Waiautoa (Clarence River). They shared the Kaituna River Valley with Ngati Kuia, who dominated elsewhere, in Te Hoiere through to Rangitoto (d'Urville Island) and adjacent areas on the mainland. Ngati Apa interests dominated from Wakatu (Nelson) westwards, and possibly as far south as Kawatiri (Buller).¹⁵ (We do not consider the southern 'boundary' of Ngati Apa in this report.) Their migration into this region was relatively recent and Ngati Tumatakokiri remained as an identifiable people at that time; although that descent line was not often claimed, it was – and is – still remembered.¹⁶

13. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o Te Tau Ihu o Te Waka a Maui, 1992 (doc A9), vol 1

14. Moses, pp 6, 8-10

15. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 18

16. See Moses, pp 6-7

In summary then, and by the Mitchells' account, in the decade prior to the invasions from the north, the occupation of the region was as follows:

Rangitane on the northern Kaikoura coast, Wairau and eastern Sounds, with well-established greenstone trails through the Upper Wairau (the 'Hundred Rivers'), Awatere, Waiau-Toa and other river systems: Ngati Kuia occupied much of the Kaituna, Te Hora, Hoiere, Rangitoto, Whangarae, Wakapuaka and Whakatu districts; and Ngati Apa sharing Whakatu and occupying westwards from Waimea and Moutere and inland to Kawatiri (Buller). There were major pa in numerous localities spread across the Te Tau Ihu region, from Te Karaka (Cape Campbell) and Matariki (at the mouth of the Waiau-toa) on the northern Kaikoura Coast to Kawatiri (Buller) on the northern West Coast.¹⁷

We are not called upon to decide where boundaries lay between the various Kurahaupo tribes before the invasions from the north, which we discuss in the next section.

2.4 THE SOUTHWARD MIGRATIONS OF THE KAWHIA AND TARANAKI IWI:

A BACKGROUND

The settlement pattern just described had been relatively stable for a number of decades, despite the usual internal conflicts and adjustments between neighbours, but in the 1820s and 1830s, the tribal landscape was disturbed by migrations from the north. These tangata heke (migrant people) were from the Kawhia and Taranaki area and included hapu of Ngati Toa, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata. Inter-marriage between these different descent lines – especially between those who were direct neighbours – had been as common a practice amongst these peoples as it had been among the Kurahaupo tribes. Indeed, Ngati Toa, Ngati Koata, and Ngati Rarua were often referred to as one (Ngati Toa) tribe in the nineteenth century. But such was not the reality. They, too, followed distinct descent lines, developing and increasing in numbers, in neighbouring districts at Kawhia and Taranaki, at about the same time as each other.¹⁸

In the early nineteenth century, the Kawhia and Taranaki peoples found themselves under increasing pressure from the Waikato–Maniapoto, who were themselves being squeezed from the north, and by the escalating conflict exacerbated by the introduction of muskets into the traditional pattern of tribal warfare. Dr Angela Ballara sums up the situation:

Ngati Toa, Ngati Rarua, Ngati Koata and Ngati Awa had close kin links that resulted in their alliances with each other against the Waikato–Maniapoto peoples in a series of wars

17. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol1, ch 3, pp 2–3

18. See Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol1, p17; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 20–21

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2.4

resulting from the expansion of each people and a search for domination of food sources, especially coastal resources. These wars were expressed in cultural terms as a series of *take* resulting from the deaths of people of rank requiring resolution through battle to restore group mana, and the escalating cycle of warfare in the early 19th century as the pressure for land and resources mounted led these peoples to seek another homeland, far removed from a seemingly endless and hopeless situation in the north.¹⁹

The migration that followed took place in stages over a period of some 20 years.²⁰ At first, the destination was the Kapiti Coast. The Ngati Toa chief, Te Rauparaha, had seen the potential of this area as a new home for his people when he accompanied an exploratory Ngapuhi-led taua south in 1819. Te Rauparaha has become a figure of renown and some notoriety in New Zealand – chief, warrior, general, and composer of the haka *Ka Mate* – but the Tribunal is required to look behind that legacy (and legend) because his position is pivotal to aspects of the claim before us. It is argued by the Ngati Toa claimants that Te Rauparaha's mana, and his capacity as a leader, was such that he – and his people – enjoyed rights to lands other than those based in a physical occupation. Other iwi are of the view that no leader in customary Maori society could exercise the degree of control that this interpretation would require. Their leaders and their people, they argue, were allied to but always independent of Te Rauparaha, whose rights did not extend to territory that had been settled as a result of a conquest in which he had taken no direct part. These counter-arguments will be explored more fully through the course of this chapter, but what is clear is that Te Rauparaha was the prime initiator of the heke that followed, establishing a new homeland for the Kawhia and northern Taranaki peoples on both sides of Raukawa Moana.

Permanent migration started in about 1820 as the first groups began to move south under their respective leaders in heke, each of which bore its own name: Te Heke Mai-i-raro, Tataramoa, Nihoputa, Tama Te Uaua, and Paukena, amongst others.²¹ Typically, the pattern of migration involved more than a single journey as members of the heke moved back and forth between their place of origin and their new homeland; at first between Taranaki and the Kapiti Coast–Wellington area and subsequently between the Kapiti Coast and Te Tau Ihu. Included in the first movement southwards were Ngati Toa and their close kin (Ngati Koata and Ngati Rarua) as well as a large party from the Taranaki area where the

19. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 24

20. The circumstances of these migrations have been the subject of Tribunal inquiry at Te Whanganui a Tara and at Rekohu, to which we refer the reader. The migrations are also described in a number of the reports filed with the Tribunal: see Ngati Rarua Claims Committee, 'Ngati Rarua Traditional History', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 1999 (doc A51), pp 11–15; Alan Riwaka, 'Nga Hekenga o Te Atiawa', report commissioned by the Te Atiawa Manawhenua Ki Te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2003 (doc A55), pp 14–64; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 87–94.

21. The following account is based on that provided in Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 19–32

Kawhia tribes had paused for a planting season. These people were from Ngati Mutunga, Ngati Tama, and Te Atiawa.

The heke was attacked both there, by Waikato, and on the Kapiti Coast, by Muaupoko, despite a marriage-based alliance with Ngati Apa (Muaupoko's close kin and neighbours). One of those attacks, which resulted in the death of Te Rauparaha's children at Ohau, was to initiate a round of reprisals and the expansion of warfare into Te Waipounamu. These deaths provided the first of several take (causes of war), which compounded with the death of the senior Ngati Toa chief, Te Peehi, the uttering of kanga (curses), and alleged insults made with regard to Te Peehi's bones. Those offences upset the spiritual balance, impaired Ngati Toa's mana, and triggered successive taua in the search for redress. That imperative – to restore the equilibrium – was paramount in the Maori world, imbued as it was, with wehi and ihi (fear and awe), but there was a more immediate 'political' need, too: namely, to ease the pressures caused by the arrival of increasing numbers from the north.²² Most of the Taranaki group who had accompanied Te Rauparaha south, returned home, but were to migrate more permanently in their own heke several years later (after the Battle of Waiorua, discussed below).

In the meantime, Ngati Toa and their closest kin remained, capturing Kapiti Island for their own stronghold in about 1823. They were subsequently joined in adjacent areas by their Taranaki allies as well as by various heke of Ngati Raukawa, to whom Te Rauparaha's branch of Ngati Toa (Kimihia) was closely related.²³ Each group settled a particular area, eventually driving out most of the former inhabitants of the region, south from the Manawatu River to Te Whanganui a Tara. Pressure on resources as later heke arrived was also to cause instability between the northern allies with further repercussions for settlement patterns in Wellington and eventually Te Tau Ihu.

The first stage of the movement across the strait to Te Tau Ihu took place in the mid-1820s. Inexorably, the Kurahaupo people, based in the northern South Island, had been drawn into the events taking place across the Raukawa Moana (Cook Strait). Te Rato (also known as Te Ratu and Te Kotuku), the high-ranking chief of 'Ngati Apa' (and of Rangitane and Ngati Kuia), had been forced out of Kapiti by Te Rauparaha and was subsequently involved in the resistance of local Muaupoko people at Lake Horowhenua (the conflict which had resulted in the death of Te Rauparaha's children). Te Rato was captured and enslaved, but subsequently escaped to his kin at Te Tau Ihu, led by Tutepourangi, who is generally identified as his brother. From there, Te Rato launched a counter-attack, drawn from the Kurahaupo peoples from both sides of the straits, attempting to regain Kapiti Island and eject the northern newcomers from the region. The resulting battle was called Waiorua.²⁴ From this

22. See Angela Ballara, *Taua: 'Musket Wars', 'Land Wars', or Tikanga?* (Auckland: Penguin Books, 2003), p 163; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 24–25

23. Riwaka, pp 53–64

24. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 90; Riwaka, pp 47–50

engagement – the first between the peoples of the South Island and those from Kawhia and Taranaki – flowed many of the events that were to alter so greatly the tribal landscape of Te Tau Ihu over the next 15 years.

Waiorua (named after the site of the conflict) was a serious defeat for the Kurahaupo forces (variously estimated at between 600 and 2000 people) and while a single engagement could not wholly decide the fate of the Cook Strait region – or its entire ‘ownership’ – it still had important consequences for patterns of power and settlement. The most important of these was the loss of mana for the Kurahaupo tribes.²⁵ The ascendancy of the incoming tribes was established, enabling them to undertake further migrations from the Kapiti Coast to settle the Whanganui a Tara (Wellington) and Te Tau Ihu lands. While Ngati Koata and Te Atiawa were involved in Waiorua, alongside Ngati Toa, it was the mana of Te Rauparaha and Ngati Toa that was most enhanced. Te Rauparaha’s personal role in the battle was largely irrelevant; the credit went to him as the prime mover of the heke and the main war leader of the Kawhia–Taranaki forces.²⁶

2.5 TUTEPOURANGI’S TUKU WHENUA, CIRCA 1825–27

One of the first consequences to flow out of Waiorua was the settlement of Ngati Koata and a smaller group of Ngati Toa in Te Tau Ihu. However, that occupation was based not on raupatu but on the ‘tuku whenua’ (gift or allotment of land) by the high-ranking rangatira, Tutepourangi, who had been captured during the battle and whose life had been spared. The tuku formed an important theme in the evidence heard by the Tribunal, with implications for our understanding of customary tenure generally, as well as the particular course of settlement in the region. It is significant that Ngati Koata, as one of the victorious parties at Waiorua, should have preferred tuku to raupatu as a take, or basis of claim, at Rangitoto and adjoining lands during later Native Land Court hearings. The tuku was also advanced by Ngati Kuia as proof of their continuing connection with lands at Wakatu and Wakapuaka, and their place within Te Tau Ihu. Both peoples recognised the importance of the tuku but had different interpretations of its meaning in terms of ‘ownership’ of land and their respective rights.

The major issues argued before us concerned the nature of the tuku, the rights enjoyed by Ngati Koata as a consequence of it, and the status of Ngati Kuia’s interests thereafter. Related issues also arose for the Tribunal’s consideration:

- ▶ What were the boundaries of the tuku?

25. Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 92

26. See Angela Ballara, ‘Te Whanganui-a-Tara: Phases of Maori Occupation of Wellington Harbour, c1800–1840’, in *The Making of Wellington, 1840–1914*, edited by David Hamer and Roberta Nicholls (Wellington: Victoria University Press, 1990), p 17; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, p 21

- ▶ What obligations did this entail upon Ngati Koata as recipients of the land and were those obligations fulfilled?
- ▶ What was the effect on the tuku of the later taua conducted by Ngati Koata's allies which resulted in the death of Tutepourangi?

Different kinds of evidence were brought to our attention with reference to these questions; descriptions of the specific actions of Tutepourangi, Tekateka, Te Putu, and the other rangatira involved in the tuku, as given (and interpreted) in the land court and tribal account; evidence as to the current understandings of the gift as handed down by elders; and general matauranga and scholarship regarding the nature of tuku.

These issues are discussed in some detail later in this chapter, but first it is necessary to outline the circumstances leading to the tuku whenua itself and its physical parameters. Although the narratives differ in emphasis and in some specific detail (especially as to exact timing and who had been present), the picture that emerged from the land court minutes was of a tuku arising initially out of battle. The senior rangatira, Tutepourangi of Ngati Kuia/Ngati Apa had been captured at Waiorua by Te Putu of Ngati Koata, who spared his life. According to one account, Tawhe, a child who was closely related to Te Putu and the other senior rangatira of Ngati Koata – Mauriri II, Whakatari, and Te Whetu – had also been captured. The boy had been taken to Rangitoto. Ngati Koata pursued in two waka and, accompanied by Ngati Toa and Kaitangata of Te Atiawa, landed at Opua.²⁷ The intention appears to have been to retrieve the boy safely, not further warfare. Tutepourangi was released and, on discovering that Tawhe was still alive and residing with Ngati Kuia at Te Hoiere, Tutepourangi had him brought back to his people. Peace was made and most of Ngati Toa and Te Atiawa returned to Kapiti, while Ngati Koata and a small contingent of Ngati Toa remained. Te Patete and some of the Ngati Koata party settled with Tawhe and Ngati Kuia at Te Hoiere. Tekateka, Te Putu, and the rest of Ngati Koata and the remaining Ngati Toa went on to Rangitoto where Tutepourangi, who had accompanied them, made a tuku of all his people's lands.²⁸

According to the accounts in the Native Land Court given by descendants from both sides (Meihana Kereopa of Ngati Kuia/Apa and Ihaka Tekateka of Ngati Koata), the tuku commenced at Anatoto at the mouth of the Pelorus Estuary, including the sound and around the coast from Kaihua (Croisilles Harbour) to Cape Soucis, Whangamoia, Wakapuaka, Wakatu, Waimea, Motueka, and on to Te Matau (Separation Point).²⁹ Thereafter, Tekateka and Ngati Koata had conducted a 'takahia te whenua' of the tuku, setting their feet on the land and

27. This is a summary of the account given by Ihaka Tekateka and Meihana Kereopa at Nelson Native Land Court minute book 2, fols 253–255, 308–309 (Tony Walzl, 'Information Audit on the Minutes of the 1892 Native Land Court Hearing to Determine Beneficial Ownership in Respect of the Nelson Tenths Reserves', report commissioned by the Ngati Rarua Claims Committee in association with the Crown Forestry Rental Trust, 2003 (doc B22), pp 11–12, 16–17)

28. Nelson Native Land Court minute book 2, fols 256–257, 266 (Walzl, 'Information Audit', pp 14–15)

29. Ibid, fols 255–256, 308 (pp 13–14, 16–17)

making peace with the local chiefs: Te Kakaho at Whitikareao, Te Waka at Te Raiti, Kihiro at Whangamoa, Te Kahawai and Te Aukomiro at Wakapuaka, and Tamatau at Wakatu.³⁰ Most importantly, high-ranking marriages were arranged between the senior rangatira of Ngati Koata and the female relatives of Tutepourangi and the other senior Ngati Kuia leaders. Nukuhoro and Keiha were married to Tekateka and Te Putu respectively, while Oriwa, the daughter of Kereopa Ngarangi and Kerenapu, was chosen for Turi Te Patete.³¹

By this means – the joining of whakapapa – the tuku was confirmed, the rights of Ngati Koata, as newcomers without prior connection to the land were validated, and the continuation of Ngati Kuia rights also ensured. Some in their party returned to the North Island under the leadership of Matiu Te Mako, but the rest of Ngati Koata settled with Ngati Kuia at Rangitoto and Te Hoiere, gathering food and resources at Wakapuaka, Wakatu, and Waimea. This pattern of accommodation and settlement was soon to be disturbed by the taua of the northern tribes. Although the rights of Ngati Koata were thereafter largely confined to Rangitoto and adjacent lands, while Ngati Kuia settled at Te Hora (Canvastown), the tuku continued to be acknowledged by both donor and donee, and was seen as sustaining the ongoing rights of both peoples.

There is wide agreement on the meaning of ‘tuku whenua’ in pre-contact society, in terms of the creation of a reciprocal relationship between the parties concerned; that is, the donors of rights to land expected benefits to flow back to them over time. There is, perhaps, more debate about whether the donor (kaituku) continued to enjoy undiminished rights in the land or taonga handed over, if it were done from a position of weakness in order to redress a serious loss of face or defeat in battle. Other questions arise. Did such land revert to the original owners if the recipient failed to fulfil those obligations? In our case, we also have to consider whether Ngati Koata held rights to the whole of the gifted area, or whether the tuku was overset by the subsequent taua. The picture was complicated by a later tuku by Ngati Koata of lands at Wakapuaka to persons within Ngati Tama, the significance of which was to be hotly debated. Much depended on the circumstances of the case and the mana of the rangatira involved.

Both Ngati Koata and Ngati Kuia were to rely, in part, on Tutepourangi’s tuku as their take in Wakapuaka in 1883 and, again, in the 1892 hearings for the Nelson tenths. For Ngati Koata, the tuku primarily defined their rights against those of subsequent arrivals rather than against Ngati Kuia, with whom they had intermarried. For Ngati Kuia, however, the respect accorded to the tuku of their ancestor was continuing proof of their own ongoing presence and rights in the land. We shall see that both Ngati Koata and Ngati Kuia/Ngati Apa argued that Tutepourangi’s tuku had a wider compass and significance than the other iwi (and the Native Land Court) were to accord it.

30. Nelson Native Land Court minute book 2, fol 255 (Walzl, ‘Information Audit’, p 13); see also Josephine Paul, brief of evidence, 2004 (doc B29), paras 36–38

31. Puhanga Patricia Tupaea, brief of evidence, 2004 (doc B15), para 21; Paul, paras 40–43; Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, pp 96–97; Ngata, pp 130, 136–137

In the hearings for the Nelson Tenths in 1892, Ihaka Tekateka, speaking on behalf of Ngati Koata, Ngati Toa, and a section of Ngati Tama and Te Atiawa, emphasised that the tuku had precedence over the later conquest and that it encompassed more than just the lands at Rangitoto. It had not been negated by later taua, nor had it been superseded by the settlement of the western Te Tau Ihu by Ngati Koata's northern kin and allies. Tekateka told the court that he had two claims to the land: first through the gift of Tutepourangi to Ngati Koata and Ngati Toa; and, secondly, through conquest.³² Ngati Koata's places of occupation since that time were listed by Tekateka as comprising the gift area: 'Nelson, Waimea, Moutere, Motueka and on to Separation Point (Te Matau)', as well as Rangitoto.³³ He argued that the rights deriving from the tuku had not been disturbed except in so far as Ngati Koata rangatira made allocations to the newcomers. Thus, Mauriri had gifted the area from Motueka to Te Matau, and Te Whetu the land at Wakapuaka to Ngati Tama.³⁴ According to Tekateka, Ngati Kuia had at first fled but then rallied around Wharehia at Wakatu.³⁵ And despite the intervening years of taua, the two peoples were still living there together, cultivating and dressing flax at Waimea, when the New Zealand Company arrived in 1841.³⁶

Ngati Kuia and the other Kurahaupo tribes supported Tekateka in most points of his narrative. Their representative, Meihana Kereopa, told the court that the tuku 'was not trodden under foot' and that Ngati Kuia had continued to live with Ngati Koata after the wave of taua from the north. Kereopa did not see Ngati Kuia's rights as ended either by tuku or by conquest.³⁷ That Ngati Koata still recognised the tuku made to them, and that the two peoples continued to live together, were seen as proof that Ngati Kuia interests endured, that they had not all been enslaved and that their occupation continued.

There were, however, important points of difference in the testimony and cross-examination of the two witnesses. The first concerned the implications for Ngati Kuia's rights when the area under tuku was subsequently invaded. Under cross-examination by the conductor of the Ngati Koata case, Kereopa could not say how much rangatiratanga had been left to him 'after the land became possessed by the northern tribes' and he acknowledged that his people had had to bury their dead secretly and that the northern tribes had acquired rights in the land by reason of raupatu.³⁸ Tekateka also argued that the gift was not overturned by the subsequent taua, that:

32. Nelson Native Land Court minute book 2, fol 253 (Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata Ki Te Tonga, c1820-1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p172)

33. Nelson Native Land Court minute book 2, fol 254; Bassett and Kay, p 172

34. Nelson Native Land Court minute book 2, fol 259; Bassett and Kay, pp 173-174

35. Nelson Native Land Court minute book 2, fol 276; Bassett and Kay, p 174

36. Nelson Native Land Court minute book 2, fol 266; Bassett and Kay, p 173

37. Nelson Native Land Court minute book 2, fol 314 (SKL (Leah) Campbell, "A Living People": Ngati Kuia and the Crown, 1840-1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), p 25)

38. Nelson Native Land Court minute book 2, fols 314-315 (Walzl, 'Information Audit', pp 39-40). For the secret burials, see Nelson Native Land Court minute book 2, fol 317 (Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 51).

There was no raupatu in the Nelson or the Waimea Districts. The reason for that was that the land was in the possession of Ngatikoata through the gift by Tutepourangi. This was the 'take' that limited the occupation of Ngatikoata to the eastward of Moutere.³⁹

But questioning of Kereopa by Ngati Koata suggests that they did not accept that Ngati Kuaia's authority had been unimpaired by the conquest in which they had been participants.

The other significant point of difference lay in Tekateka's suggestion that the initial act of tuku had included Te Rauparaha and Ngati Toa.⁴⁰ According to Bassett and Kay in their report on Ngati Koata rights, Tekateka had chosen to emphasise this point because 'at the time of the conquest, they needed to ensure that the tuku was recognised by the invading parties'. They suggest that Tekateka was attempting to give the tuku greater mana and to show that it had been accepted by Te Rauparaha.⁴¹ Kereopa maintained, however, that the tuku was to Ngati Koata only, although he conceded under cross-examination that Ngati Toa might have a right too: 'I consider the gift by Tutepourangi is confined to Ngatikoata but perhaps Ngatitoa ought also to participate as that hapu assisted to save his life.'⁴² On the other hand, under cross-examination by Paramena Haereiti (Ngati Tama), Tekateka conceded that any gift to Te Rauparaha could not stand because 'it was not competent for Te Rauparaha to effect a conquest over land that had been given to him under the gift of Tutepourangi supposing that Gift was an effective one.'⁴³

Witnesses from other iwi claimed to know nothing about the tuku and were suspicious of Ngati Koata's motivations as trying to prove a superior right, and Ngati Kuaia's as trying to show a surviving one in territory long lost.⁴⁴ The court also rejected the interpretation of custom argued by Tekateka and Kereopa. The judge regarded the rights of Ngati Koata as deriving only from conquest, the allocation of territory by Te Rauparaha, and subsequent occupation. That occupation was judged to extend as far as Rangitoto and no further; to the south at Wakapuaka and Wakatu, Ngati Koata were seen as 'just passing through'. At the same time, the rights of Ngati Kuaia and the Kurahaupo tribes were considered to have been completely extinguished.⁴⁵

This is to take the story well beyond our current narrative, but before returning to the events of the 1830s and the effect on settlement patterns and rights in Te Tau Ihu, we note the evidence of Ngati Koata today and what they say about the meaning of Tutepourangi's tuku. Puhanga Patricia Tupaea spoke on Ngati Koata's behalf, but claimed Ngati Kuaia descent also.

39. Nelson Native Land Court minute book 2, fols 262–263; Bassett and Kay, p 174

40. Nelson Native Land Court minute book 2, fols 262–263; Bassett and Kay, p 174

41. Bassett and Kay, p 174

42. Nelson Native Land Court minute book 2, fol 316 (Walzl, 'Information Audit', p 18)

43. Nelson Native Land Court minute book 2, fol 276 (Bassett and Kay, p 174)

44. See evidence of Herewine Ngapiko, Ramari Herewine, Tuaha Matenga, and Paramena Haereiti, Nelson Native Land Court minute book 2, fols 194–195, 224–225, 234, 282; Walzl, 'Information Audit', pp 18–20

45. Nelson Native Land Court minute book 1, fol 25 (Bassett and Kay, p 130); Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 287

She told us how the tuku was still remembered by her people and how she first learned of it as a child, ‘when we would sit by the fire and have koorero purakau as a child. Most of the stories were told at the Big House at Rangitoto.’⁴⁶ These stories were related by Wetekia, her brother, and Hemi Waka, who was tuturu Ngati Kuia. Mrs Tupaea gave evidence that:

The Korero about Tutepourangi’s tuku that I heard from them was that the Tuku is in the region from Clay Point to Farewell Spit. Hemi Waaka submitted to that koorero and never denied it. There was sadness in the telling of the tale, but he never denied it.

Tutepourangi’s tuku was to bring about several things for Ngati Koata, including keeping peace and reassuring Ngati Kuia they would be safe by allowing Tutepourangi to live. Tuku is something sacred. Here, because it was sealed with the promise of not spilling Tutepourangi’s blood, and it is even more sacred.

I understood that the giving . . . was a giving of mana and manawhenua, the giving of the right to make decisions that needed to be made about harvesting or homesteads, for example.⁴⁷

But a tuku, she also told us, is essentially about give and take. As in the weaving of a tuku-tuku panel, the thread is passed back and forth, ‘tuku atu, tuku mai.’⁴⁸ Marriages had interwoven the two peoples, fixing the relationship through whakapapa, honouring and keeping the tuku alive and viable. Mrs Tupaea told us of one such marriage in a tale containing strands of politics and romance. The story was told of how Hinewaka had been pledged among Ngati Kuia to marry Te Putu, but that she had refused, and Keiha, Hinewaka’s close relative – herself only a teenager – had been chosen to take her place. Then Te Putu came himself, disguised as the kaihoe of the waka that collected Keiha. Te Putu, a ‘good man’, had befriended the girl on the journey back to his kainga. The anxious Keiha had expressed a wish that her husband would be just like her new companion, after which he revealed his true identity to her before all his tribe.⁴⁹

There were many permutations in the circumstances and practice of tuku, generally, as in the narratives, but certain features may still be identified as applying in the case of Tutepourangi, that had wide acceptance in customary Maori society. This was a tuku undertaken by a senior rangatira in gratitude for the sparing of his life. According to the Ngati Koata narrative, as related to us by Josephine Mary Paul and, as told to her by Turi Elkington: ‘Tutepourangi was required to recover his patu Kauwae Hurihia from the waters in which he had thrown it, to avoid being killed by his own weapon. In exchange for his life Tutepourangi offered land to Ngati Koata.’⁵⁰ But Tutepourangi was also seen as leaving

46. Tupaea, para 16

47. Ibid, paras 17–19

48. Ibid, para 15

49. Ibid, para 21

50. Paul, para 21

with his mana intact as demonstrated by his subsequent treatment, and by the developing relationship between the two tribes, at least until this accommodation was disturbed by the wave of taua that followed. Even so, the relationship between the two peoples continued and was acknowledged by them.

Often, as in this instance, *tuku whenua* were also agreements of peace and alliance forged for protection from warfare, or to create buffer zones. An element of force might underlie this type of arrangement. Mrs Paul also told us that it was believed that Tutepourangi had been impressed by the musket power and fighting strength of the tribes based at Kapiti and that from 'concern for the safety of his people, and faced with all these pressures, Tutepourangi ceded land to Ngati Koata, which Te Putu accepted.'⁵¹ Ballara points out that it was common for people, defeated in battle and faced with the arrival of the victors, to propitiate them with gifts of land, or valuable *taonga*. Tutepourangi was making the gift from a position of weakness, as the strength and mana of the Kurahaupo people had been much depleted by their loss at Waiorua. Their status was now subordinate militarily to that of Ngati Koata, who had settled on their lands and which they had perforce to share or give over, along with their prized possessions, such as the canoe *Te Awatea*.⁵² Those lands were, however, 'given' rather than 'seized' by force of arms; in Ballara's view, this was different from the acquisition of land by *raupatu*, where the mana of the former occupants was ceded as a result of direct force.⁵³

Most importantly, marriages followed between Ngati Koata rangatira and high-ranking Ngati Kuia women. In a sense, the question of whether Tutepourangi's people were now subordinate was relatively meaningless when it came to questions of 'ownership'. Important *tuku* of this nature created a powerful relationship where none had previously existed and tightly bound the two groups. When the *tuku* was made to a people – as in the case of Ngati Koata – that did not have rights already validated by *whakapapa*, the donor (or *kaituku*) chose women from amongst their senior lines for them. These marriages uplifted the standing of both communities. Thus, Nukuhoro, Keiha, and Oriwa were married to Tekateka, Te Putu, and Te Patete. The children of those unions would enjoy undisputed right in the land, and over the course of time, a new community would be created, the members of which could claim through both sides of descent, even though it is likely that the Ngati Koata side would come to be seen as senior. Generations would pass before the transfer was complete and the land would never be totally alienated because the linkages always existed. This was so, even though the original 'owners' might now look to Ngati Koata's senior men for protection and in decisions affecting the whole community, especially after the death of

51. Paul, para 26

52. Nelson Native Land Court minute book 2, fol 256; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 83–84

53. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 80–82, 96–97

Tutepourangi at the hands of Ngati Tama. Both groups continued to live together as a community and share resources at Rangitoto, Wakapuaka, Wakatu, and Waimea.⁵⁴

The Tribunal accepts the interpretation of the Ngati Koata and Ngati Kuia claimants, and of Ballara that Tutepourangi's life had been spared because he was a chief of tremendous mana. Subsequent interaction, communal residence, and intermarriage between the families of Tekateka and Tutepourangi show that he was not regarded as a slave. Nor did Tutepourangi lose all authority over the land through this gift. Ballara notes that 'The expected result of such a gift in the time of customary land tenure before contact was that both groups, the donor's and the donee's, would utilize the land and its resources together.'⁵⁵ This interpretation is supported by the evidence – in particular, the acceptance by Ngati Koata as well as Ngati Kuia of the tuku as an enduring basis of their rights in Rangitoto and adjacent lands. The question of whether that tuku was in part overturned by conquest and how these issues played out in the Native Land Court, we leave for the moment.

2.6 TAU AND CONQUEST OF TE TAU IHU, CIRCA 1827–32

This situation of peaceful accommodation between potential enemies, created by means of tuku and high-ranking marriage, was disrupted by a series of taua conducted by Ngati Koata's northern kin and allies, followed by heke from the Taranaki and Kapiti Coast-Wellington region to lands throughout Te Tau Ihu.⁵⁶ A variety of issues arise for the Tribunal's consideration, falling into four general categories:

- ▶ What were the causes of the migrations and were they 'tika' or 'proper' in the Maori customary view?
- ▶ What was the impact of the taua and subsequent heke on the rights of the Kurahaupo tribes; were these people completely displaced, or did they retain rights in Te Tau Ihu; what was the nature and extent of those rights, if any?
- ▶ What was the relationship of the various participants of the migrations to each other and what was the nature and extent of the rights acquired by these different groups? How were the rights of Ngati Koata affected? How far west did Ngati Toa's rights extend?

54. See Nelson Native Land Court minute book 2, fols 253, 309 (Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 81); see also Tupaea, paras 9–12

55. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 80

56. A number of the historical reports filed in this inquiry dealt with these events in some detail. Included here are: Dr Grant A Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24); Miriam Clark, 'Ngati Tama Manawhenua Ki Te Tau Ihu (The Manawhenua Report)', report commissioned by the Ngati Tama Manawhenua Ki Te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 1999 (doc A47); Tony Walzl, 'Ngati Rarua Land Issues, 1839–1860', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol 1); Riwaka; Boast, 'Ngati Toa and the Upper South Island', vol 1; Hilary Mitchell and Maui Mitchell, 'Te Tau Ihu o te Waka: A History of Maori of Nelson and Marlborough', revised ed, report commissioned by Te Runanganui o Te Tau Ihu o Te Waka a Maui, 1999 (doc A63); Basset and Kay; and Ballara, 'Customary Maori Land Tenure in Te Tau Ihu'.

- ▶ What was the effect of occupation after conquest, by the conquerors and/or the defeated peoples?

Underlying these issues of entitlement are broad questions relating to customary usage. What was required to show conquest? Was occupation necessary to give rights in the land? What acts constituted occupation and how long did such occupation need to exist for such rights to be created? Were there other sorts of rights to be considered in terms of the mana exercised by and obligations owed to a pivotal leader such as Te Rauparaha? In addition, there are many matters relating to the occurrence and meaning of events and actions that, it was argued before the Tribunal, had significance in customary terms and which were disputed in detail, or in interpretation. Included here were questions as to the composition and timing of particular taua and heke, and the significance of battles that were fought, and of allocations and/or gifts of land, taonga, and slaves.

Various accounts suggest different starting dates and sequence of events, as well as motivations for the various stages of the taua. Ballara's conclusion is that it will never be possible to settle the exact timing and sequence of events in the prolonged campaign that took place in these years. Accounts from the Northern South Island tend to favour a sequence that puts the conquest of Te Tau Ihu as beginning in 1831. The campaign was part of a two-pronged attack that merged into the main, sustained siege of Kaiapoi and Onawe pa, by Ngati Toa and elements within Te Atiawa, Ngati Rarua, Ngati Koata, and Ngati Tama in 1832.⁵⁷

The taua was triggered by a combination of events and imperatives, and a number of causes for the invasion were cited as take:

- ▶ the escape to the South Island, of Te Kekerengu (from Whanganui a Tara) and the two Ngati Apa chiefs (Te Rato and Mahuika), held to be complicit in the death of Te Rauparaha's children;
- ▶ the need to respond to a succession of kanga – the 'tukituki-aruhe' and 'nihomanga' curses;
- ▶ the subsequent obligation to avenge the deaths of Ngati Toa ariki, Te Peehi Kupe, and senior rangatira, Pokaitara and Te Aratangata, who had been killed during the Kaiapoi campaign; and
- ▶ the purported desecration of Te Peehi's bones.⁵⁸

It seems likely that the first stage of the taua passed through Te Tau Ihu deep into Ngai Tahu territory, but returned to Kapiti Island. The more sustained invasion of the northern part of the island was undertaken in response to reports that Te Peehi's bones had been taken by Ngai Tahu chief, Tuhawaiki, to Ngati Kuia and Rangitane at Pelorus Sounds. It was rumoured that they had been made into fishhooks to dishonour Te Peehi's memory, and

57. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 104–105

58. Phillipson, *The Northern South Island: Part 1*, pp 22–23, David Armstrong, 'Ngati Apa Ki Te Ra To', report commissioned by the Ngati Apa Ki Te Waipounamu Trust Claims Committee, 1997 (doc A29), p 25; Riwaka, pp 65–71; Campbell, pp 19–22; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 105–107

also that Te Rato was in the district. This party comprised Ngati Toa, led by Te Rauparaha and Te Hiko (son of Te Peehi), Te Whetu's branch of Ngati Koata, Ngati Tama led by Te Puoho and his stepson, Te Wahapiro, Pohepohe, and Ngapuru, Ngati Turangapeke and Ngati Pareteata hapu of Ngati Rarua, and various hapu from Te Atiawa, each one of which had their own leaders also. Te Atiawa hapu associated with the campaign were Mitiwai, Kaitangata, Puketapu (including Ngati Komako), Ngati Rahiri, and Ngati Hinetuhi. Named leaders recorded in this context included Te Koihua, Te Manu Toheroa, Tuterangiwakataka, and Matangi in the case of Te Atiawa, and Te Iti, Pikiwhara, and Pukekohatu in that of Ngati Rarua.⁵⁹

As the force moved southward, they split to travel along the two coasts. Each of the different waka in the two parties contained crews of mixed descent under their different leaders. Most Ngati Rarua and Ngati Tama went in the western taua, accompanied by Te Atiawa, and some Ngati Toa individuals. The major battle as the taua moved through Te Tau Ihu was fought at Hikapu, at the junction of Te Hoiere and Kenepuru. In some accounts, the taua split in two before the battle; in others, shortly thereafter. Te Rauparaha then led his party eastwards, conquering Totaranui (Queen Charlotte Sound), Karauripe (Cloudy Bay), and Wairau, before travelling on to besiege and capture Kaiapoi and Onawe.⁶⁰

The Kurahaupo tribes living on the eastern side of the island (Rangitane and Ngati Apa) were severely harried in the course of the taua. A force of Ngati Toa and Te Atiawa drove them up Queen Charlotte Sound as far as Waitohi (Picton) while Ngati Rarua 'took possession' of Karauripe (Cloudy Bay) before moving on to join Te Rauparaha in the siege at Kaiapoi. The taua then returned north to Te Awaiti where Te Tau Ihu lands were divided between them. As was usual practice, some sections of the taua remained on the new territory, while others went back to the North Island, but returned later, either on a seasonal basis to collect resources, for trade or recreation, or to settle on a more permanent basis in the years that followed. Thus, while most of the taua travelled on to Kapiti Island, some of the Ngati Toa/Ngati Rarua party settled at Cloudy Bay to grow food for the whaling stations and a group of Te Atiawa remained at Te Awaiti. Shortly thereafter (around 1833) there was a general dispersal from Kapiti Island throughout the Cook Strait region, including to Te Hoiere and to lands close to those already occupied by Ngati Koata – and by Ngati Kuia who had survived the western taua (described below) and continued to look to Koata for protection.⁶¹

59. Nelson Native Land Court minute book 2, fols 210–211; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 107–109

60. Phillipson, *The Northern South Island: Part 1*, pp 21–24; Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 5; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 109–110

61. Phillipson, *The Northern South Island: Part 1*, pp 21–23; David Armstrong, "'The Right of Deciding': Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, 2000 (doc A80), pp 14–22; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 110–111

The western taua (after the split of forces) included Ngati Rarua, Te Atiawa, and Ngati Tama, accompanied by some Ngati Koata and possibly some Ngati Toa. Ngati Toa accounts suggests that they participated, but these sources did not record Ngati Toa names among the leaders (except in the case of Tamihana Te Rauparaha who claimed that his father was there).⁶² This is an important point to note because of dispute among the tangata heke as to whether Ngati Toa had acquired rights in western Te Tau Ihu (as discussed below). This party moved from Te Hoiere to Kareao-nui attacking the local people and killing their chief, Te Kakaho. At Kaiaua (Croisilles Harbour), the people had fled into the hills. Further battles were fought near Whangarae – where, again, the local chief, Te Waihaere, escaped – and Wakapuaka. There, Tutepourangi was killed, reputedly by Te Wahapiro of Ngati Tama (Te Puoho's nephew and stepson) who, in turn, took Hinewaka, a local woman of high rank, as his wife. According to the evidence of Meihana Kereopa before the Native Land Court, Hinewaka was the daughter of Tutepourangi. In the evidence of Tekateka, she was the daughter of local chief, Te Kahawai, whose death some accounts also attributed to Te Wahapiro.⁶³

Ngati Koata who had settled at Wakapuaka took no part in this stage of the taua. The assault on the pa clearly caught Tekateka by surprise; he was forced to climb out onto the roof of a whare and identify himself to the attacking party, which included Ngati Koata but had thought him to be on Rangitoto.⁶⁴ Both Ihaia Tekateka and Meihana Kereopa consistently argued in later hearings, that the peace between their two peoples had been respected; that Tekateka's people had taken no part in the fighting to this stage. Neither of these later rangatira regarded that earlier accommodation through tuku to have been compromised by an attack by other elements within Ngati Koata, nor by Tekateka's branch of the tribe joining their kin as they moved southwards into the territory dominated by Ngati Apa and the remaining Ngati Tumatakokiri.⁶⁵

From Wakapuaka, the taua moved on to Wakatu, from which the inhabitants had again fled, but the local people fought at Waimea where their chief, Te Pipiha, was killed. Te Puoho claimed the land by placing his head-dress as a rahui there. Another party of the northern tribes – a section of Te Atiawa, led by Te Manu Toheroa – met up with the taua and they moved on to Tasman Bay, where again the local people fought and were defeated. It would seem that at some point, as the taua moved on, its leaders quarrelled and Te Puoho and the bulk of Ngati Tama turned back for the North Island, as did some of the Te Atiawa party. The party that continued on comprised Ngati Rarua, Toheroa's people within Te Atiawa, and Te Puoho's younger brother, Rahui. They marauded into the Whanganui Inlet and Te

62. For a discussion of Ngati Toa evidence, see Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 22–37, and Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 110, 116.

63. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 116

64. Nelson Native Land Court minute book 2, fol 258; Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 7; see also Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 116

65. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 116

Taitapu to its south. At some point, this group defeated and killed Te Rato, the senior Ngati Apa/Kuia chief whose involvement in the death of Te Rauparaha's children had helped spark the wider conflagration, drawing in the Kurahaupo people based at Te Tau Ihu.⁶⁶

One section of the taua – Ngati Koata, led by Te Mako, and assisted by a party of Ngati Kuia and Rangitane from the Pelorus area – then raided through Maungatawai (Tophouse Pass) where Ngati Apa/Ngati Tumatakokiri seems to have maintained a community, and went on to join Te Rauparaha at Kaiapoi. In the meantime, the Ngati Rarua party, led by Te Iti, Pikiwhara, Pukekohatu and Te Arama, proceeded onto west Wanganui and Karamea where they again defeated the local Ngati Tumatakokiri. They returned to Te Awaiti (c1832) where they came across Te Rauparaha and the eastern taua, similarly returning from their incursion into Ngai Tahu territory at Kaiapoi.⁶⁷ A meeting was held and an allocation of land – described both as a 'tuku' and a 'roherohetanga' – was made between the various tribes involved in the taua. This division of territory may be broadly described as follows: Wairau and Te Hoiere (Pelorus Sounds) went to Ngati Toa; Totaranui and Arapaoa to Te Atiawa. According to Ngapiko, the recipients of these lands within Te Atiawa were Te Manu Toheroa (Puketapu), Reretawhangawhanga (Manu Korihi), Tamati Ngarewa (Ngati Hinetuhi) and Huriwhenua (Ngati Rahiri).⁶⁸ It would appear that the distribution of lands did not extend to rights in the western region, and we will return to this question and its customary implications later in our discussion of Ngati Toa's rights in relation to those asserted by Te Atiawa, Ngati Tama and Ngati Rarua.

2.7 MIGRATION AFTER THE BATTLE OF HAOWHENUA, CIRCA 1834–36

In the mid-1830s, a deteriorating situation in Taranaki resulting in the fall of Pukerangiora (1832), and friction on the Kapiti coast caused by competition for land and resources, resulted in a wave of migration southwards. Fighting flared in 1834 between Ngati Raukawa and Te Atiawa peoples. The battle of Haowhenua was followed by a general withdrawal from the vicinity of each other's rohe.⁶⁹ Ngati Raukawa went north of the Manawatu into Ngati Apa's territory, while large numbers of Te Atiawa moved across the Strait, settling at Totaranui where they augmented those who had established themselves after the initial taua and Te Rauparaha's roherohetanga.⁷⁰ Ballara argues that Ngati Toa who had kainga at Te Awaiti

66. Riwaka, pp 75–79; Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 7–9; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 117–119

67. This event was variously dated at 1828, 1832, and 1834–35; 1832 seems the more likely date as the time when the taua returned from their first expedition to Kaiapoi.

68. Nelson Native Land Court minute book 2, fols 173–174; Walzl, 'Information Audit', pp 45–48; see also Phillipson, *The Northern South Island: Part 1*, pp 38–39

69. Riwaka, pp 105–106, 113–114; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 128–134

70. Riwaka, pp 113–114

and Arapaoa, withdrew from the area, as Te Atiawa numbers expanded. It is her conclusion that Ngati Toa's 'history of occupation was made more complex' after Haowhenua. The tribe had split kin allegiances; Te Hiko and his branch within Ngati Toa had fought alongside Te Atiawa, while Te Rauparaha had sided with his Ngati Raukawa kin.⁷¹ That pattern of discord between Te Atiawa and Te Rauparaha arising from the relationship with Ngati Raukawa was to be repeated five years later at another conflict (Kuititanga), and was pointed to by Te Atiawa as evidence of their growing independence from the Ngati Toa leader.⁷² In that year, 1839, Ngati Toa at Karauripe gladly received into their midst, a contingent of Ngati Rarua from the western side of Te Tau Ihu, to augment their position against both Ngai Tahu to the south and Te Atiawa to the north.⁷³

The western side of Te Tau Ihu from Wakapuaka to Mawhero (Greymouth) was also resettled after Haowhenua. Ngati Rarua and Ngati Tama, accompanied by a number of Ngati Koata and Te Atiawa, returned to the area through which they had marauded in the earlier taua, and found it wholly deserted. Here, too, competition for territory was now between the various incoming groups rather than with the earlier inhabitants. Again, allegiances within descent groups were to be divided by the subsequent arrival of parties related more closely to one branch of the tribe than the other. No iwi group migrated in a single heke but in successive waves, and there was movement, also, within the Te Tau Ihu region between different kainga. As a result, any description of the conduct of this migration must be simplified to some degree. We rely largely on the detailed analysis offered by Ballara to provide a coherent narrative out of the different tribal perspectives offered on a complex pattern of arrivals, acts of tuku and occupation, while noting points of conflicting evidence and interpretation that have arisen.⁷⁴

Ballara herself has drawn from the testimony given before the Native Land Court in Te Tau Ihu, most especially that given in relation to New Zealand Company tenths in 1892. Notable in this context is the evidence of Paramena Haereiti of Ngati Tama, whose account of their migration was particularly detailed. Haereiti's account suggests a race by the various parties involved in the heke to secure key sites as they travelled along the coast. According to Haereiti, Ngati Tama set sail from Ohariu in a fleet of 13 waka, including one belonging to Te Whetu of Ngati Koata (who had perhaps returned to the north again) and a double-hulled canoe crewed by Ngati Rarua, under their leaders, Turangapeke, Te Poa Karoro, Wi Takira, and Takerei Pairata. They met with no one other than the community of Ngati Koata and Ngati Kuia based at Rangitoto. At Te Haumiti (French Pass), Te Whetu gathered food

71. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 54

72. Counsel for Te Atiawa, closing submissions, 2004 (doc T10), pp 29-32

73. See Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 137-138; Phillipson, *The Northern South Island: Part 1*, pp 29-30, 34-36

74. See also Clark, pp 19-49; Walzl, 'Ngati Rarua Land Issues, 1839-1860', pp 9-12; Ngati Rarua Claims Committee, pp 21-26; Walzl, 'Information Audit', pp 56-64; Riwaka, pp 173-184

(probably from Ngati Koata) and it would seem, some discussion took place regarding the rights of different parties. Te Whetu addressed the heke while Te Puoho sang a waiata in reply 'relative to the occupation of the land'.⁷⁵ From there, they travelled through Tasman and Golden Bays on to Whanganui Inlet and Te Taitapu, as the different rangatira of each party made claim to different sites.

Ngati Koata later claimed to have given the lands at Motueka to Ngati Rarua out of the gift of Tutepourangi. Tekateka referred to the tuku during the tenths hearings in 1892, stating that the land was given to Niho and that the donor (Mauriri), who was married to a Ngati Rarua woman, had settled with them there.⁷⁶ The status of the gift was not accepted by the representatives from the other northern tribes: Ngati Rarua, who had already given evidence, could not comment on the claim of tuku directly; but those from Ngati Tama and Te Atiawa recorded their disagreement with the claim.⁷⁷ This contrasts with the agreement that existed between Ngati Koata and Ngati Kuia as to the importance of Tutepourangi's tuku. There is, moreover, little evidence to show that Ngati Koata had themselves occupied that area other than intermittently. We broadly accept Ballara's conclusion: 'Motueka was deserted when Ngati Rarua came, and if any gift was made, it was more a matter of withdrawing a residual Ngati Koata claim than conferring a gift.'⁷⁸ This is not to say that Ngati Koata had no interests at all, but rather that the rights of Ngati Rarua, Ngati Tama, and Te Atiawa were rooted from the first in raupatu and their subsequent occupation; they did not recognise the tuku from one of their allies as the source from which those subsequent rights of occupation were developed.

Some of the party (Niho, Te Iti, Pikiwhara, Te Whawharua, and Pukekohatu of Ngati Rarua) remained at Anaru for a time, while the others moved onto Wakatu where they plundered the crew of a European ship before travelling on to Te Mamaku in the Moutere area, which Te Puoho claimed by planting taro. Ngati Rarua travelled on ahead and had made claim to the area around the Wainui Inlet and Pariwhakaoho before the main party of Ngati Tama arrived. Some of Ngati Tama joined them at Takapu on lands gifted to them by Te Iti in exchange for canoes and other gifts, while Te Puoho's people moved on to Golden Bay, settling at Parapara and Pakawau, under Te Wahapiro, Haereiti (the father of the witness), and Te Kohu-uaro. When Te Puoho's party later travelled on to Te Taitapu, they again found Ngati Rarua already in place under Niho. Te Puoho settled at Patarau, south of Whanganui Inlet, and before embarking on his ill-fated taua into the heart of Ngai Tahu territory in

75. Nelson Native Land Court minute book 2, fols 291-292 (Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 131)

76. Nelson Native Land Court minute book 2, fols 259, 263-266 (Walzl, 'Information Audit', pp 53-54); Riwaka, p 182

77. See Walzl, 'Information Audit', pp 54-55

78. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 248

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2.7

about 1836 (discussed below), divided his time between these two areas (that is, Golden Bay and Te Taitapu).⁷⁹

Te Niho, with Takarei, led another party of Ngati Rarua down the west coast beyond Hokitika, to attack Poutini Ngai Tahu. Thomas Brunner later recorded that this taua captured and killed many Ngai Tahu. Included amongst the captives was Tuhuru who was taken to Paturau where he presented the chief, Matenga Te Aupouri, with the greenstone mere, Kai Kanohi. That gift and the marriage of Niho to Tuhuru's daughter were the first steps in establishing a relationship between the two peoples: Niho and his people settled from Mawhera (Greymouth) to Hokitika, taking charge of the greenstone trade, but reliant on the skills and knowledge of Poutini Ngai Tahu to do so. Ngati Rarua remained in the district, protecting local Ngai Tahu from attack by Ngati Tama, led by Te Puoho on his further taua. When Ngai Tahu based in the Foveaux Straits region, retaliated against the taua and succeeded in killing Te Puoho as well as taking Wahapiro prisoner, Ngati Rarua abandoned their southernmost kainga and withdrew north to west Whanganui.⁸⁰ Whether they continued, nonetheless, to demonstrate rights in the region, visiting the Mawhera area for its resources, is not a matter for this report.

Te Atiawa also had been prominent in the conquest of the western side of Te Tau Ihu and gained considerable mana by having killed one of the Ngati Apa chiefs held accountable for the death of Te Rauparaha's children and who had initially escaped retribution. Taka Herewine Ngapiko of Ngati Rarua acknowledged this at the 1892 hearings: 'It was Puketapu who conquered the original owners – we occupied the ashes of their fires. It was Puketapu who killed Kotuku [that is, Te Rato].'⁸¹ The Puketapu hapu, Ngati Komako, is thought to have joined Ngati Rarua in their migration to the region (settling with them at Riwaka) while a party of Ngati Hinetuhi also accompanied Te Puoho (whose senior wife was of that line), but the bulk of Te Atiawa numbers arrived later, upon their more permanent removal from Taranaki. They were led by rangatira who had participated in the taua and could not be denied, but their arrival required a series of territorial adjustments (again in the form of tuku) and added another element to an already complex situation as the migrants settled into their new rohe. The hapu involved in this later wave of migration were Puketapu, Kaitangata, Mitiwai, and Ngati Rahiri. The main focus of their interest in the region was at Motueka, Aorere, Pakawau, west Whanganui inlet, and Turimawivi. Kaitangata, and Mitiwai were concentrated in the western Golden Bay and Te Taitapu area, and Puketapu at Motueka.⁸²

79. Clark, pp 36–41; Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 10; Ngati Rarua Claims Committee, pp 23–24; Riwaka, pp 178–180; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 112

80. Clark, pp 39–40; Tony Walzl, 'Ngati Rarua and the West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B5), pp 5–20; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 121–123

81. Nelson Native Land Court minute book 2, fol 196 (counsel for Te Atiawa, closing submissions, p 12)

82. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 129; Riwaka, pp 177–180

Dr Phillipson has concluded that a ‘mobile community of [Te] Atiawa, Rarua and Tama from all over Te Tau Ihu had interests and rights in the Golden Bay region.’⁸³ While certain descent groups dominated in particular parts of that district, and particular settlements were associated with particular hapu, nowhere did they occupy extensive territory, exclusively. Thus, Ngati Rarua considered the lands at Motueka, Riwaka, Marahau (Sandy Bay), and Motupipi to belong to them by right of conquest and occupation, held under the authority of their rangatira, Ngapiko, Te Iti, Te Panakenake, and Te Poa Karoro. Ngati Tama, under the leadership of Te Puoho, Te Wahapiro, Haereiti, and Te Kohu-uaro similarly dominated in Golden Bay. Hapu from the two different descent categories shared in the Takaka area, and seem to have sometimes cultivated in common at Te Taitapu.⁸⁴ However, interspersed within those rohe were settlements of each other’s people and of Te Atiawa on various types of tuku.

Thus, Te Wharerangi, Te Whitu and others of Ngati Tama occupied land at Wainui-Taupo as a result of a tuku to them by Pikiwhara and Te Iti (Ngati Rarua).⁸⁵ At Motupipi, Ngati Rarua gifted land to a party of Te Atiawa who had first settled at Te Taitapu, and another area further north at Takaka (in southern Golden Bay) to a party of Ngati Tama.⁸⁶ Mitiwai and Ngati Tama shared the Aorere district. Those accommodations in the division of territory were supported by a loose network of intermarriage between the different descent groups; for example, between Ngati Rarua and Te Atiawa at Marahau where the latter had received a tuku of land from Te Whawharua.⁸⁷ At Motueka, too, Merenako, a woman of Te Atiawa who was married to Te Ahimanawa of Ngati Rarua, seems to have invited a party of her people to join them. Merenako’s prestige was such that she was able to make a tuku of land in her own right.⁸⁸

Ballara’s description of settlement at Motueka, over the next few years, supports the conclusion that the population remained very mobile in this period. The party invited by Merenako were Ngati Rahiri and Puketapu, formerly residing at Arapaoa, but not all stayed, some returning to the Sounds. The area known as Te Matu was given to Ngati Komako. Some witnesses before the land court said the gift was by Ngati Rarua chiefs such as Te Poa Karoro who were already settled in the region; others that it was an independent exercise of rights deriving from Te Atiawa’s role in the original conquest, being a gift made by Te Manu Toheroa and Horoatua, chiefs of Puketapu, during the taua, for the ‘hokowhitu’ (the war party) of Ngati Komako. Ngati Komako also appear to have returned to Arapaoa, although Merenako’s people remained. In the meantime, a party of Ngati Rarua, who had been living

83. Phillipson, *The Northern South Island: Part 1*, pp 27–28

84. *Ibid*, p 27

85. Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, pp 254–255

86. *Ibid*, pp 258–260

87. *Ibid*, p 251

88. Riwaka, pp 180–181

with Ngati Toa at Cloudy Bay (as described below) returned to Motueka to take up their rights.⁸⁹

The resulting picture of customary rights was one that was still developing in the late 1830s and was particularly intricate in this region to the west of Rangitoto. The pattern of interaction in these years of recent migration included a variety of acts designed to bolster the authority of different rangatira in the area. Such acts include the placing of the land under tapu to prevent its occupation; the regulation of settlement by numerous tuku, which as Dr Phillipson notes, were to give rise to 'lengthy debate about the rights of givers and recipients'; and what he characterises as 'complex political manoeuvres for power within hapu and whanau groups which led to strange alliances and unexpected migrations'.⁹⁰ Furthermore, inland resources of the mountainous, forested country behind Tasman and Golden Bays were relatively unknown to the new occupants who based themselves in the coastal areas – probably, as Ballara notes, 'quite sparsely in comparison to the older-established communities in the North Island from which they had come'.⁹¹ Groups seem to have ranged extensively in each other's districts in search of mahinga kai and some rangatira moved about, enjoying rights at a number of places, including, in some instances, on both sides of the region. On the eastern side, too, communities moved about, the thin nature of the soils requiring that they do so.

It may be that spheres of exclusive influences are unable to be established between such recently settled groups. The major general question remains, however, whether the predominance of Ngati Rarua in the early stages of the settlement of the region and the fact that they were in a position to make tuku of the land to later arrivals, suggests a pre-eminence on their part. It is Ngati Rarua's view that this was the case; that:

Having established themselves, Ngati Rarua fixed a rohe which commenced at Horoi-rangi and extended to Takaka . . . From a Ngati Rarua viewpoint, the iwi controlled the arrival of new entrants into the land not only by keeping ahead of the travelling party and preventing new claims being made to land, but also through the allocation of land to the groups at different points within southern Golden Bay.

Takapu had been given to Te Pouwhero, Ngararahuarau and Takaka to Moko, and Taupo to Te Wharerangi.⁹²

As Mr Riwaka has pointed out on behalf of Te Atiawa, they do not dispute that these tuku were made; but not all the lands that they (and Ngati Tama) occupied had been gifted to them. A celebrated leader such as Te Koihua, needed no permission to settle lands which

89. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 248–249

90. Phillipson, *The Northern South Island: Part 1*, p 28

91. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 240

92. Ngati Rarua Claims Committee, pp 21, 23

he had helped to conquer, and he settled the area between Aorere and Te Rai without a prior *tuku*. As Riwaka argues: “The likes of Merenako, Rangiauru, Wi Parana, and Rawiri Putaputa, each had land that was obtained in their own right.”⁹³ And they, too, made their own dispositions of places within the lands they had taken up; for example, Merenako was said to have given land to Pukekohatu at Te Maatu (a much disputed area) and another later *tuku* (in the 1840s) to her Te Atiawa kin.⁹⁴

In our view, when the *heke* of 1834 began arriving in the western side of Te Tau Ihu, each of the tribes held an equal right to a share in the lands that they had helped to conquer. Ngati Rarua could not exclude the others, nor did they attempt to do so at the time. Even in the later Native Land Court hearings for the tenths, when each party sought to demonstrate their claim, all were in basic agreement that credit for the conquest was shared. Each had an equal right to take up rights and to develop them in accordance with custom. This included the ability to make further dispositions – perhaps to newly arrived relatives – and the capacity to return after a period of absence. However, that right was one of opportunity only and was constrained as time moved on and particular places became more strongly identified with one hapu, or one whanau, or one rangatira.

2.8 THE ‘OVERLORDSHIP’ OF TE RAUPARAHA, AND NGATI TOA INTERESTS ON THE EASTERN AND WESTERN SIDES OF TE TAU IHU

At some point during this settlement of the western side of Te Tau Ihu by Ngati Tama, Ngati Rarua, and Te Atiawa, Te Rauparaha also visited the area. According to the account of Tamihana, Te Rauparaha had wished to assess the land between Te Taitapu and Onetahua (Cape Farewell) for his possible use. It was during this expedition that Tamihana and his brother, Te Matatu, received severe burns when cartridges exploded by accident as they camped at Wakatu. This was the first recorded evidence of any remaining resistance among the Kurahaupo peoples: Te Rauparaha ordered the ammunition to be prepared, on the warning by his slaves of an intended attack by those who had fled into the interior, purportedly under the leadership of Te Roto. Te Rauparaha later informed Governor Grey that Wakatu was unoccupied, and was available for European settlement as a result of the *tapu* he had placed on the land after the accident to his sons. Local leaders challenged this assertion that the *tapu* showed any rights of ownership. Leaving Tamihana and Te Matatu to recover, the main party had gone onto Onetahua and overland to Te Whanganui where they were met by Niho and 20 chiefs of Ngati Rarua and Ngati Tama (but whom Tamihana described as Ngati Toa), as well as a large group of Ngati Apa slaves. Twenty-five of these

93. Riwaka, p181

94. Nelson Native Land Court minute book 5, fols 71–72; Riwaka, p181

men and women were given to Te Rauparaha who departed with them for Kapiti. In all, this heke took some seven months.⁹⁵

What was the significance of these events in terms of the relationship between Te Rauparaha, Ngati Toa, and their allies?

We referred earlier to Te Rauparaha's *tuku* or *roherohetanga*. Historically, the distribution of new territory among the incoming northern iwi, here, as earlier at the Kapiti Coast, has been represented as an action under the control of Te Rauparaha as the main leader of the *taua*. Included amongst those who talked of the sharing out of land in these terms, were non-Ngati Toa witnesses before the land court. Some leaders, such as Ngapiko of Ngati Rarua, stated in the tenths hearings that 'the land was divided up amongst the hapus by Te Rauparaha.'⁹⁶ This sort of statement could be interpreted as suggesting that the division of land at Te Awaitea was a demonstration of Te Rauparaha's authority over all the groups who had participated in the *taua*. It is probably more accurate, however, to see this allocation as a formalisation of claims that had already been made, and as an arrangement by mutual agreement. Ngapiko, himself, stated later in the case, that 'Rauparaha was the *tino Rangatira* who led the people to Kapiti, but I don't admit that he was the *Rangatira* who was paramount over the affairs of the hapus who conquered the district'. While Te Rauparaha was the one who 'divided the land', Ngapiko's testimony suggests that the underlying authority remained with the wider community. Te Rauparaha had been 'elected as the leader' because he had instigated the migration from Kawhia-Taranaki. His role in the allocation of territory was a 'reward for their bravery' rather than an exercise of an overarching chiefly right.⁹⁷

Professor Ward, in his evidence regarding Te Atiawa interests in Te Tau Ihu, characterises the situation thus:

Beyond Ngati Toa, many iwi, including Te Atiawa in 1832, would (like Ngapiko) have acknowledged Te Rauparaha's leading role in the whole process of conquest that had begun in 1820 and was reaching its zenith in 1832. He may well have been the dominant personality at the *hui*, with a kind of 'casting vote', and entitled to sum up the conclusions of what was probably a considerable *korero*. But given their role in the conquest thus far Ngati Awa certainly would have had a large role in the decisions about subsequent control of territory. The division in fact by and large reflected the actual occupation already effected by the tribes.⁹⁸

In our view, this interpretation accords more closely with customary practice and the relationship that existed between *rangatira*, and between *rangatira* and their people, than does the Western-influenced view of important war leaders, such as Te Rauparaha, as exercising untrammelled control over client iwi and subjects. As Ward points out: 'Given the

95. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 133-134

96. Nelson Native Land Court minute book 2, fols 173-174 (Alan Ward, 'Te Atiawa in Te Tau Ihu', report commissioned by the Crown Forestry Rental Trust, 2000 (doc D4), p 37)

97. Ibid, fol 177 (p 37); see also Phillipson, *The Northern South Island: Part 1*, p 39

98. Ward, 'Te Atiawa in Te Tau Ihu', pp 37-38

jealousy of each senior chief for his mana, and their history of independent action . . . it is scarcely conceivable that they would have passively accepted a divying-up of the spoils by Te Rauparaha alone.⁹⁹

Furthermore, as the dominance of the Taranaki–Kawhia peoples over Kurahaupo in the general Cook Strait region became more secure, the importance of Te Rauparaha's role was likely to decline. Acts of occupation – the planting of crops, births and deaths on the land – began to create rights in themselves, and the authority of Te Rauparaha as the leader of the taua and the instigator of the migration waned accordingly. Nor was the power balance between incoming northern tribes static. Of particular significance in this context was the growing conflict on the Kapiti Coast between Te Atiawa and Ngati Raukawa. Allegiances other than those of shared participation in the taua became important and Te Rauparaha's kinship with, and support for the latter (as discussed below) underwrote Te Atiawa's increasing rejection of his leadership, although their relationship with other sections of Ngati Toa remained strong.

It is significant that the allocation did not extend west of Wakapuaka, where the conquest had been conducted largely independently of Ngati Toa leadership and participation. Ngapiko testified under cross-examination that, while Te Rauparaha had assisted in conquering the Wakatu area, he had not acquired any mana over it and had not apportioned it.¹⁰⁰ According to the son of Matenga Te Aupouri of Ngati Rarua, the division extended only to the 'locality allotted to Ngatikoata at D'Urville's Island'.¹⁰¹ Hohaia Rangiauru of Te Atiawa also acknowledged Te Rauparaha's role in the allocation of Arapaoa to that tribe, but not at Blind (Tasman) Bay.¹⁰²

The division of the territory to the west of Rangitoto came *after* Te Rauparaha's roherohe-tanga, when further events in the North Island prompted a new wave of migration. The groups who had participated in the western taua returned and lit fires of occupation. The first arrivals then made tuku of portions of the land to those of their allies who came to settle a little later.

As we noted earlier, there was some debate regarding Ngati Toa's participation in the conquest of the western side of Te Tau Ihu and what rights might have been acquired there. Certainly, Ngati Toa were to argue, in subsequent years, that they shared in the ownership of these lands by reason of their participation in the conquest, even though their actual physical occupation did not extend so far. Ngati Toa chiefs included Wakatu and Te Taitapu in their dealings with the New Zealand Company in 1839. In the early 1850s, they insisted on their right to be included in any arrangements for lands in the western Te Tau Ihu region generally. When the Crown began negotiating with Ngati Toa's allies for the Pakawau area,

99. Ibid, p 37

100. Nelson Native Land Court minute book 2, fols 180–181; Walzl, 'Information Audit', p 46

101. Nelson Native Land Court minute book 2, fol 229 (Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 59)

102. Nelson Native Land Court minute book 2, fols 299–300; see Ward, 'Te Atiawa in Te Tau Ihu', pp 38–39

Rawiri Puaha and other leading Ngati Toa rangatira informed Governor Grey of their 'great concern at being encircled' by Ngati Rarua at Wakatu, at Waimea and all the places on the coast down to Arahura.¹⁰³

The letter, dated 11 December 1851, described the initial taua and migration from Kawhia, Te Rauparaha's sighting of a sailing ship in the Cook Strait, and his decision to migrate south 'to get in touch with these people' and become a 'chiefly tribe'. An account of the western campaign followed; the deaths of Kurahaupo chiefs were listed; the decision of some of the taua to remain on the land described; and reference made also to the burning of Tamihana Te Rauparaha at Wakatu. The focus was, however, on Te Rauparaha's strategic role rather than on a specific attribution of victories on the part of Ngati Toa leaders. Only Niho, Takarei, Maaka Huematamata and Hikaka were mentioned and, of these, three are generally identified as Ngati Rarua.¹⁰⁴ A second letter, written the following year, similarly asserted a kind of pre-eminence based on Ngati Toa's role in organising and leading the conquest of the region, which did not depend on actual physical occupation.¹⁰⁵

These claims were not thoroughly investigated at the time and we will never know the exact composition of the taua, or what the understanding of Te Rauparaha's role and rights was, or if such a consensus even existed.¹⁰⁶ We find it difficult, however, to see how Ngati Toa could lay a claim through a conquest in which, by most accounts, they did not play a direct part except, perhaps, for the presence of one or two individuals. More importantly, even if they did participate in the western conquest, they had not followed through on the opportunity to occupy and create a root title.

The question still remains, however, whether Te Rauparaha was owed something by the other leaders because they would not have succeeded to the extent that they did without him. It may be that if Te Rauparaha had sought to occupy lands on the western side, he would have been accommodated. He certainly visited the area, when he demanded and received slaves and placed a tapu on land at Wakatu.¹⁰⁷ The evidence is, however, that his tapu at Wakatu was not respected by his northern allies.

There is some support also, in the Tribunal's report on Te Whanganui a Tara, for the idea of Te Rauparaha having interests beyond those based in actual physical occupation, although the Tribunal's findings fall well short of an endorsement of any notion of his 'paramountcy'. There, the Tribunal discussed a kind of notional or potential right: 'ahi ka rights were not confined to the area of day-to-day living . . . but extended to other areas of association

103. Bruce Biggs, translator, 'Two Letters from Ngati Toa to Sir George Grey', *Journal of the Polynesian Society*, vol 68 (1959) (Boast, 'Ngati Toa and the Upper South Island', vol 1, p 28); see also Nicholson, attachment 1

104. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 110

105. See Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 28, 32

106. See Phillipson, *The Northern South Island: Part 1*, pp 38–39

107. See Phillipson, *The Northern South Island: Part 1*, p 29; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 133

or influence . . . In addition, Ngati Toa's take raupatu put them in a position to further establish ahi ka over those lands . . . where no other group had ahi ka.¹⁰⁸

The question for us, however, is whether such a potential to settle and develop ahi ka was dependent on actual participation in the conquest (that is, in the western taua). Without that, we see little support in custom for any Ngati Toa claim to have established actual rights in western Te Tau Ihu by 1840. We distinguish between the establishment of such rights and the continuing leadership of Ngati Toa's great war leader, Te Rauparaha, who could still call upon his various allies for support from time to time. We also note that in 1839, the year of Te Rauparaha's transaction with the company, it was probably too early for any potential or latent right to have expired, in terms of moving in and settling on conquered land. The significance of this point is discussed in section 2.15.

According to the account of Tamihana, his father had visited the western side to see if there was land worth settling but had accepted the gift of slaves and three pounamu mere instead.¹⁰⁹ Ballara suggests that this act of *tuku* was an acknowledgement of the obligations of these leaders to Te Rauparaha for his role as a leader of the venture; 'these valuable gifts having been made, the duties of the givers to make some reciprocal gesture towards Te Rauparaha were completed.'¹¹⁰ Thus, ahi kaa had been lit by Ngati Toa as far west as Te Hoiere. To the west of there, at Whangarae (Croisilles), their influence shaded into that held by Ngati Koata. Close whakapapa ties existed between these two groups and a number of Ngati Toa witnesses gave evidence of their ongoing connections with the Whangarae and Rangitoto area.¹¹¹ This relationship, and the presence of Ngati Toa at Rangitoto, was indicated by Ihaka Tekateka's appearance on their behalf in the 1892 hearings of the tenths, but Tekateka also stressed that it was Ngati Koata who had taken up occupation of that territory.¹¹² Ngati Koata's authority over Rangitoto was never challenged by Ngati Toa, nor did Ngati Toa ever seek to join with them in the *tuku* to which they traced their rights to that land.

2.9 THE CONSEQUENCES OF THE DEATH OF TE PUOHO, CIRCA 1837–39

In about 1836, the ariki, Te Puoho led a party of Ngati Tama down the west coast, accompanied for part of the way by a small group of Te Atiawa. Niho and Takerei, who were

108. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, p 41

109. 'Undated, Unsigned, Draft (?) Memorandum', NZC231/14/5 (cited in Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 133)

110. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 133–134

111. Hori Elkington, brief of evidence, 9 June 2003 (doc P6), p 11; Randall Hippolite, brief of evidence, 9 June 2003 (doc P8), pp 2–3; Selwyn Ira Wi Katene, brief of evidence, 9 June 2003 (doc P12), pp 3–5; Oriwa Solomon, brief of evidence, 9 June 2003 (doc P17), pp 3–6

112. Bassett and Kay, p 174

living at Mawhera, warned Te Puoho against taking the expedition further south, but the party moved on to Awarua River (Haast) where they turned inland, and travelled via Lake Wanaka and Lake Hawea to the Waikaia Plains and to Tukurau.¹¹³ This was a gruelling journey that lasted for several months and the motivations for which are unclear. Ballara has pointed out that Ngati Tama had a history of being squeezed out of new territories by their former allies and it may be that Te Puoho saw this as happening again in Te Tau Ihu.¹¹⁴ This explanation would seem to be supported by evidence before the Native Land Court. According to Haereiti, Te Puoho had quarrelled with Ngati Rarua, ostensibly because their chiefs had refused to hand over their Ngati Apa captive, Mahuika, for punishment for his role in the killing of Te Rauparaha's children at Ohau; but really, he thought, because they had quarrelled over Te Iti's occupation of land at Takaka.¹¹⁵ Haereiti later suggested that Te Puoho intended to acquire an anchorage favoured by European ships.¹¹⁶ In the one view, he was forced out; in the other, he was acting much as Te Rauparaha was seen to have, pursuing a grand scheme of conquest and securing strategic control of the south. He is said to have described his plan as 'scaling a fish', picking off individual Ngai Tahu settlements from one end of their territory to the other.¹¹⁷

Both explanations remain grounded in Ngati Tama's desire to find a secure home base in the south. Nor does this necessarily imply that Ngati Tama's rights in Te Tau Ihu were of a lesser nature than those of Ngati Rarua, although this is implicit in Ngati Rarua claims that they held pre-eminent rights at Tasman and southern Golden Bays. Argument to this effect is based in Ngati Rarua's belief that they were the first to conquer the district in the taua of circa 1828, but this assertion was hotly disputed by both Ngati Tama and Te Atiawa. They argued that the taua were a shared effort, the benefits of which were distributed on a mutually agreed basis (a view with which we agree),¹¹⁸

Te Puoho's taua deep into Ngai Tahu territory was an ambitious and ill-fated venture. Along the way, he and his party attacked, killed, or captured a number of local Ngai Tahu people, or found settlements deserted. Some of those who had fled carried news of the raid to their kin based at Ruapuke Island in the Foveaux Strait. A Ngai Tahu war party, led by Tuhawaiki and Taiaroa, successfully retaliated at Tukurau. Te Puoho and many of his

113. The standard published account is that of Atholl Anderson, *Te Puoho's Last Raid: The March from Golden Bay to Southland in 1836 and Defeat at Tukurau* (Dunedin: Otago Heritage Books, 1986). See also Walzl, 'Ngati Rarua and the West Coast', pp 15–20; Walzl, 'Information Audit', pp 67–69; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 134–137; and James McAloon, 'Te Runanga o Ngai Tahu: Professional Evidence', report commissioned by Te Runanga o Ngai Tahu, 2003 (doc Q4(a)), pp 23–25.

114. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 134

115. Nelson Native Land Court minute book 2, fols 278, 286; Walzl, 'Information Audit', pp 67–68

116. Nelson Native Land Court minute book 2, fols 278, 286; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 135

117. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 135

118. For a discussion of taua, see Walzl, 'Information Audit', pp 25–27, 104–109. For a different perspective, see Riwaka, pp 180–182.

companions were killed. Te Wahapiro was captured and only one of the party – Ngawahakawa of Muaupoko – managed to escape to carry news of these events to Kauhoe, Te Puoho's senior widow, who was living at Te Parapara.¹¹⁹

The death of an ariki like Te Puoho resulted in an adjustment in the political balance of the region. It made the position of Ngati Tama and their allies more precarious and demanded utu (payment) to restore the spiritual and political equilibrium. We have suggested that Ngati Tama was in some competition with Ngati Rarua for control of Te Taitapu, but this did not preclude a strong relationship between the two descent groups and with sections of Te Atiawa also. Te Puoho was closely related to Ngati Rarua hapu, Ngati Turangapeke, through his mother's line, while Kauhoe (his wife) was of Ngati Hinetuhi, a party of whom had accompanied them on the migration.¹²⁰ It was Ngati Turangapeke, with Te Rahui (Te Puoho's brother), that set out to avenge his death, while the other branch of Ngati Rarua, Ngati Pareteata remained behind. The taua only got as far as Maungatawai (Tophouse Pass) before turning back in fear of attack.¹²¹ At about this time, Niho and Takerei abandoned their settlements at Mawhera (Greymouth) to consolidate the Ngati Rarua position at Te Taitapu, although it is possible that they left people on the ground to keep their interests alive. We do not consider that question in detail in this report.

A second taua of Ngati Rarua was initiated the following year and was to result in the permanent migration of some of that party to the eastern side of the district. An influx of Te Atiawa to join one of their hapu (Ngati Komako) who had settled at Riwaka, at the same time as Ngati Rarua, had initiated a series of internal adjustments and land allocations. It also upset the power balance within Ngati Rarua. According to Pamariki Paaka, in Native Land Court testimony, Ngati Rarua split along descent lines, one more closely related to Te Atiawa, and the other to Ngati Toa.¹²² By the late 1830s the situation had resulted in a complex series of tuku in which the Ngati Rarua rangatira manoeuvred for position against each other. Dr Phillipson notes that Te Tana Pukekohatu had been angry when Te Poa Karoro made a tuku of land, that he (Pukekohatu) claimed, to Te Manu Toheroa of Puketapu (Te Atiawa). Serious insults were exchanged and settlement south of Motueka came to a halt because Te Pukekohatu had placed a tapu on the river.¹²³ When Te Pukekohatu's party reached Cloudy Bay they were 'detained by their Ngati Toa relatives' who had occupied the area since the raids on Kaiapoi. While some of the war party turned back for Te Taitapu and Golden Bay, Te Pukekohatu's hapu decided to settle there. He was then persuaded to lift the tapu at Motueka and settlement progressed on the south side of the river.¹²⁴

119. Clark, pp 71–72; Riwaka, pp 187–188; Walzl, 'Information Audit', pp 67–71; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 136

120. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 136–137

121. Nelson Native Land Court minute book 2, fols 215–217; Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 11

122. Nelson Native Land Court minute book 2, fol 223; Phillipson, *The Northern South Island: Part 1*, p 30

123. Phillipson, *The Northern South Island: Part 1*, p 30

124. Ibid

In the meantime, Te Puoho's people who had initially remained at Parapara with Kauhoe and their son, Wi Katene, decided to relocate. There were different accounts and interpretations of that event in the Native Land Court and elsewhere. According to one version, Kauhoe's community had been left in a vulnerable position and needed a more secure place to live; in another Kauhoe had been insulted by the failure to avenge Te Puoho's death. She had appealed to Te Whetu and Ngati Koata for other land on which to live, and again the versions differ. In some accounts, Te Whetu and the various rangatira of Ngati Koata agreed that Kauhoe and Wi Katene might live at Wakapuaka, but had not expected them to be accompanied by other members of Ngati Tama.¹²⁵ According to Haereiti, Ngati Tama set out in seven waka for this new home and were protected in that occupation by Kauhoe's people, Ngati Hinetuhi of Te Atiawa/Ngati Mutunga. On arrival they explored the land as far as Tauwhare and Horoirangi, looking for suitable parts to cultivate. Some of the party departed back for Taitapu, but other leaders (Hori Te Karamu and Wi Ngaparuru) remained with Kauhoe and Wi Katene, as did Ngati Hinetuhi. Te Wahipiro joined them there on his release by his Ngai Tahu captors in 1842.¹²⁶

A specific issue raised for the Tribunal's consideration was the status of this tuku to Kauhoe and Wi Katene and, in particular, whether Ngati Koata retained any rights in those lands. At the time, many Ngati Koata had moved to Rangitoto and Kaiawa. But we also heard evidence that they continued to exercise rights at Wakapuaka, and further, that this was a 'tuku kaokao' or 'tuku whakanoho', according occupation rights just to Kauhoe and Wi Katene. It was to be argued before a subsequent inquiry into ownership of the area, that the land should have reverted to Ngati Koata on the death of the two donees.¹²⁷ Despite these various objections, however, Ngati Koata had made no attempt to eject Ngati Tama.¹²⁸

For their part, Ngati Tama do not acknowledge the tuku whenua from Ngati Koata to Kauhoe and Wi Katene Te Puoho as the sole source of Ngati Tama rights, arguing that it was not raised before 1883 and, since then, had not been upheld despite repeated investigations of interests at Wakapuaka.¹²⁹ The basic take argued by Ngati Tama – including for Wakapuaka, by the daughter of Wi Katene – was one of raupatu. Ngati Tama also contend that the Ngati Koata who continued to reside in the area did not form an independent community; such residence, in their view, derived from individual marriages into Ngati Tama, or was maintained purely for cash income in a variety of employments rather than as a customary exercise of ownership in the land.¹³⁰

Our understanding of the significance of the gift in customary terms is immensely

125. Nelson Native Land Court minute book 2, fols 263–265; Walzl, 'Information Audit', p 71

126. Nelson Native Land Court minute book 2, fols 280–282; Walzl, 'Information Audit', pp 70–71

127. Alexander Mackay, 'In the Matter of Whakapuaka Native Block and the Title of Huria Matenga', 13 February 1905, AJHR, 1936, G-6B, pp 49–52; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 242–243

128. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 243

129. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), p 18

130. *Ibid*, pp 18–19

complicated by the particular circumstances of the Native Land Court hearing into Wakapuaka in 1883; by the conduct of the claims, the evidence of Alexander Mackay, and the finding of the court. The claim was brought by Wi Katene's daughter alone and not by Ngati Tama as a community, and on the grounds of conquest not of gift. Alexander Mackay supported her claims and has been condemned by Ballara as 'distort[ing] the truth', most glaringly, by representing Ngati Koata as a 'conquered party' when his own prior dealings and writings showed that he knew that they were not.¹³¹ The court award of the whole of Wakapuaka to one individual (with a 100-acre reserve for Ngati Koata) was to be bitterly protested by Ngati Koata and Ngati Tama alike, as well as by Ngati Kuia. We will deal with this issue in the final report.

We are faced once more by an immensely complicated customary situation. The fact of the gift is not under dispute, but again its meaning is. Ngati Tama see their rights as predating the tuku and deriving from Te Puoho's leadership within the taua. That rangatira had made the area one of his Te Tau Ihu residences and it seems likely that Kauhoe sought only to strengthen the position of her people by obtaining Ngati Koata recognition of rights that already had another source. Ngati Koata no longer had a permanent residence at Wakapuaka, but had residual rights; we shall see in our later discussion, that they could show that they had buried their dead there and to have continued to visit the area to gather food. Our conclusions on what this meant when it came to deciding ownership in the Native Land Court will be explored in the final report.

The death of Te Puoho at the hands of Ngai Tahu and the subsequent departure of Te Niho from Mawhera, north to Te Taitapu, also raise issues regarding how far south the control of Ngati Rarua and the other migrant tribes really extended in the 1830s. In other words, where did the boundary lie between Ngai Tahu and Ngati Rarua and their northern allies? This question and, in particular, the significance of evidence of Te Niho's ongoing relationship with the West Coast area, is not discussed in this report. We note that there was a Ngai Tahu military response to the northern taua in the late 1830s, especially in the wake of the defeat of Te Puoho. While the crucible of this action was Totaranui and the eastern side of the island, it had consequences for the whole region.

2.10 SETTLEMENT PATTERNS AT TE TAU IHU AT 1840

The above description of events briefly summarises the movement of the northern iwi into Te Tau Ihu over the 20 years prior to the New Zealand Company's arrival and the Crown's subsequent acquisition of sovereignty, and traverses some of the more important issues raised for the Tribunal's consideration. As noted earlier, it is not possible now to be certain

131. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 286–287

on many points of detail. Nonetheless, a general picture emerges. In summary, the pattern of settlement may be described as follows.

Ngati Toa were the main conquerors of the Wairau, Karauripe (Cloudy Bay), and Kaituna to Te Hoiere area. Although their occupation, which they took up in circa 1828–30, concentrated more fully around Karauripe, that arrangement reflected their interest in the whaling stations, not their lack of control and exercise of rights further inland. Residence was on the coast, but inland areas were visited for birds, pigs, and other resources. Wairau was under the authority of Te Rauparaha's elder brother, Mahurenga, while his half-brother, Nohorua, and his nephews, Te Kanae, Rawiri Puaha, and Hohepa Tamaihengia, were living at Cloudy Bay, and periodically visited other Ngati Toa settlements at Te Hoiere, where they were regarded as the chiefs.¹³²

Ngati Toa occupation included regular visits by Te Rauparaha and others of the tribe who more usually resided at Kapiti and Porirua. Te Rauparaha had a domicile at Otairua (Robin Hood's Bay) and, in the 1830s, spent long periods there each whaling season. He did not himself cultivate at Wairau, except briefly in 1843, but it is clear that he regularly visited the area.¹³³ Dr Phillipson notes that Te Rauparaha's visits were shorter in duration after the decline of whaling in the late 1830s, but this did not mean an abandonment of his rights. After the deaths during the conflict at Wairau in 1843, a tapu was placed on the land and all occupation of the area ceased for the meantime. Ngati Toa withdrew to their North Island bases, and although they were to return to the district in the late 1840s, they did so in much reduced numbers.¹³⁴

Ngati Toa shared occupation of the Wairau and Karauripe district with a branch of Ngati Rarua, some of whom had settled in the general district for about two years during the first stages of occupation. One branch of Ngati Rarua, led by Tana Pukekohatu, departed for the western side of Te Tau Ihu and settled with their kin at Motueka. They returned to the Wairau area in 1837, when the taua to avenge Te Puoho was abandoned. The bulk of the party turned back for the western side but Pukekohatu's people stayed on.¹³⁵ Although there was some suggestion before the land court in the 1880s and 1890s that this group were late-comers, there on sufferance of Ngati Toa and without independent rights, the more likely scenario is that Nohorua and the community at Cloudy Bay–Wairau welcomed their arrival. Positioned between Te Atiawa, with whom relationships had deteriorated, and a resurgent Ngai Tahu, Nohorua persuaded Pukekohatu to settle with his people rather than venturing further south. Given the close kinship between Ngati Toa and Ngati Rarua, their shared

132. Phillipson, *The Northern South Island: Part 1*, pp 33–34; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 215

133. Phillipson, *The Northern South Island: Part 1*, p 33; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 215

134. Phillipson, *The Northern South Island: Part 1*, pp 33–34

135. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 11; Phillipson, *The Northern South Island: Part 1*, p 35

participation in the earlier taua, and the fact that Ngati Rarua remained for a sustained period, this arrangement was one of mutual alliance rather than of squatting without rights, or on a client basis.

We accept Dr Phillipson's summation: 'As close relatives and as equals, the two groups shared land and resources, remaining distinct but evolving identical rights.'¹³⁶ Ngati Rarua who had returned to Motueka and Taitapu did not share in the rights of their kin in the Wairau, but the reverse was not true; a handful of the Wairau people retained interests in the Motueka and Te Taitapu region.¹³⁷ A distinct community of Rangitane also remained at Wairau, Kaituna, and Te Hoiere (Pelorus Sound). As discussed below, they were in a tributary but entrenched position by 1840.

Te Hoiere had been also claimed by Ngati Toa at the Te Awaiti meeting, but where the boundary met with Ngati Koata who maintained settlements at Whangarae (Croisilles Harbour) and Te Aumiti (French Pass) is not entirely clear. Nor is it clear whether Ngati Toa maintained an all-year occupation or visited seasonally instead. In the early 1850s, McLean identified Te Kanae as the principal man of the area, as well as of Kaituna and Wairau, but the enumeration undertaken by Jenkins, as the Crown tried to organise reserves a few years later, suggested that Ngati Kuia outnumbered Ngati Toa (at a count of 57 to 19). Jenkins also recorded 11 Ngati Apa at Gore Harbour, where they lived alongside the dominant Ngati Hinetuhi (Te Atiawa), estimated to number 65 men, women and children.¹³⁸ These mixed communities looked to Ngati Toa leaders (Te Kanae and Rawiri Puaha) as the principal rangatira of the region, but the numerical strength of the Kurahaupo groups ensured the survival of their distinct identity at 1840 even though it is probable that they would have been eventually subsumed by the dominant newcomers and developed into a joint community.¹³⁹

The extent to which Ngati Toa's control extended southwards down the east coast was also unclear and actively disputed at 1840. Neither Ngati Toa nor Ngai Tahu were in effective occupation of the Kaikoura coast. Ngai Tahu had certainly regained the initiative on the military front by this stage. They had carried out successful raids on Wairau and Totaranui in 1832, and the northern tribes had been unable to avenge Te Puoho's death; but Ngai Tahu had not regained control to the extent that they were able to resettle the area and would not resume occupation of their old sites at the mouth of the Kaikoura River until the late 1850s.¹⁴⁰ This state of affairs – the stand-off between the two iwi and the need to find accommodation

136. Phillipson, *The Northern South Island: Part 1*, pp 35–36

137. Nelson Native Land Court minute book 2, fols 215–218, 226, 271–272, 278, 292–294; see Phillipson, *The Northern South Island: Part 1*, p 36

138. 'Interpreter's Report of Information Obtained during a Visit to Kaiawa, Pelorus, Kaituna, Wairau and Queen Charlotte Sound &c, 1854–55', Alexander Mackay, comp, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols (Wellington: Government Printer, 1872–73), vol 1, pp 297–300

139. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 225–226

140. Phillipson, *The Northern South Island: Part 1*, p 34

between them – was eased by the intermarriages that took place. We draw no conclusions here about who held territorial control, as this is not a matter for our preliminary report.

Te Atiawa settled at Arapaoa and Totaranui, claiming that area as its primary conquerors, and by right of occupation by representatives of their hapu from 1832 onwards.¹⁴¹ This part of their rohe in Te Tau Ihu comprised their allocation within the division of territory on the eastern side overseen by Te Rauparaha after the first taua. These lands went to Te Manu Toheroa (Puketapu), Reretawhangawhanga (Manu Korihi), Tamati Ngarewa (Ngati Hinetuhi), and Huriwhenua (Ngati Rahiri).¹⁴² While some Te Atiawa took up immediate residence, the majority of those in occupation by 1840 had probably settled later, as a consequence of events in the North Island; namely, the fall of their Taranaki stronghold at Pukerangiora and the outbreak of fighting at Haowhenua and Kuititanga. In 1856, the Crown was to identify 51 hapu and whanau groups in the area, but Ngati Rahiri and Puketapu dominated, accounting for two-thirds of the population, while Ngati Hinetuhi, who were based at Port Gore, formed a third large party. To the south, at Te Awaitei (Tory Channel) Te Atiawa at first shared occupation with Ngati Toa, but the latter began to lose interest in the area as a result of the decline of whaling at Cloudy Bay in the late 1830s. The death of Nohorua, who had maintained shared use of the channel with Huriwhenua of Ngati Rahiri, and the further withdrawal after the conflict at Wairau, resulted in Ngati Toa largely abandoning their claims to Te Awaitei and Totaranui in the early 1840s.¹⁴³

Te Atiawa also had papakainga on the western side of Te Tau Ihu – at Pakawau, Te Taitapu, Mouteka, Marahau, Aorere, and Motupipi – where they shared rights with the other northern iwi who had taken an active role in that part of the invasion.¹⁴⁴ Dr Phillipson has pointed out that the mobility of Te Atiawa had resulted in a very complex pattern of rights in their rohe:

Many of the hapu were so intermingled that it was impossible to allot distinct territories, and important chiefs such as Witikau were considered to have rights extending throughout the Sound . . . The Te Atiawa population in the Sound seems to have been very mobile, and possibly no particular hapu could claim exclusive rights in any of the small bays scattered around its shores.

This mobility and fluidity of rights extended to North Island Atiawa in 1840. The take of those members of the tribe living in the land was often identical to those living elsewhere – and in some cases was inferior . . . relatives living at Waikanae might suddenly arrive and expect to live in the Sound, or people living in both places might decide to leave for

141. Riwaka, pp 12–13, 107–108, 113–116; Phillipson, *The Northern South Island: Part 1*, pp 31–32; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 194–196

142. Nelson Native Land Court minute book 2, fols 173–174, 229, 300; Phillipson, *The Northern South Island: Part 1*, p 31

143. Phillipson, *The Northern South Island: Part 1*, pp 32–33

144. Riwaka, pp 170–171, 173–180

Taranaki and never return. The migratory habits of Te Atiawa were not close to settling down by 1840, and were considered just as volatile in the late 1850s. Removal to Taranaki, however, seems to have been considered as an extinction of rights.¹⁴⁵

The allocations of territory that had taken place after the initial taua into Te Tau Ihu and southwards to Kaiapoi did not extend beyond Wakapuaka. That area – Tasman and Golden Bays, and Te Taitapu – was settled by Ngati Rarua, Te Atiawa, and Ngati Tama in the aftermath of the battle of Haowhenua. Ngati Rarua made their main base in the Motueka and Riwaka River areas, where they were joined by Te Atiawa. Ngati Tama were based at Wainui, Wakapuaka, Parapara, and Tukurua. Ngati Rarua with their Te Atiawa allies controlled the western Tasman Bay; Ngati Tama and their allies, the eastern part. A border area – centred on the rich Waimea River valley – was disputed between the two groups. Resources at Wakatu were shared amongst the tribes resident in the general area, and although Ngati Tama controlled the eastern bay, they also claimed rights along with Ngati Rarua and/or Te Atiawa at Motueka, Whanawharangi, Anatakapua, Motupipi, Takaka, Aorere, and Te Taitapu. The same was true of Ngati Rarua, who had control of Motueka and its environs, but shared territory elsewhere at Taitapu.¹⁴⁶

Despite the conquest and settlement of Te Tau Ihu by their allies, Ngati Koata continued to base their rights in the region on Tutepourangi's tuku, and despite the death of their senior rangatira, Ngati Kuia continued to live with them at Rangitoto and the adjoining coast to Whangamo Bay, where the river became a disputed boundary with Ngati Tama. Ngati Koata also had kainga at Te Hoiere, where their interests intersected with those held by Ngati Toa and, again, a Ngati Kuia community also lived there and was to voice their rights with increasing confidence.¹⁴⁷ The two peoples gathered resources at Wakatu, Wakapuaka, and Waimea, and both maintained that their continuing rights in Wakapuaka had been respected by Ngati Tama after the gift to Kauhoe and her son Wi Katene and the relocation of her community to the area.¹⁴⁸

The Tribunal rejects the claim of any single group within the tangata heke to have primary rights in the Te Tau Ihu region, even though they may have had the most numbers on the ground at 1840. We find the more inclusive interpretation persuasive in terms both of custom and history. There is wide agreement that new territories were divided between the different parties involved in a raupatu on a communally agreed basis as to who deserved what.

This did not preclude competition and dispute, especially in a migration which took place in different stages over a number of years after the initial invasion and conquest. New

145. Phillipson, *The Northern South Island: Part 1*, p 32

146. Ibid, pp 25–30; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 240–264

147. See Armstrong, 'Ngati Apa Ki Te Ra To', p 59; Phillipson, *The Northern South Island: Part 1*, pp 29–30, 34–36

148. Campbell, pp 34–44

arrivals demanded adjustments between different rangatira and hapu, and in the allocation of rights. Nor is there any certainty in the traditional evidence about the conduct of the taua, that any one party played a greater role than the others. Te Rauparaha's leadership was widely acknowledged, but he had not participated directly in the conquest of the western side. Neither can Ngati Rarua demonstrate, without challenge, that they played a special role as the instigator of that part of the venture, that might give them any primary right over the whole of the western region. Rights based in raupatu (followed by occupation) were shared by Te Atiawa and Ngati Tama, as well as accommodating those based in the different take of Ngati Koata and Ngati Kuia. Of course, as particular sites were settled and time passed, core territories and spheres of interest began to develop, as described above.

2.11 THE IMPACT OF THE TAU ON THE RIGHTS OF KURHAUPO PEOPLES

The accounts of the heke and taua are centered on the actions and rights established by the victors, but what of the Kurahaupo peoples who had formerly controlled the district? It is clear that they had been soundly defeated in a series of engagements from Waiorua onwards; many of their rangatira had been killed and acts of retaliation for those losses were few. Those who survived had been either captured or forced to flee into the interior. But it is equally clear that they retained a presence in the district and that the northern migrants had not displaced them entirely. They had been defeated, but not all had been enslaved. The degree and scale of the invasion did not equal that of some others in the so-called 'musket wars', and Ngati Toa could never entirely control such far-flung and difficult territory. In the customary world, entry into strange lands required the spiritual protection of tangata whenua. It was best to have the assistance of those who 'knew' and it was not in the interests of the tangata heke to remove all people from the ground. Nor did they do so. Communities such as that led by Tutepourangi survived even after his death in battle, as did Ihaia Kaikoura's at Wairau and that of Hura Kopapa at Kaituna.

The Tribunal heard evidence about two different groups of Kurahaupo still present at Te Tau Ihu in the 1830s and into the 1840s. One theme of evidence referred to the Kurahaupo people who had escaped into the interior and who lived independently from the invaders; the other, to tributary communities who lived in vassalage to their victors but still retained a coherent identity as 'Rangitane', 'Ngati Kuia', or 'Ngati Apa'. These people remained on a portion of their former lands and, it was argued, maintained rights alongside those exercised by their 'conquerors'.¹⁴⁹ It is not always clear into which category particular communities or groups noted by early European observers fell; nor was there agreement amongst witnesses

149. Armstrong, 'Ngati Apa Ki Te Ra To', pp 30-39; Campbell, pp 33-34; Armstrong, 'The Right of Deciding', pp 15, 17-24

before us as to what rights they might possess. This picture was complicated by changes in the years immediately after 1840, as the tribal balance shifted, and the tribes, who had been defeated in the taua some 10 or 15 years earlier, were able to reassert their voice and their claims to portions of their former territory. One possible interpretation of this development is that it was a true expression of customary law which allowed for the recovery of mana and in which entitlement continued to evolve after, as before, 1840. On the other hand, it has also been suggested that, in giving recognition to those claims to the extent that they did, Crown officials did not follow custom as it really existed at 1840: that the Kurahaupo people had been utterly subjugated and had lost all rights to the land.

To deal first with the issue of 'fugitive' bands of Kurahaupo: the size of the territory, the concentration of Ngati Toa and the northern tribes on the coast, plus the seasonal nature of much of that occupation, meant that numbers of tangata heke were relatively thin on the ground, especially in the interior. As a result, it was possible for small groups of local people, who had escaped into the margins of their rohe, to maintain an autonomous if precarious existence. Tamerangi and Pakauwera (also known as Pakihure) were brought to our attention as examples of rangatira living outside the authority of the senior northern rangatira.¹⁵⁰

The northern tribes were in clear control of the region in the 1830s, but it is apparent that they remained alive to the possibility of raids on isolated parties and on their newly secured resources. The example was given of the rumoured threat of a Rangitane attack on Te Rauparaha's party during his visit to the western side of Te Tau Ihu, when two of his sons sustained accidental burns as they prepared cartridges for their defence. The name of Pakauwera was also recorded on a number of occasions as posing a threat to unwary travellers, both Maori and Pakeha, in the upper Pelorus Sound and Wairau valley.¹⁵¹ While the senior chief of the area had been killed at Te Hikapu, his son Wirihana Kaipara, and grandson Eruera Wirihana Pakauwera (a young boy) both escaped the battle.¹⁵²

EJ Wakefield, who was accompanied by Ngati Toa guides in his visit to the Pelorus River, in September 1840, made several colourful references to the state of the district in his subsequent account, *Adventure In New Zealand*. He noted the 'fear and trembling' of a party of 'Rangitane' found collecting flax for Te Rauparaha when confronted with the presence of Maori of the 'victorious tribe'. On the other hand, those same northern Maori also warned Wakefield of the threat posed by 'Pakihure':

Our attendant natives begged us to examine our fire-arms and hatchets, and to keep them close at our hands, ready for use. On enquiry into the reason for this precaution, they told us that Pakihure, the great chief of the Rangitane, had managed to escape into the hills with some few of his followers from the general slaughter by [Te] Rauparaha, and that the report

150. Armstrong, 'Ngati Apa Ki Te Ra To', pp 27, 29–31; Campbell, p 35; Armstrong, 'The Right of Deciding', p 27

151. Armstrong, 'Ngati Apa Ki Te Ra To', pp 30–31

152. MS1187 item 162 pt 1 (Ngata, p 66); Armstrong, 'The Right of Deciding', p 14

of our guns [Wakefield and his friends had been shooting pigeons] might attract him, and lead to an attack on our party, for the sake of vengeance and plunder . . .¹⁵³

The Spain commission (the first Crown inquiry into customary rights in the Cook Strait region) also referred to the presence of Pakauwera, as does Elvy in his later, mid-twentieth-century, account.¹⁵⁴

Tamerangi and a band of Ngati Apa/Rangitane were also said to have intermittently occupied a pa site on the Avon River (at the back of Blenheim) during the 1830s. Maori residents in Cloudy Bay blamed an attack on a party of Europeans based at Port Underwood, on the 'fugitives' living in the interior.¹⁵⁵ Signs of small bands, probably of displaced Ngati Apa who had fled after the first taua, were also noted by Heaphy and Brunner in 1846 as they explored the headwaters of the Kawatiri River with the assistance of Ngati Apa/Ngati Tumatakokiri tohunga, Kehu or Hone Mokehakeha.¹⁵⁶ Again, the possible presence of a band of 'bush natives' living independently of the coastal settlements seems to have been the cause of some anxiety amongst the northern Maori in the party.¹⁵⁷

Our knowledge of these groups is attenuated; a matter of traces left in the bush and in the historical record, but remembered by Kurahaupo claimants as keeping their ahi ka alight. There is no doubt that their existence was precarious. Nor was there any likelihood of these groups on the periphery being able to oust the northern migrants from the region in the 1830s. Ngati Toa saw these people as pakaurere (a species of locusts), roving bands always at risk of attack who could not be said to have maintained ahi kaa but only he ahi mawhiti-whiti or he ahi mauue (the fires of fugitives).¹⁵⁸ Occasionally, the harassment worked the other way. These bands maintained an existence outside the permission of Ngati Toa and their allies and, on occasion at least, posed sufficient threat to put them on their guard. They did not acknowledge the authority of the northern rangatira and it is highly doubtful whether they would accept that their ahi ka had been extinguished for all time. Kurahaupo leaders in the 1840s and 1850s admitted their earlier defeat at the hands of the northern tribes, but consistently emphasised that they had never been fully enslaved and that some of their number retained a completely independent if marginal existence on parts of their ancestral lands.

The existence of these roving bands was not absolutely necessary to the Kurahaupo claim, but does suggest that the concept of 'conquest' is more nuanced than is often allowed. We consider the strength of their claim to lie, however, in the evidence about other sections

153. Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonisation of the Islands*, 2 vols (London: John Murray, 1845), vol 2, pp 58–59 (Armstrong, 'Ngati Apa Ki Te Ra To', pp 30–31)

154. Armstrong, 'Ngati Apa Ki Te Ra To', p 31; see Phillipson, *The Northern South Island: Part 1*, pp 41–44

155. Armstrong, 'Ngati Apa Ki Te Ra To', pp 27, 29–31

156. *Nelson Examiner*, 19 September 1846; Armstrong, 'Ngati Apa Ki Te Ra To', pp 46–52

157. Armstrong, 'Ngati Apa Ki Te Ra To', pp 50–51

158. Nicholson, p 22

of those tribes; people who had been captured, but spared, or with whom a peace had been made and who had been left as tributary communities, growing food and collecting resources for Ngati Toa and the other northern tribes. Names slowly emerged as Pakeha officials began dealing more fully with Maori resident at Te Tau Ihu. These included Ihaia Kaikoura at Port Underwood, Hura Kopapa at Kaituna, and Puaha Te Rangi on the West Coast. Pa were recorded as still standing at Kaituna and Waikakaho, and those same officials began to encounter Kurahaupo communities which demanded recognition of their rights in the Crown's negotiations.

To the west, Ngati Kuia continued to live at Rangitoto and its environs. Examples were given of parties found cutting flax and gathering resources when the New Zealand Company first arrived in the district. As we noted earlier, when Wakefield encountered such a party at Pelorus River, he recorded that they were in fear of the Ngati Toa in his party.¹⁵⁹ But they were present when Spain inquired into the company's title in 1844.¹⁶⁰ By 1854, they were assessed as outnumbering Ngati Toa/Ngati Koata at Te Hoiere, and at the time of the negotiation of the Waipounamu deeds in 1856, they were the second most numerous group of signatories. The enumeration of 1854 also recorded a small group of Ngati Apa living with the more numerous Ngati Hinetuhi at Gore Harbour.¹⁶¹ Later testimony before the Native Land Court tended to confirm that they retained a presence at Te Taitapu as well.¹⁶²

The key issue is: what sorts of rights did these groups have? This question was hotly debated before us, as it has been in the past before the Native Land Court. At the time, acts of occupation in defiance of Pakeha, most notably at Wairau in the early 1840s, were attributed to the schemes and interests of the principal rangatira of 'Ngati Toa' rather than to the exercise of legitimate local Kurahaupo rights. Pakeha accounts uniformly represented these people as 'enslaved' and acting solely on the orders of their conquerors. The few of the tribe who were living in the interior were seen only as 'fugitives' without rights because their people had been totally subjugated.

The question of whether these groups might still have rights was not considered properly until some years later, with important implications for the conduct of purchases in the district. Thus, Commissioner Spain, in his inquiry into the ownership of the northern South Island, called no witnesses from the Kurahaupo people (or, indeed, more than one Maori at all), and noted in his report of 1845 that the original occupants were 'reduced to a mere remnant, living . . . without dwelling-places, and even now hunted down by [Te] Rauparaha and his retainers.'¹⁶³ The rest were in a position of vassalage. We shall see in chapter 4 that

159. Wakefield, vol 2, pp 58, 63 (Armstrong, 'Ngati Apa Ki Te Ra To', pp 30–31)

160. Campbell, p 133; Armstrong, 'Ngati Apa Ki Te Ra To', pp 127–128

161. 'Interpreter's Report', *Compendium*, vol 1, pp 297–300; Campbell, pp 160–163

162. Nelson Native Land Court minute book 1, pp 4–7, 8, Hilary Mitchell and Maui John Mitchell, 'Documents Cited in Report No 13a', supporting documents, various dates (doc A25(a)(11.1a)), pp 4–7, 8

163. 'Mr Commissioner Spain's Report to Governor FitzRoy, on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, p 59 (Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 219)

Spain believed that captives who had been living on ‘sufferance’ of their conquerors were nonetheless resident, and therefore had the power to alienate those lands, but he dismissed the claims of Rangitane because he mistakenly believed that they were all fugitives.¹⁶⁴ When CW Ligar visited the Wairau district in 1847, he also discounted the possibility that Rangitane chiefs might still retain rights to the land even though he noted, in one instance, the continuation of their local authority. Ballara considers that he misread the situation, while Michael Macky’s view is that Ligar simply wrote what he was told by the local Maori residents.¹⁶⁵ Ligar’s perception was that:

the Rangitane tribe was conquered and taken captive from it by Rauparaha and his people the Ngatitōa, except a party of fugitives, consisting of nine individuals of the conquered tribe. These concealed themselves after the fight, but have gradually emerged from their hiding-places, and scattered themselves over the country.¹⁶⁶

Ligar recorded that another group of Rangitane lived at Port Underwood, where their rangatira, Kaikoura, was regarded as the principal man resident within the mixed community of Rangitane and Ngati Toa. But in Ligar’s view, like that of Spain, Ihaia’s people were ‘slaves’ nonetheless. In any case, Governor Grey made no attempt to include them in the Crown’s purchase of the area, except in the subsequent provision of reserves.¹⁶⁷ This was left to the Waipounamu deeds, which belatedly acknowledged their existence, describing them as having ‘co-equal rights’ with Ngati Toa. That recognition came from members of the northern tribes as well as the Crown, suggesting that custom had continued to unfold. Kurahaupo people continued to live on the land, their survival had to be acknowledged, and there is evidence that opinion was changing. Rangatira from conquering tribes were coming to accept that a defeated people could retain rights in the land although they were no longer in control of it.

In particular, we note the relationship between the Ngati Toa leader Te Kanae and Rangitane. This rangatira had married into Rangitane, supported their occupation of ‘settler’ sections in 1850, was a leader of both tribes, and supported Rangitane’s right to sign a deed and receive payment in 1856. There was rivalry between Te Kanae and his brother Puaha, whose mana had been enhanced while Te Kanae was held prisoner by the Crown. McLean noted that, while Te Kanae acknowledged Rangitane’s surviving rights (the commissioner described him as ‘put[ting] them forward’ after Te Kanae had received his own payment),

164. See Armstrong, ‘The Right of Deciding’, pp 52–55

165. See Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, pp 218–222; Michael Macky, ‘Crown Purchases in Te Tau Ihu between 1847 and 1856’, report commissioned by the Crown Law Office, 2003 (doc s2), pp 33–36

166. CW Ligar, Surveyor-General to the Lieutenant-Governor, 8 March 1847, in *Compendium*, vol 1, p 202 (Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 219)

167. Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, pp 220–222

Puaha's attitude was less certain. On that key occasion in 1856, Te Kanae clearly prevailed and Rangitane's rights were acknowledged and endorsed by Ngati Toa and Ngati Rarua.¹⁶⁸

Much depended on the status of 'vassals' as followers of leading 'conquest' chiefs, living as distinct groups within a wider community, which came together from time to time for common enterprises at the direction of those chiefs. Ngati Toa, Ngati Rarua, and Rangitane formed one such community in the Wairau district. Like the wider concept of 'conquest', that of 'vassalage' was a shaded term. Professor Ward was in no doubt that the Kurahaupo tribes had been 'thoroughly subjugated', but he, along with other witnesses, agreed that tributary communities could continue to live peacefully on part of their former territory so long as they acknowledged the authority of the principal leaders amongst the migrant conquerors:

provided the vanquished tribes contributed on demand by their conquerors the produce of gardens they cultivated, or the fish and birds they caught and preserved, provided they felled trees and made canoes when required, they could live more or less in peace on portions of their former lands. There was a gradation of degrees of autonomy which included the more lowly and powerless of the allied tribes as well as the conquered tribes, all of whom were tributary to the most powerful chiefs in some degree.¹⁶⁹

Some individuals, although captured and living in one of these tributary communities, were able to maintain or recover mana. Their whakapapa links to the land and their spiritual power were still recognised still by those in military and strategic control. An example was Hohua, the tohunga who accompanied Te Rauparaha to Kaiapoi.¹⁷⁰ Kaikoura, whose people were based at the mouth of the Wairau River, also exercised a considerable degree of autonomy at 1840. He was the leader, noted by Ligar, at Port Underwood and, most notably, had signed the Treaty of Waitangi.¹⁷¹

Instances could also be cited of marriages between the rangatira of the invading northern tribes and high-ranking women of Kurahaupo whose male relatives had been defeated in battle, or had been supplanted as the most powerful chiefs in the district. The first examples at Te Tau Ihu were those between Ngati Koata and Ngati Kuia and were accompanied by a tuku rather than a conquest of the land. The tuku, as we have seen, was made to prevent fighting, reflecting a shift in the military balance of the wider Cook Strait region as a consequence of the victory of the northern tribes at the battle of Waiorua. Tekateka took

168. For McLean's account of the views of Te Kanae and Puaha, see Armstrong, 'The Right of Deciding', p 104. See also Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 222–231.

169. Ward, 'Te Atiawa in Te Tau Ihu', p 31

170. W J Elvy, *Kei Puta Te Wairau: A History of Marlborough in Maori Times* (Christchurch: Whitcombe and Tombs, 1957), pp 70–71; Armstrong, 'The Right of Deciding', pp 17, 25

171. *Nelson Examiner*, 27 February 1847 (Armstrong, 'The Right of Deciding', pp 45–46); see also Phillipson, *The Northern South Island: Part 1*, p 43

TE TAU IHU O TE WAKA A MAUI

2.11

Nukuhoro (a close relative of Tutepourangi) as his wife, while Te Patete married another high-ranking local woman (Oriwa, daughter of Kereopa Ngarangi and Kerenapu).

When Ngati Tama subsequently invaded the district, killing Tutepourangi and others among the rangatira, they also married important local women. Thus, Te Wahapiro (Te Puoho's nephew and stepson) took Hinewaka as his wife. According to the evidence of Meihana Kereopa, Hinewaka was the daughter of Tutepourangi; in that of Tekateka, she was identified as the daughter of local chief, Te Kahawai, whose death some accounts also attributed to Te Wahapiro. Ngati Koata chief, Te Putu, married the daughter of Pou-whakarewarewa in the course of the first taua into the district. Pou-whakarewarewa had eluded the war party that had so harried his kin, ensconcing himself on Kauaeroa in Te Hoiere. Te Rauparaha was said to have suggested the peacemaking, and that section of the tribe was permitted to remain at Te Hora (Canvastown).¹⁷² The daughter of Tupou is said to have been adopted by Merenako of Te Atiawa, was married into that tribe, and some of her descendants lived 'at various places in the land'.¹⁷³ The tangata heke also formed marriages with their enemies to the south. Niho, who was endeavouring to establish an outpost of Ngati Rarua power and to control the greenstone trade at Mawhera, married the daughter of the local chief, Tuhuru (of Poutini Ngai Tahu), who had been captured in battle.

It was doubtless difficult for Victorian – and, indeed, early twentieth-century – Pakeha commentators to see these arrangements as anything other than the taking of the spoils of war, but a greater understanding of the customary world has shown that there was no loss of status for the women involved. It was by this means that fighting could be prevented, a peace made, and a new whakapapa line established between the two tribes, even though they might keep largely to their separate and autonomous existences. Those links would project into the future generations, while recent arrivals deepened their connection to the land and the loyalty of the local community was secured to them. The Tribunal at Rekohu, discussing the importance of ancestral association within Maori customary thinking, has pointed out that the best (but not the only) way for migrants to obtain the same degree of legitimacy and make safe their possession of a new homeland was to marry into the local people: 'Then in terms of what was right, one's children could never be turned off.'¹⁷⁴

Ngati Toa kaumatua, Ngarongo Iwikatea Nicholson, gave particularly helpful evidence about the practice of matching marriages to provide mediation between two different iwi. He explained how:

Marriages between male and female captives with their captors was for the purpose of providing takawaenga between tribes, who may have been at war, or intending to engage in such activity . . . The aforementioned marriage practices created what our customs describe

172. Campbell, p 22; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 81

173. JD Peart, *Old Tasman Bay: A Story of the Early Maori of the Nelson District, and its Association with Europeans prior to 1842* (Nelson: R Lucas and Son, 1937), pp 59–60 (Riwaka, p 180)

174. Waitangi Tribunal, *Rekohu*, p 143

as ‘Takawaenga’. They and their offspring became just that (the mediators or buffer states or go-betweens) in times of stress between their tribes. They had an important role of responsibility toward maintaining inter-tribal stability through this, and had special status of varying degrees, dependent on the circumstances that created them, and of course their own personal status . . . Bloodline relationships often provided stability between tribes, although the actual link could be several generations removed. The need to maintain these bloodlines were often the reason for other marriages to reunite those blood lines and secure the relationship link for future generations.¹⁷⁵

It was a responsibility handed down from generation to generation. The offspring of matched marriages were the ‘people who walk between’(takawaenga) and would create and maintain a bond between the ‘conquered’ and the ‘conqueror’.¹⁷⁶

Mr Nicholson described how Ngati Toa constructed a network of takawaenga links with both enemies and allies. One example came from the taua against Ngai Tahu at Kaiapoi, which had resulted in the death of Ngati Toa ariki, Te Peehi. When a woman prisoner, Te Ipinga, was found to be the daughter of Tukaimaka, a high-ranking Ngai Tahu chief, she was married to Matenga Te Rapa of Ngati Toa. Matenga was chosen for that role because of his relationship to Te Peehi (his cousin) and the others killed during the taua. One of the children of that union, Riria Paeamu, was married at a young age to Te Toko of Ngati Rarua to create another takawaenga within those tribes allied to Te Rauparaha, and who had taken up occupation at Te Tau Ihu. Another takawaenga was created between Ngati Toa and Rangitane. Te Rauparaha’s nephew, Te Kanae, was given a Rangitane wife, Mere Terapu, who according to Rangitane evidence, was the daughter of their chief, Ihaia Kaikoura. Their two peoples then lived together at Wairau. Te Kanae, by his first wife, Karoraina Tutari, a daughter of Te Rauparaha, had a daughter who was married by arrangement to Peneta Tanoa of Ngai Tahu, and a daughter of that union was then married into Rangitane.¹⁷⁷

All the Kurahaupo tribes at Te Tau Ihu acknowledged defeat by Ngati Toa and their allies. Former lands had been vacated or taken by force, many of their leading men had been killed or taken captive, and numbers of their people had been enslaved. Yet sections of these tribes retained a degree of independence, which was to be strengthened, in the very early years of the colony, by Christianity and the theory (if not the reality on the ground) of British law. They had survived as an identifiable people at 1840. A sufficient population remained at Cloudy Bay/Wairau, Te Hoiere, and Port Gore to form communities known by the names of ‘Rangitane’, ‘Ngati Kuia’, or ‘Ngati Apa’, they retained adequate numbers of their chiefs, their traditions were still identified with the land, and their whakapapa was remembered. As former slaves were released and as Ngati Toa’s fortunes declined (most especially after

175. Nicholson, pp 26–27

176. Waitangi Tribunal, *Rekohu*, p 141

177. Nicholson, pp 27–30

the imprisonment of Te Rauparaha, Te Kanae, and other senior leaders in 1846), the position of the Kurahaupo tribes strengthened, even though any hope of being able to drive the migrants off their territory was also lessened with the interposition of British rule. Later Native Land Court evidence suggests that, by the 1850s, these groups were largely free of any effective overlordship; although considered of lesser status, they were living separately and independently. Thus, Irihapeti Rare thought that Rangitane at the Wairau were ‘slaves’ but agreed that Ngati Toa did not interfere with them, and that they grew food for themselves but not their Ngati Toa neighbours.¹⁷⁸

Ballara notes the ‘curious mixture of independence and subservience’ that Rangitane in this district showed to Ngati Toa in the early years of the colony.¹⁷⁹ The followers of local Ngati Toa chief, Rawiri Puaha, who was cultivating the Wairau independently of Te Rauparaha and Rangihaeata at 1843, included Rangitane. This party may have been former slaves released since Te Puaha had converted to Christianity two years earlier. But when the tapu placed on the valley was lifted, Rangitane from Cloudy Bay (Enoka and Wi Te Kekeu) were again included in the party intending to resettle the area.¹⁸⁰

Certainly, at first, neither Ngati Toa nor the Crown considered Rangitane in the negotiations for the Wairau area (1847–50), which were based in the North Island. There is, however, strong evidence of Rangitane’s increasing independence of action in their subsequent opposition to this and other Crown purchases which had not included recognition of their interests. They continued to defer to the Ngati Toa chiefs, but they also told officials of their own rights. A group of Rangitane refused to leave their cultivations after the Crown had purchased the valley from Ngati Toa. Ballara points out that officials ascribed different motives to the Rangitane party. According to H Tacy Kemp, they had been deployed by Te Kanae in his power struggle with both the Crown and his younger brother, Te Puaha. Te Kanae had been sidelined by his imprisonment in 1846, along with Te Rauparaha, as a consequence of which he had also missed out on the first payments for the Wairau Valley. On his release, he had gathered a body of Rangitane about him and, in Kemp’s view, intended to oppose the Pakeha settlement of the valley in order to force the Government to give him the major share of the next instalment of the payment.¹⁸¹

John Tinline, who visited the Rangitane party, also reported that they acknowledged the leadership of Te Kanae; they claimed to be there by his permission, but only until the Pakeha settlers actually arrived to take up their farms. Notwithstanding their deference to Ngati Toa leadership, Tinline also thought that they were there to support their own claim for a share of the payment. In his view, being ‘subject to the Ngati Toa, they are afraid to

178. Nelson Native Land Court minute book 4, fols 85–90; Phillipson, *The Northern South Island: Part 1*, pp 41–42

179. Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 224

180. *Ibid*, p 218

181. H Tacy Kemp to Colonial Secretary, 15 March 1850 (Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 223)

openly assert their claim to any part of the money – & I daresay – they may have had some idea that by retaining possession of the land itself, they will entitle themselves to a separate consideration from the Government or the New Zealand Company.¹⁸² They remained on the land until May of that year but eventually harvested their crop of potatoes and departed.

The following year, when the Government attempted to survey the road through the valley, they were confronted once more by a Ngati Kuia/Rangitane presence. This time, the party was stopped by the people based at Kaituna, who again acknowledged a Ngati Toa rangatira (Te Puaha) as the principal man of the region; but, at the same time, they drew the attention of officials to the existence of their own interests in the land. Tinline recorded that he had tried to persuade them that the road was for the benefit of all but that:

On this late occasion they gave as their reasons for their objections[,] having not heard anything from Rawiri Puaha to whom and his Tribe all these natives of the Rangitane Family are in subjection on the subject[,] that the cutting of the present line was only a preliminary step to wresting the land from them[, and] that they claimed a right in the land and that therefore they should be consulted respecting its sale and receive a portion of the payment. Whatever their own claims might be however they over and over again expressed their submissiveness to the will of Puaha and whatever he did they would abide by.¹⁸³

The superintendent of the Nelson province, Major Richmond, appealed to Hura Kopapa, the local Rangitane/Ngati Kuia chief at Kaituna, assuring him that the road would be beneficial and that the land would not be taken. Kopapa replied that he and two other local Rangitane/Ngati Kuia leaders (Wirihana Kaipara and Hui) favoured settlement, although not all people of the area were of the same mind. Again, it was for Rawiri Puaha to decide.¹⁸⁴ Nonetheless, their own voice was unsilenced and, ultimately, their rights had to be dealt with by the Crown (see ch 5).

There was evidence of some local Ngati Toa accommodation with Ngati Kuia/Rangitane at the time. Kaikoura told Thomas Brunner that the whole of the Kaituna pass had been given to him instead of his share of the purchase money for Wairau.¹⁸⁵ Whether this claim was true or not, it again indicates that the local Kurahaupo people continued to assert their rights in the land. There were to be similar tentative indications of acknowledgement by the ‘conquering party’ of the rights of local occupiers of the land in 1853–54, when the Crown again negotiated with Ngati Toa and a handful of allied rangatira, supposedly for all unsold

182. John Tinline to superintendent, Nelson, 18 February 1850 (Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, pp 223– 224)

183. John Tinline to superintendent, Nelson, 26 April 1851, in Crown Forestry Rental Trust, ‘Te Tau Ihu Document Bank’, supporting documents, various dates (doc A44), pp 3058–3061

184. Te Retimana (Richmond) to Te Hura, 17 April 1851, Hura Kopapa to Te Retimana, 21 April 1851 (Armstrong, ‘The Right of Deciding’, p 74); Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 224

185. Brunner to Richmond, 26 March 1851 (Armstrong, ‘The Right of Deciding’, pp 71–72); Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 225

lands in Te Tau Ihu (this was known as the Waipounamu purchase). As we will see in chapter 5, the Governor and McLean dealt only with the groups based at Kapiti–Porirua and met with opposition from many of the local peoples resident in the northern South Island. This included not only rangatira from other northern tribes who had settled more permanently there, but Ngati Kuia and Rangitane as well.

In Ballara's opinion:

In Kaituna, Kenepuru and the Pelorus the tensions between Ngati Kuia and Rangitane on the one hand and Ngati Toa and Ngati Koata on the other were relieved in this respect that they all looked to the brothers Rawiri Puaha and Te Kanae as their highest chiefs, and were developing into one community under their authority. Inter-marriage was gradually relieving the tensions. In Kaituna and Pelorus, Ngati Kuia and Rangitane were the overwhelming majority of residents in the 1840s and 1850s and later, so that in these districts Ngati Toa were less inclined to take a dominant role, and were protective of their own rights together with those of Ngati Kuia.¹⁸⁶

Thus, when Jenkins and Brunner visited the district in December 1854, the resident Ngati Toa argued that Rawiri Puaha had not intended to include Kenepuru and Mahakipawa in his transactions but to keep them for his own use and that of the permanent residents, most of whom were, in fact, Ngati Kuia/Rangitane. Jenkins refused, however, to acknowledge any such arrangement because the land was 'some of the best in the district'.¹⁸⁷ Similar claims were made at Otairua (Robin Hood's Bay) and Arapaoa.¹⁸⁸ A further acknowledgement of the continuation of rights was made by Te Atiawa rangatira, Ropoama Te One, who paid Ngati Apa part of the purchase price at Port Gore. Two rangatira from the conquest – Hori Te Karamu of Ngati Tama and Tamati Pirimona Marino of Te Atiawa and Ngati Rarua – were also to approve the provisions made for Puaha Te Rangi's community at Kawatiri in 1860.¹⁸⁹ Similarly, northern chiefs witnessed the 1856 deeds signed by Rangitane and Ngati Kuia, in which those peoples relinquished their independent claims to the Crown and received the purchase money directly from officials. As will be seen in chapter 3, we think this witnessing of deeds to have been equal parts acknowledgement of Kurahaupo rights and intimidation of residents on behalf of the Crown – what matters here is that the northern chiefs were effectively conceding that the defeated peoples still had rights, which had to be extinguished before a valid transfer could be said to have taken place.

Of course, it may be that the assertion of Kurahaupo groups of a right to be included within arrangements for the land – even one that seems to have been supported by those

186. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 225–226

187. 'Interpreter's Report', *Compendium*, vol 1, pp 297–298 (Campbell, p 162); Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 226

188. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 226

189. See Phillipson, *The Northern South Island: Part 1*, p 42

Ngati Toa and Te Atiawa still living amongst them – reflected changes that had occurred after 1840. This was the view of Professor Ward. He argued that under customary usage, and if 1840 is the date from which entitlement was absolutely fixed, these people had no – or only the most limited – rights in their former lands. He warned that ‘attempts to diminish the customary significance of raupatu can be overstated, and have been used, wrongly in some cases to revive claims to large areas by groups that were wholly subjugated as at 1839, but who survived and re-emerged in consequence of new influences such as Christianity’. Hitherto dominant parties often tacitly acknowledged those adjustments in the balance of power and accepted that rights existed, but ‘post 1840 changes widely accepted by Maori should not be confused with the state of affairs as at 1839, or “read back” in such a way as to modify the pre-1840 customary principles’.¹⁹⁰

Thus, in Ward’s view, ‘under the British, the conquered groups gained a degree of recognition greater than they would have in a wholly traditional Maori world’.¹⁹¹ It was especially unjust if Christian and/or law-abiding tribes were penalised for not resorting to force and contesting revived claims, only to have the Crown or Native Land Court take that as acceptance of the claims.¹⁹²

Our view differs for two reasons. First, we are not so concerned with what custom may have been at 1840, except as a marker in an evolving situation. Nor do we consider that Christianity or British law inhibited Maori in the northern South Island from asserting their rights after 1840, quite forcefully on occasion. Professor Boast, Professor Ward, and Iwi Nicholson argue that Ngati Toa’s ‘hands were tied by the Gospel’, and they therefore took no action against tribes who became ‘whakahi’ (cheeky).¹⁹³ The example cited is from the Rangitikei district, and we have not heard evidence on that area. In our own inquiry district, claimant and Crown historians noted several examples where Maori took action after 1840 that stopped short of physical violence but nonetheless disputed claims to land – both settler and Maori – by traditional means. These included the burning of whare, the removal of materials, destruction of cultivations, and even the driving out of parties of people.¹⁹⁴ This kind of thing was still happening as late as the 1890s, when Hemi Matenga killed stock and burned houses of Ngati Tama living at Wakapuaka.¹⁹⁵

Nor was British law necessarily inhibiting so long as Maori stopped short of serious violence. The Government itself asked Ngati Toa to remove Rangitane from ‘sold’ land in the Wairau in 1850 – without success, because the Ngati Toa leaders did not have to take action, but the Government hoped that they would do so, and expected them to be free to do so if

190. Ward, ‘Te Atiawa in Te Tau Ihu’, p 7

191. Ibid, p 32

192. Professor Alan Ward, brief of evidence, 9 June 2003 (doc P9), pp 14–15

193. Richard Boast, brief of evidence, pt 1, 2003 (doc P20), pp 2–3; see also Nicholson; Ward, brief of evidence

194. See, for example, Clark, pp 109–113, 120–121; Macky, p 31

195. Dr Grant Phillipson, *The Northern South Island: Part II*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p 39

they chose. The Government tried to bring in the Ngati Toa chiefs rather than their other option – the ‘Armed Police’ – but the Rangitane people later moved off the land in accordance with an agreement between themselves, Te Kanae, and the Government.¹⁹⁶ The historical record is sketchy but all the examples that we know of in Te Tau Ihu, where claims were contested by customary acts after 1840, involve northern tribes disputing with each other or with settlers. They had the means, in our view, to have contested the rights of Kurahaupo peoples in a similar manner, when these were asserted from the late 1840s, had they thought it necessary or tika (right). Instead, the process of peaceful joint occupation and intermarriage continued, and Kurahaupo rights were recognised and allowed by the northern chiefs in various ways. The weight of authority rested more with the newcomers, but Kurahaupo peoples had retained rights in their ancestral lands.

Secondly, we do not, in any case, see rights deriving from conquest as precluding the continuation of rights based in ancestry. Although some Maori thought that any form of vassalage meant loss of all rights, an alternative opinion existed and was advocated by iwi such as Te Atiawa returning to Taranaki, and Ngai Tahu reclaiming Kaikoura and the West Coast, as well as by Kurahaupo at Te Tau Ihu.¹⁹⁷ We place more weight in our reading of the likely Maori view on the question of Kurahaupo rights, on:

- ▶ early instances of recognition by ‘conquerors’ of the continuing status of a handful of Rangitane/Ngati Kuia rangatira;
- ▶ the importance of the custom of matching marriages as creating a connection respected by the conquering people;
- ▶ the survival of intangible links to the land (of their names, stories, and knowledge of local atua); and
- ▶ the importance of ancestry as a source of right.

We do not discount instances of conquerors recognising that such rights continued and had revived by the 1850s simply because the context was changing, nor do we see it as an alien development. Although the issue was hotly debated at the time of both purchase negotiations and Native Land Court hearings, the evidence suggests that custom was continuing to unfold; in our view, such recognition of the rights of defeated peoples cannot be considered uncustomary even if it had been brought about, in part, by ideas and circumstances introduced by Europeans.

We are guided towards that opinion by the prior findings of the Tribunal in the Rekohu case. There, the Tribunal considered how Maori custom operated not from pragmatic acceptance (that ‘conquerors’ were likely to, and did, assert rights in lands acquired only a few years earlier) but from its moral standpoint. In their view, the ‘might is right’ interpretation of traditional land tenure is a reductionist reading of a particularly complex situation.

¹⁹⁶ Macky, pp 58–61. Macky’s argument that the Ngati Toa chiefs did not actually remove the ‘trespassers’ is substantiated by the available evidence.

¹⁹⁷ See Phillipson, *The Northern South Island: Part 1*, p 42

Strength of arm was not necessarily equated with strength of right in customary Maori society, which, at the least, was capable of holding a range of attitudes to the propriety of claims made on the basis of 'raupatu':

We think it reasonably clear from Maori history that naked conquest was seen as less than tika (proper). This is commonly evident in numerous (but feeble) attempts to camouflage aggression by some trumped up claim of prior offence. The point is that, had aggression been seen as proper, such fictions would not have been required . . . On the other hand, some conquests were seen as legitimate, even though they might not have been thought of as such in European eyes. For example, it was legitimate to go to war on no other pretext than that a slight or, worse, a curse had been made. The distinction between right and wrong in Maori aggression is not always abundantly clear to the untrained eye, but still it was necessary to adduce evidence of just cause.¹⁹⁸

It is a misinterpretation of Maori custom to elevate the importance of 'mana' over 'tika', 'conquest' over 'ancestry', and male over female. In the opinion of the Rekohu Tribunal:

From the father, the children had mana (power). But from the mother, they had right. Through her, they came in on the ancestral line to the land. Maori society traced rights through both men and women, and often men were associated with power and women with what was just.¹⁹⁹

This was the reason that marriage into the local people, especially to the wife or daughter of a conquered chief, was an important means of legitimating claims to new land. The father might remain an outsider – not one of the tangata whenua, or the people of the land – but not so the issue of that union.²⁰⁰

Ballara predicted the likely outcome in Te Tau Ihu, had matters continued to evolve in a pre-contact manner:

In pre-contact times however, this rigid orthodoxy [about exclusive ownership inside Western-style linear boundaries] was absent, relations between groups and their lands being marked by a relatively inclusive, flexible system. What would have happened earlier is that the conquerors including their allies, and the conquered, would have made peace and put into place a formal relationship built on intermarriage, particularly in chiefly families. Many such marriages between the conquering migrants and the early tangata whenua actually took place, both at the time of conquest, and in the 1830s and later as part of a network of peacemaking. Over time the children of such marriages would have inherited land rights from the conquered and mana toa from the conquerors, and in two generations the

198. Waitangi Tribunal, *Rekohu*, p 140

199. *Ibid*, p 141

200. *Ibid*

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distinctions between the two groups would have been fading, not in terms of their existence as separate groups, but in terms of the status of those groups and their status in relation to the land.²⁰¹

To some extent, this prediction is counter-factual, but it is an extrapolation based on evidence of earlier, pre-contact conquests and their results. The Tribunal has found many examples of it throughout the country, where the passage of time had allowed such an evolution to take place before the Treaty. We refer, in particular, to the findings of the Tribunal in its report *Te Raupatu o Tauranga Moana* with regard to the relationships, authority, and types of claims put forward by ‘conquerors’ and ‘conquered’.²⁰²

Ngati Kuia, Rangitane, and Ngati Apa had little opportunity to make known their views on whether they held rights until after the bulk of the district had been sold by non-residents, and the Crown began to negotiate the provision of reserves for the local population. They deferred to Ngati Toa chiefs but considered themselves to have retained rights in the land of their ancestors. Thus, when Thomas Brunner and William Jenkins came to Te Hoiere, Ngati Kuia emphasised that conquest had not utterly extinguished their links to the land and that they had a right to be considered amongst its owners:

Although we were once conquered by Ngatitōa and Ngatiawa, we have never been driven from the land of our fathers. We consider that we are yet a people, a living people, and have a right to speak when our land is being sold without our consent, and no payment is received by us. Our conquerors did as they pleased before we became British subjects, but now we think we ought to have half of the talking about it, and half of the payment for it; and therefore we now positively say that unless the Government pay into our hands a fair share of the payment, we will not give it up, neither will we allow it to be surveyed; but if we are dealt fairly with by the Government, we shall be glad to see the white men come and cultivate the ground.²⁰³

2.12 BALANCING RIGHTS: TRIBUNAL COMMENT AND ANALYSIS

Questions pertaining to traditional customary rights present some of the most difficult issues for this inquiry. We can state with certainty that all eight descent groups in Te Tau Ihu had customary rights and interests in that area. We can also state with certainty in some cases, that particular rangatira or hapu were associated with, and had rights in particular

201. Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 65

202. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 43–47

203. ‘Interpreter’s Report’, *Compendium*, vol 1, p 297 (Phillipson, *The Northern South Island: Part 1*, p 158); Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu’, p 226

areas. In other cases, however, rights were contested or understandings were to change over time.

The knowledge of the tikanga associated with customary rights in the early to mid-nineteenth century has been much reduced for groups that had been defeated and we are now reliant, to a large extent, on scant early European – and even more scarce Maori – sources for a description of their presence and traditions. Furthermore, the detailed recording that does exist of what Maori thought about relative customary interests came at least one and, more usually, two or three generations after the events that were the subject of discussion. The initial investigation by Spain was cursory, and we must perforce patch together the hints provided by Crown negotiations as its officers sought the extinguishment of all interests, whatever their nature, in the 1850s. Such a source must be approached with caution. The testimony given before the Native Land Court is equally suspect because of the lapse of time that had occurred and the distortions in tikanga that the court process often generated, as claimants stressed one aspect or other of their claim as required to win the case. It is impossible in these circumstances of fragmentary sources, conflicting stories, and differing viewpoints, to come to a definitive and mutually agreed history of the customary tenure of Te Tau Ihu, and there is a risk, noted by a number of witnesses and counsel, that in arbitrating between competing views, the Tribunal will oversimplify complexities and entrench past errors. Thus, our intention has been to identify the certainties where we are confident that they existed and the principles which we believe to have operated, but to acknowledge, too, the ambiguities where the evidence does not permit clear adjudication between competing points of view.

2.12.1 The rights of conquerors

In our view, the crux of the issue lies in the short time that had elapsed between the arrival of the northern tribes and the British Government into the area, which meant that customary rights were still evolving when sovereignty was declared. That must be the case unless one accepts the proposition that rights in land derived merely from presence on it, no matter how short-term or how recent. This is clearly antithetical to the fundamental concept of whenua as taonga tuku iho, inherited by ancestral descent, and of the importance of whakapapa and korero embedded into the land. For the Kurahaupo tribes, the question was whether such rights had been lost and if sufficient time had lapsed that their rights were practically extinguished and the identity of those who remained on the ground absorbed into that of their conquerors. For the newcomers, the question was whether the rights that they had taken up after conquest were fully matured and unassailable.

Contemporary Europeans tended to see rights by conquest as complete once the conquest was over, but anthropological studies have now established that a good title came only after the passage of time. We look to the authority of the Waitangi Tribunal at Rekohu, which, in

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turn, relied on Te Rangi Hiroa (Sir Peter Buck) as enunciating the established principle of customary law that the functioning title was an ancestral one. Conquest, while not in itself valid, could be legitimated by time.²⁰⁴ A number of planting seasons and then a number of generations passed; and, eventually, the importance of those further acts of occupation and, ultimately, of successive tupuna born on the land, would supplant conquest as the basis of claim. Even in the case of a *tuku whenua*, where the land was gifted by those with ancestral association, occupation by the recipient was required to give any meaning to the take. It was integral to the *tuku* of land that the recipient would remain.

Still, the reality of conquest at Te Tau Ihu, as demonstrated in the defeat of the local people by the *tangata heke*, followed by occupation and the exercise of *tino rangatiratanga*, cannot be denied. Clearly all the ‘later arrivals’ in Te Tau Ihu in the 20 years prior to the Crown’s acquisition of sovereignty, who stayed or visited regularly for local resources, held rights in the region at 1840. They were acknowledged as the principal *rangatira* of the area by those *Ngati Kuia*, *Rangitane*, and *Ngati Apa* who had survived, and they dominated the historical record.

We regard these *taua*, which created the occasion for the development of rights, as legitimate under custom. Although armed with new technology, the northern *iwi* followed traditional practices in their conduct of the *taua* and subsequent *heke*. Muskets bestowed military advantages on those who possessed them and resulted in significant losses for those who did not, but war had not changed its function, or its rules of behaviour. It continued to be the final and accepted recourse for the resolution of dispute in Maori society until the wide acceptance of Christianity and British–Christian justice in the mid-1840s. We accept Professor Mead’s evidence on this point, and Ballara’s interpretation of the state of Maori society:

Warfare remained permeated with *tikanga* (rules), and constrained and limited by ritual, especially between kin. *Taua muru* (punishing raids) were used as lesser sanctions, and ritualised forms of war remained as systematic substitutes for fighting. Universally recognised peace-making techniques helped to contain violence. The introduction of European weapons, especially muskets, had its effects on the technology of warfare . . . and, for a relatively brief period, on numbers killed. The introduction of new methods of diplomacy . . . had their effects . . . In spite of these accretions, however, the nature of Maori warfare in this period remained essentially the same in 1845 as it had been in 1800.²⁰⁵

In distinction to the *Ngati Tama–Ngati Mutunga* raids on Te *Rekohu*, there were sound reasons in both *tikanga* and socio-political terms for the invasion. These included the need for new territory, which it was the newcomers’ intention to occupy, either seasonally or on a year-round basis, and the take provided by deaths of ranking individuals and by the

204. Waitangi Tribunal, *Rekohu*, p143

205. Ballara, *Taua*, p163; Professor Hirini Moko Mead, brief of evidence, 9 June 2003 (doc P5), pp3–4

uttering of curses and insults. Furthermore, the tangata heke operated according to tikanga in respect of the raupatu. They followed the usual course of marrying a number of ranking women, taking slaves but also leaving tributary communities on site, and permitting individual rangatira to exercise some local autonomy, or respecting the spiritual power of tohunga while they themselves held political and military control of the wider region.²⁰⁶ We cannot put aside the rights of the conquering iwi on the grounds that their actions had been uncustomary or improper, as was suggested by some Kurahaupo witnesses to the Native Land Court in the 1880s.²⁰⁷

2.12.2 The 'overlordship' of Te Rauparaha and the rights of Ngati Toa: eastern Te Tau Ihu

Rights of newcomers could derive from the moment of conquest or of *tuku*, but in both cases were given real meaning only by subsequent acts of occupation. We heard evidence that put a different slant on this rule: effective occupation rested ultimately on the ability to defend one's territory and strategic control of a wider rohe. A physical presence was unnecessary to have such control over constituent parts of that territory.²⁰⁸ In its transactions, in evidence to the Spain commission regarding customary ownership at Wellington, and, later, in the Native Land Court in a variety of cases, Ngati Toa claimed to have an overriding mana within the whole of the Cook Strait region. They argued that they exercised authority over not only the Kurahaupo groups, which had survived and were living upon portions of their old territory, but also the other participants in the *taua* and *heke*. As stated to Crown officials, the conquered had been enslaved or left in possession to provide labour and resources for them, and in the case of Ngati Toa's allies, had been allocated lands. Neither group, so it was argued, could sell without Ngati Toa sanction. The evidence of historians and kaumatua all agree that this has been a constant and sincere claim advanced by Ngati Toa from at least 1839 to the present day.²⁰⁹

Some support for these claims may be found in the acknowledgement of the *roherohe-tanga* undertaken by Te Rauparaha. There was no occasion on which the understanding of Te Atiawa, the major beneficiaries other than the various Ngati Toa rangatira of the allocation made at Te Awaiti, was sought. In more recent times, however, they, and expert witnesses on their behalf, have argued that this sort of territorial division was a due acknowledgement by all parties involved of their role in the conquest of the eastern side of Te Tau Ihu. It did not imply subordination and they acted independently of Te Rauparaha's leadership with increasing frequency as time passed.²¹⁰

206. See Nicholson

207. See Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 283

208. *Matiu Nohorua Te Rei*, brief of evidence, pt 1, , 9 June 2003 (doc P1), pp 12, 22; Nicholson, pp 17-18; Mead, pp 3-5, 8-9; Ward, brief of evidence, pp 6-7

209. See Nicholson; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 62

210. Riwaka, pp 115-116, 183-184; Phillipson, *The Northern South Island: Part 1*, pp 39-40

Te Rauparaha's territorial division, they argue, did not negate the take already present from their own independent conquest. Nor did it extend into western Te Tau Ihu. In the evidence of Ballara, such a division should not be confused with a *tuku* (gift) of one's own ancestral land – the custom has a different significance here.²¹¹

As indicated earlier in this chapter, we agree with Te Atiawa's interpretation of the significance of Te Rauparaha's *tuku* or *roheroetanga*. We consider the idea of a sustained 'overlordship' to have little basis in Maori customary thinking. *Taua* were conducted as a collective effort and to the extent that Te Atiawa – and the other allied tribes – acknowledged Te Rauparaha's capacity to make decisions on their behalf, this occurred at a time of transition, of warfare and migration. Once the conquest and *heke* were relatively complete, and conditions became more stable, and as their independent claims were strengthened through sustained occupation, these groups became less inclined to acknowledge the leadership of Te Rauparaha. By 1840, Te Atiawa had already fought two battles against forces that had included Te Rauparaha, but in the North Island. At Te Tau Ihu, Te Rauparaha had clashed with local Te Atiawa chief, Te Tupe-o-Tu, over the violation of a *tapu* at Kaparatehau (c1838–39) but the two peoples had settled into their respective *rohe*.²¹² Ngati Toa withdrew from Te Awaitea as increasing numbers of Te Atiawa arrived from the North Island, but their departure seems to have reflected their own declining interest in the area with the fall-off in whaling, as much as it did the apparent deterioration of relationships between the two tribes.²¹³ Te Atiawa intrusion into the Wairau, on the other hand, was met with a firm and decisive response in the mid-1840s.²¹⁴

Both Ngati Toa and Te Atiawa were a mobile people, maintaining rights on both sides of Cook Strait. As we have seen, Te Atiawa were extremely migratory in their habits. They joined with Ngati Tama and Ngati Rarua in their occupation of the western side of the region in the late 1830s, as well as having territory at Te Whanganui a Tara, Waikanae, and in Taranaki.²¹⁵ They moved freely between their *pa* and resource areas in the Cook Strait region, and rights were often recognised in all of them. Te Atiawa loyalties, allegiances, and interests were far more diversely based than those provided by an alliance with Ngati Toa alone. It is equally difficult to see Ngati Toa as a coherent political entity, all their leaders deferring to the overriding authority of Te Rauparaha. Indeed, the allegiances of the tribe divided over the issue of Ngati Raukawa and Te Atiawa.²¹⁶

Ngati Toa's initial control over the eastern side of Te Tau Ihu had been predicated on their alliance with Te Atiawa, but as relations between the two groups deteriorated, their strength was bolstered by the arrival of their Ngati Rarua kin and solidified by the *takawaenga*

211. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 150–151

212. *Ibid*, pp 61, 139–140

213. Phillipson, *The Northern South Island: Part 1*, pp 32–33

214. Macky, p 31

215. Phillipson, *The Northern South Island: Part 1*, p 32; Riwaka, pp 152–156

216. 'Interpreter's Report', *Compendium*, vol 1, pp 297, 300; Phillipson, *The Northern South Island: Part 1*, p 31

created with Kaikoura's people. Some amongst Ngati Rarua took the opportunity generated by their participation in the conquest of the region and their kinship with Ngati Toa and settled in the Wairau. From that point they developed their own rights, living in their separate communities but sharing resources with Ngati Toa. Communities of Kurahaupo peoples also formed around the leadership of Ihaia Kaikoura at Port Underwood and Hura Kopapa at Kaituna, surviving defeat at the hands of Ngati Toa and their allies, whom it proved increasingly difficult to control as Ngati Toa's power was undermined (as discussed in chapter 5).

2.12.3 The 'overlordship' of Te Rauparaha and the rights of Ngati Toa: western Te Tau Ihu

Ngati Tama and Ngati Rarua witnesses in the nineteenth-century Native Land Court drew a distinction between people holding lands through the allocation at Te Awaiti and their own occupation of lands further west, which they had conquered for themselves, and where Te Rauparaha's role had been notional only. Te Rauparaha had enormous mana but the idea of an overlordship is now seen as the legacy of an imperial rhetoric which, in European writings, exaggerated his power and control. Our rejection of that argument in the case of western Te Tau Ihu is founded, in large part, on the emphasis we place on occupation as integral to development of rights in the land. The weight of evidence from Land Court witnesses in the case of both the northern South Island and conquered areas elsewhere in New Zealand is that conquerors had to actually live on, or exercise other direct acts of 'ownership' over, lands to properly make claim to them. A claim might ultimately trace back to raupatu, but recognised rights of ownership came only with sustained occupation. While we agree that occupation need not be based on actual residence to have effect, it did need to be of a more tangible character than that provided by a strategic control based in the North Island.

Te Rauparaha's visit to the western side after the taua, the gifting to him of slaves, the placing of tapu on land at Wakatu, and the history of subsequent dealings with the New Zealand Company and Crown, indicate that Te Rauparaha might have been able to develop such rights if he had chosen to do so, but he did not. Instead, he let that opportunity go. According to Ballara, any obligations on the part of Ngati Toa's allies in the west were satisfied by the generous gifts presented to him on his visit to the district.²¹⁷ Regardless of whether that is so, Te Rauparaha and his people evinced no real interest in settling or using resources in western Te Tau Ihu. Other than the immensely important pounamu, captured by Niho, there were no ships or settlers or traders to attract Ngati Toa's attention. This was why it was easy for Kapiti chiefs to 'let go' (tuku) parts of western Te Tau Ihu to the company in 1839. But governments of the 1840s and 1850s felt that, in order to ensure that any and all possible Maori rights in an area were extinguished, great leaders like Te Wherowhero and

217. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 133–134

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Te Rauparaha had to be paid, even for land which they had not conquered or settled. There is also the point that, according to some evidence, Tutepourangi's tuku was in part to Ngati Toa as well as Ngati Koata, and two hapu of Ngati Toa briefly settled on Tutepourangi's lands (but did not stay).

Had Te Rauparaha chosen to contest the company's claim to western Te Tau Ihu as he did to the Wairau in 1843, or had he visited the area seeking to settle close to the new company town but on land conquered by Ngati Toa's allies, what would have happened? Given the evidence of how other latecomers were treated, we suspect that the resident iwi would have had little choice but to make him a tuku of land. We will never know, as Ngati Toa's only concrete assertions of rights were not made in this way but rather to land purchasers (the company and then the Crown).

Even then, when face to face with the resident Maori, Ngati Toa leaders claimed the mana of accepting payment and distributing it to others, but not the kind of right-holding that entitled them to keep it. It was mainly out of the district and in the absence of most resident right-holders, that the Ngati Toa leaders sought to keep the lion's share of payment for western Te Tau Ihu lands. We will explore these points further in chapters 3 and 5, where we will consider how the Crown dealt with customary right-holders in the Pakawau and Waipounamu purchases. Here, we note that, while the Ngati Toa claim to overlordship and primary rights in western Te Tau Ihu was accepted by the company and Crown, it was rejected later by the land court, and does not appear to us to be sound in custom.

We do not go so far as Ballara, however, and reject it entirely. As we have noted throughout this chapter, custom was evolving with infusions of Christian and other European ideas. The absolute alienation of land in Maori custom required the total and permanent removal of people from the land – either voluntarily, as in the case of a migration in which nobody was left behind to keep fires alight and nobody intended to return, or involuntarily, when defeated peoples were entirely exiled from their lands without ability or hope of ever returning. The proof of either was, of course, the function of time. The company and Crown policy of reserves, in which 'vendors' remained on the land they were alienating but were nonetheless supposed to be giving up all rights to it forever, was alien to custom. Also, an absolute transfer that had immediate permanency, in which no residual rights remained that could be recovered later, was also alien to custom. In these circumstances, the Crown had to ensure that all possible rights – both the primary rights of residents and any rights that were still recoverable under custom – were satisfied.

How much of a right Ngati Toa might have been able to establish in western Te Tau Ihu had they sought to settle there, we will never know. But we think that Te Rauparaha's overall leadership of the taua and heke, the very close whakapapa links with Ngati Rarua and Ngati Koata, and a possible share in the tuku of Tutepourangi, alongside the military power of the Ngati Toa tribe; all gave potential rights in the area that persisted in the 1840s. In other words, not enough time had elapsed to cancel the recoverable rights of either the Kurahaupo

peoples or the conquerors who had not (yet) lit fires of occupation on the land. Although Ngati Toa had only one stick in the bundle of rights, which we discussed above, it was nonetheless the basis of a claim. It would have been stronger had they actually participated in the western taua, rather than relying on Te Rauparaha's overall leadership and the view that the taua were 'his braves'. It would have been stronger still had they carried out any of the tangible or intangible acts which marked authority and occupation in an area. But there was a latent right, strongest for the leading chiefs of Ngati Toa, and they succeeded in convincing the Crown that no transaction could stand without their concurrence. In the circumstances of the early 1840s, this was certainly correct. After the imprisonment of Te Rauparaha and the military contest of the mid-1840s, it was no longer as true – but that made it only the more convenient for the Crown, as we shall see in chapter 5.

There was still, therefore, a latent, residual right available to Ngati Toa in the 1840s. Had they turned up, custom would have dictated their inclusion, probably by means of a tuku from one or more of their allies. Such a tuku would have been more in the nature of an adjustment to the division of conquered lands than an incorporation of strangers by gifting rights where they had had none, with significant rights then persisting for the kaituku (donors). This latent right was foreclosed, along with all others, when the Crown purchased the land. While it was far from the primary rights claimed by Ngati Toa (and for Ngati Toa, by the Crown), it was nonetheless a right that Ngati Toa possessed, and for which they were rightly paid in 1839 and 1852–54 (along with other non-resident right-holders) (see chs 4, 5).

2.12.4 Equal claims for the conquerors (at first) as they settled

We do not accept that any one of the groups that migrated and settled on the western side had a greater right to exercise rights over the land than others, by reason of tuku, their role in the taua, or the subsequent sequence of their arrival. Of course, as occupation developed from being exploratory to more settled in character, particular rangatira and hapu became more closely associated with certain areas, or they came into conflict with each other over the use of them. However, the basis of their right to settle in the area remained the same as each other's and none took precedence. All the iwi involved in these later migrations began to add to the rights acquired by reason of raupatu, with or without an intervening tuku; by cultivation, resource use, further tuku to later arrivals, placing of tapu, marriages with local people, and eventually, by the birth of children, deaths, and burials.

2.12.5 The special circumstance of Tutepourangi's tuku

Special circumstances arose for Ngati Koata and the Kurahaupo tribes in Rangitoto and the adjacent coastal lands, and extending into Pelorus Sound and Tasman Bay. The rights of Ngati Koata predated the conquest and were based on a tuku of ancestral land by the leading

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Kurahaupo rangatira of his day, Tutepourangi. This tuku initiated a reciprocal relationship, reinforced by intermarriage and co-residence, in which Ngati Koata had to protect and look after Tutepourangi's people in return for the right to settle, use resources, and exercise authority throughout their tribal lands. Both parties had rights and exercised tino rangatiratanga, although the balance of authority over people clearly lay with the protecting tribe. Ngati Koata and the Kurahaupo peoples (more particularly Ngati Kuia, but Ngati Apa and Rangitane also) have consistently confirmed, relied on, and lived out this tuku ever since. We accept their evidence that it is the basis of their reciprocal rights and duties in parts of Te Tau Ihu, and that its effect remains.

2.12.6 The rights of defeated peoples

The idea that time and acts of occupation were normally required to establish rights of conquest has important implications because the corollary is that time was also required 'before the interests of those who had left the land . . . could be said to have been abandoned or extinguished.'²¹⁸ As we noted in our earlier discussion, Tribunals who have looked at this question in different regions have placed different emphases in their interpretation of customary law. At Te Whanganui a Tara, Ngati Toa and Te Atiawa rangatira who appeared at the inquiry into the New Zealand Company purchase in Port Nicholson, where Spain had undertaken a more thorough investigation of Maori views than at Te Tau Ihu, were in no doubt that they owned those lands by reason of their own conquest, even though a generation had not yet passed. Nor had the incorporation of earlier groups with long-standing ancestral associations been demonstrated to be a prerequisite of 'ownership' of lands there.²¹⁹

There were, however, significant differences between the two districts. The situation at Te Tau Ihu was, in a sense, more akin to that of Rekohu where the defeated people also remained on the ground, even though there were differences here, too, in terms of the tikanga followed by the conquerors, whether the venture was 'tika' and the status accorded those who survived. The Rekohu Tribunal did not dismiss the claims of conquerors who had remained in occupation and had thus developed an independent set of rights, but it did support the idea that the rights of those who had been defeated might survive conquest and even a very harsh enslavement.

At 1840, if the migrant accounts dominated the historical evidence at Te Tau Ihu, the naming of the land and the spiritual associations remained, for the meantime at least, with Kurahaupo. The Kurahaupo tribes remained with the land and it is our understanding that where that is so – where land continued to be occupied by an identifiable community,

218. Waitangi Tribunal, *Rekohu*, p 139

219. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 32–34

even if on ‘sufferance’ of new, more militarily powerful arrivals – ancestral rights survived. While we agree with the proposition that a total extermination of the people in situ was not required for a conquest to be complete, we do not accept the argument that iwi who suffered defeat, but who were left on the ground in a tributary condition, had lost all ahi ka, and that the principle of ringa kaha superceded. Even if this concept – control of territory and subjugation of its inhabitants by force of arms – has validity in custom amongst some tribes, it is difficult to see that it could encompass the whole of Te Tau Ihu with its multiple bays and rugged interior. Certainly, the northern allies held control of the wider region, but the alliance was too far flung and the territory too extensive and too difficult of control to be under their complete and absolute authority. The historical evidence rather is that free Kurahaupo groups survived in the interior and occasionally struck back (with no notable successes), and that these fugitives later rejoined the settled, tributary communities that had survived under their own chiefs – no longer with exclusive rights, but with valid customary rights nonetheless.

Rights based in ancestry could not be sundered in so short a time as had elapsed in the case of Te Tau Ihu. The Treaty came so soon after these events that the rights of conquerors had not had sufficient time to fully develop so that they were grounded in ancestral association, nor those of the defeated to be fully submerged. The Kurahaupo iwi retained a separate identity and a number of their own rangatira, even though the migrant leaders were now recognised as the principal men of the district. Ihaia Kaikoura, in particular, had enough status to have signed the Treaty of Waitangi, and was recognised as a rangatira locally. There was no occasion for further dispossessing the local Ngati Kuia, Rangitane, and Ngati Apa who proved useful informants and a bulwark against Ngai Tahu. It is clear that the leaders of those communities were permitted to regain a large measure of autonomy as the years passed, and as the tangata heke set their own roots ever deeper into the land.

It is our opinion, therefore, that, while the northern iwi dominated the region at 1840, they did not have exclusive rights to it in custom. We recognise that with defeat came loss of territory and loss of complete independence of action, but it did not entail loss of ancestral connections with the land, or of rights in areas in which they retained a presence. Nor do we accept that a tributary condition – or any sort of ‘slavery’ or ‘vassalage’ – resulted in the loss of all rights forever. There was room for recovery of status and for the revived exercise of rights.²²⁰

We also recognise that the capacity of defeated peoples to insist on the recognition of such rights increased with the interposition of British sovereignty and the more peaceful conditions that resulted. We do not, however, see this development as uncustomary; it was possible for custom to go on evolving, even with infusions from the Treaty, Christianity, and European law. Even so, it was still practicable, as the historical evidence shows, for the

220. On this point, see Mead, pp 6–7, and Nicholson, pp 19–20.

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northern iwi to contest Maori or settler claims of which they did not approve by means of a range of customary practices, from destroying property to removing people altogether. It is notable that Kurahaupo claims, when they came in the late 1840s and early 1850s, were not actively contested by these means. While Maori expressed a range of opinion about the impact of conquest on the rights of the defeated, even some of the conquering party accepted that such rights endured and that the surviving communities of Kurahaupo, though they might defer to the senior northern rangatira, were effectively independent by the late 1840s.

It was not until the Native Land Court era, when all Te Tau Ihu Maori were forced to fight each other for the insufficient land remaining, that the northern conquerors insisted on an exclusive definition of their rights. Hitherto, their practice had been inclusive so long as their mana was also recognised. This was no longer possible in the extreme circumstances of the 1880s and 1890s. The Crown has recognised and conceded that its insufficient reserves contributed to this result.²²¹

221. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 7, 13

CHAPTER 3

**THE CROWN AND CUSTOMARY RIGHTS IN TE TAU IHU:
GENERIC ISSUES**

As we have seen in chapter 2, there was a complex system of law governing Maori relationships to each other and to land and resources. Tribes, hapu, chiefs, and families possessed layers of rights, often overlapping in both a horizontal manner (between groups) and vertically (between communities and their leaders, and leaders of high rank outside the immediate community). This was not an easy system for outsiders to grasp. In particular, the intricacies of whakapapa by which the many relationships between people were embedded into the land were not apparent to outsiders, who ascribed convenient labels where they could and ignored complexity where they could not. Nonetheless, both claimants and the Crown argued that Clarke, Spain, Grey, McLean, and other prominent officials had learnt many aspects of Maori law and right-holding from close observation and from korero with Maori leaders. There was sufficient 'expertise', the parties agreed, for the Crown to have assured itself that it was dealing with the correct people and leaders in its transactions for land. Indeed, the Crown and claimants both noted that McLean and Grey were knowledgeable enough to be able to manipulate and exploit custom in these negotiations to the disadvantage of Maori.

These agreements between the parties are important because one key aspect of the Te Tau Ihu claims was that the Crown did not actually inform itself properly of customary law and rights in its major transactions with Maori. As a result, it was alleged, the Crown did not always deal with the correct people and leaders, nor with the correct customary decision-making mechanisms, in its purchase of land. This was, in the claimants' view, entirely avoidable and in some cases deliberate, amounting to a serious breach of the Treaty principles of partnership, reciprocity, and active protection. Further, the Te Tau Ihu claimants argue that the Crown failed to investigate the New Zealand Company transaction properly, before granting Maori land in Tasman and Golden Bays to the company. Nor did it properly ascertain the rights which people wished to retain, resulting in a lack of mutual understanding in the deeds and the expropriation of people's rights in violation of the Treaty. As a result of these failures on the part of the Crown, it obtained almost the entire northern South Island from Maori in breach of Treaty principles.

In reply, the Crown argued that customary rights were so unsettled after the recent

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migrations as to be in a state of flux, justifying its blanket purchase approach of settling with everyone (eventually). Also, the Crown argued that it lacked the infrastructure and resources to carry out exhaustive inquiries.

In this chapter, we discuss the Crown's Treaty duty to satisfy itself that it was purchasing land in the correct manner and from the right people and leaders, and to ensure that valid transfers had been made (by the correct people) before confirming the transactions of others. The detail of how the Crown carried out its Treaty obligations in particular purchases, and prior to granting land to the company, will be covered in the following chapters.

3.1 OVERVIEW OF THE CLAIMANTS' CASE

Before beginning our discussion of the claimants' case, we note the brief outline of key events contained in section 1.4. The Te Tau Ihu claimants were all affected by the events described in that section. Their claims focus on certain actions of the Crown, including the decision to investigate the validity of the New Zealand Company's title before confirming it, the Spain commission's inquiry and compensation settlement, and the Crown's purchase of almost the entirety of the northern South Island from 1847 to 1856. These Crown actions have generated similar claims and arguments, which we summarise here. Broadly, certain issues were almost identical for all of the claimants. Others were more distinct, especially in terms of the differing perspectives of the Kawhia and Kurahaupo groupings. In this section, we summarise the generic, shared elements of the claimants' case, noting particular differences where relevant.

3.1.1 Treaty principles

Among other Tribunal reports, the claimants referred to the *Muriwhenua Land Report*, where the Tribunal found that Maori customary law was protected and guaranteed by the Treaty, either as an element of rangatiratanga or as a taonga. This included systems of land tenure and relationships between hapu, and 'customary laws as to rights and interests in land and other taonga'. In Ngati Toa's submission, the Crown entirely failed in its duty, arising from the plain meaning of article 2 of the Treaty, to protect Maori interests and taonga, including customary tikanga. Tikanga was either disregarded (such as in the blunders leading to the Wairau incident) or (where it was known) exploited to the detriment of Maori by Grey and McLean: taking Te Rauparaha captive, for example, and using the concept of utu to extract Wairau from Ngati Toa. Then, the Native Land Court distorted things further by squeezing tikanga into its own paradigms, such as by individualising title, which was not in accord with the rights in common held by Te Tau Ihu iwi. As a result, understanding of

tikanga by the claimants themselves has been seriously eroded and the plain meaning of the Treaty breached.¹

The Crown's Treaty duties were further elaborated by Ngati Koata, who argued that the Treaty guaranteed tino rangatiratanga and its exercise by customary law and tikanga. This included a guarantee that as tribal collectives, Maori would have the full, exclusive, and undisturbed authority over their lands, estates, fisheries, and other taonga. The Crown promised a government that would prevent the disadvantages arising from any absence of laws and institutions, would govern and control settlers, avoid adverse effects for Maori, and carry out the Treaty guarantees. In particular, the Queen's royal protection and the rights of British subjects were promised. This was a reciprocal agreement. Te Tau Ihu Maori agreed that settlers could come and share their resources, subject to the full protection of Maori rights, and that the Crown could govern, again subject to the full protection of Maori rights. As early as 1846, Chief Justice William Martin acknowledged that before the Treaty of Waitangi the whole of New Zealand was divided between, and belonged to, iwi and hapu. The Treaty guaranteed Maori retention of what they then possessed for so long as they wished to retain it.²

The Crown's obligation to protect tino rangatiratanga was, in the findings of the Ngai Tahu Sea Fisheries Tribunal, an active (not a passive) one. Governments had to ensure a fair process for determining Maori Treaty rights, to consult with Maori, and to redress any breaches. These obligations arise from the plain meaning of the Treaty and also from the principle of partnership. In its *Ahu Moana* report, the Tribunal reiterated that, in order to discharge its duty of active protection, the Crown must fully investigate the nature and extent of Maori interests so as to make informed decisions. In carrying out such an investigation, the Crown has an obligation to ensure a fair process. In its *Muriwhenua Land Report*, the Tribunal found that such a process requires accountability (the Government should be accountable for its actions) and an independent audit (the Crown's decisions, where disputed, should be subject to an independent inquiry).³

The claimants argued that procedural fairness and impartiality are required of the Crown. As stated in the *Maori Development Corporation Report*, the Crown as a Treaty partner, acting in a manner akin to a fiduciary, must act fairly as between beneficiaries rather than allowing one group to be favoured. This is the Treaty principle of equal treatment. Circumstances may require the interests of a particular sector or group of Maori to receive special treatment where they have particular needs. Otherwise, the Crown has to be fair and impartial as between Maori groups.⁴

1. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 14-15

2. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 27-28

3. *Ibid*, pp 30-34

4. *Ibid*, p 33

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3.1.2

In Te Tau Ihu, the claimants alleged that the Crown's actions in respect of its failure to properly and fairly investigate, identify, negotiate for, and purchase their customary rights, have breached:

- ▶ its obligation to protect Maori tino rangatiratanga in return for the cession of sovereignty (the principle of reciprocity);
- ▶ the principle of partnership;
- ▶ its fiduciary duty;
- ▶ its duty of active protection;
- ▶ its obligation of procedural fairness;
- ▶ the requirement that it investigate Maori rights, consult with Maori about them, and make informed decisions about them; and
- ▶ the obligation to redress past breaches.⁵

3.1.2 The Crown's alleged failure to conduct a proper inquiry into the nature of customary rights and the identity of customary right-holders

The Ngati Rarua submission was fairly typical of the claimants' position on this issue, which they argued was a breach of the Treaty principles outlined above. The key feature of the Ngati Rarua claim is the Crown's policies and practices with regard to the purchase of land in the 1840s and 1850s. It is clear from the evidence, they argue, that officials and Maori had vastly different views of the nature and extent of the transactions. Ngati Rarua hoped to forge a strong relationship with the Crown and to obtain the benefits of settlers and wealth, and had no true understanding of the consequences of the transactions. When they did discover the consequences, protest was forthcoming. Evidence from the 1870s and 1880s demonstrates that Ngati Rarua had a very different understanding of the transactions (and what kinds of rights they retained) from that of the Government.⁶

As part of this huge general problem, a particular feature was the Crown's failure to inquire properly as to who had customary rights, thus setting iwi against iwi in a process of blanket purchasing of huge districts that was in fact the 1840s waste lands policy in another guise. (The waste lands policy is described briefly in section 1.4 and in more detail in section 3.3.2.) Also, the Crown did not conduct an adequate inquiry into the nature and extent of customary rights, and of customary practices in terms of how such rights could and should be transferred. Despite not carrying out such inquiries, the Crown proceeded with major transactions, to the serious detriment of all iwi. This was inconsistent with the Treaty. The nature and extent of customary rights were not unfathomable at the time – though they are more difficult to establish *now*, which is the Crown's fault – and the Crown chose to satisfy settler pressure for land at the expense of properly ascertaining and then acquiring

5. Counsel for Ngati Koata, closing submissions, p 37

6. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 6–8

Maori rights to specific lands. The Crown, in the claimants' view, is now required to provide redress for that failure.⁷

The claimants' allegations cover questions of both what customary rights were (and were admitted to be by the Crown), and who held them. In terms of the 'what' question, one key issue was the policy debate around so-called 'waste lands', and the extent to which the Government was prepared to (or thought it had to) recognise Maori title to uncultivated lands. This became a key policy consideration in Governor Grey's approach to acquiring Maori land. In 1846, Earl Grey became Secretary of State for the Colonies. He was known for his opposition to the Government's apparent wide recognition of Maori title. He thought instead that the Treaty had made much of the colony into 'waste lands' of the Crown. He instructed Governor Grey to implement that policy as far as was possible. The Governor's solution, however, was to extinguish (rather than not to accept) Maori title over extensive areas in advance of settler needs, at a low price. The Wairau transaction is the first example of this virtual waste lands practice (later continued in the Waipounamu purchase). Having also been instructed to satisfy the needs of the New Zealand Company, the two policies came together with the need to subdue Ngati Toa and led to the virtual extraction of the Wairau from that tribe. The Crown's Treaty obligations to Ngati Toa and indeed to all resident Maori, including Ngati Rarua, were not considered.⁸

In terms of the 'who' question, the Crown at first contemplated the establishment of a process for investigating the nature of right-holders to land before purchasing. The Crown's historian, Macky, identifies the imperative placed on Grey by instructions from the British Government to undertake a robust examination of right-holders. Lord Stanley 'instructed Grey to ensure that purchases of land from Maori were made from the right parties.'⁹ This was explicitly linked to assisting the New Zealand Company to obtain the land it needed. In the example of the Wairau purchase (see map 4), the Government at first abided by these instructions – sending the surveyor Ligar to identify customary 'owners' – but then it departed from its own standards by ignoring Ligar's report and dealing improperly with just three chiefs of only one tribe. In any case, the Ligar inquiry was woefully inadequate and admittedly incomplete. The same failures were evident, it is argued, in the Waipounamu purchase (see map 5).¹⁰

The submissions of other claimants on this broad issue were similar. Ngati Koata, for example, argued that the Crown did not carry out an adequate inquiry into who held customary rights and tino rangatiratanga before any of its major transactions in Te Tau Ihu. In cross-examination, Dr Gould (the Crown's historian) agreed that without a knowledge of customary rights, tenure, and relationships, it was not possible to evaluate Maori agreement

7. Ibid, pp 6–9

8. Ibid, pp 40–41

9. Ibid, pp 41–42

10. Ibid, pp 41–76, esp pp 41–44

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to deeds. Nonetheless, there had been sources of information available for Crown agents to have made a comprehensive analysis of customary rights in Te Tau Ihu. The evidence of Ballara and Bassett-Kay is that rights were complex and overlapping but they could still be ascertained. McLean and other officials oversimplified deliberately for expediency and as a tactic.¹¹

In the claimants' view, the Crown's assertion that inquiry was not possible (nor rights reasonably certain and therefore reasonably ascertainable) is refuted by Dr Ballara. She argues not that there had been 'no inquiry at all' but that the inquiries that had been carried out were inadequate, even given the standards and logistical difficulties of the time. Crown agents and officials such as Grey and McLean received advice as to the proper methods for dealing with Maori and their land but chose to ignore it. The Crown's objective in the critical Waipounamu purchase was rather to mop up any outstanding *claims* (instead of proven rights) that emerged from earlier transactions, and to arbitrate and compensate such claims so as to complete the supposedly finished purchases. The overriding goal was to obtain virtually all the land for settlers. Adequate inquiry, on the other hand, would have enabled the Crown to act consistently with the Treaty, by dealing with those who actually had rangatira-tanga, giving them a proper voice in managing the settlement process, and finding out what they really owned, and – in respect of that – what they wanted and needed to retain. Only this could have ensured that Maori had real choice and retained sufficient and appropriate land and resources, as they were entitled to under the Treaty.¹²

The nature of the rights being conveyed and/or retained was also an issue. Dr Gould agreed, in cross-examination, that Maori understanding of transactions would not have encompassed the wholesale alienation of land that subsequently occurred. Valid transactions required both parties to understand the same thing. This was especially doubtful in the case of Wakefield's presents in the company transaction, which the claimants argue were not seen as payments for land. Ngati Koata maintain that early transactions, especially those with the company, conferred occupation rights only. The Crown failed to ensure that Ngati Koata understood the transactions as an absolute and unconditional alienation, which was the Crown's interpretation of them.¹³

3.1.3 The Crown's alleged failure to properly identify and extinguish customary resource-use rights

Building on this allegation about the Crown's failure to inquire, the claimants argue in particular that the Crown failed to identify the full range of customary resource-use rights, and to ensure iwi agreement to alienate or extinguish those rights in its purchases. Ngati Koata,

11. Counsel for Ngati Koata, closing submissions, pp 40–41

12. Ibid, p 43

13. Ibid, pp 44–46

for example, argue that their customary practice of travelling throughout the region, inter-dependently with other iwi, using a wide variety of places for harvesting, fishing, rongoa, and other things, was a customary right that should have been protected by the Treaty. It was not something that Ngati Koata and other tribes wanted to surrender (or knew they were surrendering) to the Crown in any of the blanket purchase transactions.¹⁴ Rangitane agreed, and submitted that they still believed after the 1856 deed that they could use their food-gathering sites throughout the region as before.¹⁵

The Crown's interpretation of its transactions eventually compelled Maori to relinquish these rights absolutely some years later, without consent or compensation. Had the Crown carried out its Treaty duty and properly informed itself of customary rights in Te Tau Ihu, and of those rights which Ngati Koata wanted and indeed needed to retain for their physical, economic, spiritual, and cultural wellbeing, this outcome could have been prevented without any great harm to settlement.¹⁶ As Rangitane submitted, many such sites were, in the words of McLean, 'valueless to Europeans.'¹⁷ In Ngati Kuia's view, it is 'inexplicable' that McLean should have taken such a harsh and ungenerous approach to reserve-making. The result was a virtual waste lands policy, in which the Crown reserved only land that was in actual, full-time occupation (and not even all of that), and did nothing to identify or reserve resource-use areas or needs, or other significant sites. The extent of Maori landlessness then became apparent when the progress of settlement hemmed them in on their actual reserves.¹⁸

3.1.4 The claimants' response to the Crown's argument that customary rights were neither settled nor ascertainable upon reasonable inquiry

In its submissions, the Crown argued that the outcomes of the Spain commission and the blanket purchasing process were defensible on the grounds that customary rights were in fact in a state of flux at the time, and that a policy of buying possible claims and satisfying any missed claimants after the event was reasonable in the circumstances. The claimants all rejected this position. Ngati Toa, for example, cited the evidence of Professor Ward, Professor Mead, and Mr Iwi Nicholson, to demonstrate the existence of a clear system of customary tikanga in Te Tau Ihu as at 1840. The application of tikanga may have varied between regions, but in Ngati Toa's view, the evidence of these witnesses (based as it is on different regions) shows the commonalities – there was a broadly applicable system common to all Maori and commonly understood.¹⁹ In the claimants' view, the Crown cannot

14. Ibid, pp18–20, and passim

15. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp26–27

16. Counsel for Ngati Koata, closing submissions, pp18–20, and passim

17. Counsel for Rangitane, closing submissions, p 30

18. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 45, 57–58

19. Counsel for Ngati Toa Rangatira, closing submissions, p 23

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argue that the nature of Maori tikanga in Te Tau Ihu was uncertain, complex, and not readily discoverable. Its own witness, Dr Gould, himself commented that he disagreed with Crown counsel's submission on this point.²⁰

The Crown has accepted Ballara's criticism that it did not conduct an inquiry prior to major transactions, sufficient to properly inform itself of Maori customary rights and tino rangatiratanga. This failure has been of prejudice to all iwi in Te Tau Ihu. Later Crown actions, in allocation of reserves and the operation of the Native Land Court, compounded the problem. In Ngati Toa's view, the Crown cannot retract this submission via the backdoor, by arguing that inquiry would have been fruitless and that it was therefore right to simply extinguish any and all possible claims so long as someone put their hands up. Nor can the Crown rely on present-day misunderstanding caused in large part by its own actions, to say that customary rights were not readily discoverable by the Crown in the 1840s. A readily identifiable system of customary tenure did in fact exist at that time, and the Crown's failure to investigate (while proceeding with transactions anyway) was in clear breach of the Treaty.²¹

Ngati Kuia, from their different perspective, made similar arguments. They maintained that customary rights were continually evolving in all parts of New Zealand – Te Tau Ihu was not exceptional in that way. There is never an absolutely definitive or final position in customary law, by its very nature. But, once the nature of customary right-holding was understood, identifying rights and their holders at any point in time was simply an inquiry of fact, and entirely practicable for the Crown.²²

3.1.5 The claimants' response to the Crown's argument that it could do only what was practical within logistical and resource constraints of the time

The claimants did not accept that the Crown was reasonable in citing resource constraints to justify the limited extent of its inquiries. Ngati Rarua, for example, cited the 1847 Ligar investigation, which shows that an inquiry on the spot would uncover customary right-holders and could begin to uncover the nature of customary rights from Maori, who were both knowledgeable and available. The Crown's submission that this would have involved an impracticable degree of travel and inquiry for thinly spread officials is gainsaid by the fact that the Ligar inquiry actually happened. What was necessary was for the inquiry to be completed and the 'many other claimants' (and the nature of their claims) identified, a matter that was entirely practicable.²³ Ngati Koata agreed, relying on the evidence of Dr Ballara

20. Counsel for Ngati Toa Rangatira, closing submissions, pp 20–21

21. Ibid

22. Counsel for Ngati Kuia, closing submissions, p 35

23. Counsel for Ngati Rarua, closing submissions, pp 48–49

that the Crown's inquiries were inadequate, even taking into account the resource and logistical constraints of the time.²⁴

Ngati Kuia agreed with the Crown that it was not required to take steps beyond what was reasonable, but said that the test of what was reasonable must 'be necessarily high because the consequences of not undertaking a proper inquiry into customary right-holding was (for Kuia) so drastic'. These consequences included the permanent alienation of the claimants' land without their full consent. Also, given the power imbalance at the time between the Government and tribes like Ngati Kuia, and the Crown's fiduciary responsibilities, the bar must be set even higher for any argument that an inquiry was either unnecessary or impractical. Given the existence of Maori trails and the availability of Kurahaupo guides, even the hinterland was within reach of an inquiry, had the Crown been minded to find the owners of the land it was purchasing.²⁵

3.1.6 Particular viewpoints

The submissions as summarised above were broadly shared by all the claimants. In their analysis of particular inquiries and issues, however, the claimants differed on some points. We will address many of their arguments in more detail in chapters 4 and 5, when we assess the particular Crown actions of concern to them. Here, we note some of the broad themes.

(1) *Ngati Toa's position*

In Ngati Toa's view, the Tribunal must pose itself the following questions:

- ▶ Did the Crown adequately investigate and assess the essential nature of customary interests in Te Tau Ihu?
- ▶ Did the Crown make assumptions about customary interests in Te Tau Ihu based on European understandings of 'occupation' and 'ownership' that were not in fact applicable to custom?
- ▶ Did the Crown take inappropriate account of post-1840 changes, which were not customary and in fact happened as a result of Crown interventions like the Spain commission?

Physical occupation is a component of *ahi ka*, but not the main one, according to *Matiu Rei*:

it was a hook . . . from which the Crown could say, 'well, let's try and move that particular path of customary tenure and we'll make that the main part, because that's going to align very well with the English custom, if you like, of land tenureship'. And that's why, in my view,

24. Counsel for Ngati Koata, closing submissions, p 43

25. Counsel for Ngati Kuia, closing submissions, pp 33–34

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that whole doctrine of physical occupation came into being. But that is not the doctrine, if you like, of Maori tikanga in terms of land tenureship.²⁶

These claimants submit, essentially, that the Crown was right to deal with them first in purchase transactions: ‘historically, the ultimate right to control alienation of the land remained with Ngati Toa, although the Crown also had obligations to recognise the rights of the other [conquering] iwi’.²⁷

(2) Claims on behalf of the other seven iwi

In contrast to Ngati Toa’s position, the other iwi took a different view.

(a) The correct process followed for Waitohi and Pakawau: respecting tino rangatiratanga: In Te Atiawa’s and Ngati Rarua’s submission, the correct process was followed in the Waitohi and Pakawau purchases (see map 5).²⁸ For Waitohi, counsel argued:

In this case Te Atiawa conducted their sale without any Ngati Toa involvement. In a very real sense this was the exception that proved the rule. In this case locally-based Company agents identified the need for land at Waitohi, identified the Te Atiawa owners, and worked closely with the Crown in ultimately effecting a purchase. This stands in sharp contrast to the approach usually taken by the Crown in these matters.²⁹

For both Waitohi and Pakawau, the resident right-holders were approached first, the transactions were publicly debated on the spot and all right-holders given an opportunity to put their case at a hui, and those present at the hui then agreed among themselves with whom the Crown should deal. In both cases, the Crown abided by the decision of the people arrived at by their own customary processes. Te Rauparaha’s claim to involvement in – even control of – the Waitohi purchase was, in Te Atiawa’s submission, rightly rejected. Having demonstrated a better way, and its knowledge as a result of Waitohi and Pakawau that Ngati Toa’s claims to primacy were not accepted by resident Maori, the Crown then deliberately followed a wrong and improper process in the Waipounamu purchase, with devastating effects.³⁰ This view of the Waipounamu purchase was shared by Kurahaupo iwi, as well as Ngati Toa’s ‘allies’.³¹

Ngati Tama reminded us of the finding of the Taranaki Tribunal, that it was not actually that difficult to find out whose tribal land it was and where the leaders could be found. The

26. Quoted in counsel for Ngati Toa Rangatira, closing submissions, pp 46–47

27. Counsel for Ngati Toa Rangatira, closing submissions, p 45

28. Te Atiawa and Ngati Rarua have claims about other aspects of those purchases, which will be addressed in our final report.

29. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p 39

30. Ibid, pp 35–40, 157–169; counsel for Ngati Rarua, closing submissions, pp 56–65

31. See, for example, counsel for Rangitane, closing submissions, pp 21–25

Government should have treated those leaders as equals and negotiated with them before entering the district to purchase land. If necessary, the Crown could have formalised tribal authorities as bodies with whom to negotiate. Further, the Crown should not have been the one to decide who had the right to sell – only Maori could decide that.³²

The claimants put to us the following propositions from the *Taranaki Report*:

There was no basis for the Government to purchase land when it liked, where it liked, and from whom it chose, when the process as a whole had not been agreed with the Maori leadership. The process, chosen unilaterally, ensured that matters would be determined by British practices, on British terms, and by British persons, with Maori under British control. It allowed and encouraged manipulation, with devastating results in war. The Government could determine all matters: the price, who could sell, and whether a sale was effected. Being a judge in its own cause, the Government unsurprisingly found itself in the right. This was not a valid exercise of the Government in terms of the Treaty of Waitangi, but the assumption of a licence to destroy.³³

(b) A cumulative process of coercing resident right-holders: In Ngati Tama's view, the Crown established a coercive pattern that was followed throughout the 1840s and 1850s, when it failed to conduct a full and exhaustive inquiry into the nature and extent of their (or anyone's) rights, either in the Spain commission or prior to any purported alienation or purchase of their interests after it. The alleged coercion consisted of:

- ▶ the supposed 'prior purchasing' of vast undefined areas from non-resident Maori;
- ▶ knowingly transacting with non-resident Maori who were not mandated to alienate the land, rights, and interests of resident right-holders; then
- ▶ forcing 'sales' by presenting Ngati Tama (and other residents) with a *fait accompli*, offering only a 'take it or leave it' option, and failing to present any other option other than that their land was already alienated.³⁴

Ngati Tama submitted: 'It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.' Yet that was exactly what happened to resident iwi in 1839–56.³⁵ First came the retrospective validation of the Kapiti chiefs' transaction with the company through the London agreement, the Spain commission, and the 1848 Crown grant. Secondly, there were the deeds of 1853–56, supposedly conveying land already granted by the Crown to the company in 1845 and 1848. The cumulative effect was the total and permanent alienation of these lands, without that ever being

32. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), pp 57–58

33. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 55 (quoted in counsel for Ngati Tama, closing submissions, p 58)

34. Counsel for Ngati Tama, closing submissions, p 37

35. *Ibid*, pp 46–47

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3.1.6(3)

properly explained by the Crown to Maori, and without Maori right-holders actually consenting to it.³⁶

The Crown's failure to inquire into the nature and distribution of customary rights and authority in Te Tau Ihu prior to the Waipounamu purchase was, in the claimants' view, a deliberate tactic. The Crown has accepted that it did not conduct such an investigation, but defends itself by arguing that it did identify and deal with resident right-holders before the purchase was concluded. In Ngati Tama's submission, this is not an adequate defence. Officials of the time understood that customary tenure was complex and feared that it might be too difficult to resolve before entering into purchase negotiations. Walzl quoted McLean as admitting this point. Counsel concluded: 'This awareness on the part of the Crown of the complexity of customary right-holding coupled with the failure to adequately investigate such matters increases the severity of the Crown's breach of its obligations because it acted knowingly.'³⁷

This was a breach of the principle of active protection, in which the Crown failed to ensure that the resident iwi kept their lands and resources until such time as they themselves wished to alienate them by free and informed choice.³⁸ The issues raised by Ngati Tama were largely shared by the other claimants.³⁹ We will consider these points (and the related submissions of other iwi) in more detail in our section on the Waipounamu purchase in chapter 5.

(3) Claims on behalf of the Kurahaupo iwi

The submissions of the Kurahaupo iwi – Rangitane, Ngati Kuia, and Ngati Apa – were in broad agreement with matters as outlined in the preceding section, but with further, particular issues of their own. Ngati Kuia argued that the Treaty must be read in conjunction with Normanby's 1839 instructions to Governor Hobson, in order to guide its interpretation. When this is done, it becomes clear that the Treaty guarantees Maori customary law, including in its so-called 'fourth article', but that this is qualified by the requirement that customs not be repugnant with British justice or the principles of humanity.⁴⁰ In contrast to Ngati Toa, therefore, Ngati Kuia argue that Maori customary law was (rightly) modified by the Treaty, in broad accordance with the intentions of its signatories, both Maori and the Crown. The Crown, having thus interdicted the settlement of disputes by force, failed to put in place any kind of legal process that would recognise and reconcile the new post-contact world, Treaty values, and Maori custom, all of which were now realities on the ground. In

36. Counsel for Ngati Tama, closing submissions, p 48

37. Ibid, p 53

38. Ibid, p 54

39. See, for example, counsel for Ngati Koata, closing submissions, pp 63–71

40. The 'fourth article' refers to a statement read out by Hobson at Waitangi that he would tolerate and protect the various religious faiths of New Zealand, including Maori (translated by the word 'ritenga', or customary law).

fact, the Crown failed to provide either legal or practical protection for the rights of defeated peoples, not even in its own transactions with Maori groups.⁴¹

In its *Rekohu* report, the Tribunal found that the Crown was required to visit Maori communities and find out the circumstances of its new subjects without reasonable delay. This point, argued Ngati Kuia, was especially relevant to the Crown's failure to find out and understand the nature and extent of surviving Kurahaupo rights in Te Tau Ihu. Instead, officials like Spain, Grey, and McLean distorted tikanga without due inquiry in order to get purchases through. These officials elevated and modified take raupatu claims, and ignored or downplayed the rights of actual occupants of the land. They redefined raupatu according to European views and purchasing strategies, so that it conferred all and exclusive rights. Grey, for example, recognised the winners of battles as conquerors with all rights, even if they had not occupied the land. Spain at least recognised that occupation was necessary and, indeed, key to rights, although he failed to properly investigate and identify the surviving rights of Kurahaupo peoples. The result of officials' refusal to inquire properly into – and therefore to identify and recognise – the rights of defeated peoples was loss of land and further degradation.⁴²

(4) The unique claim of Ngati Apa

Both Ngati Kuia and Rangitane recite the history of their assertion of rights, and the Crown's failure to provide timely, appropriate (or sometimes any) recognition of those rights. There was, in both cases, a belated and inadequate recognition in 1856.⁴³ Not so for Ngati Apa, who argue that they have a unique claim before this Tribunal, and, in a major respect, one that is 'even more gross'.⁴⁴ The Treaty rights of Ngati Apa were entirely ignored by the Crown, except for a very limited recognition in the Arahura deed in 1860, and the vesting of miniscule reserves at Port Gore in 1889. 'Ngati Apa say that, as a people, they existed, continued always to exist, and still exist in the Te Tau Ihu area.'⁴⁵ Any proper inquiry as to right-holding, they argue, would have revealed their continued existence, ancestral associations, and resource-use.⁴⁶

Crown officers made no investigation of the hinterland areas at all, and based their coastal dealings on a misconception of custom (that conquest carried all).⁴⁷ The evidence of Ngati Apa continuing to exist as a people in the aftermath of the very recent conquest, both as tributary communities and more freely in the interior, was discoverable at the time of the Crown's transactions. There were various references to them from Europeans of the

41. Counsel for Ngati Kuia, closing submissions, pp 11–16, 28, 35

42. Ibid, pp 28, 36, 40–43

43. Ibid, pp 49–50; counsel for Rangitane, closing submissions, pp 21–25

44. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 2

45. Ibid, p 3

46. Ibid

47. Ibid, p 6

3.2

time, and, of course, the people themselves could have testified to it, as Kereopa did to the Native Land Court in the 1880s. Such testimony could also have been obtained from the conquerors, who did record from time to time that raids were possible or expected from the interior. These people could (and did) safely return to live in coastal areas in the 1840s.⁴⁸ Thus, as a result of the unsatisfactory processes of Spain and McLean, Ngati Apa argue, they lost their rights forever without consent or compensation.⁴⁹

3.2 THE CROWN'S CASE

The Crown is required not to 'defend' itself against the claimants' case but to test evidence, propose alternative interpretations, and assist the Tribunal to find the truth of matters. As claimant evidence was tested at hearing and the Crown's own research was completed, the Crown's case changed considerably. Its initial position was put most fully after our hearing of generic issues in 2002. In light of cross-examination and further evidence, the Crown changed that position considerably in its opening submission (2003), conceding several points in the claimants' case. After subsequent cross-examination and additional hearings, the Crown made further concessions in its closing submission (2004). In a sense, the Crown (as with the Tribunal) has been on a journey of discovery during our inquiry, and has ended up in a place quite different from where it started. We set out the development of the Crown's changing position in some detail in this section, as it assisted our evaluation of arguments abandoned for good reason.

We appreciate the Crown's concessions made during the course of this journey, but we consider that it did not engage as fully as possible at the commencement of the generic hearing stage of this inquiry. If the Crown had engaged fully at that point, it would certainly have been of great assistance to the hearing process, and we encourage the Crown to do so sooner rather than later in future inquiries.

3.2.1 The Crown's position at the time of the hearing of generic issues, 2002

The Crown began by denying that it had failed to inquire properly as to customary rights and right-holders in Te Tau Ihu:

The Crown submits that there appears to be little basis for a Treaty breach claim in respect of the Crown's knowledge of Maori customary rights and tenure at the time of these early transactions. There is no evidence that the Crown acted at relevant times in a state of avoidable ignorance. The more compelling aspect of the claims is considered to be the failure

48. Counsel for Ngati Apa, closing submissions, pp 11–14

49. Ibid, pp 18–23

by the Crown to ensure that many Te Tau Ihu Maori were left with sufficient land for the present and future needs. The Crown therefore considers that any claim for Treaty breach resides primarily in a claim under the principle that the Crown had a duty of active protection to, at some stage, ensure that there was sufficient land holding retained in Maori hands in Te Tau Ihu.⁵⁰

In part, this was because there was no settled system of customary tenure in place in Te Tau Ihu that was 'readily discoverable by the Crown upon reasonable inquiry post 1840'.⁵¹ The Crown cited Dr Ballara, who suggests that during and after the actual process of conquest, customary claims to land are generally in a fluid or uncertain state. This was the state of Te Tau Ihu in 1840, at which time customary rights appear to have been largely unsettled. This was compounded by the introduction of new European factors affecting custom, including the advent of European technology and Christian concepts.⁵²

Further, the Crown was concerned about what it saw as ahistorical evaluations of its actions, especially with regard to its capacity at the time in human, technological, and financial terms.⁵³ With hindsight, it is too easy to criticise the conduct of Crown officials:

The postulation of some form of idealised inquiry whereby Crown officials would have traversed the entire region consulting with all Maori communities, prior to negotiating or completing any major transaction simply ignores the actual historical context. Relevant factors include the geographic size of the region, the small number of Maori, the handful of Crown officials on the ground and the need for practical solutions to urgent issues in light of the arrival of settlers in increasing numbers and the expectations and demands of many Maori to have settlers amongst them.⁵⁴

But the fundamental point was that the Crown did carry out sufficient inquiries to properly inform itself:

The Crown did not act in a state of avoidable ignorance at the time that it engaged in or completed major transactions with Maori. The Crown did conduct an inquiry sufficient to properly inform itself of Maori customary rights and tino rangatiratanga in the Northern South Island.⁵⁵

The historical evidence does not show 'culpable ignorance of Maori customary concepts on the part of Crown officials'. To the contrary, officials and agents such as the Clarkes, Meurant, Spain, McLean, and Governor Grey all appear to have acted from a basis of

50. Crown counsel, submission concerning generic issues, 20 September 2002 (paper 2.371), p 5

51. Ibid, p 6

52. Ibid, p 8

53. Ibid, p 6

54. Ibid, pp 7–8

55. Ibid, p 7

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reasonable understanding and knowledge. McLean in particular had a considerable knowledge of customary rights (in the evidence of Phillipson) and a reasonable grasp of who the main descent groups were in Te Tau Ihu (in the evidence of Boast). Importantly, Boast agreed ‘broadly’ that McLean was right not to try to fix where everyone’s rights were located, so long as adequate care was taken over making reserves.⁵⁶

Mr Armstrong contended that the Crown should have been able to reach a consensus resolution of competing claims, based on examples in Hawke’s Bay, Whanganui, and Rangitikei. The Crown questions whether the situations were comparable. In any case, there was no single point at which the Crown was in error or failed to carry out an adequate inquiry. This was in part because the Crown’s treatment of people’s rights began with its investigation of the company purchases but carried on into the 1850s, at which point McLean resolved undealt with or residual rights by purchasing all of them. This was, in the Crown’s view, a proper and satisfactory resolution.⁵⁷

Nonetheless, the Crown argued that the legitimacy of its actions did in fact depend on finding out the identity of the correct right-holders and purchasing their interests, before transferring title to settlers. It ‘consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land.’⁵⁸ This applied to both the Crown’s own dealings and its directions to the commissioners appointed to inquire into pre-1840 transactions. The Crown pointed out that Governor FitzRoy, who signed the Nelson Crown grant in 1845, had earlier stated: ‘I will never sign a Deed of Grant of Land to any person in New Zealand, if, I, in my conscience, believe that the owner of such land has not contracted to convey or sell it to the proposed grantee.’⁵⁹ He made this statement in respect of Spain’s Taranaki award of the preceding year.

(1) *The Spain commission*

We will provide a more detailed summary of the Crown’s position on the Spain commission in chapter 4. Here, we note the Crown’s outline of the standards to which the commission had to adhere. When challenged by the company, both Spain and the British Government maintained that its title had to be proven before it could be granted land, and that the Treaty required nothing less.⁶⁰ In 1842, Spain wrote to Hobson that, if the Government had intended to simply admit the company’s titles to be good and grant them the land they were entitled to under the Pennington award, then it would have made the company’s

56. Crown counsel, submission concerning generic issues, p 9

57. Ibid

58. Ibid, p 8

59. Ibid, pp 10–11

60. Ibid, pp 15–16

claims exempt from the operation of the Land Claims Commission (see section 1.4 for an explanation of the Pennington award). But it did not. Such an approach would have been a 'manifest injustice to the aboriginal inhabitants of this country, and so totally inconsistent and irreconcilable with the profession made to them, that Her Majesty would afford equal protection to all Her subjects, whether native or European, I confess I have not been able to believe that such an intention ever existed'.⁶¹

In 1843, Spain commented further:

It appears to me, that a consent on the part of the Government to grant to the Company the land which, according to Mr Pennington's award, they were found to be ultimately entitled to, without obliging them to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the Treaty of Waitangi, and in violation of all the assurances of Her Majesty's Government to the aborigines, of affording them justice and protection.⁶²

These were the standards under which the Crown says that Spain and the Government were required to act. The question of whether a full and proper inquiry took place for the Nelson claim, however, can only be answered by placing it in the context of Spain's other inquiries. As in Wellington, and based partly on a prior investigation by the commissioner's interpreter, Meurant, Spain and Clarke opted for compensation – but much more quickly in Nelson. In the Crown's view, the switch to arbitration and compensation was not unprincipled. Spain was clearly aware of the flaws in the Kapiti deed, but the company had gone on to recognise the principle he considered universally acknowledged – that residents had the strongest (perhaps the only real) title, and had paid them for it with 'presents'. Spain switched from inquiry to arbitrated compensation after authorisation by the Governor. He had seen flaws in the arguments of both sides and found a middle ground by which the 'competing equities' could be resolved by agreement. Customary interests were complex and overlapping, settlers were already there (with more coming), and Maori wanted the settlers to stay. In all of those circumstances, Spain's approach was the right one, and in accord with the wishes of the parties appearing before him. Maori appear to have agreed to boundaries and the amount of compensation in negotiations with Spain and Clarke.⁶³

(2) Crown purchases

The Crown submitted that its intentions were not simply to get enormous areas of land for settlement. Its agents also had as objectives:

61. Ibid, p17

62. Ibid, pp17–18

63. Ibid, pp18–24, 44

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- ▶ to honour the Crown's Treaty obligations;
- ▶ to prevent discord or violence between Maori and settlers; and
- ▶ to ensure that Maori retained their pa, cultivations, burial grounds, and additional suitable reserves.⁶⁴

There was pressure on the Crown from the growing number of settlers, but from the time of the 1844 deeds of release through to the completion of McLean's purchases, the Crown's approach was to identify and make payments to all possible right-holders, in order to secure possession in as quiet and just a manner as possible. The help that McLean sought and obtained from Ngati Toa, to assist in completing the Waipounamu transaction, was not brought about by pressure on Ngati Toa nor as a result of a fiction that the land had already been sold by Ngati Toa. It is more likely, in the Crown's view, that Ngati Toa's involvement was necessary because McLean and Maori of other tribes recognised or acknowledged their interest. Having them present did not amount to duress on other iwi.⁶⁵

The Crown conceded that there was no formal inquiry into customary rights during the Waipounamu transaction but argued that the purchase process undertaken by Grey and McLean was itself a process of inquiry as to right-holders. The purchasers did not proceed in a state of ignorance of occupations and entitlements. These were identified and addressed on the ground by the making of reserves, and there was no failure of active protection by doing it in that way.⁶⁶

Further, the Crown considered it doubtful that Grey ever applied a 'waste lands policy'. While it was considered at various stages, it was never actually applied in New Zealand. Nor did Grey apply an 1840 rule approach and act as if conquest gave exclusive rights in this region. He began with Ngati Toa for sound practical reasons, and was right to 'commence' with them in the case of Wairau and Waipounamu.⁶⁷

(3) The 'unique' Ngati Apa claim

The Crown accepted that the region was large and hard to traverse, and that the hinterland areas were at best only partly explored by Europeans or officials prior to completing the major transactions. Inquiries by officials and Spain were restricted to the coast. But these things were not problematic, in the Crown's view, because the population was small and most, if not all, lived in the coastal margins. Small numbers may have lived in the hinterland but explorations of the time suggest that, if Crown officials had gone there, they would not have found anyone to negotiate with in any case.⁶⁸

64. Crown counsel, submission concerning generic issues, p 43

65. Ibid, pp 43-46

66. Ibid, p 51

67. Ibid

68. Ibid, pp 49-50

(4) *Providing for Maori to continue to exercise customary rights inherent in their 'traditional' lifestyle*

The Crown argued that at the time its purchases were completed, both officials and Maori generally believed that enough land had been reserved for their needs as foreseen at the time. Subsequent failure to survey reserves, and in some cases the purchase of those reserves, meant that many Maori were eventually left with insufficient land, or access to land, either to maintain their traditional economy or to develop farming and other pursuits for the new economy. The Treaty promised that Maori could continue to act tribally, to abandon that way of life, or to steer a middle course. Although the Crown could not anticipate social and economic changes like the advent of forestry or the dairy industry, there was no lack of recognition of the known Maori needs for sustenance in terms of their customary lifestyle. But officials thought that the tenths, plus existing pa, burial grounds, and cultivations, should be sufficient for that.⁶⁹

3.2.2 Changes to the Crown's position in its opening submission, 2003

In opening its substantive case, the Crown retained some arguments from its submission on generic issues but abandoned others. It now acknowledged that its officials had sidelined the Treaty or subordinated its standards to the needs of settlers with a 'ruthless pragmatism'. Many of its acts, policies, and omissions 'did not sit well with the Treaty promises'. In particular, the actions of Spain, Grey, and McLean were acknowledged as having sidelined the Treaty and subordinated Maori interests to those of settlers. 'Examples include Governor Grey's actions against the Ngati Toa chiefs and the actions of McLean in land purchasing and the creation and preservation of reserves.'⁷⁰

In particular, the Crown abandoned its position that it had undertaken sufficient inquiries prior to any of its major transactions with Te Tau Ihu Maori. Counsel submitted:

In its Generic Issues Submissions the Crown said; 'The Crown did not act in a state of avoidable ignorance at the time that it engaged in or completed major transactions with Maori. The Crown did conduct an inquiry sufficient to properly inform itself of Maori customary rights and tino rangatiratanga in the Northern South Island.'

In light of the evidence heard since that time, and in light of the evidence now completed on behalf of the Crown, we are no longer so confident of that proposition. It is accepted that there is force in the criticisms made by Phillipson that McLean exploited his understanding of Maori customary rights to the ultimate disadvantage of Maori. In broad terms, Dr Phillipson's criticism is borne out in the research of Michael Macky. It is also accepted that

69. Ibid, pp 35-36, 43

70. Crown counsel, opening submissions, 17 November 2003 (paper 2.748), p 4

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3.2.2(1)

there is force in Dr Ballara's criticism that the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available.

McLean did not approach Crown purchase with the idea of developing a clear understanding of the state of customary rights. McLean had a "reasonable grasp" of who the main descent groups were. His objective was to rapidly acquire quiet possession of the area by buying up rights of those present and asserting rights. While there was a degree of understandable pragmatism at work, the method and the result appear to have contributed to the situation where iwi were pitted against each other in competition for scarce resources. The method can be criticised for failure to properly inquire and the result was an early state of virtual landlessness due to the policy of purchasing entire districts.

The relationships between the northern iwi and the original tangata whenua iwi (whether living amongst the northern iwi, or those fugitives who fled inland) were not given due consideration.⁷¹

The Crown did not, however, depart from its view that the customary basis for the various interests of Maori in Te Tau Ihu was neither settled nor readily discernible upon reasonable inquiry.⁷² It highlighted the mobility and transience of Maori after the migration and conquest of the 1820s and 1830s, the relatively brief period of the migrants' occupation prior to the company and Crown transactions, and the suggestion that Maori were still working out their own rights and occupation at the same time that they were transferring rights to settlers. As a result of these and other issues, the Crown did not acknowledge that any Treaty breach had taken place from its admitted failure to inquire into customary rights prior to major transactions. It still considered that the 'more compelling' aspect of the claims was the failure to ensure that Maori were left with sufficient land, and that this was the principal Treaty breach.⁷³

(1) Concessions about Spain's inquiry

In the course of his inquiries, Spain had access to advice from those considered to possess knowledge of Maori customary concepts. By the time of the Nelson inquiry, however, Spain and Clarke appeared to have developed a modus operandi to ensure a relatively quick process. Spain's Nelson hearing was 'very short'. As a result, the commission did not give Nelson Maori 'sufficient opportunity to relate their understanding of the events'. Spain only heard from one Maori witness (Te Iti), but there were other Maori present from whom the commissioner could have extracted further evidence. Spain and Clarke should also have been able to understand that the original tangata whenua of the area had a presence within

71. Crown counsel, opening submissions, pp 12–13

72. Ibid, p 13

73. Ibid, pp 5–6

the district recommended for Crown grant by Spain, and in which the tenths arrangements existed. Spain was clearly aware of the existence of one group he referred to as Rangitane. Because of the speed of the inquiry, it is doubtful whether Protector Clarke was able to inquire or consider properly the status of the original tangata whenua people.⁷⁴

This early failure to inquire in any depth was, the Crown conceded, compounded by the length of time that elapsed before the 1892 Native Land Court hearing into who held beneficial interests in the tenths. The Crown also accepted that it did not promptly identify all eligible beneficiaries, and it also acknowledged that, when the identification did take place, a difficult issue arises as to whether the result was 'fair'.⁷⁵

(2) Concessions about the 'unique' claim of Ngati Apa

In its earlier submission, the Crown had argued that agents sent into the interior would have had difficulty locating anybody of whom to make inquiry about customary rights. The hinterland was claimed from the coast, and the Crown did not accept that there were 'any significant numbers of Maori living in and deriving their livelihood from the hinterland areas who were deprived of their entitlements by reason of lack of proper inquiry as to Maori customary rights in the hinterland areas'.⁷⁶ Such groups were certainly small (as was the population of the Te Tau Ihu region generally). However, without having made an inquiry at the time, the Crown now conceded that 'it cannot be asserted with confidence that such groups, however small, were not deprived of entitlements'. This was particularly pertinent to Ngati Apa, who were not recognised in any Crown deeds aside from the Arahura purchase.⁷⁷

3.2.3 Further modification of the Crown's position in its closing submissions, 2004

In its closing submissions, the Crown repeated the concessions of its opening submissions, but with further additions and modifications to its position.

(1) Treaty principles and acknowledgement of breach

The Crown retained the phraseology that the 'more compelling aspect of the claims' was its failure to ensure that Te Tau Ihu Maori were left with sufficient land for their present and future needs. This was, the Crown acknowledged, a breach of the Treaty principle of active protection. Judgements about the quantity of land required for future needs, however, were not easy to make. The Crown cautioned us against the use of hindsight to evaluate such judgements.⁷⁸ Counsel did not draw conclusions about the meaning of his other concessions in Treaty terms. This was in part because he considered himself to be highlighting

74. Ibid, pp 13-14

75. Ibid, p 18

76. Ibid, p 14

77. Ibid, pp 14- 15

78. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 3

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‘important matters of fact’ and leaving it for the Tribunal to decide how the Crown’s acts or omissions should be judged against the Treaty standard.⁷⁹

Nonetheless, the Crown advanced the following standards against which to judge its actions:

- ▶ It is an overarching principle of the Treaty that the Crown must act honourably and in good faith to its Treaty partner.
- ▶ The Crown has an obligation to act in an informed manner when it forms policy or acts in ways that affect Maori interests.
- ▶ The Crown has a duty of active protection in relation to Maori rights and interests guaranteed by article 2 of the Treaty.
- ▶ In carrying out its Treaty obligations, the Crown is not required to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable to take change depending on the situation that exists at any particular time.
- ▶ The Treaty contemplates settlement and the voluntary relinquishment of land, and many Maori in Te Tau Ihu appear to have willingly sold large areas of land.
- ▶ The duty of active protection must not infringe Maori authority, te tino rangatiratanga, and become paternalism.⁸⁰

(2) Acceptance of Ballara’s criticism of reserve-making

In its closing submissions, despite its caution against hindsight, the Crown changed its position on reserve-making. In earlier submissions, counsel argued that the failure to ensure that Maori retained sufficient land was something that happened *after* the purchasing process. Now, however, the Crown conceded that it arose also from ‘a failure to adopt a more generous approach to reserves in the Crown purchase era’. In particular, the Crown made a key concession that has influenced our findings. It adopted completely Dr Ballara’s criticism of the process as inherently flawed, to which we will return in chapter 5.⁸¹

The Crown’s acceptance of Ballara’s criticism is important to the claimants’ case, and in particular (for the issues addressed in this report) as to whether customary rights of travel, harvest, hunting, fishing, migratory resource-use, and shifting agriculture ought to have been reserved or provided for at the time of purchase. We will discuss this further below and in chapter 5. Here, we note that, although it quibbled on some points of detail, the Crown conceded that it had a Treaty duty to ensure Maori retained sufficient land, or access to land, to continue their ‘traditional economy’ for as long as they wished.⁸²

79. Crown counsel, closing submissions, p 7

80. Ibid, pp 5–6

81. Ibid, p 4

82. Ibid, p 116

(3) *Partial modification of the Crown's position on whether customary rights were settled at the time and ascertainable upon reasonable inquiry*

The Crown changed its position on this issue, which had hitherto been one of its firmest arguments in justification of McLean's actions, and in mitigation of what it conceded to be the Crown's failure to inquire properly before transacting land. This change of position resulted in particular from the evidence of Professor Ward and Dr Ballara in 2003. Counsel cited their cross-examination, and accepted their position that Maori customary rights were always evolving, and that this was especially so in a situation of such recent conquest. The situation was, according to Professor Ward:

complex and changing, even as the Company ships were arriving in Cook Strait. But some things were clearly established. Certain kainga were occupied by certain hapu and not other hapu, and these facts could be ascertained on the ground. Certain kind of relations, certain relationships were clearly articulated by some of the rangatira and accepted by others in the partnership [the alliance of northern iwi], if you like. Others, they disputed over . . . These things were noted by observers at the time and articulated by Maori leaders at the time.⁸³

Also, in Ward's view, the detailed Spain inquiry in Wellington shows what was possible, because Spain was able to take a great deal of evidence which in fact gave a clear picture of customary rights there. The same could have been done in Nelson. Dr Ballara stated that despite the apparent complexity, these matters were clear enough for Maori and certainly discoverable at the time.⁸⁴

The problem, the Crown conceded, is more one of inquiry today than it would have been then, because evidence was not collected and recorded at the time:

Professor Ward is no doubt right when he says that some things were clearly established. Certain hapu occupied certain kainga and not others and certain relationships between rangatira were accepted, others fought over. The problem in Te Tau Ihu is that there was no due inquiry by the Crown into these matters in the 1840s so that now little reliable evidence remains.⁸⁵

This modification of the Crown's view was a partial one. Although accepting that some things were settled, it noted that others were not, and continued of the view that the state of customary rights was changing very significantly throughout the period of major transactions.⁸⁶ As a result, the Crown continued to argue that this mitigated the Crown's blanket purchase policy and justified some of McLean's actions.

83. Ibid, pp 16-17

84. Ibid, p 17

85. Ibid, p 20

86. Ibid, p 24

(4) Modified position on the 'waste lands' policy and its relation to Crown purchases

In its generic submission, the Crown argued that it was doubtful that Governor Grey applied a waste lands policy (that indigenous peoples were only entitled to land on which they had houses or cultivations). The possibility of applying this policy was considered at various stages but it was never actually carried out in New Zealand. Grey's approach to the Wairau purchase and the 1848 Crown grant did not mark the adoption of a waste lands policy.⁸⁷ In its closing submission, the Crown modified this position in significant ways. It did so on the basis of evidence from Dr Loveridge, presented in the Wairarapa ki Tararua inquiry, to which it drew the attention of this Tribunal.⁸⁸

In brief, the Crown now accepted that Governor Grey thought large-scale Crown purchases a viable solution to the demands of Earl Grey for a registration of Maori lands in 'actual' occupation. But the Wairau purchase itself arose more from Stanley's instructions to assist the company in making good its claims. Either by compensation or by fresh purchases from Maori, the Governor was instructed to acquire, 'with the free consent of the Natives,' the lands required for the New Zealand Company.⁸⁹ The result was a return to Normanby's original 'land fund' scheme, where the Crown would buy land cheaply and sell it dearly, with ample reserves for Maori as the true payment for their land.

Earl Grey instructed the Governor in 1846 that Maori could not claim property rights in land which they did not live on or cultivate. Further acknowledgements by the Crown of rights to large tracts of waste lands must stop, and the Crown must maintain its rights of pre-emption over the remainder. The preliminary step was an inventory of lands to establish their owners.⁹⁰ The Crown notes that this was not implemented, and nor was the policy of only recognising Maori ownership of lands which they actually lived on or cultivated. Governor Grey's response was to repeatedly affirm that 'the Crown would act in accord with the Treaty'.⁹¹ In the Crown's view, Normanby's original land policies were not substantially affected by Earl Grey's defunct instructions.

In May 1848, though he had been contemplating it long before, the Governor stated officially that it would be impossible to persuade Maori that their customary claims to 'unused' lands had no merit. A formal and quick investigation of all titles would also be impossible to bring about voluntarily, because it would aggravate conflict between tribes and make them suspicious of the Government's intention. So long as the Crown acknowledged the validity of customary claims to 'unused lands', however, Maori would agree to sell them for a nominal price. Grey proposed, therefore, to substitute cheap purchases for title registration.

87. Crown counsel, closing submissions, p 89

88. Dr Donald Loveridge, "An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852, report commissioned by the Crown Law Office, 2004 (Wai 863 RO1, doc A81). The Crown appended extracts from this report to its closing submission (doc T16(a)).

89. Crown counsel, closing submissions, p 90

90. Ibid, p 92

91. Ibid, p 93

Occupied and cultivated portions adequate for the future needs of Maori would be registered as reserves, forming (by extinguishment of the rest of their claims to entire districts) 'the only admitted claims of the natives in that district'. Reserves would, however, have to be big enough to allow for future (shifting) cultivations, as part of what Maori did actually require for their 'subsistence'.⁹²

The primary difference, the Crown submitted, between this policy and the proposal to register land and refuse all Maori claims to 'unused' lands, was that the latter would not work and might result in war, while the former would work and would be cheaper in the long run. Otherwise, the policies were the same and would reach the same end. Further, Grey argued, the payments would have various positive effects, including enabling Maori to purchase stock and farming equipment. The proposed system was well suited to the 'probable future wants of an agricultural [crop-growing] population, such as the Maories [*sic*] are'. The Crown notes in reference to this statement that Grey had in fact pointed out in 1847, before Earl Grey's instructions, that Maori did not support themselves solely by cultivation, so that what he meant here was probably that the future of Maori lay in agricultural pursuits on the European model.⁹³

Grey's purchase policy required a monopoly, excluding any real competition and paying artificially low prices to Maori, while charging high prices to settlers. This was a cardinal policy in Normanby's original instructions, which were based on the idea that much of the land was of no real value to Maori. The intention was that the real payment for Maori land would be the great rise of value in their retained lands, which would be sufficient for their present and future needs. The Crown agrees with the Orakei Tribunal that this ideology was honest only if Maori did in fact retain sufficient land for the anticipated benefits to occur, and it argues that this is a key issue for the Te Tau Ihu inquiry.⁹⁴ In effect, the Crown is suggesting that we concentrate on the outcome and not pay too much attention to how things got there, because the policies of Earl Grey, as transmuted by George Grey, were in fact the policies of Normanby in any case.

3.2.4 Summary of the Crown's position

The evolving position of the Crown was a complex one, and its final case is contained in a number of different and interrelated submissions. We summarise our understanding of the outcome as follows. The Crown accepted that valid purchases required the consent of all customary right-holders and the extinguishment of their interests, with their 'free and intelligent' consent. The Crown was obliged under the Treaty to fully inform itself as to their rights before completing transactions and transferring title to others. In doing so, the

92. Ibid, pp 93-94

93. Ibid, pp 95-96

94. Ibid, pp 96-97

Crown admits that it never carried out an adequate inquiry into customary rights and their holders prior to commencing any of its major purchases or before transferring title to the company's settlers. Also, the Crown states that the relevant officials, especially Spain, Grey, and McLean, acted with a ruthless pragmatism that sidelined the Treaty and subordinated the interests of Maori to settlers. In particular, the Crown conceded that the Spain inquiry was inadequate. Maori understanding of what (if anything) had been transferred to the company was not sought, the rights of defeated peoples were not identified, true agreement was likely not obtained to 'compensation', land was granted to settlers anyway, and beneficiaries to the tenths were not ascertained until too late to be reliably accurate or fair.

The eventual outcome of officials' sidelining of the Treaty was the Crown's active creation of Maori landlessness in Te Tau Ihu, with Maori not allowed by the Crown to keep sufficient land for either their present or foreseeable future needs. This included a failure to preserve sufficient land, or access to land, for Maori to continue their customary practices of the time, for as long as they wished to do so. Normanby's instructions and any reasonable reading of the Treaty, and of the standards of the time, show that the Crown's ideology required Maori to retain sufficient land for their customary lifestyle and participation in the new economy, and this was the real payment for their land. The Crown's acts of commission and omission in respect of Maori landlessness (by 1860) were therefore in serious breach of the principles of the Treaty.

Nonetheless, the Crown argues that certain factors mitigated its failure to inquire properly into customary right-holding, so that it was not in breach of the Treaty in its own transactions. First, in such a vast district, the Crown did not have to go beyond what was reasonable in terms of seeking out right-holders and negotiating with them. Secondly, Maori rights were in a state of flux and still being worked out on the ground because of the recent timing of the conquest, and the modification of custom arising from contact and Christianity. As a result, the Crown's view was that inquiries would not have produced conclusive answers.

Taking these two factors together, the blanket purchase policy had some justification in the Crown's view. It did not require Maori to resolve their disputes with one another over their respective rights, yet it did ensure that all right-holders who came forward (or, rather, claimants of rights) were included before the end. If one looks, as the Crown suggests we should, at the Spain deeds of release, the Wairau purchase, and the Waipounamu purchase as a single process, then all customary right-holders were eventually identified and compensated. The only exception was Ngati Apa. In taking this approach, the Government was right to deal with Ngati Toa first, as the leading and most powerful tribe, although the Crown admitted that it had ulterior motives for doing so. Grey wanted to subdue the Ngati Toa leaders and make them dependent on his payments and favour, while McLean wanted to use their assent to the Waipounamu purchase as a means of forcing agreement from others. The Crown admits that the result in the Wairau was 'controversial' but argues that McLean's strategy failed in Waipounamu. Many Maori were therefore willing sellers,

although they did not intend to render themselves landless. That was the fault of the Crown for ‘stinting’ Maori in their reserves, in admitted breach of the Treaty.

We turn now to the Tribunal’s analysis of the Crown and claimant cases and our conclusions on the Crown’s Treaty duty in respect of the matters outlined above.

3.3 THE CROWN’S TREATY DUTY

The parties agreed in this inquiry that the Crown had to purchase land from the correct ‘owners’, and to ascertain that pre-1840 purchasers had done so before confirming their titles. The Crown acknowledged its obligation to act honourably and in good faith towards its Treaty partner, to ‘act in an informed manner when it forms policy or acts in ways that affect Maori interests’, and its duty of ‘active protection in relation to Maori rights and interests guaranteed pursuant to article II.’⁹⁵ In our view, these points inform the Crown’s duty to identify correct (and all the correct) right-holders in making or confirming land transactions. This was a fundamental requirement if the Crown was to act honourably and in good faith, to make informed decisions, and actively to protect the rights guaranteed to Maori by article 2. This was clearly understood at the time. Maori customary rights to land were guaranteed by the Treaty and had to be recognised and dealt with according to, and in terms of, their own law and customs. This view was communicated by secretaries of state and governors at various points in the 1840s. Countervailing views on the part of the 1844 House of Commons committee and its chair, the later Secretary of State, Earl Grey, did not become accepted theory in New Zealand, but were nonetheless influential.

In 1839, the New Zealand Company instructed its agent: ‘Above all, you will be especially careful that all the owners of any tract of land which you may purchase shall be approving parties to the bargain, and that each of them receives his due share of the purchase money.’⁹⁶ It was a fundamental principle of British justice (then and now) that valid purchases of land required the correct identification of vendors, and the duly witnessed recording of their consent. What was required in the New Zealand context, where this principle was guaranteed by articles 2 and 3 of the Treaty, was the identification of the customary law relating to rights in land, the identification of all customary right-holders, and, in Normanby’s words, the recording of the ‘free and intelligent consent of the Natives, expressed according to their established usages.’⁹⁷ Unless all three requirements were fulfilled, there would be no valid transaction and the Treaty rights of the ‘vendors’ would be violated.

95. Crown counsel, closing submissions, p 5

96. Instructions to Colonel Wakefield, May 1839, Alexander Mackay, comp, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols (Wellington: Government Printer, 1872–73), vol1, p 51

97. Normanby to Hobson, 14 August 1839, *Compendium*, vol1, p 14

But this conclusion was not inevitable at the time. There was a vigorous debate about whether Maori rights of ownership should be defined according to Maori law or to European theories (not law) about what indigenous peoples owned. Under some European theorising, aboriginal title was restricted to land that they had improved by labour, either by building on it or cultivating it. The New Zealand Company adopted this view, as did a select committee of the House of Commons in 1844, and Earl Grey in 1846. Variants of it can be seen in the thinking of key officials such as Governor Grey and Donald McLean. There was a battle for control of Crown policy in the 1840s, the nature and outcome of which was critical to Crown breaches of the Treaty in the northern South Island. For that reason, we have set out the debate in some detail in the following sections. We also address the generic questions of mitigation as put by the Crown. Was custom in a state of flux, such that right-holders could not readily be identified upon reasonable inquiry? Were there valid logistical constraints on the kind of inquiry that the Crown could conduct? And, in particular, was it sufficient in Treaty terms to identify ‘after-claimants’ subsequent to the signing of the first deed, so that anyone with a ‘claim’ was eventually paid? All these points, the Crown argues, so mitigated its admitted failure to inquire properly before initiating purchases that there was no resultant Treaty breach.

In order to reach a view on exactly what the Crown’s Treaty duty was, in the circumstances of the time, we have posed the following questions:

- ▶ Did the Crown have a Treaty duty to inquire and to properly identify customary right-holders before transacting for land?
- ▶ Or was it sufficient if, as the Crown put it to us, it had identified and paid most or all right-holders by the end of a serial purchase or by the end of some later transaction?
- ▶ Did the Crown have a Treaty duty to inquire and to properly identify customary right-holders before confirming that their title had been alienated to settlers or the New Zealand Company?
- ▶ Were right-holders and the nature of their rights governed by Maori customary law? What was the impact of the countervailing theory that the Crown owned the ‘waste lands’ by virtue of its sovereignty, and that it only had to transact with Maori for improved land?
- ▶ Could the Crown have inquired and properly identified customary rights and their holders?
- ▶ Was the situation too much in flux, with rights too unsettled, for the Crown to have ascertained them on reasonable inquiry?
- ▶ What mechanisms were available to the Crown at the time and what kind of inquiry was practical in the circumstances?
- ▶ Did the Crown carry out adequate inquiries so as to fully and properly identify customary rights and the holders of those rights, before undertaking (or confirming) transactions?

In sections 3.3.1 to 3.3.4, we address these questions at a generic level, as this establishes whether Crown policies were in breach of Treaty principles. We then consider the particular instances of Crown actions and their consequences in the following chapters.

3.3.1 Did the Crown have a Treaty duty to inquire and to properly identify customary right-holders before transacting (or confirming transactions) for land?

We begin with a brief survey of the Government's promises and commitments in the 1840s. These provide the context from which to judge the Crown's actions against Treaty principles. They also provide a very clear 'yes' in answer to this question. In addressing these issues, we have relied extensively on a report by Dr Donald Loveridge for the Wairarapa inquiry, to which the Crown referred us in its closing submissions, because it deals in detail with the development of Crown policy from 1839 to 1852.

(1) Normanby's instructions

The Secretary of State's instructions to the first Governor have been considered many times by the Tribunal, and they provide the immediate lense through which to interpret the Treaty in the circumstances of the time. We see no need to repeat the detailed analysis already available in *The Orakei Report* and others. We note the salient features, however, because these instructions remained the Crown's key statement of intent in the 1840s. In particular, Lord Stanley did not issue fresh instructions on the standards and ethics of Crown purchasing, but rather referred Governor Grey to Normanby's previous instructions.⁹⁸ All the governors responsible for Crown actions in New Zealand, therefore, were familiar with (and bound by) Normanby's instructions during the period in which almost the entire northern South Island was purchased by the Crown.

Normanby instructed Hobson to 'obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers'. All such contracts were to be made through a protector, and 'must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the Islands'.⁹⁹ This meant that in purchasing land, he had to obtain 'the free and intelligent consent of the Natives, expressed according to their established usages'.¹⁰⁰ In purchasing the 'waste lands', the Secretary of State theorised that they were of no exchangeable value to Maori and could therefore be purchased for a low sum and resold at a large profit, in order to fund colonisation. There would be, in his view, no real injustice to Maori because their retained lands would thereby become a source of wealth and the real payment for giving up the rest.

98. Loveridge, 'An Object of the First Importance', pp 260–261

99. Normanby to Hobson, 14 August 1839, *Compendium*, vol 1, p 15

100. *Ibid*, p 14

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In a very clear expression of the principle of active protection, Normanby added that Maori:

must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory the retention of which by them would be essential or highly conducive to their own comfort, safety, or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the Natives can alienate without distress or serious inconvenience to themselves.¹⁰¹

Finally, we note his instruction that a commissioner be appointed to ‘investigate and ascertain, 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’. The commissioner was not to have full authority but rather to make recommendations to the Governor.¹⁰²

(2) *The Treaty of Waitangi*

Normanby’s principle of active protection was carried over into the Treaty. Again, these matters have been well canvassed in previous Tribunal reports. We note in particular the discussion in the *Ngai Tahu Report*, because the Crown purchasing covered in that report abuts our own inquiry district and has so many similarities. In particular, the Ngai Tahu Tribunal noted the principles of active protection and reciprocity arising from the Treaty.¹⁰³ In agreeing to guarantee the collectively owned lands, forests, and estates of Maori, and their tino rangatiratanga over their whenua and taonga, the Crown guaranteed its active protection of Maori customary rights to all land, resources, and taonga according to their own law. In return, Maori ceded kawanatanga (the right to govern) and pre-emption (the sole right to purchase Maori land). Both governments and courts of the time recognised the reciprocity and fiduciary-style obligations involved in Maori ceding the right of pre-emption. It required the Crown, stated under-secretary Merivale on behalf of Earl Grey, to act as ‘trustee for the public good, and more particularly as guardian of the native races.’¹⁰⁴ The Supreme Court of the time also found that pre-emption ‘contemplates the native race as under a species of guardianship’. It was possible, the court warned, to ‘oppress and destroy under a show of justice.’¹⁰⁵

101. Normanby to Hobson, 14 August 1839, *Compendium*, vol 1, p 15

102. Normanby to Hobson, 14 August 1839 (quoted in Dr Ashley Gould, *The New Zealand Company and the Crown in Te Tau Ihu*, 2003 (doc s5), p 28)

103. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 238–245

104. Quoted in Loveridge, ‘An Object of the First Importance’, p 327

105. Loveridge, ‘An Object of the First Importance’, p 327

The Treaty right of pre-emption stipulated that the Crown would purchase such land ‘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’. We agree with counsel for Te Atiawa:

These words are unambiguous, the Crown must determine who the proprietors are and negotiate an agreed price with those people for their land. Face to face interaction between the Crown and the proprietors on land matters and agreement as to the price at which the land will be transacted is clearly requisite.¹⁰⁶

We do not need here to address questions of sovereignty or whether pre-emption was understood as a ‘first right of refusal’, as they were not raised in our inquiry. Rather, matters hinged on the Queen’s promise of protection and the explanation of pre-emption as a device for that purpose, and whether Maori rights according to Maori law were the object of that protection.

The historical evidence of Dr Williams addressed the latter point. He noted the so-called fourth article read out at Waitangi and Hobson’s promise to protect Maori custom (ritenga). Other oral and written promises were made to the effect that the Government would recognise Maori customary rights. Hobson issued a circular letter promising that he would ‘ever strive to assure unto you the customs and all the possessions belonging to the Maoris’. He ordered Protector Clarke to assure Maori that their customs would be respected, except where opposed to principles of humanity and morals. At the Treaty signing in Kaitaia, Shortland promised: ‘The Queen will not interfere with your native laws or customs.’ Hobson himself reported to London that Tamati Waka Nene had stipulated in the debate at Waitangi: ‘You must preserve our customs and never permit our land to be wrested from us.’¹⁰⁷

In Williams’ view, therefore, the recorded promises in the Treaty debates clarified the meaning of article 2, and the Crown’s intention to recognise Maori property rights (something it wanted to obtain) as defined and regulated by Maori law. We agree, and consider the evidence very clear that the principle of active protection applied to those things, tangible and intangible, over which Maori exercised tino rangatiratanga according to their own law. Officials did not explain to Maori that the Crown’s endorsement of their law was intended to be temporary, in so far as it applied to customs regulating relations between peoples. Williams notes that early ordinances recognising Maori custom were explicit about this, which was in accord with Normanby’s assumption that British law would ultimately apply.¹⁰⁸ Such ordinances, however, applied to the administration of justice and other civil

¹⁰⁶ Counsel for Te Atiawa, closing submissions, p163

¹⁰⁷ Dr David Williams, ‘The Crown and Ngati Tama Ki Te Tau Ihu: An Historical Overview Report’, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), pp16–17

¹⁰⁸ Ibid, pp16–17, 21–22

3.3.1(3)

matters. There is no evidence that the guarantee of customary property rights was intended to be short-term in this way. That was why, in our view, the meaning of that guarantee was so hotly contested by various interest groups.

(3) What was considered appropriate at the time?

As we have noted, Normanby's instructions anticipated both an inquiry into pre-1840 transactions to determine whether they were valid, and the purchasing of 'waste land' on the basis of fair and equal contracts. The latter required the free and informed consent of Maori according to their customs, under a principle of active protection. Legislation was soon passed in New South Wales to appoint land claims commissioners, to determine whether land had been acquired before 1840 'on equitable terms' from Maori. Implicit in this Act was that the land had to have been acquired, and from the correct people. In December 1840, Lord John Russell advised the New Zealand Company of the Government's intention to hold this inquiry. The Crown wanted to assert its title to all lands '*granted by the Chiefs of those Islands, according to the Customs of the Country*, and in return for some adequate consideration' (emphasis added).¹⁰⁹ James Stephen, the key Colonial Office official at that time, was also of the view that Maori transactions with the company had to have been valid in Maori custom. The Crown, he wrote, could only grant land where it had been freely sold 'according to their Native customs.'¹¹⁰

Lord John Russell's instructions of December 1840 did not change Normanby's previous statements on the purchase of land. The new Secretary of State did note, however, that the protection of Maori interests was a sacred duty, and gave official recognition that Maori had their own customary law relating to land and property. Stephen was rightly concerned, however, about an ambiguity in the instructions in terms of 'waste lands'. On one level, Russell was anticipating the Crown's ownership of what was still thought would be large areas of land left over from pre-1840 claims, but the instructions could also be read as implying that the Crown planned to consider unsold Maori 'waste lands' as Crown lands. Stephen politely informed the Secretary of State that that could not possibly be his intention, but Russell's reply failed to clarify the matter. He simply stood by his instruction that all land be registered, Maori land be identified, and the Government investigate what parts Maori needed to retain. He did add, however, a new role for the land claims commissioners. Any disputes between or among Maori 'as to the right of any Land' should be brought before the commissioners, who would be given authority to determine the matter. Protectors would act as advocates and attorneys for Maori. This was the first official instruction that disputed Maori titles should be made the subject of a legal process.¹¹¹ We note, in this respect, Ngati Kuaia's

109. Loveridge, 'An Object of the First Importance', p 44

110. Ibid, p 54

111. Ibid, pp 49-59

submission that some such legal process was essential to resolve disputed titles in the new era (see sec 3.1.6(3)).

Russell's instructions were not carried out. Loveridge's view is that the apparent ambiguity was not actually an attempt to depart from Normanby's theories and assume Crown ownership of 'waste lands'.¹¹² In any case, a land purchase process of sorts was being developed in New Zealand by the protectorate. Typically, it was supposed to involve small, well-defined pieces of land, for which all owners could be identified, their consent obtained, and payment distributed publicly to all. Chief Protector Clarke liked Russell's proposal for a register, and suggested a *Domesday Book* of his own, in which Maori land titles would be recorded. In his view, the investigation and registration of titles was essential prior to purchasing land.¹¹³ 'I am aware', he wrote, 'that this would be an expensive procedure, but it would be a sure one for I cannot conceive how purchases can be made with satisfaction by the Government unless this is done.'¹¹⁴ Disputes about tribal land would be resolved by district courts of Maori chiefs, chaired by a protector.¹¹⁵ In Clarke's view, therefore, title needed to be ascertained prior to purchase on a grand scale, and with a Maori court recognised by the State to resolve disputes.

We will consider the practicability of Clarke's suggestion in section 3.3.3. Here, we note that it was not adopted. Acting Governor Shortland established the following process:

- ▶ Having identified a piece of land wanted by the Crown, protectors would do a preliminary inquiry as to whether the Maori 'concerned' were disposed to sell.
- ▶ After that, if the answer was 'yes', the Government would publish a notice in the Maori Gazette, calling for any other owners to make claims by a certain date.
- ▶ If there were no counter-claimants, or the counter-claims were not 'substantiated' (by an unspecified process of inquiry), the Crown would accept the gazetted people as the owners and proceed with the purchase.
- ▶ The Government agent would then 'treat with the owners of the soil on the spot', assisted by a surveyor, who would prepare a plan.
- ▶ At the end of negotiations, the agent would sign a deed with the owners containing the proposed price, and he would submit it to the Governor.
- ▶ If the Governor approved the purchase, it would go ahead.¹¹⁶

In Loveridge's view (for the Crown), this was a sensible and practicable process. Clarke objected, however, because the Government planned to use it to buy blocks of more than 10,000 acres. He argued that there would be too many overlapping rights for the process to be safe in buying such 'big' blocks, and that it would cause hostilities between hapu;

112. Ibid, pp 58–59

113. Ibid, pp 65, 68–69

114. Quoted in Loveridge, 'An Object of the First Importance', p 69

115. Clarke to Colonial Secretary, 31 July 1843, BPP, vol 2, Appendices to the House of Commons Committee Report, p 348

116. Loveridge, 'An Object of the First Importance', pp 72–74

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the Crown should restrict itself to buying small blocks gradually. This advice, according to Loveridge, was impractical if colonisation was to happen at all.¹¹⁷ Both Shortland's and Clarke's proposals provided for the prior determination of title, and the resolution of any disputes between co-claimants, either by agreement or by some kind of Maori court. These things had to happen before the Crown would buy land.

While the process of land purchase was being thus thought out in New Zealand, the company's affairs triggered a lengthy debate between its directors, the Colonial Office, and the supporters of each in the British Parliament. There is no space here for a full account of this debate, but we do need to note some salient standards advanced at the time, by which the subsequent conduct of the Crown may be judged. In its submissions, the Crown put much weight on the Colonial Office's staunch defence of the need to inquire and confirm that a valid transfer had taken place from Maori to the company.¹¹⁸

Dr Loveridge's report made similar points. He noted Lord Stanley's defence of the Government's actions, pointing out to the company that Normanby's instructions were public long before the November Agreement, so the company must have known that its titles would be investigated. The Crown had to keep faith with Maori and its own public pledges to them. It had recognised Maori title to land, and had committed itself to obtaining it only by 'free cession'. The company must therefore prove that it had valid titles or bear the loss. Stanley himself believed that there were probably unowned 'waste lands' in New Zealand, but he took the position that that first needed to be established by an inquiry into Maori custom and 'native title' on the spot, by those duly and legislatively authorised to carry it out. Stanley maintained that the Treaty of Waitangi must be kept and the validity of the company's purchases proved, but he also instructed FitzRoy to help the company get enough land for its settlers.¹¹⁹

News of the 1843 Wairau conflict led to a company campaign that the Crown should not recognise any Maori title or property rights in so-called 'unused' lands. This contributed to the famous select committee debate of 1844, in which the committee considered that the Treaty was a mistake and that the Government and Commissioner Spain had so far interpreted article 2 incorrectly, taking it to mean Maori ownership of the whole country. The true position, in the committee's view, was that the Treaty had only guaranteed land in actual occupation (by residence and cultivation). Despite extensive evidence to this and earlier committees, its report revealed an ignorance of how Maori used their 'unused' land, arguing that they did not hunt or run herds but supported themselves entirely by cropping.¹²⁰

The Government tried to head off an unfavourable report by proposing its own set of resolutions. Their underlying principle was that the Crown might end up with unclaimed

117. Loveridge, 'An Object of the First Importance', pp 74-76

118. See, for example, Crown counsel, submission concerning generic issues, pp 16-18

119. Loveridge, 'An Object of the First Importance', pp 91-101

120. Ibid, pp 196-209

‘waste lands’, but that Maori had laws and customs of their own, and under such they owned more than just their pa and cultivations. The Treaty was a solemn act binding on the Crown and must be kept. The way forward, therefore, was to investigate Maori titles and register all of them, fairly and equitably, and then see if anything was left over for the Crown. The process of registration would also prevent the Crown or private settlers buying land from the wrong people.¹²¹ The Government knew that Maori ‘clearly understand and fully rely upon the guarantee which the Treaty gives of their proprietary rights.’ The question of the extent of those rights was no longer up to the Crown’s prerogative or policies but could ‘be tried and decided upon the true construction of the Treaty only.’¹²²

The committee rejected these Government propositions, but they remained Colonial Office policy in any case. Stanley sent the committee’s report to New Zealand, with a covering note to FitzRoy that it might be the case that the Crown could claim some waste lands. Nonetheless, the Governor was to uphold the Treaty and do nothing about ‘unused’ lands for the time being. Many private citizens, including the missionary societies, protested the content of the committee’s report and its condemnation of the Treaty. The Government of New Zealand, by means of a resolution of the Governor and Legislative Council, affirmed officially that Maori owned or claimed the entire lands of New Zealand, apart from the small amount purchased by the Crown or pre-1840 settlers. Maori customary rights to land were, the Government stated, guaranteed by the Treaty and recognised by the Crown.¹²³

The appointment of a new governor did not change this position at first. Stanley instructed Grey to carry out Normanby’s and Russell’s instructions, and to ‘honourably and scrupulously fulfil the conditions of the treaty of Waitangi’. Maori customs, unless incompatible with peace or morals, were to be respected. He also asked Grey to finally proceed with the delayed registration of Maori land titles. Almost all of the North Island was clearly claimed by the tribes, but the Secretary hoped that there might be unclaimed land in the South Island. Nonetheless, Grey was to register titles and purchase large tracts of land ‘on very moderate terms.’¹²⁴ Loveridge concluded: ‘As Crown purchase was, clearly, to *follow* registration, the implication appears to be [that] the Crown would only purchase from Maori who held a recognized and registered title’ (emphasis in original).¹²⁵

In terms of the company, Stanley secretly authorised the Governor to spend up to £10,000 ‘as a last resort . . . in the purpose of acquiring with the free consent of the Natives the lands required for the use of the Settlers of the New Zealand Company.’¹²⁶ The Crown’s historian, Mr Macky, noted that there was a clear instruction from Stanley for the Governor to ensure

121. Ibid, pp 209–213

122. Ibid, pp 212–213

123. Ibid, pp 214–218, 236–237

124. Ibid, pp 260–266

125. Ibid, p 266

126. Tony Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol1), p168

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that he purchased land from its correct owners. This instruction, alongside the renewal of Normanby's instructions, is critical in our view to the Crown's Treaty duty as understood at the time:

in giving to the Company your best assistance . . . and in facilitating the negotiations with the natives, you will not fail to bear in mind the importance of endeavouring to ascertain, so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.¹²⁷

Most important of all, Stanley made a key speech to Parliament in which he acknowledged that the Treaty compelled the Crown to protect Maori by its guarantee of their property, as owned according to their own law and custom. In his view, the Crown had agreed to be bound by Maori law when it guaranteed their property rights.

(a) Stanley's speech in Parliament: Maori title can only be decided by Maori law, as guaranteed and protected by the Treaty of Waitangi: Dr Loveridge has provided a detailed extract from Stanley's speech of July 1845, which was published in New Zealand in December of that year:

I am not prepared to say that there may not be some districts wholly waste and uncultivated – there are such in the northern island – but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions – boundaries and limits in some places natural, in others artificial – as satisfactory and well defined, as were, one hundred years ago, the bounds and marches of districts occupied, by great proprietors and their clans, in the Highlands of Scotlands [*sic*]. (hear, hear.) With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the crown. But that is a question on which native law and custom have to be consulted. That law and custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed,

127. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253 (quoted in Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), pp 24–25)

– these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [that is, by Crown grant] that which it does not possess itself. (cheers).¹²⁸

This speech is self-explanatory, and we put great weight on it when determining the Crown's Treaty duties as they were understood and articulated at the time.

(b) The standards that the Crown required of others: We have taken note not only of officials' statements and instructions with regard to Crown purchases but also of the standards they required of private persons in the purchase of land. A waiver of pre-emption in favour of the New Zealand Company and private settlers was carried out in the early to mid-1840s. Shortland, FitzRoy, and their critics agreed that the protectorate should scrutinise any private land sales to ensure that the correct 'vendors' had been identified. There was also some agreement between these governors and their prominent critic, SMD Martin, in favour of investigating and registering Maori customary titles in advance of land purchases, though it was not done.¹²⁹ The Crown referred us to this statement from FitzRoy: 'I will never sign a Deed of Grant of Land to any person in New Zealand, if, I, in my conscience, believe that the owner of such land has not contracted to convey or sell it to the proposed grantee.'¹³⁰ Mr Walzl, for the claimants, also noted the terms of FitzRoy's instructions to Protector Symonds in the 1844 Otakou purchase, that he should 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 possessor.'¹³¹

More particularly important for our inquiry, perhaps, are the standards that Governor Grey required of others. In June 1846, he was contemplating a system of direct private purchases in which the Government would act as an intermediary. In this instance, Maori would have to prove their title to the land they were selling before the Government would accept the sale.¹³²

Nor was this a one-off standard. In November 1846, the Governor reported his intention to license the leasing of Maori land. This would enable the Government, he argued, to 'take care, that equitable arrangements are entered into with the true native owners'. European licensees would not be allowed to occupy any land 'until the question of Native title has

128. *New Zealander*, 13 December 1845 (quoted in Loveridge, 'An Object of the First Importance', p 264 fn 645)

129. Loveridge, 'An Object of the First Importance', pp 123, 138, 170

130. Crown counsel, submission concerning generic issues, 20 September 2002, pp 10–11

131. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 163

132. *Ibid*, p 173

been amicably arranged, amongst the Natives, and until the claims to such lands have been duly ascertained and registered.¹³³

In the same month, Grey introduced a Land Claims Bill to sort out the claims generated by FitzRoy's waiver of pre-emption. The preamble stated that no Crown grant could be safely issued 'until it shall be ascertained that such alleged purchases have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished.'¹³⁴ This was only some four months before the Wairau purchase. As we shall see, the Governor's own actions in that purchase, followed by his issuing of a Crown grant to the New Zealand Company, certainly fell well below this standard.

We will consider Grey's purchases further in chapter 5, but here we note the standard expected of private parties before the Crown would validate their transactions. There are no circumstances, in our view, in which the Crown could legitimately expect less of itself than its subjects, especially given the honour and good faith of the Crown that was pledged to Maori in the Treaty. It is not that the right standards for purchasing land were not known and articulated – the problem for Te Tau Ihu Maori was that they were not followed, resulting in serious infringements of Treaty principles.

To summarise, there was broad agreement amongst many officials and policy-makers up to 1846, that the correct Maori owners must be identified for consent and payment before the Crown could confirm that a valid alienation had taken place (to the company or private purchasers) or before the Crown itself could purchase land. In our reading of the evidence, the accepted standard for Crown purchasing up to 1846 was that there should be:

- ▶ a clearly delineated and relatively small block of land;
- ▶ a prior investigation of its title;
- ▶ the identification of all right-holders; and
- ▶ an agreement between them as to their relative distribution of rights; or,
- ▶ in the event of a dispute, reference to a register or court.

As we will find below, the actions of Grey and McLean substantially departed from this standard after 1846.

What was not resolved, however, was whether the correct 'owners,' and the nature of their rights, should be determined by Maori law or by British law and policy. We turn now to a more detailed consideration of the 'waste lands policy,' which was critical to that issue and to the claims before us.

3.3.2 A countervailing principle: the impact of the 'waste land' theory

Critical breaches of the principles of the Treaty of Waitangi in Te Tau Ihu o te Waka arose from the conjunction of 'waste land' theory with the blanket purchase practices of Grey and

133. Loveridge, 'An Object of the First Importance', pp 303–304

134. Ibid, p 293

McLean. Most claimant counsel and historians considered it a key issue, as did the Crown. There was broad agreement between the historians, including the evidence of Dr Loveridge for the Crown, and our analysis is drawn from a number of sources.

At first, Grey may have been somewhat puzzled by his instructions from home. In 1845, Lord Stanley:

- ▶ sent him the papers of the 1844 committee;
- ▶ advised him to carry out the instructions of Normanby and Russell;
- ▶ asked him to reinstitute pre-emption;
- ▶ instructed him to identify the correct owners before buying land for the company;
- ▶ requested him to assist the company to put its settlers in possession of promised land;
- ▶ instructed him to scrupulously uphold and fulfil the Treaty; and
- ▶ advised him that there might be unclaimed 'waste lands' available, and requested him to register Maori claims to land within three years so that the property of Maori and the Crown could be delineated with certainty.¹³⁵

One result of these many and varied instructions was the Wairau purchase of 1847. Other factors, such as the Crown's policy regarding Ngati Toa, were also instrumental. We will consider those further in our final report. Here, we are concerned with the effect of the 1844 committee report and Stanley's mixed instructions on the actions of Governor Grey.

In the Wairau purchase, Walzl noted that Grey appeared to have acted in 'unwitting anticipation' of Earl Grey's December 1846 instructions, which reached New Zealand after the purchase.¹³⁶ In our view, this was no coincidence. Governor Grey's purchase of the Wairau was the result of the more generous approach to waste lands evinced by Stanley, as compared to that of the company, the 1844 committee and Earl Grey, in combination with the Governor's own views. Stanley, noted Dr Loveridge, believed that the Crown must 'act in accordance with the "feelings and expectations founded . . . upon declarations and concessions made in the name of the Sovereign of England" in the Treaty, which he interpreted to mean that all Maori claims to land arising from their own customary rights had to be respected by the Crown.'¹³⁷ Yet Stanley anticipated that there would be some unowned waste lands in the South Island, which could be declared the property of the Crown. It all depended on Maori law. If an inquiry and registration of titles showed that there were waste lands unowned according to Maori custom, then they belonged to the Crown.

But, without carrying out an inquiry into the facts of Maori customary law and claims and then creating a register of titles, as Stanley had anticipated, Governor Grey acted on his own beliefs. He was (or said he was) influenced by the company's theories, but he developed his own view that Maori overlapping claims were not valid outside their core kainga, which will be discussed below. One result was the nature and extent of the Wairau purchase, which

135. *Ibid*, pp 159–268, 333

136. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 179

137. Loveridge, 'An Object of the First Importance', p 371

for a number of reasons set aside the active protection enjoined by Normanby, Stanley, and the Treaty.

Even though Earl Grey's 1846 instructions arrived after the first 'blanket purchase' (Wairau), they were nonetheless influential, particularly on the Government's post-Wairau reserves policy and its Waipounamu purchase of 1853–56. In brief, Earl Grey had chaired the 1844 Commons committee that condemned the Treaty and the particular interpretation of article 2 that had been adopted by the British Government. As Secretary of State, he instructed his namesake to keep the Treaty and to honour any prior recognition of Maori title in particular places. But, where the Crown had not already recognised Maori title to any specific 'waste lands', the Governor was now to carry out the principles of the 1844 report. These principles were based on the views of Swiss jurist de Vattel, as popularised in Britain at the time by Dr Thomas Arnold, the headmaster of Rugby. Arnold theorised that aboriginal peoples had no law to speak of, and only owned land on which they had built residences or expended labour. In New Zealand, this did not include natural grasslands, unless used as runs for cattle, but it did include cultivated land. Thus, Earl Grey ordered the Governor to register Maori titles to the land 'in use', as narrowly defined by Arnold, and to assert the Crown's title to the remainder.¹³⁸

These instructions produced a storm of protest from the missionary societies and prominent New Zealanders, such as Bishop Selwyn and Chief Justice Martin, as well as Maori memorials of protest. There is no need to recount the detailed history here. Suffice it to say that Earl Grey backed down, reaffirming the Treaty and that it guaranteed what Maori owned by their own customary law, including uncultivated land. In the meantime, Governor Grey appeared to do nothing to carry out his instructions, until he finally wrote to the Secretary of State in May 1848 to the effect that he had come up with a safer way of achieving the same ends.¹³⁹ Professor Ward notes that it is 'to the credit of the Crown' that it finally and definitively recognised Maori title after what he characterised as 'some seven years of hesitation'.¹⁴⁰ But the price for this recognition was a high one in Treaty terms.

As we noted, Stanley's instructions had already influenced Governor Grey in a 'waste lands theory' direction. Although Stanley ordered him to fulfil the Treaty, the Secretary of State wanted a registration of titles to determine 'what portion of the unoccupied surface of New Zealand can justly, and without violation of previous engagements, be considered at the disposal of the Crown'.¹⁴¹ This registration was to follow an inquiry as to titles, based on Maori law rather than British precepts, as Stanley explained to Parliament (cited above).

138. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 64–68; Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp 128–132

139. Loveridge, 'An Object of the First Importance', pp 306–332

140. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 163

141. Quoted in Ward, *National Overview*, vol 2, p 130

Coming alongside Stanley's instruction to buy land for the company and to assist it to complete its engagements, the Secretary of State's expectations influenced Grey considerably. The primary influence was not Stanley or Earl Grey but the Governor's own conviction that 'Maori rights in [waste] land were so intersecting, confused or inchoate as not to be really "valid"'.¹⁴² Mr Walzl agreed with Professor Ward on this point.¹⁴³ The result was the blanket purchase policy, trialled in the Wairau and extended in the Waipounamu purchases, 'purporting to extinguish Maori interests across vast areas' and confining them to tiny 'occupation' reserves.¹⁴⁴

Ultimately, the parties and historians in our inquiry agreed that this purchase policy was, to a major extent, Earl Grey's waste lands policy under another name. This was submitted to us by counsel for Ngati Rarua and Ngati Tama, and by Crown counsel. Dr Phillipson (for the Tribunal), Dr Williams, Mr Walzl, and Ms Campbell (for the claimants), and Dr Loveridge (for the Crown) were all of that view. It was, in Governor Grey's words, a 'nearly allied principle': Maori could be persuaded to sell their waste lands for a nominal sum – maybe even for no payment at all, so long as their mana was acknowledged – and then their titles to land in actual occupation would be registered as reserves, just as if that had been all they had ever owned.¹⁴⁵ The primary difference, the Crown submitted, between this policy and the proposal to register land and refuse all Maori claims to 'unused' lands, was that the latter would not work and might result in war, while the former would work and be cheaper in the long run. Otherwise, the policies were the same and would reach the same end.¹⁴⁶ This is a key point for our inquiry and we agree with the parties on that conclusion.

There was, however, a significant difference between the early prototype (Wairau) and the later purchases. Ngati Tama, for example, submitted that there was a drastic change in the size, nature, and purpose of reserves that appeared to be the result.¹⁴⁷ Professor Ward agreed, noting Rolleston's evidence to the Smith–Nairn commission that the 1848 Kemp purchase reserves 'represented all the land they [Ngai Tahu] had in cultivation – that is, that they bestowed labour upon, and really had any title to'. This attitude, argues Ward, underlay the Waipounamu blanket purchase initiated by Grey and McLean in 1853, replacing the Governor's 'brief dalliance (in the Wairau purchase) with making large reserves for the continuance of the traditional Maori economy'.¹⁴⁸

This is a critical issue for our inquiry for a number of reasons. Ward, Walzl, Phillipson, Campbell, and other historians stressed the theory underlying Grey's making of a large,

142. Ward, *National Overview*, vol 2, p 163; see also pp 130–131, 135, 140

143. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 183. These views were expressed in Governor Grey's letter to Earl Grey of 15 May 1848.

144. Ward, *National Overview*, vol 2, p 163

145. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 179–184, 188, 205–206

146. Crown counsel, closing submissions, pp 95–96

147. Counsel for Ngati Tama, closing submissions, pp 62–63

148. Ward, *National Overview*, vol 2, p 134

117,000-acre reserve in the Wairau purchase.¹⁴⁹ Grey's explanation of his early variant to the waste lands policy is worth quoting in full:

I should also observe that the position I understand to be adopted by the New Zealand Company's Agent, that if tracts of land are not in actual occupation and cultivation by natives, that we have, therefore, a right to take possession of them, *appears to me to require one important limitation*. The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds, – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these. To attempt to force suddenly such a system upon them must plunge the country again into distress and war; and there seems to be no sufficient reason why such an attempt should be made, as the natives are now generally very willing to sell to the Government their waste lands at a price, which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than it was previously, when they had the use of their waste lands, and thus renders them a useful and contented class of citizens, and one which will yearly become more attached to the Government. [Emphasis added.]¹⁵⁰

Such was the Governor's early theory in April 1847. Earl Grey himself conceded that it would be unjust not to reserve sufficient land for Maori to practise shifting agriculture, a key feature of their customary economy.¹⁵¹ He also conceded that Maori used 'waste lands' for hunting and fishing but did not accept that they should keep any of them. Land capable of supporting a large population of settlers through farming should not, in the earl's view, be reserved for hunting and fishing in the way intended by the Governor. Yet it could not be taken from those Maori who relied on such resources for survival. The Government had to come up with an alternative fully equal to the loss.¹⁵²

In response to Governor Grey's comments of April 1847, therefore, Earl Grey stated:

149. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 179–181; Phillipson, *The Northern South Island: Part 1*, pp 131–132; SKL (Leah) Campbell, "A Living People": Ngati Kuia and the Crown, 1840–1856; report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), pp 126–127

150. Grey to Earl Grey, 7 April 1847, BPP, vol 6, sess 892, pp 16–17

151. Phillipson, *The Northern South Island: Part 1*, pp 129–130

152. Loveridge, 'An Object of the First Importance', p 325

and though it certainly would not have been held that the cultivation and appropriation of tracts of land capable of supporting a large population [of settlers] 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 which they might lose.¹⁵³

The Crown, therefore, had either to reserve sufficient land for Maori to continue their customary resource-use (Grey's Wairau policy) or to provide for them 'in some other way advantages fully equal to those which they might lose' (Earl Grey's response). We will return to these arguments in chapter 5, where we will consider the claims of Ngati Koata and others that they were deprived of their customary resource-use rights as a result of this policy, without their actual and explicit agreement to any such extinguishment, to their great prejudice.

Here, we note the shift in the New Zealand Government's views, in response to those of its imperial masters in London. Ward argues that the new reserves policy reflected the harsher instructions of Earl Grey, along with the Governor's belief that Maori customary rights in the 'waste lands' were invalid anyway. Loveridge refers to the Governor's despatch of May 1848, in which he commented that reserving 'occupied' land from purchase, as opposed to registering it, was 'well suited to the present circumstances of the country, and to the probable future wants of an agricultural [crop-growing] population, such as the Maories are.'¹⁵⁴ The Crown notes, in reference to this statement, that the Governor had pointed out in 1847 (before he received Earl Grey's instructions) that Maori did not at present support themselves solely by cultivation. What he meant here then, the Crown argues, was just that the future of Maori lay in agricultural pursuits on the European model (not that reserves no longer needed to include waste lands for resource-use).¹⁵⁵

We disagree. This was clearly a shift in reserve-making philosophy, based on the new approach of the British Government. In 1853, Governor Grey wrote to the Secretary of State that the 'whole of the waste lands' in Te Tau Ihu had been acquired for settlers by his Waipounamu purchase.¹⁵⁶ This included not merely 'unsold' land but also the purchase of the large Wairau reserve set aside only a few short years earlier. In 1854, McLean wrote that

153. H Merivale (for Earl Grey) to the Reverend J Beecham, 13 April 1848, enclosed in Earl Grey to Grey, 3 May 1848, BPP, vol 6, sess 1002 (quoted in Loveridge, 'An Object of the First Importance', p 325.) Loveridge's view is that this was a response to Governor Grey's comments on the Porirua and Wairau purchases (see his footnote 778). The statements quoted here were made in April 1848 on behalf of Earl Grey by a Colonial Office under-secretary, H Merivale, and forwarded to Governor Grey as the Secretary of State's views in May 1848.

154. Loveridge, 'An Object of the First Importance', p 319

155. Crown counsel, closing submissions, pp 95–96

156. Williams, p 100

reserves were generally to be land in actual cultivation and occupation.¹⁵⁷ The result was, as we shall see, a serious breach of Treaty principles. The underlying policy also was in breach of Treaty principles.

Earl Grey resiled officially from his original instructions in April 1848. He did so in a letter to the Wesleyan Missionary Society, which he then forwarded to Governor Grey as an explanation of his views on the Treaty and the waste lands instructions.¹⁵⁸ In that letter, the Wesleyans were informed that the Government ‘intend, and have always intended, to recognize the Treaty of Waitangi’. The Government recognised the Treaty:

in both its essential stipulations; the one, securing to those native tribes of which the chiefs have signed the treaty *a title to those lands which they possessed according to native usage (whether cultivated or not)* at the time of the treaty; the other, securing to the Crown the exclusive right of extinguishing such title by purchase. [Emphasis added.]¹⁵⁹

Thus died the waste lands theory, though not (as the Crown conceded) in practice. Maori law, as the source of Maori rights to land, was finally recognised and confirmed by both sides of the waste lands debate in Earl Grey’s surrender of 1848. ‘It is now admitted’, wrote Chief Justice Martin, ‘that a nation sustaining its civilization by law is not at liberty to disregard even the unwritten customary law of a less civilized people.’¹⁶⁰ This, then, was the undeniable standard by which to measure the actions of the Crown. In purchasing land, it had to identify the correct right-holders under Maori law, and the nature of their rights under Maori law, and provide for their free and informed consent to the alienation of those rights to others. The standards developed from 1840 to 1846, as outlined in section 3.3.1, were thus reaffirmed in 1848.

The Crown argued that this was nothing less than a return to Normanby’s policy, in which it would pay artificially low prices (to Maori) and charge high prices (selling to settlers). The real payment for Maori was supposed to be their retention of sufficient and appropriate land so that they would prosper by settlement all around them, and, in the words of Earl Grey above, obtain ‘advantages fully equal to those which they might lose’. The Crown agrees with the Orakei Tribunal that this ideology was honest only if Maori did in fact retain sufficient land for the anticipated benefits to occur. The policies of Earl Grey, as transmuted by George Grey in practice, were alleged to be the policies of Normanby.¹⁶¹

We do not accept the Crown’s submission that there was no essential difference between Grey’s practice and Normanby’s theory. Rather, the evidence of Ballara and the other historians in this inquiry is that, while the Treaty’s principle of active protection was affirmed in

157. Campbell, p 126

158. H Merivale (for Earl Grey) to the Reverend J Beecham, 13 April 1848, enclosed in Earl Grey to Grey, 3 May 1848, BPP, vol 6, sess 1002, pp 144–157

159. Ibid, p 154 (Loveridge, ‘An Object of the First Importance’, p 323)

160. W Martin to Governor Grey, 20 October 1848, BPP, vol 6, sess 1120, pp 54–55

161. Crown counsel, closing submissions, pp 96–97

theory, it was not carried out in practice. The blanket purchase policy did not consider what land Maori required for their safety, comfort, or subsistence, or what districts they could not alienate without serious or unintentional injury to themselves. Nor was it carried out with the requisite sincerity and good faith. These were, it will be remembered, fundamental parts of Normanby's instructions. Grey's purchasing policy was shorn of the active protection envisaged in those instructions and promised in the Treaty.¹⁶²

We will address the issue of reserves, and their sufficiency, in our final report. Here, we make a preliminary finding that Governor Grey's purchase policy was in fact, as he himself phrased it, so 'nearly allied' to the waste lands theory as to be virtually indistinguishable in its application and results. In the view of the claimants, it was irreconcilable with their tikanga.¹⁶³ Grey's view that overlapping or conflicting Maori titles to 'waste lands' were invalid is demonstrably wrong, even on his own admission. He acknowledged that such claims existed under customary law. He failed, however, to carry out his instructions to investigate their validity, choosing instead to extinguish them in a manner that would – rather than Maori exercising their tino rangatiratanga and making free and informed choices to sell particular sites – simply negate their rights as if they had never existed. As we shall see below, in our consideration of the particular transactions, the Wairau and Waipounamu purchases were in serious breach of Treaty principles. A policy so misguided as to extinguish all Maori claims whatever they might be, without the requisite specificity or mutuality, and with a predetermined outcome that Maori should only be allowed to keep land in 'occupation', whatever their wishes, was clearly in breach of Treaty principles. It follows from our analysis of the evidence above that this was clearly inappropriate in the circumstances and by the avowed standards of the time.

3.3.3 Could the Crown have inquired and properly identified customary rights and their holders?

The Crown advanced two arguments in mitigation of its admitted failure to inquire into customary rights properly (or at all) before granting land to the company and conducting its own transactions. We have summarised those arguments in section 3.2. In brief, the Crown argued that many customary rights were so recent and unsettled in the district that it could not be 'assumed' that they were readily identifiable on reasonable inquiry. The blanket purchase approach, in which all possible claims were eventually settled, was therefore a quiet and peaceable way of purchasing land in that circumstance. Secondly, the Crown

162. Dr Angela Ballara, 'Summary of Selected Aspects of an Historical Overview Report Prepared in Response to Questions from the Waitangi Tribunal', report to the Waitangi Tribunal, 2002 (doc F1), passim; Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 211

163. See, for example, the cross-examination of Matiu Rei, quoted in counsel for Ngati Toa Rangatira, closing submissions, p 47

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argued that even if tenure had been settled enough to ascertain upon inquiry, it had limited resources at its disposal and was not required to do more than was reasonable in the circumstances. We consider these arguments in turn.

(1) *Were customary rights unsettled, to the extent that the Crown could not have ascertained them upon reasonable inquiry?*

The Crown relied on the evidence of Dr Ballara, who argued that customary rights in an area of recent conquest were in a state of ‘flux’, until sufficient time had passed for the conquerors to have established their roots in the soil and for the status of any remaining defeated people to be settled by intermarriage and co-occupation, or, alternatively, by total removal or military resurgence (see sec 3.2). The claimants did not accept that their rights were too unsettled for discovery at the time. Counsel for Ngati Toa submitted that tangata whenua and historian witnesses showed that tikanga was clear and understood by Maori at the time, with universal principles common to most districts. Counsel for Ngati Kuia agreed with that position. It remained, therefore, for officials to do one of two things: inform themselves on tikanga and then inquire as to the facts of right-holding, authority, and occupation on the ground; or, in the submission of Ngati Tama, identify the correct leaders and communities with whom to deal, and leave it to them to decide what was appropriate (see secs 3.1.4, 3.1.6).

We do not need to discuss this question in detail, because the Crown modified its position in the light of cross-examination. As we noted in section 3.2.3, counsel accepted:

Professor Ward is no doubt right when he says that some things were clearly established. Certain hapu occupied certain kainga and not others and certain relationships between rangatira were accepted, others fought over. The problem in Te Tau Ihu is that there was no due inquiry by the Crown into these matters in the 1840s so that now little reliable evidence remains.¹⁶⁴

This modification of the Crown’s view was a partial one. Although accepting that some things were settled, it agreed with Ward that others were ‘fought over’. The Crown’s implication, as we understand it, was that this mitigated its blanket purchase policy and justified some of McLean’s actions.

We accept the evidence of Alan Ward, Angela Ballara, Iwi Nicholson, Matiu Rei, John and Hilary Mitchell, Puhanga Tupaea, Josephine Paul, Mark Moses, Alan Riwaka, and many others that there were principles of customary law that were known and understood by Maori of the time. Not everything was agreed, then as now. Ngati Toa and Ngati Kuia, for example, state that they have different tikanga for raupatu. Professor Ward and Dr Ballara, in cross-examination by the Crown, stated clearly that Maori law and the distribution of

164. Crown counsel, closing submissions, p 20

rights were not merely known but were discoverable upon inquiry. In their view, and also that of Dr Gould for the Crown, there was sufficient expertise among Maori, officials, and long-term settlers (like Hadfield) to have carried out an inquiry steeped in custom law and capable of ascertaining the correct right-holders with authority to alienate land.¹⁶⁵ We agree. Governor Gore Browne, for example, inquired of Maori and settler experts on his arrival in 1856, appointing a special board for that purpose.

A serious challenge remained for the governments of the time. As everyone agrees, things were changing on the ground. In part, these changes were facilitated or even caused by the Crown. Its attempts to suppress Ngati Toa's military power, for example, and to establish a strong influence over that tribe, had an effect on their ability to exercise rights in Te Tau Ihu. In the face of such change, Ngati Toa suggests that the Crown should have considered rights as frozen from 1840 (see sec 3.1.6). That could not have fitted with even the 1840 rule, which, as Professor Ward pointed out, accommodated peaceful and agreed changes.¹⁶⁶ This was especially necessary, since groups among the conquerors and defeated peoples were moving around, sometimes relocating permanently. Kurahaupo refugees from the interior, for example, were returning to the coast and settling with their relatives, while leaders like Henare Te Keha were moving their people closer to the European settlements. Ms Gillingham and Mr Riwaka describe Te Keha's relocation to Pariwhakaoho in 1845, settling on Ngati Rarua claimed land, *after* Spain's deeds of release (1844).¹⁶⁷ An answer to the question 'who has rights at Pariwhakaoho', therefore, might not be the same in 1846 as it was in 1844. Tuku and their consequences were still being worked out, with the additional ingredient of European settlers on company lands. Finally, defeated peoples were recovering rights but were not visibly asserting them before around 1849, in so far as they had opportunity to be recorded (see our discussion in chapter 2).

Nonetheless, the Crown wanted to buy land from these people and it had no choice but to decide whether the company's title was valid. In those circumstances, the complexity of overlapping and changing rights was not an excuse not to inquire into them – quite the reverse. Trying to settle overlapping rights in the context of a purchase might well generate conflict. It was incumbent upon the Crown to find a purchasing process that gave Maori the opportunity to debate and resolve their differences or, where that was not possible, to submit them to an agreed and Maori-controlled legal process. We consider some of the options available in this respect in the next section. The Crown submits that its intentions included abiding by the Treaty and trying to keep the peace between Maori and settlers, and between

165. The Crown cited Professor Ward and Dr Ballara in its closing submissions at pages 16 to 20. Dr Gould's cross-examination was cited by counsel for Ngati Toa Rangatira in her closing submissions at page 20.

166. Professor Alan Ward, brief of evidence, 9 June 2003 (doc P9), pp 13–16

167. Alan Riwaka, 'Nga Hekenga O Te Atiawa', Te Atiawa Manawhenua Ki Te Tau Ihu Trust, July 2000 (revised 2003) (doc A55), pp 231–234 ; Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, February 2000 (doc A74), pp 24–26

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Maori.¹⁶⁸ In our view, avoiding a contested situation by picking winners without inquiry, and then settling with any after-claimants who were able to come forward, was no solution.

This was especially so where the Crown tried to extinguish undefined rights in under-defined districts. Mr Walzl's evidence, for example, shows the problems caused by the legacies of the Wairau purchase. In 1850, three years after the deed was signed, Richmond was trying to negotiate reserve boundaries with local leaders, Te Kanae and Kaikoura, who eventually signed a deed of certification. Te Kanae claimed some of the Waitohi land sold by Te Atiawa, but Richmond had to explain that the Wairau deed – to which Te Kanae had not been a party – had purchased all of Ngati Toa's rights until they met those of Te Atiawa. Anything belonging to Te Atiawa had been sold by the Waitohi deed, while anything belonging to Ngati Toa had been alienated in the Wairau deed.¹⁶⁹ Anything belonging to Rangitane had been overlooked. So the Crown's argument is clearly misplaced that blanket purchases obviated the need for conflict-causing definitions. Both Te Kanae and Te Rauparaha claimed that they had interests at Waitohi, but there was no investigation of such claims or their merits prior to the Waitohi purchase.

Blanket purchases might well obscure overlapping interests and thereby postpone conflict. They also had the effect of obscuring exactly what rights were involved and being alienated, exactly what sites were being given up or retained, exactly who had the authority to make the decisions, and who had the right to be involved and be compensated. In the view of the claimant and Crown historians, and of the claimant communities' experts on Maori law and customary rights, these questions were capable of being answered at the time upon due and diligent inquiry. The Crown mostly conceded the point.

Finally, we note that the Crown put a lot of emphasis on the mobility of the Te Tau Ihu population.¹⁷⁰ Was it too mobile for the Crown to be certain as to who had rights where? In this respect, we note Governor Grey's memorandum of 1846 in respect of the proposed Wairau purchase:

It will be desirable, before entering into any negotiation upon the subject, to ascertain the exact number of Natives at present inhabiting the district, the extent of land they have under cultivation, and whether any portion of the Ngatitōa Tribe are likely to remove from Porirua to that district, and then take the necessary precautions for securing to the Native inhabitants blocks of land in continued localities of sufficient extent to provide for the wants of the probable Native population.¹⁷¹

Clearly, this was a sensible approach. If in doubt, the Crown *could* inquire.

168. Crown counsel, submission concerning generic issues, 20 September 2002, pp 43, 84

169. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 189–191

170. See, for example, Crown counsel, opening submissions, pp 5–6; and Crown counsel, closing submissions, pp 3, 23–25

171. Memorandum of Sir George Grey, 14 September 1846, *Compendium*, vol 1, p 72

(2) What inquiry mechanisms were available or proposed at the time, and what kinds of inquiry were reasonable and practical in the circumstances?

Prior to Grey, the Government was starved of revenue. It was in something of a catch-22 situation. The Colonial Office expected government and colonisation to be funded from customs revenue and the on-sale of land – the surplus land from that ‘sold’ by Maori but not granted to pre-1840 settlers, and land purchased cheap from Maori but sold dear to settlers. Yet, to obtain either category of land for on-sale, the Crown had first to establish title. This required some kind of inquiry process, by the standards of the time.

(a) Formal inquiry by royal commission: The earliest and most obvious inquiry mechanism was a formal one by royal commission. The Land Claims Ordinances appointed commissioners, with Maori represented indirectly by their ‘protectors’, to inquire into the validity of pre-1840 transactions. This model was used to inquire into the company’s Nelson district claims in 1843 and 1844. Lord John Russell instructed in 1841 that all Maori, non-Maori, and Crown land should be registered. He also instructed the Governor to give the commissioners legal authority to investigate and resolve any titles disputed between Maori themselves (see sec 3.3.1(3)). As noted earlier, neither instruction was carried out. Hobson dropped a proposed clause in the Land Claims Ordinance 1842 that would have authorised the commissioners and protectors to settle disputed Maori titles on the spot.¹⁷² Nonetheless, this model of inquiry was clearly available to the Crown and endorsed by the Colonial Office. Ballara concluded: ‘Inadequate as it was, the Spain commission was nevertheless the only serious attempt at inquiry into these matters before 1860.’¹⁷³

(b) Informal inquiry by officials: This was the most common type of inquiry carried out in Te Tau Ihu. Surveyors, purchase agents, or interpreters toured districts and met with the people of the land, inquiring as to their customary rights. In Ballara’s view, this was the least successful kind of inquiry, because of its objects and the manner in which it tended to be carried out.¹⁷⁴ She argued:

The need over time for extra reserves to be surveyed, compensation to be paid for groups whose rights had been ignored or overlooked, and the cynical determination to hold to Spain’s award ‘as it at least holds good against those parties who received money under it’, prove in themselves the failure of the Crown adequately to inquire into customary land tenure, tino rangatiratanga and to find which Maori were the proper persons with whom to negotiate and who had the power to declare the interests and decisions of the community, and to receive payment on their behalf. Typical of the expedient attitude and actions of

172. Loveridge, ‘An Object of the First Importance’, p 93 fn 238

173. Ballara, ‘Summary of Selected Aspects’, p 7

174. Ibid, pp 6–8

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3.3.3(2)(c)

Crown officers was the statement of one who said: 'Without entering particularly into the merits of the claim of the Natives I offered to pay them £100 to settle the dispute.'¹⁷⁵

The Crown conceded: 'It is also accepted that there is force in Dr Ballara's criticism that the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available.'¹⁷⁶

(c) Logistics and practicalities: In terms of practicability, the Crown asked us to take into account the difficulty of terrain, the enormous size of the region, and the shortage of officials, when judging the thoroughness of these kinds of inquiries. We did not receive evidence on this point, although several historians were asked to comment in cross-examination. Ngati Rarua submitted that the Ligar inquiry showed that it was by no means unfeasible for officials to tour a large district and inquire as to the distribution and possessors of rights. Ligar was hampered by his inability to find a local guide – he was not entirely trusted – rather than the nature or size of the district. Counsel for Ngati Apa pointed out that that tribe's loss of entitlements may have rested solely on officials' failure to visit or find them. The Crown acknowledged the point. Counsel for Ngati Kuia agreed that the Crown was not required to do more than was reasonable but cautioned us that the bar must be set very high, given what was at stake for Maori (see secs 3.1, 3.2).

The Spain inquiry clearly did not come close to the limits of what was possible, even taking into account any logistical constraints. Spain himself said that he would move his court to Golden Bay if necessary, but he did not do so. Neither Clarke nor Meurant visited Golden Bay. Maori themselves, and company witnesses who had been there, were available in Nelson to give evidence. Logistics and opportunity do not account for or mitigate the inadequacies of Spain's inquiry.¹⁷⁷ In conducting the Waipounamu purchase, McLean did not go west of Nelson. When he gave evidence to the Native Land Court in 1883, Meihana Kereopa of Ngati Apa stated that this was his first ever opportunity to claim rights in Taitapu (and, by implication, western Te Tau Ihu).¹⁷⁸ The exclusion of Taitapu from sale and the failure of, first, the Spain commission and, secondly, the lead purchase agent to go west of Nelson, may well account for this kind of 'late' claim. At the same time, Brunner and Jenkins could easily have toured eastern Te Tau Ihu before the first and second deeds were signed with Ngati Toa, instead of after. They could have inquired as to the nature and extent of people's rights, whether they wanted to alienate them, and who had the power to make

175. Ballara, 'Summary of Selected Aspects', p 8

176. Crown counsel, opening submissions, p 12

177. See Dr Ashley Gould, 'Summary of Report: The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5(a))

178. Dr Angela Ballara, 'Customary Maori Land Tenure In Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc d1), p 284

that decision for the community, rather than telling people that their land was sold and that small, limited reserves now had to be made.¹⁷⁹

Did officials need to visit every bay, valley, forest, and mountaintop? The answer is 'No'. Did they need to find out the location of every significant kainga and group of right-holders in the block, and ensure that those people had a fair opportunity to participate? The answer is 'Yes'. Professor Ward suggests that it was a 'utopian hope' that all interests could be defined absolutely before beginning a purchase. In his view, the correct process was for Maori or the Crown to propose a certain piece of land for sale, to be followed by a period of discussion and the reaching of a consensus, after which the boundaries were publicly marked. This was not utopian, and was done in some instances.¹⁸⁰

We agree. The correct right-holders and their leaders had to be identified and consulted before the decision to sell was accepted by the Crown as having been made, and a deed signed. After all, the Crown had the option not to buy. As will become clear, Maori did not have the option not to sell if they were missed out. The Kurahaupo witnesses argued that guides and trails were available and that no place where Maori were living could be considered too inaccessible.¹⁸¹ But the purchase process in the northern South Island became mired in the fact that the Government was no longer buying particular places, sites, or clusters of rights. Rather, it considered itself to be extinguishing 'claims' across whole regions; claims that it thought were barely valid. In that circumstance, neither Grey nor McLean inquired closely or anywhere near to the extent practicable and feasible.

We agree with Ngati Kuaia's submission that, in light of the Treaty principle of active protection and the relative power imbalance between the Crown and, in particular, the Kurahaupo tribes, a high standard was required. To keep the standards it had mooted in the early 1840s, the Waipounamu purchase (with its undefined nature and unwalkable boundaries) would never have happened in the manner it did. Dr Ballara reminded us:

If the Crown officers concerned were in fact being judged by today's standards, it would not be fair or appropriate. But rather than those of 2002, they are being judged by the proclaimed standards of 1840. Had there been no Treaty of Waitangi, and had not the Colonial Secretary at the time, early governors and other Crown representatives committed the Crown by frequent, recorded and public rhetoric to upholding the Treaty promises and to an honourable course of protecting Maori in their landed and other possessions, there would be no contemporary standards against which to measure their successors' performance. But the rhetoric was spoken and the promises were made . . . Contemporary senior Crown officers such as Grey and McLean had heard the vocabulary of just dealing and

179. Ballara, 'Summary of Selected Aspects', p 8; *Compendium*, vol 1, pp 294, 297–300

180. Ward, *National Overview*, vol 2, pp 136–138

181. See, for example, June Robinson, brief of evidence, 8 March 2003 (doc N8); Albert (Sonny) McLaren, brief of evidence, 2003 (doc N5); Ngati Apa Claims Committee, *Ngati Apa Ki Te Ra To: The Footsteps and Gardens of Ngati Apa*, VHS videotape, 2001 (doc N12)

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3.3.3(2)(d)

expressed it themselves at times; they had received expert advice as to the proper methods of treating with Maori for their land but chose to ignore it.¹⁸²

In any case, the correct course of action for the Crown was neither expensive nor impractical. The best example in Te Tau Ihu was that of Richmond's purchase of Pakawau in 1851–52, which generated no Treaty claims in our inquiry.¹⁸³ He visited and toured the block he wanted to purchase, met with the resident chief and hapu, inquired widely and met with overlapping right-holders, and, ultimately, left Maori to decide their own entitlements at a large, well-attended, intertribal hui. It is to that option – the giving of effect to tino rangatiratanga – that we now turn.

(d) Tino rangatiratanga: There were a number of options through which Maori could decide these questions for themselves but still provide the kind of finality that the Crown required for the transfer of title from Maori to itself. In the view of the Ngai Tahu Tribunal:

the tribe retained control over alienation of resources through senior rangatira. Crown agents seeking to purchase land from Ngai Tahu would be expected to negotiate with the tribe through these principal chiefs. They had the power of veto and without their consent the sale was not valid. However, the rangatira as trustees for their people and their resources could only approve a sale if the necessary consensus was in place. The traditional way of ensuring this then, and now, would be to debate the purchase on the marae in the presence of those who had rights in the land, both those living and those passed on. This would represent a meaningful exercise of rangatiratanga.¹⁸⁴

In Ngati Tama's submission, we should adopt the findings of the Taranaki Tribunal to the effect that it was not for the Government or British persons to decide who had the decision-making authority to transfer land. Rather, it was for the Crown to seek out Maori leaders, and for those leaders and their communities to decide who had rights where, and what rights (in what places) would be given up.¹⁸⁵

There were various customary methods for hapu and iwi to resolve differences peacefully and legitimately, even after war was banned and muru became less acceptable. Counsel for Ngati Rarua and for Te Atiawa submitted that the Pakawau purchase was a good one in this respect (though not in others).¹⁸⁶ No iwi in our inquiry argued that the Pakawau purchase

182. Ballara, 'Summary of Selected Aspects', p 3

183. That is, no claims with regard to how customary right-holders were determined in the purchase process. There were claims about other aspects of the transaction.

184. Waitangi Tribunal, *Ngai Tahu Report*, vol 2, p 241

185. Counsel for Ngati Tama, closing submissions, pp 56–58

186. Counsel for Ngati Rarua, closing submissions, pp 56–65; counsel for Te Atiawa closing submissions, pp 35–41, 130–131, 162–164

was deficient in terms of identifying customary right-holders. Richmond's process was, at first, that of informal inquiry by a touring Crown agent, in which he identified those living on the land at the time of his visit (and whom he therefore considered to have the primary rights). When Te Koihua's right to decide was challenged by others, whom Richmond also met with, the outcome was a hui at a nearby centre (Nelson). The tribes assembled (about 500 people) and the rangatira debated their positions and agreed on whose authority would be encapsulated in signing the deed and distributing the purchase money. Not all those who claimed such rights also claimed a layer of rights sufficient to keep any of the purchase money. Te Koihua, as the leading resident rangatira, received the largest share for his people.¹⁸⁷

Ms Gillingham concludes:

To the government's credit, its inclusive stance of settling with claimants ensured that all Ngatiawa chiefs who pressed a claim to the land were consulted with. It also ensured that the leading resident right-holder received the greatest share of the purchase money, as well [as] a reserve. The purchase payment, however, did not accurately reflect the value of the land because the government declined to pay for mineral value. Thus, although the Crown treated with Ngatiawa and other claimants to ensure a full and final settlement, its failure to pay the full price of the land denied Ngatiawa the full value of it.¹⁸⁸

We will consider the mineral wealth of Pakawau and the purchase price in our final report. Here, we note that this kind of decision-making by Maori was entirely their right under the Treaty, and a valid process for the Crown to have accepted and relied upon in its Pakawau transaction. In terms of affordability, a hui like Pakawau cost the Crown little or nothing. Presents of food would have been appropriate and welcome, but Maori bore the cost otherwise.

(e) Why was this model not followed in 1853? Counsel for Ngati Rarua submitted that there was a major cost for the Crown from the Pakawau hui at Nelson. At the same time as he was attempting to acquire the suspected mineral wealth of the Pakawau block, Richmond was also trying to arrange a blanket purchase of the entire west coast of the South Island. This had generated debate between tribes, and between tribes and officials, with both Ngati Rarua and Ngati Toa writing to the Governor to outline their claims. On this occasion, Grey advised Ngati Toa to go to Te Tau Ihu and sort it out on the spot with Richmond and the other tribes. For Richmond, the sticking point was the price – he could not get anyone to agree to the kind of low price that the Earl Grey/Governor Grey/Normanby approach

187. Gillingham, pp 166–170; Macky, pp 120–127

188. Gillingham, p 170

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required. The tribes' bottom line at the Nelson hui was £3500, to which the Government would not agree. The result was that neither side gave in and the negotiations had to be abandoned (until the very different processes of the Waipounamu purchase the following year).¹⁸⁹

From this experience, Ngati Rarua argue that the Crown learnt the following lessons:

- ▶ Maori overlapping rights in Te Tau Ihu were very complex, the tribes were competitive, none would immediately accept the others' claims, but ultimately the issues could be resolved by community agreement;
- ▶ reaching such agreement required time – in this instance, a period of seven months;
- ▶ so many overlapping rights, when considered by the tribes meeting all in one place, was likely to raise prices; and
- ▶ an inter-iwi hui, with the tribes in a position of strength, might resolve matters in a way that led to no purchase – as happened with the west coast proposal.¹⁹⁰

These lessons, argue the claimants, provide the context for the very different approach of Grey and McLean in the Waipounamu purchase the following year. We agree. Any recognition of tino rangatiratanga carried with it the possibility that Maori might say 'No'. The Treaty guaranteed them the retention of their land and resources for so long as they wished to keep them. Normanby instructed the Government to make fair and equal contracts with the free and informed consent of Maori. Implicit in such requirements was that Maori could say 'No'. The Crown, however, would brook no refusal. As Crown counsel submitted, the policies of Grey and McLean were characterised by a ruthlessness that sidelined the Treaty and its promises, and subordinated the interests of Maori to settlers. They did so by designing a purchase process in which Maori tino rangatiratanga was unfairly and unduly suppressed, enabling the Crown to force through a result that would not have been possible had the Treaty promises been honoured.

(f) Partnership: Finally, we note that there were alternatives and variants to the hui decision-making that resolved tribal differences over Pakawau, and which involved partnership between the Government and Maori leaders. The Governor, for example, as a person of great mana, could be entrusted with the kind of role that Te Rauparaha had played in the roherohetanga hui which divided up eastern Te Tau Ihu (see ch 2). According to the evidence of a Ngai Tahu rangatira, Wiremu Te Uki, Governor Grey proposed just such an arrangement to settle the overlapping claims of Ngati Toa and Ngai Tahu in 1848:

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 judge between us; and if we were able to show that the land

189. Counsel for Ngati Rarua, closing submissions, pp 56–65

190. Ibid, pp 62–64

belonged to us, he would recognize it as so; and if the other party showed that the land belonged to them, he would recognize them.¹⁹¹

The proposed hui did not happen, but it shows the potential available for this kind of decision-making in partnership between the Crown and Maori.

Not all officials or missionaries had that kind of mana. Mr Macky, the Crown's historian, suggests that we do not know exactly how much Richmond, Tinline, and the missionaries were involved in the decisions reached at the Nelson hui, which they attended. The only point recorded was that they stepped between Puaha and Te Koihua when they thought things were getting too heated.¹⁹² In our view, the attendance of European observers and advisers at hui made them part of the inclusiveness of Maori decision-making. Their views would have contributed to the consensus reached, and their influence would have depended on their mana. None of them had the mana of a Grey or a Te Rauparaha, able to sum up and speak (and possibly even decide) for the whole. As Ngati Rarua submitted, however, they had an entrée to the Maori world and were part of the partnership between tribes and the Crown.¹⁹³

Sometimes, outside help was needed. Officials considered formalising a process of Maori-controlled dispute adjustment, with an official as president (rather than adjudicator). As we have seen, Lord John Russell preferred a commissioners' court to decide disputed titles. Chief Protector Clarke, on the other hand, proposed district courts of Maori chiefs with Maori juries and a protector as chair.¹⁹⁴ Counsel for Ngati Kuia submitted that the Crown was obliged to provide a legal mechanism for adjusting disputes, when these arose from the interface between customary rights, European custom and law, and the Crown (see sec 3.1.6(3)). We agree. In our view, it was entirely possible to have provided one in the circumstances of the time. FitzRoy's Native Exemption Ordinance, Grey's resident magistrate arrangements, church komiti, and, finally, the formalisation of State runanga in the 1850s and 1860s, show how Maori autonomy could be given expression in official institutions, and in partnership with the Crown. Had this been done in Te Tau Ihu for the purpose of negotiating land purchases and deciding overlapping entitlements, Maori leaderships would have had official mechanisms for the Crown to work with, and a Maori-controlled process for adjusting any disputed overlaps.

We agree with counsel for Ngati Tama and the findings of the Tribunal in its *Taranaki Report*, that the Crown was required to seek out the right leaders and, if necessary, formalise Maori bodies with whom to negotiate. It was not up to British persons to decide Maori

191. Wiremu Te Uki, evidence to the Smith–Nairn commission, 3 April 1880 (quoted in Phillipson, *The Northern South Island: Part 1*, p186)

192. Macky, pp125–126

193. Counsel for Ngati Rarua, closing submissions, pp5–6

194. Clarke to Colonial Secretary, 31 July 1843, BPP, vol2, Appendices to the House of Commons Committee Report, p348

3.3.3(2)(g)

land entitlements. Ultimately, the Crown and Maori had to work in partnership, but the Crown was not supposed to have an interest in which Maori did the negotiating.

(g) Registration of titles prior to transacting: Prior to 1846, it was commonly held that Maori title must be ascertained before purchase, so that the Crown could be sure of dealing with the right (and all the right) people, and thereby acquiring a valid title. In the evidence of Dr Loveridge, Lord John Russell, Lord Stanley, Earl Grey, Acting Governor Shortland, Governor FitzRoy, and Chief Protector Clarke, all favoured a process of investigating and registering Maori titles to land, prior to purchasing. Russell wanted the land claims commissioners to investigate and resolve title disputes, Clarke preferred a Maori court to do that, and Earl Grey referred to a ‘court’ without being too specific about its composition (see sec 3.3.1). Courts in New Zealand at the time, as FitzRoy, Clarke, and Governor Grey agreed from their very different perspectives, had to have a Maori component and work according to Maori mores in Maori districts. They did not agree, however, on how formal the recognition of Maori law should be in these special arrangements, nor how quickly or to what extent British law should predominate.¹⁹⁵

Despite broad agreement between secretaries of state and governors, no process of registration was ever attempted. There were a number of reasons. As Clarke pointed out, to do it for the whole country at once would be very expensive, yet nothing short of that could have kept ahead of Grey’s purchase plans.¹⁹⁶ By the time the Government was better resourced, the proposed registration was tarred too much with Earl Grey’s waste lands brush, and had been set aside as too dangerous to attempt. Concentrating attention on overlapping claims, and trying to achieve finality on them, would likely have generated conflict. As with the purchase process itself, much would depend on how far Maori were in control, whether they saw it as a needful or meaningful exercise, and whether there was sufficient incentive for them to adjust matters among themselves. We have no way of knowing how far a royal commission or Clarke’s Maori courts could have resolved disputes.

In Professor Ward’s view, a registration process would not have been the kind of permanent fix envisaged by Clarke and others. Customary law and rights continue to evolve and change with movements of mores and peoples. It would all have to be done again, he argued, at the actual time of purchase.¹⁹⁷ The evidence in our inquiry certainly supports such a conclusion. Further, without an actual land transaction as a driving force, Maori would have seen no benefit and were unlikely to have participated. For our purposes, the proposed solution is less important than officials’ acknowledgement of the problem. As Clarke put it, the advance registration of titles would be ‘an expensive procedure, but it

195. Alan Ward, *A Show of Justice: Racial ‘Amalgamation’ in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), pp 42–91

196. Loveridge, ‘An Object of the First Importance’, p 69

197. Ward, *National Overview*, vol 2, p 165

would be a sure one for I cannot conceive how purchases can be made with satisfaction by the Government unless this is done.¹⁹⁸ As part of the standards of the time, some such exercise was considered essential prior to purchasing. Whether or not the particular solution of registering titles would have worked, it was necessary for the Crown to develop a process to ensure that it was dealing with the correct ‘owners’.

3.3.4 The Tribunal’s finding

We find that the Crown, in the circumstances of the time, considered prior investigation of Maori customary rights, as determined by their own customary law, to be a vital prerequisite to its acceptance of any decision to sell. Yet it failed to do so in an adequate manner. Its failure to abide by its own standards, more particularly during the transactions of 1844 to 1856, was in serious breach of Treaty principles. The Crown failed to actively protect Maori interests, by ensuring that their entitlements were fairly identified by themselves and according to their own laws, before commencing to buy them. It failed to act in partnership with Maori or to respect their autonomy, by establishing official mechanisms, the decisions of which would be binding on both sides, for the negotiation of purchases and the resolution of disputes. It failed to respect and provide for tino rangatiratanga: Maori were not permitted to debate and decide their own entitlements through their own institutions before the Crown obtained deeds and made payments. That it could have done all of these things is demonstrated above all by the Pakawau hui at Nelson and by proposals for advance title registration and dispute resolution by Maori courts.

3.3.5 Was the Crown’s failure mitigated if it identified right-holders after accepting a decision to sell or even by the end of a later transaction?

It is clear from our preceding discussion that, by 1847, the Crown had accepted that it was bound by the Treaty and by the Maori law governing customary rights in property. It had also articulated the view, on many occasions, that it would not buy Maori land – or confirm the extinction of Maori title by Crown grant to others – unless there was proof that the correct right-holders had been identified and paid. Further, it was the proposed practice of Governors Shortland, FitzRoy, and Grey that the correct Maori right-holders must be identified before either purchasing land or (in the case of private purchasers) confirming a purchase. We noted the proposed purchase processes of Shortland and Clarke, the registration instructions of Russell and Stanley, the purchase instructions of Normanby and Stanley, and the proposed confirmation processes of FitzRoy and Grey. All required the identification of Maori title prior to the Crown’s acceptance of a decision to sell or, in the case of

198. Loveridge, ‘An Object of the First Importance’, pp 65, 69

confirmations, its acceptance that a sale had taken place and before a Crown grant to the purchaser could ensue.

The Crown and claimants agreed that this did not happen in Te Tau Ihu. At first, the Crown denied it but eventually conceded the point, particularly on the evidence of Dr Ballara. The evidence of its own witnesses, Dr Gould and Mr Macky, also confirmed the point. The Crown argued, however, that its failure was mitigated by identifying and paying all right-holders by the end of the Waipounamu purchase. Clearly, it could not argue this for the Wairau purchase. But, the Crown urged us, its transactions should be considered as one continuous process. By the end of the Waipounamu deed-signings, it claimed to have identified and paid anyone who still had what it called ‘remaining or residual rights’ left over from its 1844–1853 transactions.¹⁹⁹

In our view, this is a problematic and troubling submission. The Crown, in Lord Stanley’s words, had no right to grant lands that it did not itself possess.²⁰⁰ The idea that its transactions could somehow be validly or fairly completed after Maori land had been granted away to settlers, or after it was judged as irrevocably sold, is incompatible with either the Treaty or British principles of justice as we understand them. We accept the submission of Ngati Tama: ‘It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.’²⁰¹ Anything less than the free and informed consent of Maori to the alienation of their land, before the Crown claimed to own it or to grant it to others, was in violation of articles 2 and 3 of the Treaty, the rights of all British subjects, and the tino rangatiratanga of Maori tribes. Compensation of ‘after-claimants’ subsequent to their land being counted as sold and with a non-negotiable sum, was in obvious violation of the Treaty principles of reciprocity (inherent in pre-emption), partnership, and active protection.

We will consider this issue in detail as we examine each of the Crown’s major purchase transactions in the next chapters.

199. Crown counsel, submission concerning generic issues, 20 September 2002, p 9

200. Loveridge, ‘An Object of the First Importance’, p 264 fn 645

201. Counsel for Ngati Tama, closing submissions, p 46

CHAPTER 4

THE SPAIN COMMISSION

In chapter 3, we noted the Crown's argument that it 'consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land.'¹ It also admitted that 'the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available.'² These two admissions underlie many of the other concessions of fact made by the Crown.

In this chapter, we consider a key instance in which the Crown has admitted that it failed to inquire properly or adequately into customary rights in Te Tau Ihu, and the Treaty claims that have resulted from that failure. These claims relate to the Spain commission, which was appointed to inquire into the validity of pre-1840 transactions and to recommend whether or not Crown grants should be issued to the New Zealand Company by the Governor.

4.1 THE CLAIMANTS' CASE

4.1.1 General elements

General elements of the claimants' case have already been summarised in chapter 3. Here, we describe the particular arguments advanced with reference to Commissioner Spain's inquiry into the New Zealand Company's Nelson claims. The claimants raised many issues and grievances, all of which will be considered in our final report, but this preliminary report concentrates on issues with regard to customary rights and how the Crown dealt with them. In general, all of the claimants argued that Spain's inquiry was predetermined by a desire to put the company's settlers in possession of their land. The November Agreement (see sec 1.3) and the presence of settlers on the ground made it impossible for Spain to hold a truly impartial inquiry. It was also politically impossible for him to find that the company transactions were invalid. As a result, Spain did not conduct an adequate inquiry into either who held customary rights and tino rangatiratanga or the nature of the particular customary practices in Te Tau Ihu that regulated the transfer of property. Had he done so, he could

1. Crown counsel, submission concerning generic issues, 20 September 2002 (paper 2.371), p 8

2. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 12

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4.1.1

not reasonably have found that an absolute alienation of rights or of land had taken place to the company. Most claimants argue that the transaction was a *tuku* in Maori customary terms, and governed by Maori law, whilst being void in British law (because it masqueraded as goodwill present-giving, something not cognisable as a purchase even if pre-emption had been waived).

Everyone agrees that the inquiry was short and incomplete. European testimony was heard first, followed by only one Maori witness. The latter's evidence, which suggested that the transaction had significant flaws, was so worrying to Spain, Clarke, and Wakefield that no other chiefs were called. Not even this much of a formal inquiry was held anywhere outside Nelson. The true explanation for this is that the commission's object was not to conduct an impartial inquiry into the validity of the company's transactions. As a result, it took no account of known issues with regard to the nature of Maori customary tenure. Meurant's prior informal investigation was also limited and clearly inadequate. Dr Ballara's evidence is that Spain did in fact uncover some of the principles of customary tenure but that he did not put them into practice in his inquiry or decisions. The fact that Spain had such knowledge and did not apply it, the claimants argued, increases the seriousness of the Treaty breach caused when the Crown failed to inquire into customary rights in Te Tau Ihu. As a result, Spain's 1845 report contains a number of inconsistencies in order to justify actions already taken. By 1844, Spain saw his role as cooperating with the company to complete arrangements for settlement, and he thus allowed his inquiry to be cut short and arranged for compensation. This was not the hallmark of an independent commission.³

The claimants referred us to the findings of the Te Whanganui a Tara Tribunal on similar issues. Ngati Rarua submitted that, 'by the time of the Nelson hearing, Spain was oriented towards arbitration instead of just investigation'⁴ – a process that had already occurred at Wellington and was described in the *Te Whanganui a Tara me ona Takiwa* report as:

irreconcilable with the Land Claims Ordinance 1841 under which Spain was authorised to hold an inquiry with full opportunity for the parties, Maori and company, to be heard. The inquiry was abandoned, and Spain's role was converted from that of a judicial officer into an umpire directing and, when required, deciding the outcome of negotiations between the company and the protector. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was subject to pressure from Spain to reach an agreement with Wakefield.⁵

The claimants also cited the evidence of the Crown's historian, Dr Gould, in support of their case. Ngati Koata, for example, concluded that Spain was not truly independent, that

3. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), pp 49–50

4. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 35

5. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 116 (quoted in counsel for Ngati Rarua, closing submissions, p 35)

Dr Gould could point to no evidence that Maori agreed to his arbitration–compensation process, and that Spain had not inquired sufficiently to have a grasp of the facts when he decided that a perfectible transaction had taken place. Based on Gould’s evidence, the Crown had also acknowledged that Spain did not give the people of the Nelson district a sufficient opportunity to convey their understanding of what had happened and that he was intent on a quick process.⁶

The claimants relied on Dr Gould’s conclusion that Spain’s inquiries:

were really not inquiries at all but partly window dressing, and partly an adjunct to his real purpose which was to ensure that all Maori within the disputed districts or settlements received compensation in exchange for signing deeds of release, confirming the prior purchases of the Company. The model could not work in all of the Company settlements. His task was really to perfect existing, flimsy, transactions and to ensure that they were fair. Just how Spain, or Clarke for that matter might have determined what was fair is a fraught question.⁷

Gould agreed with the claimants that the customary rights of Maori appear not to have been sufficiently investigated, and the manner in which Spain and Clarke negotiated settlement in 1844 ‘does not appear fair or robust.’⁸

4.1.2 Particular viewpoints

The claimants had particular and sometimes differing perspectives on aspects of Spain’s inquiry.

(1) *Ngati Toa*

Ngati Toa argued that Spain was wrong to consider the New Zealand Company entitled to its grant because of the Kapiti transaction, in that ‘Taitapu’ and ‘Wakatu’ were wrongly identified by Spain with entire regions. Ngati Toa did not intend ‘to sell all of their rights to the whole of the Nelson, Waimea and Golden Bay areas.’ Nonetheless, Spain’s findings are favourable to Ngati Toa’s case because he:

clearly accepts that one of the reasons why the company was entitled to a grant at Nelson was because the land had been alienated from Ngati Toa. Our submission is that it must follow from this that Ngati Toa is entitled to share in the beneficial interests in the Nelson Tenth, as those interests formed part of the consideration for such land.

6. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 50–53

7. Quoted in counsel for Ngati Koata, closing submissions, p 53

8. Ibid, p 53

TE TAU IHU O TE WAKA A MAUI

4.1.2(2)

Ngati Toa accept that the occupation, cultivation, and burial reserves were in a different category and that they had no right to them.⁹

If, argued Ngati Toa, one accepts the premise that the tenths were part-payment for extinguishment of Maori title as at 1839–40, then beneficial interests in the tenths should have been fixed at that time, when the authority of Ngati Toa chiefs was still recognised over a wide region. In the evidence of Professor Boast, if this had been done when it should have been, rather than 50 years later, then a very different result would have taken place. The Crown failed in its duty of active protection. It should have derived correct title through Maori custom at the time of the ‘supposed purchases’, not 50 years later in the Native Land Court.¹⁰

(2) *The northern allies*

Ngati Tama, Te Atiawa, Ngati Rarua, and Ngati Koata advanced similar claims, largely arguing the general case as outlined above. They had particular submissions about the process of arriving at deeds of release, which affected them but not Ngati Toa or the Kurahaupo peoples. Ngati Rarua, for example, submitted that they were not consulted over the decision to move to arbitration, that they had no opportunity to select a representative or advocate, and that the representative selected, Protector Clarke junior, was unsatisfactory. Counsel also submitted that Ngati Rarua were pressured by the Crown to settle quickly, though they ‘initially rejected the terms of the settlement’ and accepted them only after two days of ‘pressurized negotiations’, when it became apparent that ‘if they resisted the settlement they would receive nothing’.¹¹

In Ngati Tama’s view, matters were predetermined not merely by the November Agreement but also by Spain’s prior investigation of the Ngati Toa chiefs for Port Nicholson. Questioning those chiefs was hardly an adequate inquiry into the nature of customary practices that regulated the transfer of property, or who held such rights, in Te Tau Ihu. But, argued Ngati Tama, it may nonetheless have predetermined the outcome at Nelson because of Spain’s improper reliance on the Kapiti deed as justifying the outcomes he wanted to reach.¹²

Te Atiawa made the most technical of the claimants’ submissions, relying particularly on whether or not Spain had acted in accordance with his empowering ordinance. If not, counsel argued, then the Crown breached Treaty principles relating to good government as well as to active protection, in basing its Crown grant on an invalid commissioner’s report on a wrongly validated transaction. On this reading, Spain’s adjournment of his Nelson hearing

9. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p100

10. Ibid, pp 108–109

11. Counsel for Ngati Rarua, closing submissions, p36

12. Counsel for Ngati Tama, closing submissions, p 49

was ‘incompatible’ with the Land Claims Ordinance 1841.¹³ Had Spain completed his inquiry, counsel argued, he would have discovered that Te Rauparaha and Te Hiko did not have sole power to alienate the land. He would also have found that the local people had not signed or sighted the Kapiti deed, had no idea of its contents, and had not ‘at law, received any payment whatsoever for their land.’¹⁴ Spain’s report nonetheless relied on Captain Wakefield’s gift-giving, which ‘could not provide consideration at law’. Since the Crown and Spain were at all material times bound by the 1841 ordinance, and since Spain adjourned his investigation and took into account the ‘gifts given to Maori in 1841 and 1842 when such gifts were unlawful and/or of no effect’, he never conducted a ‘proper or lawful inquiry into the Company’s claims to the Tasman and Golden Bays.’¹⁵

Finally, we note that, in the submission of these claimants, the correct decision was made in 1892 about the ownership of the tenths. The indiscriminate use of their revenue before that date, however, for all Maori in the district (and sometimes in the whole of the South Island), and for general community purposes like welfare and social services, was manifestly incorrect. The long delay in ascertaining the true beneficiaries was one of many Treaty breaches associated with the Crown’s administration of the tenths.¹⁶

(3) *Kurahaupo tribes*

As with the northern allies, the Kurahaupo tribes shared many of the common issues with regard to the adequacy of Spain’s inquiry. They had their own perspective, however, about its outcome and particular effects for them. Ngati Kuia argued that they were improperly excluded from recognition by Spain, even though they were present at the inquiry and participated in the payment of money distributed after the signing of deeds of release.¹⁷ This exclusion was critical to their mana, and later to Judge Mackay’s faulty decision not to recognise their claim in the Nelson Tenths.

Ngati Apa submitted that one of the fundamental aspects of an inquiry into the validity of a purchase must surely be the identification of iwi that had customary rights in the area supposedly purchased. Validity depended on the consent of all who had customary rights in the lands, forests, fisheries, and other taonga affected by the purchase. This required the process that McLean had to undergo in the Manawatu – that of literally walking the lands to meet all those occupying in areas sought to be purchased, so that the Crown was aware of all who claimed rights. Meurant and Clarke, on the other hand, spoke only to some northern iwi in the coastal Nelson area, and Spain heard only a single witness. These facts are not disputed. And, yet, surveyors had encountered at least two families of Ngati Apa in the

13. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p 88

14. Ibid, pp 88–89

15. Ibid, pp 97–98

16. Counsel for Ngati Tama, closing submissions, pp 71–72

17. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 42–43

4.2

Waimea area, and Kereopa gave evidence that 21 named men of Kurahaupo descent were present at Wakatu at the time that Spain was there. These 21 men were likely to have had their families with them, which, counsel argued, would have made for quite a large presence in Tasman Bay at that time. Nonetheless, Spain's and his assistants' perfunctory inquiry did not identify those people.¹⁸

On the basis of Spain's unsatisfactory process, Ngati Apa alleged that they lost their rights forever to reoccupy the affected coastal lands in Tasman and Golden Bays. As they continued to regain their rights and status after 1840, they now found their lands (both coastal and interior) granted away to others by the Crown. Spain validated the New Zealand Company purchase without any regard for those people living on the land and coastal areas in a tributary state, and in hinterland areas in a free state. This was an enormous breach of the Treaty's guarantees.¹⁹

4.2 THE CROWN'S CASE

The Crown agreed with the claimants that Spain's inquiry was inadequate and that there were prejudicial affects for Maori. It did not, however, concede specifically that the Treaty had been breached. As we noted in chapter 3, the Crown's standards for the Spain commission were as follows.

In November 1842, the Governor of the company protested to Lord Stanley about the Spain commission, objecting that there was nothing in the November Agreement that made it conditional upon the company having acquired valid titles. If there was still any extinguishment of Maori title required, that was the Crown's duty. The Colonial Office responded that the company's title was not investigated by Pennington and that its assumed validity was the basis of the promised grant; if the facts proved otherwise, the company would have to bear the results. As part of correspondence in 1843, in which the company suggested that the Treaty was unratified and of no legal effect, Stanley replied that it could not be set aside now that the Crown enjoyed the advantages that it guaranteed. The Crown's obligations must be honoured, and Lord Stanley would 'not admit that any person, or any Government acting in the name of Her Majesty, can contract a legal, moral, or honorary obligation to despoil others of their lawful and equitable rights.'²⁰ On that basis, the Spain commission proceeded without interdiction from London.

Spain, the Crown argued, saw his duty in the same manner. In 1842, he wrote to Hobson that, if the Government had intended to simply admit the company's titles to be good and

18. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), pp 17–18

19. Ibid, p 19

20. Crown counsel, submission concerning generic issues, p 16

grant them the land they were entitled to under the Pennington award, then it would have made the company's claims exempt from the operation of the Land Claims Commission. But it did not. Such an approach would have been a:

manifest injustice to the aboriginal inhabitants of this country, and so totally inconsistent and irreconcilable with the profession made to them, that Her Majesty would afford equal protection to all Her subjects, whether native or European, I confess I have not been able to believe that such an intention ever existed.²¹

In 1843, Spain commented further:

It appears to me, that a consent on the part of the Government to grant to the Company the land which, according to Mr Pennington's award, they were found to be ultimately entitled to, without obliging them to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the Treaty of Waitangi, and in violation of all the assurances of Her Majesty's Government to the aborigines, of affording them justice and protection.²²

Dr Ballara details the gulf between Spain and the company, stating the company's belief that, even if the original agreements with Maori were defective, its 'settlers had a better right to land than sparse Maori populations who did not make proper use of it'. Spain and other officials, however, 'considered themselves bound by the Treaty and the British Government's instructions to protect Maori interests by a full investigation.'²³ These standards, the Crown conceded, were not met. Spain acted with a 'degree of ruthless pragmatism that saw the Treaty either sidelined or made secondary to the needs of the settlers and the New Zealand Company.'²⁴

In the Crown's submission, Spain had access to advice from those considered to possess knowledge of Maori customary concepts. In examining Spain's Nelson investigations, the Crown argued that Spain consistently held to the view that the 1840 agreement did not remove the need for a 'searching inquiry' into the company's extinction of the native title.²⁵ But, having said that, the Crown examined Spain's behaviour in his Wellington inquiry. For instance, in February 1843, and already aware of the company's imperfect title, Spain instructed Wakefield to pay further compensation to Wellington Maori. This clearly pointed the way for a Nelson settlement. But, in contrast to the long-running Wellington inquiry, the Crown admitted that Spain's Nelson inquiry was adjourned as early as the second day and replaced by a negotiation or an arbitration. As the Crown described it, 'by the time of

21. Quoted in Crown counsel, submission concerning generic issues, p 17

22. Quoted in Crown counsel, submission concerning generic issues, pp 17-18

23. Crown counsel, submission concerning generic issues, p 18

24. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 2

25. Ibid, p 42

the Nelson inquiry, Spain (and Clarke) appeared to have developed a *modus operandi* to ensure a relatively quick process.²⁶

The Crown's concessions of fact were based mainly on the evidence of its historian, Dr Gould. It admitted that Spain's Nelson hearing was very short and that it did not extend to the people of the Nelson district sufficient opportunity to relate their understanding of the events. Spain heard from only one Maori witness, Te Iti, a Ngati Rarua rangatira. His evidence was interrupted by Protector Clarke junior, who suggested that Te Iti was not telling the truth. There were other Maori present from whom the commissioner could have extracted further evidence. Spain and Clarke should have been able to understand that the original tangata whenua of the area had a presence within the district defined by Spain's findings in 1845, in which the tenths arrangements existed. Spain was clearly aware of the existence of one group he referred to as Rangitane. Because of the speed of the inquiry, it is doubtful whether Clarke was able to inquire into or consider properly the status of the original tangata whenua people.²⁷

In principle, however, the Crown argued that there was no Treaty breach and no illegality in a switch from an investigation of title to arbitrated compensation. The Crown accepted claimant counsels' position – especially as outlined by Dr Williams – that Spain's appointment and legal authority were based on the Land Claims Ordinance 1841. Nonetheless, there was an issue as to how far the Governor and commissioner were in fact bound by some of the terms of that ordinance, as argued, for instance, by counsel for Te Atiawa. This was because its last clause provided that nothing in it was to affect the 'right or prerogative of Her Majesty'. Moreover, local ordinances did not fetter the Governor's prerogative powers to grant land. In the Crown's view, that had another important implication. Although the ordinance made no provision for commissioners such as Spain to abandon their judicial inquiries for an arbitrated settlement, any such move and any award resulting from it could be authorised and confirmed by the Governor under his prerogative power.²⁸

There is, the Crown argued, evidence of some Maori support for the compensation option. This consists of Meurant's report to Spain that Maori were willing to acknowledge a sale in return for further payments. The extent of any such willingness across all Te Tau Ihu Maori 'is not clear'. The only evidence of active objection came from Golden Bay, which Meurant had not visited.²⁹

Under the heading 'Effect of failure to conduct full inquiry', the Crown acknowledged that Nelson Maori did not have a sufficient opportunity to relate their understanding of events. The evidence is inconclusive precisely because the inquiry was so abbreviated. Unlike the Wellington inquiry, where extensive evidence was heard and recorded, the Nelson inquiry

26. Crown counsel, closing submissions, p 47

27. Crown counsel, opening submissions, pp 13–14

28. Crown counsel, closing submissions, pp 40–42, 48

29. *Ibid*, pp 48–49

was so short that there is very little contemporary record of what Maori thought about customary rights and the company's transactions. Similarly:

it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.³⁰

With regard to customary rights and the tenths, the Crown acknowledged the claim that it did not attempt to ensure that all iwi who sold land to the Nelson settlement obtained a proportionate share of the tenths, nor did it hold any investigation or consultation to determine what that proportionate share might be. This problem affected the creation of the suburban reserves, which were all selected in the Motueka and Moutere districts, and the rural tenths, which were effectively pre-empted by land set aside in the Wairau district alone. The Crown accepted that this claim is well founded.³¹

The Crown also acknowledged that there may have been a breach of Treaty principles arising from the exclusion of Ngati Apa, Ngati Kuia, Rangitane, and Ngati Toa from a beneficial interest in the tenths estate and in the correctness of the allocation of interests as between the four successful iwi.³² But the Crown advanced no view on this claim. Rather, it suggested that there was nothing so faulty in substance or process as to have justified any Crown intervention after the Native Land Court tenths decision.³³ If the Tribunal concludes that there has been a Treaty breach (as it did in Wellington over the exclusion of Ngati Toa), the Crown suggested that it would be inappropriate to retrospectively deem that new classes of beneficiaries should be included in a trust estate of such long standing. The matter would need to be settled by negotiation between the Crown and affected claimants.³⁴

4.3 AGREEMENT BETWEEN THE PARTIES

As is apparent from the previous sections, the Crown and claimants agreed on some key issues with regard to Spain's inquiry, although the Crown confined itself to concessions of fact rather than of Treaty breach. The claimants, however, do not agree among themselves as to who should have been beneficiaries of the tenths.

30. Ibid, pp 49–50

31. Ibid, pp 65, 71–72

32. Ibid, pp 60, 83–84

33. Ibid, p 83

34. Ibid, p 84

From our discussion of the parties' arguments, we consider that the following points are agreed:

- ▶ Commissioner Spain's inquiry into customary rights and Maori understanding of – and agreement to – the company's transaction was totally inadequate, which had prejudicial effects for Te Tau Ihu Maori.
- ▶ In particular, Meurant visited only some districts in Tasman Bay, Clarke did not have time to inquire informally, and Spain heard only one Maori witness, while many others were present who could and should have been heard. Even the evidence of that one Maori witness, Te Iti, was not given its due weight. Spain dismissed it on the basis of an accusation that it was untruthful, which was made by the company agent and the protector, who did not call any evidence to corroborate their accusation. Tasman Bay tribes therefore did not have a proper opportunity to put their evidence on their understanding of what (if anything) had been agreed with Captain Wakefield, what rights (if any) Ngati Toa could or did alienate, whose rights were affected, and who had authority to decide such matters. Golden Bay communities had no opportunity to be heard at all and definitely did not consent in advance to an arbitrated settlement or to the amount of compensation determined for them to receive.
- ▶ The Crown should have inquired into and established how Maori customary rights related to their share of the Nelson Tenth's at the time. To have left it for 50 years was wrong and unfair.

The Crown's other concessions either did not go as far as the claimant position or were not entirely agreed among the claimants. The Crown, for example, acknowledged that Spain and Clarke could (and should) have inquired into the rights of the Kurahaupo tribes, a point not necessarily accepted by the northern allies. It also agreed with the claimants that Spain had to operate according to the 1841 ordinance, but the parties, of course, do not agree on the legal or Treaty implications of that requirement. Also, the Crown thought it 'probable' that Tasman Bay Maori were given no choice but to agree to arbitration and compensation, and even to the amount of compensation, but considered the evidence 'inconclusive'. Similarly, it was 'possible' that right-holders were left out, who neither consented nor were compensated. The claimants, on the other hand, considered the evidential foundation strong enough to take these conclusions further. They believe that the Tribunal can come to a definite view that Maori did not consent to a switch from investigation to arbitration–compensation and that the 'arbitration' was in fact a coercive process in which they were given no choice but to accept deeds of release and a dictated amount of compensation.

Significant issues remain in contention, which we will address in our final report and, where relevant to the issue of customary rights, in the following sections.

4.4 THE CROWN'S TREATY DUTY: INVESTIGATION AND ARBITRATION

It will be clear from our discussion in chapter 3 that the Crown had a Treaty duty to ensure that the company had made a valid purchase of land (and from the correct 'vendors') before confirming its title. The Crown thought so too, both then and now. In its submissions in our inquiry, the Crown relied on Normanby's instruction that there be an investigation, the Colonial Office's insistence to the company that it could not have title without one, and Spain's own view that to award title without first investigating and confirming its validity would have been in breach of the Treaty. We accept the Crown's submissions. These are the standards against which its actions must be judged.

The Crown conceded that it did not meet these standards but suggested that the switch from inquiry to arbitration was not necessarily in breach of the Treaty. Much depended on whether Maori supported such a switch and participated in (rather than being objects of) the arbitration and, ultimately, whether they consented to the final arrangements. Much depended also on the objective of the switch. Was it carried out with a view to properly balancing the Crown's obligations to its Maori and settler subjects and its commitments in the November Agreement and the Treaty?

We are of the view that there was nothing inherently incompatible in the November Agreement and the Treaty, so long as both were interpreted correctly. In Dr Gould's evidence, Hobson made the crucial failure of not interfering with or supervising Captain Wakefield's actions in 1841–42, because the Governor believed that the November Agreement gave the company title wherever its officials chose to select land in 'their' district. Hobson's failure was a critical one, and in breach of Treaty principles.³⁵ That was clearly the case according to the Colonial Office and Spain, who maintained that the agreement did not give the company an inch of soil unless it could prove a valid alienation had taken place from Maori. How, then, did Spain go from that perspective to arbitrating a perfection of invalid titles, imposing awards of compensation on those who had not alienated their rights?

In the Crown's view, Spain rightly considered that Maori admitted an incomplete purchase and that they wanted the settlers to stay. Nor was it in the interests of Maori for the settlers to leave, which would probably be the consequence if Maori were allowed to insist on market prices to complete the purchase. Political motives predominated; the Government wanted to put the settlers in possession of the land they had purchased in good faith from the company, and it had to be done cheaply, but the assumption was that this would benefit Maori as well.

It was Spain's responsibility, as a commissioner appointed under the 1841 ordinance, to investigate the validity of the company's purchases. Under that ordinance, Spain had no obligation to award the company any land, no matter what the November Agreement said.

35. Dr Ashley Gould, 'The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5), pp 20, 62–64

Counsel debated technical legal questions with regard to this ordinance. Did it restrict Spain to recommending a maximum of 2560 acres? Did the Governor have to go through the form of consulting the Executive Council before extending such awards? Did the saving of the Crown's prerogative allow it to make grants anyway, to any extent, and without regard to the commissioner's reports?³⁶ Could the Governor alone exercise the prerogative or did it rest with the Secretary of State in London?³⁷ All of these issues go to questions of good government. Under the Treaty, the Crown ought to keep its own laws and enactments so that British subjects may be assured that the Government is acting legally and governing properly. These are important matters but not of direct relevance to how Spain dealt with customary rights, and we leave them to be addressed in our final report.

Here, we note that the November Agreement did not require a breach of the 1841 ordinance or force a finding in the company's favour. The Crown could still have met its four-acres-per-pound expenditure obligation to the company by purchasing the necessary land from Maori, and, indeed, the company had suggested that as a solution in London. 'The duty of extinguishing any Native title', asserted Somes, the governor of the New Zealand Company, in 1842, 'is the duty of Government alone.'³⁸ In New Zealand, Shortland suggested the same thing in 1843.³⁹ FitzRoy waived pre-emption so that the company could purchase land itself, as it did in Otago, while Governor Grey purchased the Wairau to help the company fulfil its quota of rural sections.

Any fresh transaction, however, required the free and informed consent of Maori, which carried risks for the Crown. On the one hand, Maori might say 'No', although that was unlikely since they wanted to keep settlers. They would, however, have the opportunity to decide what places and how much land to now transfer absolutely to the company, according to their own decision-making mechanisms. This was what the Treaty had guaranteed to them. On the other hand, Spain feared that they might ask for what the land now appeared to be worth, rather than accepting pre-1840 prices. Spain, therefore, chose the path of allowing the company to 'complete' its Nelson purchase by paying further 'compensation', at pre-1840 levels, as he had already done in Wellington.⁴⁰ In this choice, he had the permission and support of Shortland and FitzRoy.

The parties agreed that the context for Spain's Nelson decision was his earlier one to switch to arbitration in Wellington. Claimant counsel generally accepted the discussion of the Te Whanganui a Tara Tribunal on that choice, as do we. Spain had already conducted a

36. Counsel for Te Atiawa, closing submissions, pp77-80, 97-98; Crown counsel, closing submissions, pp37-44

37. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol2, pp298-299

38. Quoted in Crown counsel, submission concerning generic issues, p15

39. Gould, pp74-75

40. Gould, pp78-79; Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp74, 80

reasonably thorough inquiry into the Wellington claim and had come to the conclusion that, had he made a formal decision, the company would have been awarded very little land on the strength of its Port Nicholson deed. He viewed the Kapiti deed in much the same way. But as early as August 1842, four months after beginning his inquiry in Wellington, Spain was willing to act as an arbitrator. This was approved by the Acting Governor in January 1843, although it was not until the end of January the following year that the policy was imposed by FitzRoy, Clarke, and Spain on reluctant Wellington Maori.⁴¹ The Wellington Tribunal concluded that Spain's arbitration process was irreconcilable with the Land Claims Ordinance 1841. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was subject to pressure by Spain to reach an agreement with Wakefield.⁴²

We agree with the claimants that that conclusion also applies to the Nelson case, though perhaps with greater force, since Spain terminated that inquiry in favour of arbitration at a much earlier stage – indeed, before any Maori witnesses other than Te Iti had been heard. As in Wellington, Maori were not consulted over the decision to change from investigation to arbitration or over who would 'represent' them. We comment further on this issue below when we discuss the conduct of the arbitration in Nelson and make a finding on whether Maori customary decision-making (*tino rangatiratanga*) was respected and protected in that process (sec 4.4.3).

The termination of the Nelson hearing and the move to arbitration meant that Spain ceased his inquiry into the validity of the Kapiti and Queen Charlotte Sound deeds. Yet, the Kapiti deed at least was still regarded as providing a foundation for the Nelson award once the 1841–42 'presents' and the company's payments, following the arbitration, were taken into account. In section 4.4.2, we will address the question of what validity such arrangements – and the company's transaction – had in Maori law, and whether that was discoverable by Spain upon reasonable inquiry in 1844. First, however, we must describe Spain's decision on customary rights and the validity of the company's purchase.

4.4.1 Spain's decision on customary rights and the validity of the company's transactions

Spain's decision was delivered orally in August 1844, at the conclusion of the arbitration proceedings. He announced:

Were I called upon, in the execution of my duty as Her Majesty's Commissioner, to decide whether you were properly entitled to receive any payment, I could not have awarded you any further compensation now, and for this reason: these lands were purchased long ago by

41. Crown counsel, closing submissions, p 41; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 113–144

42. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 116–117

Colonel Wakefield, of Rauparaha and others at Kapiti. When Captain Wakefield afterwards came here, he went amongst you in the different districts, and made you large and liberal presents. The goods given in payment at Kapiti were very numerous, and those goods, added to what Captain Wakefield gave you and the money now offered, make the price of these lands higher than any that has ever been paid for in this country. The district which has been lately paid for at Otakou was purchased at a lower rate than this, though the land was nearly treble the quantity. But the Queen and the Governor wish to do something more for you now, and therefore Mr Clarke has been sent to represent you in Court, and to advocate your interests. He has awarded you the money which you have come this day to receive, not as a payment, but for the sake of making friends of you and the white people; to put an end to all the quarrels and disputes about the land, so that both races in this settlement may live peaceably and happily together in future.⁴³

Essentially, the commissioner repeated this decision in his formal report to Governor FitzRoy of March 1845. In the view of the Crown's historian, Dr Gould, this involved Spain in 'mental gymnastics' in order to 'at first confirm that Ngati Toa Rangatira had sold the region to the company, and at the same time deny Ngati Toa any lasting interest vis-à-vis the local inhabitants'.⁴⁴

The commissioner began by discussing his examination of Te Rauparaha and Te Rangihaeata at Otaki in 1843, which had focused on finding out what land *they* considered they had sold under the Kapiti deed. Te Rauparaha denied that he had 'sold' anything other than Taitapu, which Spain described as a 'district' in Golden Bay, and Te Rangihaeata denied that he had 'sold' more than Wakatu, or Nelson Haven. Two other Ngati Toa chiefs, Hiko and Tutahanga, gave similar evidence. Spain was 'perfectly willing to entertain the claim of the Ngatitooa chiefs . . . so far as I was assured of their actual residence on and cultivation of parts of the various portions of land of which they declared themselves owners'. He had, however, 'more than once laid down . . . that mere conquest, unsupported by actual and permanent occupation, and more particularly where the conquered parties still remain in occupation, or having left it for a short time return and occupy it for a series of years, bestows no title on the invaders'. Spain concluded that he therefore had a 'duty to receive the evidence, and listen to the statements of the Natives residing within the blocks surveyed by the company . . . in order to ascertain who were the actual owners, according to what I found to be the Native custom'.⁴⁵

This suggests that Spain was prepared to hear a variety of witnesses from the groups in occupation of land already surveyed around Nelson for the company settlers, as indeed he

43. Minutes of proceedings, 24 August 1844, Alexander Mackay, comp, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols (Wellington: Government Printer, 1872–73), vol 1, p 61

44. Gould, p 50

45. 'Mr Commissioner Spain's Report to Governor FitzRoy, on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, p 55

was obliged to do for the thorough inquiry into the company purchase that was required by the Land Purchase Ordinance. Before reporting his hearing of evidence, however, the commissioner noted the outcome of Meurant's preliminary visit, and his subsequent advice to Spain that 'the Natives were anxiously waiting my coming amongst them, and that there existed a favourable disposition in the minds of those in the neighbourhood of Nelson, Motueka, and Massacre Bay'.⁴⁶ This 'favourable disposition', Spain believed, had arisen from the 'presents' that Captain Arthur Wakefield had distributed, though he admitted that further payments might be requested. Spain praised Captain Wakefield for 'this liberal and judicious policy' and regretted only that he had failed to describe his 'presents' as purchases and to obtain receipts for those payments. 'Had this been done', Spain continued, 'I have little doubt that the resident Natives would have regarded and acknowledged the transaction as a regular sale and disposal of their lands.'⁴⁷ Later on in his report, however, Spain actually claimed that 'the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the lands.'⁴⁸

Spain was so satisfied with the additional 'payments' made by Wakefield that he was:

inclined to conclude that the resident Natives had not only been amply remunerated for their land by presents in which, with scarcely an exception, they had all participated, but that they were aware at the time of the nature and satisfied with the termination of the transaction to which they had been parties.

As Spain announced in the speech of 24 August 1844 that we quoted above, he would have been prepared to make an award to the company without further payment. Indeed, Colonel Wakefield's offer of an additional payment of £800 was regarded by Spain as a bonus that had to be seized quickly:

But when I found Colonel Wakefield ready, after examining but one Native witness, to negotiate for a further payment, and understood from Mr Clarke that he was prepared to arrange for the final alienation of the Native claims by the payment of a few hundred pounds, which the Principal Agent was willing to advance, I was glad of an opportunity of so easily complying with the expectations without acknowledging the rights of the Natives, and by effecting an immediate adjustment, of leaving this settlement in quiet possession of the land, and on amicable terms with the resident aborigines.⁴⁹

On what evidence did the commissioner base this conclusion? It involved more 'mental gymnastics', because he had to argue that gifts which Wakefield specifically told Maori were presents upon settling and not payments for their land were in fact understood by Maori

46. Ibid

47. Ibid, p 56

48. Ibid

49. Ibid, p 57

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to be payments for the permanent alienation of their land. With no deeds and no agreed boundaries, as he found, there was nonetheless an understanding among Maori that they had sold all their lands save their residences, cultivations, and tenths reserves. In Spain's view, this was because the distinction between a present and a payment was 'too fine-drawn' for Maori to make.⁵⁰ They must, therefore, have understood presents as payments. If they admitted receipt of presents, then they admitted permanent alienation of their land. This reasoning is so antithetical to Maori custom, as we will explain in the next section, that we have to stress the extremely thin (in fact, non-existent) evidential base on which Spain rested this conclusion.

Ultimately, it came down to the evidence of Te Iti, even though that evidence was interrupted. In Dr Ballara's view, Spain had sufficient knowledge (with Clarke) to have uncovered the truth if and when he asked the right questions.⁵¹ But neither the protector nor the commissioner questioned the witness about the meaning of presents in Maori custom. As we have seen in chapter 2, there was a rich lore – and law – about *tuku* in Te Tau Ihu, which is still known and practised today. Spain came to a decision that presents would have been understood as payment for a permanent alienation, but he had – and could recite – no evidence for this. Indeed, Te Iti's answers to the questions that he *was* asked ought to have given the commissioner serious pause, suggesting as they did that Maori saw the transaction as a customary *tuku*, not an outright sale.

Spain's conclusion that Maori understood Wakefield's gift-giving as 'an alienation of their rights and interests in the lands treated of' was based on a single piece of evidence, that being that the local people had 'stipulated for the retention' of the Big Wood at Motueka and their pa and cultivations. Had he inquired further (or at all), Spain must have discovered the shared resource-use arrangements at a place like Wakatu, where groups congregated at various time to fish, gather flax, and use other resources, and the more exclusive occupation of certain places on which the tribes would naturally have insisted. Te Iti's evidence was that local Maori had agreed to the settlers coming to live among them, and to sharing some lands with them, in return for ongoing gift-giving and other advantages. There is nothing inconsistent here with stipulations that certain places were for the exclusive occupation of one side or the other. Spain's reasoning on this point could only hold up because of his failure to inquire. Spain did note Te Iti's expectation of further 'payments', and his evidence that boundaries may not have been agreed, but he did not ask any questions about the nature of Maori custom or what such points – if proven – may have meant.

Rather, Spain concluded:

50. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56

51. Dr Angela Ballara, 'Summary of Selected Aspects of an Historical Overview Report Prepared in Response to Questions from the Waitangi Tribunal', report to the Waitangi Tribunal, 2002 (doc F1), pp 2, 4–6

Under these circumstances I was inclined to conclude that the resident Natives had not only been amply remunerated for their land by presents in which, with scarcely an exception, they had all participated, but that they were aware at the time of the nature and satisfied with the termination of the transaction to which they had been parties. I also bore in mind that the lands included in the Company's surveys, with the exception of the Wairau, were those of which Rauparaha and Rangihaeata had admitted the sale to Colonel Wakefield at Kapiti, under the denominations of Wakatu and Taitapu. Thus, whatever might have been their right to or interest in these lands, by their own evidence it had been alienated and paid for. Unless, therefore, some much stronger evidence than I had yet heard could be given by the Natives in contravention of the statements made by the English witnesses, I was prepared to decide in favour of the Company, without allowing the resident Natives any further compensation.⁵²

Yet, it was at this very point in the proceedings that Wakefield offered to pay compensation. Spain and Clarke agreed that the matter could be settled for a few hundred pounds but that there was to be no acknowledgement that Maori still had unalienated rights to be settled. We will consider the further mental gymnastics involved in bringing this about, while yet signing deeds of release, in section 4.4.2.

Spain did not finish his report at the point at which he concluded that resident Maori had permanently alienated their land on receipt of Wakefield's presents. He still had to resolve the conundrum of how their rights related to those of Ngati Toa. He did so without any inquiry on this point at all, either of Ngati Toa or Golden Bay Maori (who were not present) or resident Tasman Bay Maori (who were present). He began by reiterating his now strongly held view that conquest without subsequent occupation could not confer title and that the rights of occupants (including defeated peoples) prevailed:

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.⁵³

52. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57

53. *Ibid*, p 58

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In view of this principle, which Spain said was ‘universally acknowledged’, the very act of Captain Wakefield:

paying over again (for such was the real state of the case) the actual residents whom he found in occupation and undisturbed possession for the very land which, two years before, had been pretended to be conveyed to the Company by two or three chiefs of another tribe, affords so convincing a proof, from a quarter where least expected, at once of the justice of my decisions, and the deficiency, and his conviction of the deficiency, of the original purchase, that I cannot pass over it without particular observation.⁵⁴

In his oral decision, Spain had based his judgment in part on the Kapiti deed, and he still relied on it in his final report. Yet, he concluded that this alleged purchase was ‘as enormous in extent as the [company] claim which was advanced under it was preposterous in principle’. Land thus ‘sold’ by Ngati Toa was land ‘to which those who pretended to convey it had not in equity or by Native custom the shadow of a right’, because they had not followed conquest with occupation.⁵⁵

This does not sit well with his oral decision, nor his prevarication about whether or not Ngati Toa actually had rights to sell. On the one hand, he argued that they had only such rights in the Wairau, Sounds, and Cloudy Bay – yet, if they did have rights in western Te Tau Ihu, those were now admittedly sold. Even so, there appears to have been no inquiry about what exactly was conveyed, if anything, in Ngati Toa’s admission to have ‘sold’ Taitapu and Wakatu. At one point, Spain relied on Brook’s evidence that Taitapu was in Tasman Bay.⁵⁶ This mistake was based on Clarke’s cross-examination of Brook.⁵⁷ At other points, Spain considered it a district in Golden Bay, forming part of the Nelson settlement, and then he equated it with the whole of Golden Bay.⁵⁸ These three very different versions of what Te Rauparaha intended to convey, all contained in the same brief report, demonstrate the lack of specific or reliable evidence uncovered by Spain on this point. We will return to this issue below, when we examine Ngati Toa’s claim.

We turn now to the specific question of whether Spain, having carried out an inadequate inquiry, was nonetheless correct or had proper grounds for his finding that the company transaction was valid.

54. ‘Spain’s Report to FitzRoy’, 31 March 1845, *Compendium*, vol 1, p 58

55. *Ibid*, pp 57–58

56. *Ibid*, p 58. Brook interpreted for the company at the negotiation of the Kapiti deed in 1839.

57. Tony Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol 1), p 108

58. ‘Spain’s Report to FitzRoy’, 31 March 1845, *Compendium*, vol 1, pp 55, 59. The third definition made it into the 1844 deeds of release, where Golden Bay was described in both the Maori and English versions as ‘Te Taitapu (Massacre Bay)’: copies of deeds of release, *Compendium*, vol 1, p 67.

4.4.2 Captain Wakefield's 'presents' and the question of whether an absolute alienation had taken place under either Maori or British law

The Crown and claimants agreed that Spain's inquiry did not permit Maori to give their evidence of how they saw the 1841 arrangements with Captain Wakefield and thus their understanding was not uncovered or taken into account by Spain. Despite not inquiring fully, Spain's oral findings of 1844 and his report of 1845 rested on the following convictions:

- ▶ that there had been a purchase from Ngati Toa leaders at Kapiti, because – if invalid in so many other ways – they had at least testified to an intention to 'sell' 'Wakatu' and 'Taitapu';
- ▶ that there had been a purchase from resident Maori, because they accepted presents from Captain Wakefield and such presents must have been understood by them as payment for their land; and
- ▶ that these purchases amounted to an absolute alienation of land, after which the compensation arrangements were a 'gratuity' to mend relations and rectify any omissions.⁵⁹

Spain based these conclusions on:

- ▶ his examination of Ngati Toa leaders in 1843;
- ▶ indirect evidence (reported by Meurant) that Maori resident in Tasman Bay acknowledged a sale but wanted a further payment;
- ▶ the evidence of the company witnesses heard in a day;
- ▶ the testimony of Te Iti that he had received Wakefield's presents; and
- ▶ Protector Clarke's stated intention not to contest the company's claim to Golden Bay.⁶⁰

The historians in our inquiry agreed that this was, in the words of Dr Gould, a 'flimsy' basis for deciding that the company had absolute title to 151,000 acres of land, minus reserves.⁶¹

A key issue for the Tribunal is whether Captain Wakefield's gift-giving could be considered the basis of a purchase in British law, and what kind of significance it had in Maori law. On the first issue, Spain took the view that Captain Wakefield disguised payments for land as presents, without deeds or recorded boundaries, because to do otherwise would have amounted to an admission that the Kapiti deed was insufficient.⁶² We agree. But there was an even more compelling reason, not noted by Spain. Gipps and Hobson had issued proclamations forbidding private persons from buying land in New Zealand. Unless the Crown waived its right of pre-emption, Wakefield could not legally purchase Nelson lands. Dr Gould, for the Crown, carried out a careful study to determine whether pre-emption

59. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, pp 54–60; minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61

60. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, pp 54–60

61. See, for example, Gould, pp 20, 50

62. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56

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was in fact waived in favour of the company in Tasman Bay and concluded that it was not.⁶³ Unlike the Colonial Office, however, Hobson took the view that the November Agreement was an express or implied commitment that the company settlers should have their land. He felt unable, in Gould's evidence, to stop or interfere in Wakefield's establishment of a new settlement at Nelson, despite Clarke's advice that Colonel Wakefield could not possibly have purchased the company 'district' from just a handful of chiefs, without the consent of its inhabitants.⁶⁴

Thus, Captain Wakefield met with the assembled Nelson tribes and informed them that their land had been purchased from Ngati Toa at Kapiti but that he was nonetheless going to give them 'presents upon settling'. There appears to have been discussion of where the settlers would be located and something approaching an attempt to explain the tenths system and to designate areas that Maori wanted to keep exclusively to themselves. Resident Maori maintained that Te Rauparaha could not transfer land without their consent but that they were wanted the settlers to stay.⁶⁵ In the absence of deeds or any of the legal accoutrements of a purchase, this transaction was an oral one based on two different systems of law. Wakefield's view was that a British-style purchase had happened at Kapiti and he was merely giving gifts to the residents before settling among them. The Maori view, as communicated by Te Iti in his evidence to Spain, and as demonstrated by Maori actions outside of the restricted opportunity to be heard, was that they had made a customary tuku in which:

- ▶ the company settlers could take up residence;
- ▶ certain districts and resources would be shared;
- ▶ other places would be held exclusively by those making or those receiving the tuku; and
- ▶ the company would need to make further gifts to cement and maintain the arrangement.

The historical evidence is firmly in favour of this interpretation.⁶⁶ In particular, Williams, Phillipson, and Walzl have carried out a detailed analysis of the cross-examination of Te Iti, the continued Maori use of resources in 'shared' districts, and the contemporary Maori view that they retained rights in 1844 (and, indeed, afterwards as well).⁶⁷ Because of its centrality to our findings, we summarise Te Iti's cross-examination here in some detail.⁶⁸

63. Gould, pp 56–63

64. Ibid, pp 62–64

65. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 53–61, 92–96

66. See, for example, SKL (Leah) Campbell, "A Living People": Ngati Kuia and the Crown, 1840–1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), pp 53–87

67. Dr David Williams, 'The Crown and Ngati Tama Ki Te Tau Ihu: A Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), pp 72–74, 83–90, 96–98; Phillipson, *The Northern South Island: Part 1*, pp 49–62, 76–80; Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 53–61, 92–96, 105–160, 225, 232

68. The following summary and quotations are taken from the unpublished minutes of the Spain commission, August 1844, OLC1/907, ArchivesNZ, Wellington.

Te Iti was questioned initially by Colonel Wakefield about his recollections of Captain Wakefield's giving of 'presents' in 1841. He confirmed that he had been at the meeting with the latter at Kaiterere. Asked 'what passed on that occasion concerning the land in this district', Te Iti replied:

I first began the talk to Capt Wakefield & I told Captain Wakefield I did not see the payment made to Rauparaha: that is all I said to him at that time. Capt Wakefield said he would give me some blankets, if I would receive them as a Present.

Te Iti described the blankets and other goods he received, including a dozen double-barrelled guns and powder. He was then asked whether, on receiving the goods, he consented 'to allow the occupation of the land by the settlers when they arrived?' 'Yes', Te Iti replied, 'on that occasion I did consent for the Europeans to settle but not to take all the land.' Asked if it had been explained to him that 'there would be reserves for the Natives' and whether he understood that, Te Iti replied:

I did not understand it from Capt Wakefield there was to be one part reserved for us. I said I would point out to Capt Wakefield what part I would let them have. Mr Wakefield said 'don't be afraid this will not be the last payment you will have from me.' I still persisted in showing Wakefield the land he shd have – I showed him from Kaiterere outwards to the ocean – and when I had showed him it was done – afterwards he encroached & came on this side.

Te Iti was then questioned about his interests in Waimea. He confirmed that he was a chief of that district but said that he had not consented to the occupation of it. His tribe had occupied Waimea for 20 years but had not cultivated there for the past six. Asked why they had abandoned it, Te Iti said that they had a great deal of cultivation at Motueka. He denied that they were anxious to have a town at Motueka and that he had said that the land there 'would not grow anything.' He also denied that reserves for Ngati Rarua at Motueka, including the Big Wood, were pointed out and returned to them, though he admitted that they were cultivating at the Big Wood. Te Iti admitted to Wakefield that his people had helped to build houses for European settlers at Motueka, adding that he was 'told the Europeans were to stop there for a short time. Were coming to live amongst us.'

Then Protector Clarke took up the questioning, covering much of the ground already covered by Colonel Wakefield. Asked whether he remembered the meeting at Kaiterere, Te Iti replied: 'Yes. I caused that meeting.' But he denied that he consented to 'let the Europeans take possession of land in this District'. Clarke came back and asked: 'Then what District did you consent to?' Te Iti replied: 'When I came over to Nelson I consented to let them have from Horoirangi [near Wakapuaka] to a stream called Moturoa.' He denied consenting to Europeans taking possession of any other place or that other members of his tribe had done so. Te Iti was asked whether he remembered what the interpreter Brook had said

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about reserving certain portions of the land. The chief replied that Brook 'told the Natives to keep from the Stream Moturoa to Kuriwaka'. But when he was asked whether Brook had told them at Kaiterere that 'the whole District wd be surveyed & certain proportion of the land wd be set apart for the use of the Natives', Te Iti replied: 'No, I did not understand that. I thought the surveying was a mere form.'

Clarke then asked Te Iti about a conversation they had had that morning when Te Iti admitted that Brook had told the Kaiterere meeting that the land would be 'divided between the Natives and the Europeans'. Te Iti admitted that Brook had said that. Clarke then asked Te Iti: 'How can you reconcile this answer with your last?' Te Iti replied, 'I did not exactly understand Brook's meaning at that time but I have lately understood it.' Asked what land he had in 'this District', Te Iti replied: 'From Nelson to Massacre Bay'. Clarke then asked Te Iti whether Te Rauparaha had a right to dispose of this land without his consent. Te Iti replied that he considered Te Rauparaha 'did wrong in selling it without informing us'.

The final recorded question came from from Spain, who asked:

Did not Capt Wakefield at the meeting wh[ich] you have alluded tell you the land had been previously sold by Rauparaha, Hiko & others to the NZ Company & that he only gave them the goods as presents but not as payment for the land but upon admitting the previous sale & allowing the Europeans take possession?

Te Iti replied, 'Yes. I received the presents [and] consented to allow the Europeans to settle on the land.' It was at this stage that Te Iti's evidence was interrupted by Wakefield, and he was not recalled.

Dr Williams, who presented a report for Ngati Tama, called this exchange with Te Iti 'a classic instance of people talking past each other.' He explained as follows:

The question, with an English law assumption about the importance of consideration being paid as the basis for a binding contract, is focussed on the receiving of goods and the 'obvious' conclusion that this was a regular disposal of land. The answer, with a tikanga Maori assumption about the importance of gifts to evidence a *tuku whenua*, is focussed on the welcoming of settlers and the 'obvious' conclusion that the settlers would settle alongside their Maori allies and share the use and resources of the ample land in the region.⁶⁹

We agree with this approach and consider that most of Te Iti's answers were consistent with it.

This does not mean, however, that the Maori understanding of the transaction was not discoverable upon due inquiry. Colonel Wakefield recorded in his diary that Maori sometimes 'betrayed a notion that the sale would not affect their interests, from an insufficiency of emigrants arriving to occupy so vast a place to prevent them retaining possession of any

69. Williams, p 86

parts they chose or even reselling them at the expiration of a reasonable period.⁷⁰ The commissioner could presumably have elicited this information from Wakefield or other company witnesses, as a British perception of Maori custom. Dr Phillipson refers to a recently-arrived Nelson missionary, Charles Reay, who wrote in 1845: 'it is not consistent with their practice to alienate their lands in perpetuo; but only during the life-time or during the convenience or occupancy of the party to whom it may be conveyed'. It was impossible, Reay thought, for Maori to have 'ceded absolutely and without reservation' their rights in the land.⁷¹ If a recently arrived missionary could uncover this aspect of Maori law at Te Tau Ihu, it was clearly not beyond the ability of Spain and Clarke to have discovered it, upon reasonable inquiry.⁷² As both Crown and claimants agree, however, there was no proper or adequate inquiry.

The Crown does not address the question directly of whether Wakefield's gifts were part of a customary tuku, though it acknowledges that Spain did not inquire adequately into customary rights, Maori understanding of the transactions, and – in fact – the validity of the transactions themselves. The Crown's historian, Dr Gould, did not comment either, other than to suggest that both Te Iti's evidence and continued Maori resource-use on settler sections could be construed as references to reserves and confusion about their location.⁷³ In our view, the available evidence supports Walzl's, Phillipson's, and Williams' interpretation. The recorded evidence of Te Iti, and Maori behaviour on company lands in the 1840s, was only explicable in terms of the continued operation of their customary law, and their belief in the arrangement with Captain Wakefield as an ongoing tuku relationship, in which some lands were shared, others were for exclusive use. In Maori law, there was no basis for considering Captain Wakefield's gifts as payments for an absolute alienation of land. There was, however, support for the fact that a customary transaction had taken place, conferring rights on the company's settlers.

What was the situation in British law? Here, we accept the submission of counsel for Te Atiawa. Wakefield made 'presents' because after the Gipps and Hobson proclamations and the signing of the Treaty, it was no longer possible to purchase land directly from Maori. There was nothing to prevent Wakefield from giving Maori presents but they had no legal standing as payments for land, and could not be used as the foundation of a purchase that could be validated by further payment. The available evidence is that Te Tau Ihu Maori who accepted what Captain Wakefield deliberately described to them as 'presents', did indeed regard them as such – that is, as a tuku whenua or a licence to occupy their land, albeit one that had to be renewed from time to time with further presents. We consider that there was some hypocrisy by company and Crown officials, including Spain, over this issue. They

70. Quoted in Campbell, p 82

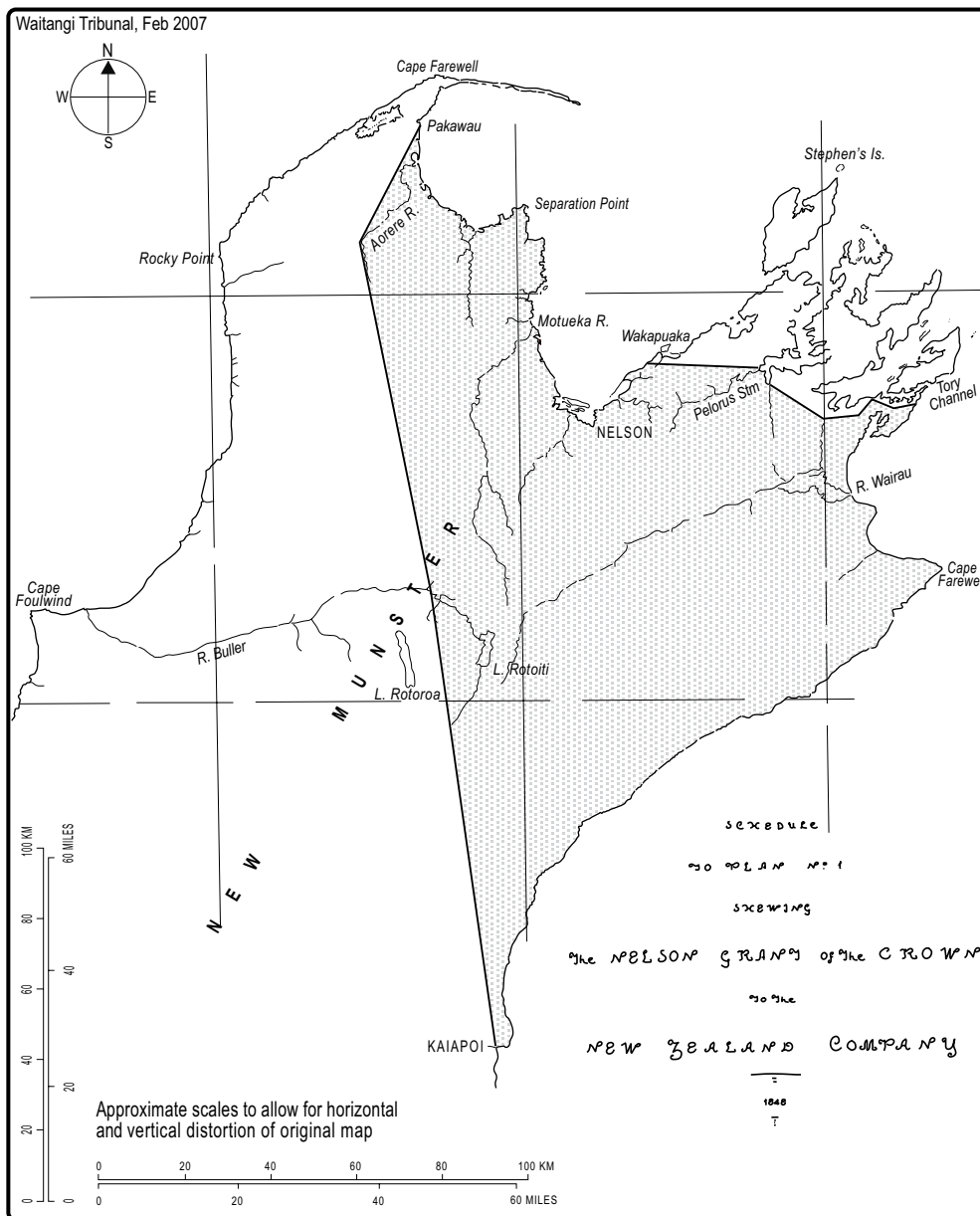
71. Quoted in Phillipson, *The Northern South Island: Part 1*, p 58)

72. Charles Reay of the Church Missionary Society arrived in New Zealand in 1842.

73. Gould, pp 81, 91, 95

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Map 8: The 1848 Crown grant. Source: s01054.

knew full well that the ‘presents’ had no legal standing but they gave them status as payments for a purchase that could then be completed by further ‘compensation.’ Indeed, Spain went so far as to say that no further payment was strictly required at all.

So what was the prejudice for Maori? Simply, their land was adjudged as belonging to others, and that judgement was given effect by Crown grant. Under British law, the ‘presents’ could not confound pre-emption and were of no legal effect. But Maori recognised that a relationship had been created, and rights conferred, under their own law. They did not want

the settlers to leave. To that extent, a negotiated solution would have been both fair and acceptable. But Commissioner Spain judged that a transfer of absolute title to 151,000 acres had taken place, and recommended that it be granted to settlers. Governors FitzRoy and Grey accepted this recommendation – indeed, Grey took it much further (see maps 3, 8). In the meantime, acting as an ‘umpire’, Spain proceeded to impose deeds of ‘release’ and supposedly gratuitous compensation payments. Everything now depended on this being a fair and equal process, by which Maori consent to an absolute alienation (with proper reserves) might yet be obtained.

We will consider that issue below. Here, we find that the acceptance of the 1841–42 ‘presents’ as payments for an absolute purchase of Nelson lands was in direct breach of the Crown’s proclamations and of the pre-emption clause of the Treaty of Waitangi. In neither British nor Maori law could they be used as a basis for validating the purchase of those lands. Further, the Crown’s reliance on Spain’s ‘award’ as the basis for its grant of land to settlers was in breach of the Treaty principles of reciprocity, partnership, and active protection. It violated the tino rangatiratanga of Maori, set aside their law and customary arrangements, and took their land from them on the mistaken basis that they had consented in 1841 to an absolute sale. This was not the case, and provable on the facts had Spain inquired properly.

4.4.3 Tino rangatiratanga and the arbitration process

As we noted in chapter 3, the Nelson hui about the Pakawau purchase was a good example of how the Crown could act with respect for tino rangatiratanga, by ensuring that all potential right-holders had been visited and knew what the Crown wanted, followed by an inter-tribal hui for them to discuss, agree, and arrange the matter for themselves. We now ask the question: was this standard met at the Nelson ‘arbitration’ hui of August 1844?

Spain’s Nelson hearing had been widely anticipated and a considerable number of people had arrived for it. Dr Gould notes, however, that the commissioner’s arrival was delayed and some people had given up and gone home by the time he opened his inquiry.⁷⁴ Nonetheless, a significant number of Tasman Bay hapu and their leaders were present. Although Meurant claimed that everyone approved Te Iti representing them, it is doubtful whether he could speak for all of the northern iwi, let alone groups from the Kurahaupo iwi who might have been present. In the negotiation, Crown officials did not rely on Te Iti but Nga Piko, another Ngati Rarua chief, to try to push through the compensation deal. He was paid £10 (on his request) for his trouble. Ngati Toa and Golden Bay hapu and leaders were not present, although the outcome of the arbitration was held to be binding on them. (Ngati Toa got nothing; Golden Bay people were presumed to agree to compensation of £290.⁷⁵)

74. Gould, pp 80–81

75. Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, pp 123–160

Any civil proceedings may be resolved by an out-of-court settlement, but Spain, unusually, reported that the resultant payments were a gratuitous arrangement for political purposes (not a settlement of claims). He proceeded to make findings on the validity of the company transaction as if he had conducted a full and proper inquiry. The arbitration was not, therefore, an out-of-court settlement. In other words, Spain stated that reaching a settlement on the initiative of the company made no difference whatsoever to his finding that the company's purchase was valid, or to his award of 151,000 acres (minus reserves) to the company. In coming to this decision without a proper inquiry or affording Maori the right to be heard, Spain was in serious breach of the principles of natural justice.

In our view, there is nothing wrong in principle with a settlement 'out of court', provided both parties agree to follow that procedure and fully participate in the negotiation, or are represented by advisers of their choosing. We have no doubt that one of the parties, the company, approved the change to arbitration. Indeed, Wakefield asked Spain to suspend the inquiry and authorise Clarke to negotiate with Maori to accept a further payment. Spain readily agreed and helped to facilitate the process, going with Clarke and Meurant to persuade Maori to accept 'the terms of the settlement we were anxious to accomplish.'⁷⁶ That was a telling admission, showing that the initiative came solely from the company and the Crown. Spain, Clarke, and Meurant were not asking the assembled Maori whether they preferred to negotiate rather than proceed with the hearing, but merely to accept a deal and the amount of compensation that they had already agreed with Wakefield. This was not even a true arbitration, as the arbitrator insisted that it made no difference to his findings, which were based upon his inquiry into the evidence. Spain announced that, had he been called on to decide whether Maori were entitled to receive any further payment, he would not have awarded them the compensation they were about to receive. They were getting it 'for the sake of making friends of you and the white people'. Payments were then made to chiefs from Motueka, from Wakatu and to chiefs of 'Ngatiawa'. All of them were required to sign deeds of release.⁷⁷

We deal first with issues of process and consent. We note the Crown's concession, cited above:

it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.⁷⁸

76. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56

77. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, pp 61–62

78. Crown counsel, closing submissions, pp 49–50

In our view, the evidence is firmer than was admitted by the Crown. Despite the sketchy nature of the records, it is clear that the Nelson tribes were not permitted to exercise their tino rangatiratanga at the two-day hui. The so-called arbitration was initiated by Wakefield, with Clarke's acquiescence, approved by Spain, and foisted on those Maori who were present at the meetings in Nelson. There is no evidence whatsoever that any of them were consulted or approved the decision to move from inquiry to arbitration, or even that they had any real chance to improve the amount being offered. Meurant's diary shows that the participants were permitted only one real exercise of tino rangatiratanga – the tribes divided up the money between themselves, according to a consensus reached on their relative entitlements. This was, as Meurant reported, debated between Ngati Tama of Wakapuaka and the others.⁷⁹ It also resulted in the inclusion of Kurahaupo people in part of the payment, according to the evidence of Ms Campbell for Ngati Kuia.⁸⁰ To that extent, tino rangatiratanga was respected and the arrangements of Maori confirmed by Spain and Clarke.

But not so for Golden Bay hapu. The sum of £290 was allotted to them by the agreement of the company and Protector referees, without their input, consent, or even their knowledge. One district and group (of the northern allies) was not even identified, because of the lack of inquiry. The Crown did not discover until much later that there were Ngati Tama living in the Wainui-Separation Point district who had received neither presents from Wakefield nor payment from Spain. Their existence and rights were simply overlooked.⁸¹

As for the communities in Golden Bay, Clarke visited the district and determined the answer to the commissioner's sole question – did local Maori admit receipt of presents from Wakefield? When Clarke answered this question in the affirmative, and stated that he would not oppose the company's claim to Golden Bay, the commissioner did not renew his inquiry but enforced his award of compensation by banking the money and ruling that the land was purchased validly by the company.⁸² Governor FitzRoy clearly had no qualms about this. He accepted Spain's award, in the knowledge that Golden Bay Maori had had no inquiry, were not parties to the arbitration, and had not consented to its outcome. He granted their land to the company in 1845, after which some of them bowed to pressure and accepted the money. This was in serious breach of the plain meaning of article 2 of the Treaty, of the Crown's stated intent in investigating the validity of the company transactions, and of the Treaty principles of reciprocity, partnership, and active protection.

The arbitration process followed the lines of the Wellington 'settlement' where the amount of compensation was also agreed by Wakefield and Clarke, accepted by Spain, and foisted on Wellington Maori (with the additional support of Governor FitzRoy). Was such a one-sided process in accord with the Land Claims Ordinance? That is unlikely in our view, since

79. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 128–131

80. Campbell, p 113

81. Phillipson, *The Northern South Island: Part 1*, pp 103–104

82. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57

4.4.3(1)

Spain did not complete the inquiry specified in the ordinance, before making what was ostensibly an award based on it, though in fact it was configured to equate with the districts already surveyed or partly surveyed for settlement. Spain did not complete his inquiry into the validity of the Kapiti purchase either in Wellington or Nelson. Yet, when he addressed Nelson Maori at the conclusion of his ‘arbitration’, he had the audacity to say that ‘these lands were purchased long ago by Colonel Wakefield, of Rauparaha and others, at Kapiti.’⁸³ And in Spain’s view, further payments were unnecessary because of the ‘generous’ presents given by Captain Wakefield.⁸⁴

Spain may have complied with the ordinance in a technical sense by holding an inquiry and making findings that were based on that inquiry, and not on the out-of-court arrangements. But equally, he did not comply with the spirit of the Crown’s intentions, as described by the Crown in the statements of Lord Stanley and of Spain himself (see sec 4.2). His incomplete and inadequate inquiry was, by his own standards, in violation of the Treaty.

That brings us to a further question: did the arrangements that led to Spain’s award and the award itself conform to the principles of the Treaty? The Crown submitted that the shift from inquiry to arbitration was not in principle inconsistent with the Treaty.⁸⁵ That may have been so, but the Waitangi Tribunal always has to examine the practical actions or omissions of the Crown for compliance with the principles of the Treaty. Moreover, we have to try to understand what Maori understood of the Crown’s offers and actions and how they, as Treaty partners, responded. It is here that we have particular difficulty in view of what can be one-sided evidence from Crown officials of the time – which is virtually all we have in this instance – and the lack of reporting, or accurate reporting, of Maori views. In particular it was essential under the Treaty for Maori to willingly consent to any alienation of their land. Yet, in the formal judgement of Commissioner Spain, they had nothing to alienate.

(1) The Tribunal’s findings

Like the Wellington Tribunal, we consider that under article 2 of the Treaty, Maori needed to have more than a ‘minimal input’ in these negotiations. They had to be allowed to choose and instruct their own representative, rather than rely on an official (Clarke) who was not answerable to them but to Spain. Moreover, the Wellington Tribunal considered that the arbitration process was ‘irreconcilable with the Land Claims Ordinance,’ and that Maori had no independent voice since Clarke was subject to pressure from Spain to reach an agreement with Wakefield.⁸⁶ Similarly with the circumstances in Wellington, we find that the Crown acted in breach of Treaty principles in that:

83. Minutes of proceedings, 24 August 1844, *Compendium*, vol1, p 61

84. *Ibid*

85. Crown counsel, closing submissions, p 48

86. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 115–116

- ▶ it failed adequately to consult with Maori having customary interests in Tasman Bay and Golden Bay before deciding to switch from an inquiry into the validity of the company's transactions to a form of arbitration;
- ▶ it proceeded to implement the arbitration process without the informed consent of such Maori;
- ▶ it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty;
- ▶ it failed to respect, protect, and provide for tino rangatiratanga when it imposed an amount of compensation, and restricted the decision-making of the intertribal hui to a single point, that being the proportionate distribution of that set compensation;
- ▶ it failed to permit even that exercise of tino rangatiratanga to Golden Bay hapu and leaders, whose refusal to accept or divide up the compensation was followed by its being awarded anyway, and their land awarded to the company;
- ▶ it accepted Spain's award as a legitimate basis for a Crown grant to settlers, even though that award was based on an inadequate inquiry and its decision was wrong on the facts; and
- ▶ that, as a consequence, all such Maori were prejudicially affected by the arbitration proceedings and award, with the expropriation of their title to 151,000 acres of land, without their meaningful consent, and to their social, cultural and economic harm.

Outstanding issues, such as whether the pressure placed on Maori amounted to duress or coercion, whether the price was adequate, whether Spain and the Governor acted lawfully, whether reserves were properly defined or adequate, and other such issues, will be dealt with in our final report.

(2) *Were customary rights extinguished by the 1844 deeds of release?*

This question is complicated by the lack of evidence available to the Tribunal about exactly what was said and done at the two-day hui in Nelson. We know that much of the time was spent on discussing reserved sections, and on Maori deciding how the set compensation should be allocated among themselves. We know little, however, of how the deeds of release were explained, or how Maori understood them. Spain certainly told those present at the hui that the deeds and payments were an act of friendship from the Queen and Governor, to secure peace, and were not a payment for their land. In the official minutes, it was recorded as:

But the Queen and the Governor wish to do something more for you now, and therefore Mr Clarke has been sent to represent you in Court, and to advocate your interests. He has awarded you the money which you have come this day to receive, not as a payment, but for

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the sake of making friends of you and the white people; to put an end to all the quarrels and disputes about the land, so that both races in this settlement may live peaceably and happily together in future.⁸⁷

A local newspaper recorded it as:

The Commissioner plainly intimated to the natives in open court through the interpreter that he considered they had been previously amply paid for the land claimed in this district . . . and that they must receive the sum about to be given them by Mr Clarke not as a matter of right but as an act of grace and good-will towards them on the part of the Europeans.⁸⁸

In Maori law, the relationship with the settlers was thus strengthened, their rights to share the land cemented by a second lot of gifts, and the relationship extended to the Queen and Governor, whose friendship and protection for both peoples was now assured. But this time, they had to sign 'deeds of release' after listening to Spain's remarks, purportedly relinquishing all claims on listed districts. Both Williams and Walzl argue that Ngati Tama, Ngati Rarua and others might not have realised the true nature of what actually happened in 1844 for some time.⁸⁹ We are frustrated by the lack of evidence of exactly what Spain and Clarke said to Maori in the short couple of days between moving to arbitration and the signing of the deeds of release.

According to Dr Williams, Spain was influenced by the waste lands theory (see ch 3), that Maori only had genuine rights to the land they lived on and cultivated. Nothing else, in his view, can explain why Spain thought such a low 'price' appropriate for such a large amount of land.⁹⁰ Dr Gould considered that this was also the explanation for why so much of the interior of the island was included in the 1848 Crown grant (map 8), suggesting that it was based on the idea 'that the rights of occupiers – as defined by Spain – were not considered as extending into the hinterland.'⁹¹ Ballara noted that Spain was influenced by de Vattel, but considered missionary Octavius Hadfield to have been a much stronger influence.⁹² Finally, we have glimpses of what Maori may have understood, from sparse records of the time.

Mr Walzl has placed a lot of emphasis on an 1851 letter from Ngati Rarua to Grey, in which they stated:

Mr Spain paid us the money[.] we asked him what land the money was for and he replied for Motueka only – We said – purchase also Nelson and Waimea. They said no – as there were no natives on that land – We therefore consider that if we are not paid for that land

87. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61

88. Quoted in Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 131

89. Williams, pp 86–101; Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 133–134, 148–151, 224–225, 231–233

90. Williams, pp 95–96

91. Gould, p 151

92. Ballara, 'Summary of Selected Aspects', p 5

we will feel it a great grievance on account of our land being taken for nothing[.] we have accordingly been endeavouring for the last two years to be paid up to the time you arrived when you agreed to our request.⁹³

It will be recalled that Te Iti was cross-examined about when his people had last cultivated at Waimea, and he had replied that they had not done so for six years. In his award, Spain reserved only that land which had been cultivated from 1840 onwards.⁹⁴ If the evidence of Williams and Walzl is correct, then the arbitration proceedings may have been based on compensating Maori for districts where they lived year-round and cultivated (with them keeping the pa and cultivations plus one-tenth), but not others.

We are not satisfied that the deeds of release, explained as a gratuitous payment rather than an extinguishment of rights, can be shown to have changed the customary aspects of the tuku to the company, to the certain knowledge of the Maori signatories. After all, they wanted the settlers to stay, and that was one outcome. Ngati Tama and Ngati Rarua continued acts of occupation on some 'settler sections' in the late 1840s, even for cultivation (which is a strong assertion of rights under Maori law), until Government and settler pressure began to restrict their activities.

Ngati Rarua then wrote to the Government that their rights in certain places had never been acknowledged by Spain, nor compensated.⁹⁵ Superintendent Richmond commented that this was an 'absurd claim', because the Maori involved had signed a deed, in their own language and fully explained to them, 'alienating to the New Zealand Company all their right in the lands in question.'⁹⁶ Alfred Domett, perhaps not realising the significance of his knowledge, advised Grey that that payment had been explained to Maori by Spain as a matter of 'grace and favour.'⁹⁷ Whatever the exact circumstances, Ngati Rarua considered themselves as still possessing rights and entitled to further 'payments'. The Governor accepted his officials' recommendation that no such payments should be made.⁹⁸ Te Tau Ihu Maori continued to assert their claims until the time of the Waipounamu purchase of the mid-1850s, when further deeds and payments were arranged.

In the Maori view, there remained unalienated customary rights in the lands adjudicated by Spain and awarded to the company. In the Crown's view, all rights had been extinguished by purchase (as found by Spain), and the land was then legitimately granted to settlers (minus reserves). As a result of Spain's failure to inquire properly and find the truth, and his explanation of the 1844 payments, Maori and the Crown were still 'talking past each

93. Quoted in Walzl, 'Ngati Rarua Land Issues, 1839-1860', p 232

94. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 60

95. Walzl, 'Ngati Rarua Land Issues, 1839-1860', pp 232-233

96. Quoted in Walzl, 'Ngati Rarua Land Issues, 1839-1860', p 233

97. Quoted in Walzl, 'Ngati Rarua Land Issues, 1839-1860', p 233. Alfred Domett was the Colonial Secretary of New Munster (and also Civil Secretary of the General Government).

98. Walzl, 'Ngati Rarua Land Issues, 1839-1860', pp 232-233

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other' by the 1850s. The difference was that all unalienated customary rights had, at law, been expropriated and granted to others by Crown grant in 1845 and 1848. The issuing of these Crown grants, based on the faulty Spain inquiry and award, compounded the Treaty breaches enumerated above.

All Maori in Tasman and Golden Bay were prejudicially affected by these breaches of the Treaty. There were, however, some differences in the way in which groups were treated, leading to the particular claims described above in section 4.1. We turn now to our additional conclusions and findings on these claims.

4.4.4 The rights of Ngati Toa

Ngati Toa were not signatories to the Port Nicholson deed, the basis for the company's claim to Wellington. Though Port Nicholson was also covered by the Kapiti deed, this was disregarded as a basis for the Wellington purchase. On the other hand, the Kapiti deed was regarded as the primary basis for the Nelson purchase. Spain considered that the payment Ngati Toa received for the Kapiti purchase sufficiently covered their interests in the districts he awarded the company and they received no further payment for these. In response to intense questioning as to what he had 'sold', Te Rauparaha was adamant that he had intended Wakefield and the settlers to have Taitapu, and Te Rangihaeata made the same admission regarding Wakatu. Spain appears to have accepted this for the most part, though he variously equated Taitapu with a part of Golden Bay, the whole of Golden Bay, and even Tasman Bay, and Wakatu with all of Tasman Bay. Nevertheless, he still relied on the Kapiti deed as a basis for the purchase of the districts he subsequently awarded the company as, for instance, in his speech at the end of the Nelson hearing.

What in fact was Ngati Toa's evidence to the Spain commission? They do not appear to have been present at Nelson in 1844, so we have summarised their 1843 evidence at Otaki and Pukerua in some detail. Te Rauparaha was recorded as testifying:

When the vessel was at Kapiti Col Wakefield sent for me Tungia, and Rangihiroa – and he said to me 'Friend, to whom does Taitapu belong?' & I said 'It belongs to me.' He said 'Would not you consent for me to have it.' I answered 'are you much in want of it.' He said 'I am-' I asked 'what payment' – He said 'I will pay you in pipes, tobacco, knives . . . [and other items]' This was for Taitapu alone, and I was dissatisfied with this payment and I was persisting to get more, but Col Wakefield would not give me any more. He then told me to collect Rangihaeata and others – and he would make a request to purchase Wairau also. and it dropped at that and I have never seen him since.⁹⁹

99. This and following extracts are from the evidence of Te Rauparaha, 26 April 1843, OLC1/907, ArchivesNZ, Wellington.

When the Kapiti deed was put before him, Te Rauparaha admitted that he had signed it, because ‘I was told that if I signed it my name would be showed to the Queen of England and I should be known as the Great Chief of New Zealand.’ Asked if the deed was read and interpreted to him and whether he understood the contents, Te Rauparaha replied that ‘No one Interpreted it.’ He admitted that John Brook had acted as an interpreter, but added that ‘we did not understand him’ and ‘he did not interpret the deed to me.’ Asked whether he understood that the deed ‘purported to convey land to Col Wakefield,’ Te Rauparaha replied: ‘No. I did not – Col Wakefield said at the time “give me a small piece of ground equal to the property that I have given you”’. When he was asked if he had told Wakefield the boundaries of this land, he replied: ‘Yes – on the West Coast of the middle Island from a little Creek called Te Wanganui up to a Timber [?] mountain which I agreed to sell to Col Wakefield.’ Te Rauparaha denied he had sold any other land to Wakefield. Asked if he had agreed to sell Taitapu, he replied, perhaps with a sense of relief and hope that he would be understood: ‘Yes, that is it.’

But when asked if he agreed to sell Wairau, Te Rauparaha answered with a firm ‘No.’ He also denied selling various places in the North Island that were included in the Kapiti deed. Then Te Rauparaha was asked whether he kept a portion of the payment but replied that he had not; he had distributed it among Ngati Toa and others on board the vessel. Spain tried one more time by asking Te Rauparaha what he considered the payment was for, and he replied ‘For Taitapu.’ Spain asked Te Rauparaha whether he quarreled with Wakefield after he signed the deed. The chief replied ‘Yes. I told him he should not have Wairau & other places, and he threatened to tie me- I asked him why he should tie me?’¹⁰⁰ Those places that you want belong [to] Rangihaeata, Nohorua & Mahurenga.’

Subsequently, Te Rauparaha never varied in his declaration that he had only intended Taitapu for the settlers. By Taitapu, as he had testified at Otaki, he meant a small segment of land on the West Coast of the South Island between the base of Farewell Spit and West Whanganui – not Golden (Massacre) Bay, as Spain incorrectly presumed in his Nelson findings.¹⁰¹

Te Rangihaeata and Te Hiko were also questioned by Spain at the Otaki hearing.¹⁰² They denied intending that Wakefield should have anything but Wakatu for his settlers. Te Hiko stated that when Wakefield asked where his settlement was to be, he had agreed to ‘Wakatu. The place w[h]ere no people were.’ Asked whether the places mentioned in the deed were read out to them before they signed, Te Hiko answered, ‘Not at all.’ Significantly, he added, ‘The names were mentioned as conquered places but not for sale.’ When he was asked

100. The threat of being ‘tied’ refers to being arrested and put in irons.

101. ‘Spain’s Report to FitzRoy’, 31 March 1845, *Compendium*, vol 1, p 55, 59. See also copies of deeds of release, p 67, where the definition of Taitapu as ‘Massacre Bay’ was replicated and formalised.

102. Evidence of Te Rangihaeata, 26 April 1843, OLC1/907, ArchivesNZ, Wellington

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whether Captain Lewis, who had assisted with the interpretation, explained the contents of the deed, Te Hiko replied that he and Brook had done so. But when he was then asked if he was told they were parting with the land forever and would receive no further payment, he replied: 'No I never heard any such thing- Mr Wynen¹⁰³ & Col Wakefield had some words -He told Col Wakefield not to be foolish & steal the natives settlements – Col Wakefield ordered him on shore.' When asked whether Lewis or Brook explained the nature of the reserves, Te Hiko answered: 'No.' Then, when he was asked (again) why Te Rauparaha had repeated the names of places listed in the deed, Te Hiko replied: 'Yes – he was telling the Places he had conquered (like Wellington and Blucher conquering all –)'.¹⁰⁴ Tutahanga also gave evidence to similar effect at Pukerua, reinforcing that of Te Rauparaha and Te Rangihaeata.¹⁰⁵

From this review of the Ngati Toa evidence, it is clear that:

- ▶ there was a consistency in the statements of all of the four chiefs referred to above;
- ▶ they had firm ideas as to the limited nature of their 'sales' in Te Tau Ihu, essentially limiting them to Taitapu and Wakatu;
- ▶ they refused to alter their declarations, despite persistent questioning from Spain;¹⁰⁶
- ▶ the translations by Brook and Lewis were inadequate and in particular failed to convey that the chiefs were selling the huge territory claimed;
- ▶ it seems from the exchange between Colonel Wakefield and Wynen, that the company men were not fully disclosing the enormity of their intended purchase; and
- ▶ there was no justification whatsoever for equating Taitapu with any part of the Golden Bay land awarded to the company, and only justification for equating Wakatu with that part of Tasman Bay accepted under that appellation by the resident iwi.

We find that the leaders of Ngati Toa intended that Wakefield's people should settle and have land at Taitapu and Wakatu, but not to transfer any of their other interests to the company. We accept Ngati Toa counsel's submission that they received no payment for the additional area granted to the company (beyond Taitapu and Wakatu as they defined them), or a share in the company tenths that were awarded to others, but we find it difficult to assess the extent of Ngati Toa's loss. As Spain was aware, they were not, at the time of his inquiry, in occupation of any of the districts he awarded to the company. As we discussed in

103. Wynen was a whaler who associated with Jackie Guard at Port Underwood. Jerningham Wakefield claimed that Guard and Wynen incited the 'Kawhia natives' against Wakefield's expedition because they wanted to acquire Port Nicholson for themselves: Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonisation of the Islands*, 2 vols (London: John Murray, 1845), vol 1, p105.

104. Evidence of Te Hiko, 1 May 1843, OLC1/907, ArchivesNZ, Wellington

105. Evidence of Tutahanga, 2 May 1843, OLC1/907, ArchivesNZ, Wellington; 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 55. Pukerua is spelt incorrectly as 'Pukeroa' in the minutes.

106. According to Edward Jerningham Wakefield, Te Rauparaha once stated that he had sold Rangitoto (d'Urville Island) as well as Taitapu, at a meeting with him in November 1839. On this occasion (and still at the time of publication), Wakefield thought 'Taitapu' was Tasman (Blind) Bay: see Wakefield, vol 1, pp142–143.

chapter 2, they claimed a kind of a suzerain right, deriving from their earlier leadership in the conquest of Te Tau Ihu and their wider strategic control. In Maori terms, this could be described as a take raupatu. After 1840, previous conquests could still be used as a basis for ownership of land, though normally they needed to be confirmed by occupation. Raupatu could no longer be exercised, but there was nothing in the Treaty to prevent Maori groups from peacefully re-occupying land. There was a similar situation in the district covered by the Tribunal's Wellington inquiry, since Ngati Toa were not in occupation of any of that district, though they periodically utilised resources in Heretaunga and Ohariu. Nevertheless, the Wellington Tribunal concluded that Ngati Toa had take raupatu and ahi ka rights in the district.¹⁰⁷

We discussed Ngati Toa's rights in western Te Tau Ihu generally in chapter 2, and consider that they had take raupatu and latent ahi ka rights in the specific districts Spain awarded to the company, similar to those that the Wellington Tribunal recognised in the Port Nicholson block. It is quite clear from the recorded evidence of the 1840s that resident right-holders did not accept Te Rauparaha's claim to primary authority, nor that he could alienate land without their consent. From 1840, Ngati Toa were free to re-occupy land in the conquered districts, so long as they did it peacefully. Had they done so, it is unlikely that they would have been resisted by either their former northern allies or remnants of the Kurahaupo iwi, who were also now free to reoccupy their former land. Ngati Toa were occupying districts like the Wairau in varying strength, and itinerating for resource use and to trade with Pakeha, in the area outside Spain's award. As the Crown rightly reminded us, the situation in the early 1840s was fairly fluid. Ngati Toa and their northern allies were for ever coming and going across Cook Strait and did not suddenly freeze their customary land ownership when the Treaty of Waitangi was signed.

We acknowledge that Ngati Toa had inchoate rights, even when they were not in physical occupation, in the land Spain awarded to the company. He should have acknowledged those rights and was wrong to conclude that they had been wholly extinguished by the Kapiti deed. While we cannot quantify the amount, we consider that Ngati Toa should have been given some compensation for their take raupatu and latent ahi ka rights in land that was awarded to the company, in addition to the original payment they received at Kapiti.

We find that the Crown breached article 2 of the Treaty in relation to Ngati Toa, by including in Spain's Nelson award far more than the limited areas at Taitapu and Wakatu that they admitted intending for the settlers in the Kapiti deed. Ngati Toa needed to consent to this, and to be compensated for it and for their continuing rights based on their former take raupatu and an inchoate right to develop ahi ka. The Crown's actions were in breach of the principles of partnership and active protection. Ngati Toa's case for wrongful exclusion from the Nelson tenths is discussed in section 4.5.

107. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 39–41, 44

4.4.5 The rights of the Kurahaupo iwi

Finally, in contrast to Wellington, where there were no defeated peoples in occupation in 1839–40, there were surviving communities of the Kurahaupo iwi still in occupation of land in Te Tau Ihu. As we found in chapter 2, they retained and were recovering rights in the land, alongside the northern iwi (whose mana they acknowledged). Some were present at Spain's Nelson hearing, but he made no attempt to hear them or consider their rights. They had apparently received none of Captain Wakefield's 'presents', Spain made no provision for them in his award, and they were not included in Colonel Wakefield's compensation arrangements. When matters were left to Maori to arrange, however, as with the apportionment of compensation at Nelson, they were included in Spain's payments.¹⁰⁸

Dr Ballara and Dr Gould were particularly critical of Spain and his inquiry on this matter. Ballara noted that Spain had recognised the rights of defeated peoples, where they occupied on the 'sufferance' of their conquerors, and that their concurrence was necessary for any absolute alienation of all rights in the land. She criticised his failure to actually apply this understanding of custom in his Te Tau Ihu findings, and to inquire properly about the status of those who he believed were fugitives without settled communities ('Rangitane').¹⁰⁹

Spain's understanding of Maori customary rights to land and how he applied it in his award was not in fact an outcome of his abbreviated Nelson hearing. As we have already noted, the claimants and Crown agree that Spain's early termination of his Nelson hearing precluded him from getting a full understanding of customary rights in Te Tau Ihu.¹¹⁰ Counsel for Ngati Apa was the most critical – which is not surprising, since Spain ignored the rights of Ngati Apa altogether. Counsel submitted that:

one of the fundamental aims of a process of inquiry as to whether or not a purchase from Maori had validity must have required a process of identification of iwi who had customary rights in the area purportedly being purchased. That was vital so as to ensure that any purchase arrangement was occurring by consent of those Maori having customary rights in all the lands, forests, fisheries and other taonga affected by the purchase proposal.¹¹¹

Counsel then said that the Crown officials should literally have walked the land concerned to meet those in occupation, as officials had done as recently as July 1844 in connection with the Otakou purchase.¹¹² But in the Nelson case, Spain's assistants had limited their visits to Wakatu, Motueka, and the Croisilles and only approached people from the

108. Campbell, p 113; David Armstrong, 'Ngati Apa Ki Te Ra To', report commissioned by the Ngati Apa Ki Te Waipounamu Trust Claims Committee, June 1997 (doc A 29), pp 127–128

109. Dr Angela Ballara, 'Customary Maori Land Tenure In Te Tau Ihu (The Northern South Island) 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), pp 151, 154, 160–161

110. For instance, counsel for Ngati Tama, closing submissions, pp 48–49; counsel for Ngati Koata, closing submissions, pp 49–50

111. Counsel for Ngati Apa, closing submissions, p 17

112. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 309–310

northern iwi, just one of whom, Te Iti, was called as a witness at the hearing. Furthermore, counsel argued, two Ngati Apa families had been encountered by surveyors on the Waimea plains, though Meurant did not go there. According to evidence presented to the Native Land Court in 1892, 21 named men of Kurahaupo descent had been in Nelson at the time of Spain's hearing. It was not so much that these people were unknown. Rather, it was because of a 'mindset' of officials who believed that only conquests mattered, that Ngati Apa and other Kurahaupo iwi were not considered by Spain. Counsel was also critical of the failure of officials to inquire into who occupied the interior of Nelson.

As we discussed in chapter 3, the Crown argued that such matters must not be viewed with hindsight, but in light of what could reasonably have been known and done at the time, bearing in mind the limited resources at the disposal of the Crown. The Crown argued that rights were unsettled in Te Tau Ihu, and that the 'postulation of some form of idealised inquiry whereby Crown officials would have traversed the entire region consulting with all Maori communities, prior to negotiating or completing any major transaction simply ignores the actual historical context.'¹¹³ Nonetheless, counsel submitted: 'The Crown consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land. This applied to both the Crown's own dealings and the pre-1840 claims.'¹¹⁴ This remains a fundamental point, in our view.

There is much that we agree with in the submissions of counsel for Ngati Apa and the Crown. In particular, both were essentially agreed on what must, in Treaty terms, be regarded as a given: that before the Crown could validly purchase and extinguish Maori title it must have the agreement of all who had customary rights to the land in question. As we noted in chapter 3, we accept that the Crown could not be expected to do more than was practicable at the time, but, in view of its Treaty obligations and what was practicable, there was still a high standard to be met. We also resolved in chapter 3 that customary rights were not too unsettled to be discoverable upon reasonable inquiry.

Here, we must consider what was reasonably practicable for Spain and his officials to have done. Spain's award was confined to the area already mostly surveyed for settlement: 151,000 acres in Nelson, Waimea, Moutere, Motueka and Golden Bay. According to counsel for Ngati Apa, Meurant visited only Wakatu (Nelson), Motueka, and Croisilles prior to Spain's arrival, but company surveyors clearly had knowledge of all of the districts on that list and, presumably, the people in occupation of them. Though Spain called one company surveyor, Thomas Duffy, as a witness, he was merely questioned on Captain Wakefield's distribution of 'presents' in Golden Bay. Spain could have called other company surveyors and questioned them on the identity of Maori groups in occupation of the districts he intended to award to the company; as indeed he could have called representatives of the

113. Crown counsel, submission concerning generic issues, pp 7–8

114. *Ibid*, p 8

Maori occupants, many of whom were present at his hearing.¹¹⁵ For Golden Bay, however, he needed to move his inquiry to that district to afford the hapu and their leaders an opportunity to be heard. This was entirely practicable, as he noted in his report. He decided not to do so, however, when Protector Clarke, who visited the district after its inhabitants had been awarded compensation without their input, said that he would not contest the company's claim there.¹¹⁶

It would have been possible, as it was indeed necessary under the Treaty and the Land Claims Ordinance, for Spain to have conducted a full inquiry into customary ownership of the districts he intended to award to the company. Moreover, he needed to satisfy himself that the occupants (whom he believed to have prime rights of ownership) were willing to alienate their rights.

Commenting on the knowledge of Crown officials on Maori custom, the Crown submitted that the evidence did not show 'culpable ignorance of Maori customary concepts on the part of Crown officials.' On the contrary, officials such as Spain, Clarke, Meurant, McLean, and Governor Grey, all appeared to have a 'reasonable understanding and knowledge.'¹¹⁷ The Crown added that Spain's earlier experiences in Wellington and New Plymouth, and contacts with missionaries such as John Whiteley, meant he was well informed on Maori custom by the time he arrived in Nelson. We agree that officials such as Spain had a reasonable understanding for their time of Maori customary rights. Indeed in some respects, Spain had a better understanding than other officials in that he did not rely on conquest alone as providing rights to land but insisted that a conquest had to be followed up by occupation. We largely agree with that view, though recognising, as we have found, that the ability for Ngati Toa to develop ahi ka was not foreclosed thereby in the circumstances of the 1840s.

Spain, though clearly aware of the presence of defeated peoples, called them all 'Rangitane' and assumed that they were fugitives without settled communities under their own chiefs. In the South Island, he wrote, 'the tribe Rangitane, the original occupants, is reduced to a mere remnant, living in the interior without any fixed dwelling places, and even now [1845] hunted down by Rauparaha and his retainers.'¹¹⁸ He came to this conclusion without inquiry, and, as we found in chapter 2, was demonstrably wrong as to the facts. In evidence to the Native Land Court in the 1890s and later documents, the Kurahaupo people claimed to have had a presence at Wakatu at the time of Wakefield and Spain, and to have participated in Spain's compensation money (as apportioned by the 1844 hui).¹¹⁹ The northern allies, such as Ngati Tama, dispute this claim and note that this evidence comes long after the event.¹²⁰ We see no grounds for disputing the oral history of the Kurahaupo peoples, as recorded in the

115. Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 51–73, 79–104, 125–130

116. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol1, p 57

117. Crown counsel, submission concerning generic issues, p 9

118. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol1, p 59

119. Campbell, p 113; Armstrong, 'Ngati Apa Ki Te Ra To', pp 127–128

120. Counsel for Ngati Tama, closing submissions, pp 17–18

1890s, that they had at least a presence and were recognised to have some kind of rights by their participation in the payment. Exactly what those rights were or how far they extended from Tasman Bay into Golden Bay, and on what basis, it is not now possible to say.

We find that Spain, though reasonably informed on Maori custom, did not investigate properly or apply that knowledge in seeking out all who had customary rights in the districts included in his Nelson award, nor in gaining their assent to the alienation of the land to the company. This applies particularly to the Kurahaupo iwi, who had rights in the district. It also applies to the Wairau, where Spain ignored the rights of Ngati Rarua and Rangitane, but we take up that issue when we examine the Wairau purchase in our next chapter.

The matter did not end with Spain, whose report was a recommendation to the Governor. We are particularly mindful of the interface here between custom, with layers of rights and authority in the land and over its resources and people, and the British need to extinguish all rights before the Crown could grant Maori land to others. Chief Protector Clarke put it like this in 1843:

Rauparaha, who conquered and took possession of parts of this country, would, in connexion with his followers in the vicinity of Cook's Straits, have large claims; but his title would no doubt be disputed by the original proprietors, so soon as they were in a position to maintain their claims. A tribe never ceases to maintain their title to the lands of their fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors. If a conqueror spares the lives of the conquered, and they thenceforth become amalgamated with his own tribe, he infallibly secures his own title by uniting the claims of the original possessors with his own.¹²¹

Our attention was drawn to Clarke's views by both counsel for Ngati Toa and by Mr Armstrong, historian for Ngati Apa.¹²² In Armstrong's evidence, this understanding of custom required the extinguishment of all rights in order to achieve a clear title. This inevitably required the Crown to deal with defeated peoples still in occupation, as in Te Tau Ihu.¹²³ We agree. If the Crown indeed sought a free, fair, and informed acquisition of a clear title to land, it had to ensure that the interests of all right-holders were voluntarily relinquished.

Dr Gould argues that there was an inconsistency in that Governor FitzRoy and Chief Protector Clarke intervened in Spain's Taranaki award, but did not do so in Te Tau Ihu. In his view, the concern for the rights of formerly defeated peoples evident in Taranaki was not shown in Te Tau Ihu. The reason for the inconsistency was the speed and inadequacy of Spain's inquiry, giving the commissioner and protector little opportunity to 'inquire or

121. G Clarke to Colonial Secretary, 17 October 1843, BPP, vol 2, Appendices to 1844 Committee, p 359; see also pp 356, 358

122. Counsel for Ngati Toa Rangatira, submissions in response to the closing submissions of counsel for Ngai Tahu and the Crown concerning the 1840 rule, 19 April 2004 (paper 2.784), pp 10–11; Armstrong 'Ngati Apa Ki Te Ra To', pp 35–36. (Armstrong refers to H T Clarke, but Chief Protector George Clarke is in fact the author.)

123. Armstrong, 'Ngati Apa Ki Te Ra To', pp 28–44

consider properly the status of the original tangata whenua living within the area covered by the 1844 Deeds of Release.¹²⁴ As a result, FitzRoy's intervention in Taranaki was not replicated at Nelson.

Chief Protector Clarke's advice to the Government about the rights of conquerors and defeated peoples (cited above), and his particular statements about the Cook Strait region, indicate that FitzRoy and Clarke knew enough to have at least queried Spain's findings as they did in Taranaki. Justice required their intervention, given the inadequacy of Spain's inquiry, as it did in Taranaki. The Crown's historian agrees with the claimants' historians, Armstrong and Campbell, and with Dr Ballara, on this point.

Further, the Government ought to have inquired as to whether Spain was correct when he reported that 'Rangitane' were fugitives being 'hunted' by Te Rauparaha. Had that been true, then being the Queen's subjects, they would have required immediate and substantial protection. On the evidence, it was not true in 1845, but the Government could not have known that without inquiry, and Spain clearly did not know it. Any follow-up inquiry by the Government or protectorate, which was surely required on the basis of Spain's report, could have uncovered the status and surviving rights of the defeated peoples in the company districts (and elsewhere).

Either way – given the Chief Protector's knowledge that a layer of rights survived in tributary communities of defeated peoples, and Spain's report that the defeated peoples were hunted fugitives still – the Crown had a Treaty duty to have inquired further and taken appropriate action. Its failure to do so had serious consequences for Ngati Apa, Ngati Kuia, and Rangitane in Te Tau Ihu.

We find that Spain breached article 2 of the Treaty by his failure to investigate the rights of the Kurahaupo iwi, and his failure to consult or include them in his arrangements for deeds of release and compensation. The more general Treaty breaches described in section 4.4.3 apply equally to the Kurahaupo iwi. We find further that the Crown's failure to intervene, despite the Chief Protector's knowledge of the situation, was in breach of the Treaty principle of active protection. Given FitzRoy's intervention in Taranaki to supply justice to more powerful tribes who were a greater threat, the Crown was also in breach of the Treaty principle of equal treatment. It did not give Te Tau Ihu Maori the active protection it gave to other Maori in broadly comparable circumstances. Finally, the Crown was in breach of the Treaty principle of equity, which required it to act fairly as between Maori and settlers. Several company witnesses were examined, and its senior official represented it in the arbitration, whereas not a single Kurahaupo witness was heard, and they had no status or representation in the arbitration. As far as we know, Protector Clarke Junior did not mention them, and had not ascertained their presence or rights.

124. Gould, p 89

As is often the case, Maori ameliorated this somewhat among themselves, by including the Kurahaupo people in the compensation payment. That does not, however, excuse or rectify the Crown's failure to ensure the free and willing consent of the Kurahaupo people, either to Wakefield's original arrangements or to its own supposed extinguishment of their rights, prior to granting the districts awarded by Spain to the company.

4.5 THE TENTHS ESTATE

Many of the Te Tau Ihu claims revolved around the making and administration of the Nelson Tenths. We will deal with most of the issues in our final report. Here, we are concerned with the claims that the customary right-holders entitled to benefit from the tenths should have been identified at the time of the Spain award, and that serious errors resulted from the long delay in determining ownership. Broadly, the claimants and Crown agree that the failure to identify rights at the time was a serious one. Also, the claimants agree that the tenths were supposed to be an endowment estate, additional to (not including or mixed up with) reserves for occupation. The parties do not agree on whether tenths should have been created in the company's rural Wairau lands, or in its port at Waitohi. The Crown officials' argument at the time that the 1847 Wairau reserve excused the company from making rural tenths has further complicated matters and led to particular claims about that issue.

As we outlined above in section 4.1, the claimants have advanced the following broad positions:

- ▶ Ngati Toa argue that they were entitled to a share of the tenths (though not occupation reserves), and that any decision at the time would have had to include them, more particularly as their Kapiti deed was supposed to have been a basis for the company's transaction.
- ▶ The northern allies, Ngati Rarua, Ngati Tama, Ngati Koata, and Te Atiawa, argue that the Native Land Court was correct to consider them alone as the owners, although they did not necessarily agree on the proportions or the completeness of the lists of owners. It followed that if the Court was correct, then the Crown had wrongly treated the tenths as a fund for all Maori in the district from the 1840s to 1892. Some also argued that treating the Wairau reserve as a substitute for making rural tenths was unjust to them, because they had no interests there yet were entitled to rural tenths.
- ▶ The Kurahaupo tribes argued that they were entitled to a share of the tenths because they had customary rights in the districts, even if those rights had not been recognised by the company or Spain.

We make no comment here on the Native Land Court process and decision. Nor do we comment on how the tenths fund was administered, or the question of rural tenths at the

Wairau. Those important matters will also be addressed in our final report. Rather, we focus on the question of entitlement to the tenths as at 1844, when the Crown and claimants agree that it should have been determined.

It follows from our discussion above and in chapter 2, that we consider that Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary interests as at 1844. The rights of the first three tribes were based on take raupatu, followed by itinerant resource-use, residence, and cultivation, and by the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land. The rights of Ngati Koata were derived from take tuku, and from itinerant resource-use, occasional residence in the company lands, intermarriage, and burial of the placenta and the dead in the land.

The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Their leader, Tutepourangi, had made a tuku to Ngati Koata which was still live at the time, and a basis of relationship and rights for both. It is not clear how far they were still in occupation, especially in Golden Bay. According to the evidence of Meihana Kereopa, Kurahaupo peoples were still in occupation of part of Tasman Bay, until after the Spain award (as a result of which, it appears, they had to leave the district). There were Ngati Apa families scattered around, some still in 'slavery', despite the Treaty promise that they had the rights of British subjects. Their right to continue peacefully recovering from the 'conquest' was, as with the Ngati Toa right to take up ahi ka, foreclosed by the Spain decision of 1844 and the Crown grants of 1845 and 1848.

Ngati Toa, as described above, had still in 1844 a latent right to visit for resource-use or take up residence and cultivation (which together or severally make up ahi ka). As we concluded in chapter 2, the evidence is that, had they chosen to take up this latent right in the 1840s, their former allies in western Te Tau Ihu, especially their close relatives among Ngati Rarua and Ngati Koata, would likely have accommodated them with a tuku. There would have been little choice, given the leading role of Te Rauparaha in the raupatu (even if not personally involved in the west), and the way they considered it tika to accommodate other conquest chiefs who came to settle after the first wave. We consider the movement of Te Keha to Pariwhakaoho in 1845 to be proof of that. But without taking up this latent right, Ngati Toa of the 1840s were too far away from western Te Tau Ihu to maintain any kind of authority over their relations or allies, nor could they claim primary or leading rights in the land.

It is not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we think the leading share in the tenths was indeed correctly decided in 1892, although we make no comment on the proportion as between the four northern allies. But as the tenths were considered part-payment for the company lands and an endowment for the 'vendors', we consider that Ngati Toa and the Kurahaupo iwi should also have had a share.

We find that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths. We agree with the Crown's submission that it would not be appropriate to reopen the question of ownership of the estate at this late stage, even if that were possible. The lands of the Wakatu Incorporation are privately owned within the meaning of the Treaty of Waitangi Act, and we have no jurisdiction to make such a recommendation in any case. We recommend that the Crown negotiate with Ngati Toa and the Kurahaupo tribes to agree on equitable compensation separate from the current tenths estate.

CHAPTER 5

THE WAIRAU AND WAIPOUNAMU PURCHASES

In chapter 4, we discussed the first major instance in which the Crown failed to inquire properly into the customary rights of Te Tau Ihu Maori, which resulted in serious Treaty breaches and consequent prejudice for the tribes. In this chapter, we consider the Crown's admission that it failed to inquire properly during its major land purchases, and the Treaty claims that have arisen from that failure. Ultimately, the tribes of Te Tau Ihu argue that their customary interests were never properly ascertained or protected, their customary mechanisms of authority and decision-making were not respected in the purchase process, and, as a result, their land and resources were alienated without their full, free, and informed consent. Sometimes there was no consent at all, constrained or otherwise.

The first major claim arises from the Wairau purchase of 1847, preceded by the Spain report (which commented on customary 'ownership' of the district) and the Ligar inquiry. The second claim involves the Waipounamu purchase of 1853 to 1856, in which officials conducted an inquiry of sorts in parts of Te Tau Ihu, after the Crown claimed to have purchased the entire multi-million-acre region from Ngati Toa leaders of Porirua–Kapiti in 1853, and after the Crown had granted part of that region to the New Zealand Company in 1848. The final claim addressed in this chapter arises from the Crown's alleged failure to ascertain migratory customary resource-use rights and either to provide for their reservation, as Maori wished to retain them, or to gain proper consent to their extinguishment.

5.1 THE WAIRAU PURCHASE

In 1843, the company's attempt to survey and allocate sections at the Wairau was challenged by Ngati Toa leaders Te Rauparaha, Te Rangihaeata, and Puaha, and by resident right-holders. The resultant conflict ended with the loss of life, a military defeat for the company's 'police' force, and a political defeat for the company with FitzRoy's verdict that it had been in the wrong. In 1845, Commissioner Spain reported that Wairau was in the 'bona fide possession' of Ngati Toa. That same year, Lord Stanley instructed Grey to assist the company by purchasing land for it if necessary.

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5.1.1

Ultimately, resolution of the company's claim to the Wairau came in 1847, after military action against Ngati Toa in the Hutt Valley, and the kidnapping and imprisonment of their leading chiefs. As part of a complicated military, political, and settlement strategy, Governor Grey purchased the Wairau district and Kaikoura coast (which he estimated at three million acres) in March 1847 for £3000 (map 4). Prior to the purchase, Surveyor-General Ligar was sent to investigate the nature of land and resources in the district, and the identity of its customary 'owners'. He reported that there were 13 leading 'Ngati Toa' chiefs whose assent was required, and many other right-holders who also had claims. Grey ignored this report, restricting the purchase to just three Ngati Toa chiefs, and conducting it behind closed doors at Government House. This transaction was followed by an enormous grant of Te Tau Ihu land to the company in 1848 (map 8), and generated many of the Treaty claims in our inquiry. In this section, we consider the aspects relating to the Crown's treatment of customary rights and their holders.

5.1.1 The claimants' case

General elements of the claimants' case have already been summarised in chapter 3. Here, we describe the particular arguments advanced with reference to the Wairau purchase.

(1) Ngati Toa

In Ngati Toa's view, the Crown's historian, Mr Macky, had accepted that there were important problems with the Wairau purchase:

- ▶ The transaction was made with just three rights holders, whereas Ligar had identified 13 principal rights holders ('all Ngati Toa'), and many others who had interests, but Ligar's report was not used as a basis for the Government's negotiations.
- ▶ The three chiefs consented in a 'coercive context'.
- ▶ There are doubts about the proper distribution of the purchase money, and the Government did not do all it could have to ensure a fair distribution.¹

All of the Ngati Toa witnesses described the tribe's oral history that the Wairau purchase was the price of Te Rauparaha's freedom and utu for the deaths of the Europeans at Wairau. This view was confirmed by claimant, Tribunal, and Crown historians, from the documentary evidence. Ngati Toa emphasise the extent to which Grey played with Maori customary concepts of reciprocity and utu to secure the 'sale'.²

In Ngati Toa's view, the following Crown actions were in breach of the Treaty:

- ▶ At the time of the Wairau purchase, the Crown deprived Ngati Toa of the advice and authority of its senior rangatira and failed to gain their consent.

1. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 100–101

2. Ibid, pp 99–103

- ▶ The Crown deliberately took advantage of the absence of those chiefs.
- ▶ The Crown claimed the lands on the basis of utu or compensation for the Wairau incident, when it had in fact conceded that no wrong had been done by Ngati Toa, and it lacked any moral or legal basis for demanding compensation.
- ▶ The Crown coerced the three signatory chiefs by falsely representing that the signing would lead to Te Rauparaha's release.³

(2) Ngati Rarua

For Ngati Rarua, the Wairau transaction has led to a claim that the Crown acquired an enormous area, yet ignored the known rights of resident right-holders. Broadly, the Wairau purchase was the beginning of a new, coercive process of land acquisition. In the evidence of Tony Walzl, the Crown wanted to:

- ▶ deal with the powerful security threat posed by Ngati Toa;
- ▶ find a way of purchasing land that cut through the complexities and perplexities of Maori title (which were making purchasing too small-scale and difficult); and
- ▶ solve the land shortages of the company settlements.⁴

As discussed in chapter 3, Ngati Rarua claimed that the waste lands theory was crucial to the Wairau purchase and the blanket purchases for which it was the precursor. We have already found that claim to be well founded. Here, we note that Ngati Rarua argued this virtual waste lands policy coalesced with two other key imperatives: the need to satisfy the company's commitments to its settlers and the political need to subdue Ngati Toa. Together, these led to the virtual extraction of the Wairau from that tribe. The Crown's Treaty obligations to Ngati Toa and, indeed, to all resident Maori, including Ngati Rarua, were not considered.

At first, argued Ngati Rarua, the Crown contemplated the establishment of a process for investigating the identity of right-holders. The Crown's historian, Macky, stressed Stanley's instruction to Grey to 'ensure that purchases of land from Maori were made from the right parties'.⁵ This was explicitly linked to assisting the company to obtain the land it needed. At first, as shown by his 1846 instructions to McCleverty, Grey envisaged negotiating with just three Porirua chiefs.⁶ But later, in presumed fulfilment of Stanley's instructions, Grey sent Ligar to investigate customary right-holding in the Wairau. Counsel noted Macky's view that this was a compromise arising from a meeting between the Governor and Colonel Wakefield in February 1847. Given the Government's own process for land acquisition – that

3. Ibid, pp 111–112

4. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 37–38

5. Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), p 24 (quoted in counsel for Ngati Rarua, closing submissions, pp 41–42)

6. Lieutenant-Colonel McCleverty was appointed by the British Government in 1845 to assist the New Zealand Company with its selection and acquisition of land, to relieve the Governor of some of his work in that respect.

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5.1.1(2)

is, Stanley's instruction that land for the company must be bought from the correct people – Ligar's report gave the Governor notice that there were resident right-holders with whom the Crown had to deal and that not all of those with rights had been identified. Given the latter point, the Governor was also on notice that Ligar's inquiry had not been adequate, because there were still many unidentified claimants.⁷

Counsel for Ngati Rarua noted the Crown's change of position from its generic submission and its concession that it did not carry out adequate inquiries into customary rights, even though there was expert evidence available. The Government's decision to abandon its own process of inquiry (having gone only so far), and to ignore the results of what that inquiry had begun to uncover, was in breach of the Treaty. Also, Ngati Rarua did not accept Macky's view that Ligar identified Ngati Rarua chiefs as Ngati Toa because he was told so at Port Underwood in 1847. Rather, they ascribed this to avoidable ignorance on Ligar's part, because the evidence available in our inquiry clearly shows the presence and identity of Rarua and their chiefs. The Crown, in failing to make a full and proper inquiry, failed to discover the duality of Tana Pukekohatu's whakapapa.⁸ Ngati Rarua cited Ballara's evidence: "This lack of recognition of Ngati Rarua probably reflected the official and other European tendency to regard them as a hapu of Ngati Toa as well as the tendency to regard all migrant allies of Ngati Toa as in the same sense their subordinates or clones."⁹

Also, the claimants rejected the Crown's submission that rights at the time were fluid and uncertain. In counsel's view, Ligar's experience showed that an inquiry on the spot could uncover customary right-holders and begin to uncover the nature of customary rights from Maori, who were both knowledgeable and available. The Crown's submission that this would have involved an impracticable degree of travel and inquiry for thinly spread officials is gainsaid by the fact of the Ligar inquiry. What was necessary was for the inquiry to be completed and the 'many other claimants' (and the nature of their claims) identified, which was entirely practicable.¹⁰ Instead, argued Ngati Rarua, Grey relied on the incomplete and faulty Spain inquiry, and used the Ligar report as ammunition against the company to confirm that Ngati Toa (as named by Ligar) were the principal right-holders.

The claimants concluded:

[It is] our submission that the Crown failed to adequately inquire into the identity of resident right holders, failed to act on notice that there existed resident right holders and failed to act on notice that what inquiries it had undertaken were incomplete. Because of these failures, the Crown in our submission breached its Treaty obligations to resident Ngati Rarua rights holders.¹¹

7. Counsel for Ngati Rarua, closing submissions, pp 41-44

8. Ibid, pp 44-48

9. Ibid, p 49

10. Ibid, pp 48-49

11. Ibid, p 50

(3) Rangitane

Counsel for Rangitane did not make specific criticisms of the Wairau purchase but rather outlined the history of Rangitane's assertion of claims in the district and, therefore, the reasons why they should have been included. In his view, the tribe was asserting its own distinct claim by the late 1840s. Rangitane occupied 'sold' land after the 1847 purchase in protest at not having been paid, and they informed the Government that Ngati Toa had promised them the reserved Kaituna in lieu of money. In April 1851, when the Government wanted to survey a road through the Kaituna, it had to ask Hura Kopapa for access. In the view of the claimants, this was an acknowledgement both that they were in occupation of the land and that their consent was required, even if final authority was seen to lie with Ngati Toa. On each occasion that there was an opportunity to express discontent at the Crown's purchasing of the Wairau from Ngati Toa alone, Rangitane did in fact complain. In sum, therefore, Rangitane had retained rights and had informed the Crown of them whenever possible, and those rights could be purchased only directly from Rangitane.¹²

5.1.2 The Crown's case

In chapter 3, we discussed both the Crown's concession that it did not inquire adequately about customary rights and its submission about the waste lands policy. Here, we note that, in terms of the specifics of the Wairau purchase, the Crown described the following points from Macky's evidence as relevant:

- ▶ Grey's indefinite detention of Te Rauparaha without trial.
- ▶ Grey's desire to obtain influence or control over Ngati Toa as being a reasonable response to protect the Wellington settlement.
- ▶ Grey's use of the detention of Te Rauparaha and his application of 'moral pressure on Ngati Toa chiefs to agree to a cession of land'.
- ▶ Ligar's investigation and his identification of 13 principal 'owners' and many other claimants.
- ▶ The Governor's purchase from only three chiefs of Ngati Toa, despite Ligar's report.
- ▶ The point that payment may not have been distributed widely enough and that Rangitane certainly were not paid.¹³

In particular, the Crown criticised Ligar's inquiry because it failed to:

- ▶ explain the overlapping interests or the relative interests of Ngati Toa, Ngati Rarua, and Rangitane;
- ▶ explain what authority the Kurahaupo rangatira Ihaia Kaikoura had over the land as an accepted leader of the Port Underwood community;
- ▶ explain why Pukekohatu was identified as Ngati Toa;

12. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 21–24

13. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 98–104

5.1.3

- ▶ explain whether the Rangitane ‘fugitives’ admitted to be living independently in the interior had rights; and
- ▶ identify the ‘many who have claims’.¹⁴

The Crown accepted that its indefinite detention of Te Rauparaha was in breach of Treaty principles, although it did not accept that the Governor had acted illegally.¹⁵ Counsel concluded that the Wairau purchase was ‘not without its controversies such as to whether all right-holders were identified, whether consideration was distributed widely, delays in surveying and the coercive context associated with the Ngati Toa chiefs’.¹⁶ We note, of course, the Crown’s earlier concessions that it did not inquire properly into customary rights, that it did not deal properly with defeated peoples, and that the actions of Grey and McLean sidelined the Treaty and put Maori interests second to those of the settlers (see sec 3.2). But the Crown argued that the ‘fair’ purchase price of £3000, the Wairau residents’ desire for settlers, and its setting aside of a large and sufficient reserve for all the residents were factors in mitigation of its actions. The Crown did not, therefore, go beyond its description of the ‘facts’ and accept that the noted ‘controversies’ were in breach of the Treaty.¹⁷

5.1.3 The Tribunal’s discussion and findings

Before beginning our discussion of the specific issues with regard to the Wairau purchase, we reiterate our findings from chapter 3. Up to 1846, the Crown had articulated an accepted standard for its land purchases, which involved:

- ▶ a clearly delineated and relatively small block of land;
 - ▶ a prior investigation of that land’s title;
 - ▶ the identification of all right-holders; and
 - ▶ an agreement between those right-holders as to the relative distribution of their rights;
- or
- ▶ in the event of a dispute, proposed reference to a register or court (see ch 3).

In addition, Lord Stanley had agreed with the company that there might be unowned waste lands in the South Island but that this could be determined only by an inquiry into Maori customary law and right-holding on the spot. The Treaty guaranteed Maori possession of whatever they ‘owned’ according to their own law. The Secretary of State instructed the Governor to register all Maori land and, if necessary, to purchase land for the company’s requirements. In all such purchases, Stanley told Grey that:

in giving to the Company your best assistance . . . and in facilitating the negotiations with the natives, you will not fail to bear in mind the importance of endeavouring to ascertain,

14. Crown counsel, closing submissions, pp 103–104

15. Ibid, pp 99–100

16. Ibid, p 104

17. Ibid, pp 101, 104

so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.¹⁸

These, then, were the standards by which Grey's actions in 1847 should be judged.

Further, we accepted the claimants' evidence that customary right-holding was decided according to a system of law common to all districts, though with regional variations, and that sufficient Maori and settler expertise was available for the Government to have inquired adequately as to customary law and those who held rights under it. Such rights continued to change and evolve according to custom during the 1840s, but this did not mean that things were in such 'flux' as to be impossible to settle upon due inquiry and the exercise of tino rangatiratanga by iwi through their customary mechanisms. We accepted the claimants' view that the Pakawau hui was a good example of this process in action. We also accepted that such inquiries were not impossible for the Crown, even given its infrastructural limits, since both the Spain and Ligar inquiries were practicable and could have been much more thorough.

Finally, we accepted the evidence of Professor Ward and Mr Walzl that Grey's Wairau purchase (and subsequent 'blanket purchases') was based in part on his own belief in the waste land theory, and that overlapping Maori claims to vast districts were not valid. Even so, this approach was tempered in the Wairau. The Governor agreed to a large reserve there to allow for customary uses other than cultivation, until Earl Grey's December 1846 instructions influenced policy more in the direction of limited 'occupation' reserves for kainga and cultivations.

(1) *The political and military context of the Wairau purchase*

The Wairau purchase was a precursor of the regional 'blanket purchases' of the late 1840s and early 1850s. Chief Protector Clarke, it will be remembered, had cautioned the Crown against trying to buy blocks of land bigger than 10,000 acres in order to avoid conflict from overlapping claims. Governor Grey had a number of reasons for setting aside the articulated standard of cautious, small-scale block purchases with all right-holders identified and involved in making a decision whether or not to sell. In particular, the British Government's view that the New Zealand Company must be enabled to meet its commitments to settlers, and the military and political situation in the Wellington region, influenced Grey's land purchasing policy.

As we noted in chapter 3, Governor Grey resumed Normanby's policy of buying land cheaply in advance of settlement, but shorn of its protective features. By the mid-1840s,

18. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253 (quoted in Macky, pp 24–25)

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settlers were beginning to ‘squat’ on the pastoral lands of the future Marlborough province. Their payment of rent could drive up prices and make it impossible for the Crown to purchase cheaply. The need to stay ahead of this risk influenced the urgency and the massive size and extent of the Wairau purchase.¹⁹

In March 1846, Grey visited Nelson and reappointed those magistrates who had signed the warrants for Te Rauparaha’s arrest in 1843 and had resigned or been dismissed by FitzRoy for it. Grey ‘took a different view of the question to his predecessor’ and discussed his plans to acquire land for the company at Wairau with Colonel Wakefield.²⁰ He was clearly determined to carry out his instructions and provide the company with enough land for its settlers. According to William Wakefield, Grey claimed that he ‘would be glad to facilitate by every means, short of direct dictation to the natives, the accomplishment of the Company’s views.’²¹ These two reasons – the desire to keep ahead of settlement and buy land cheaply for colonisation and the determination to provide the company with land – are part of the ‘why’ of the Wairau purchase.

The form taken by the purchase, however, is explicable only in light of Grey’s military, strategic, and political objectives. Historians agree that the Governor considered the successful colonisation of the middle of New Zealand, and the establishment of the Government’s political domination of it, could happen only if the powerful Ngati Toa alliance were to be subdued and broken. Hence, Grey embarked on a campaign of military and political subjugation. He divided Ngati Toa from their allies by dealing with them alone for lands, by exploiting conflict between iwi, and even by exploiting Ngati Toa’s need to reassert their claims after his actions against them. He further divided Ngati Toa themselves by enlisting a new generation of Christian chiefs against the older leaders. This took two forms. First, he fought with Te Rangihaeata and, with some success (in the case of Puaha and his followers), he tried to force ‘neutral’ sections of the tribe to support him. Secondly, he arrested and detained Te Rauparaha and other major leaders while boosting the mana of Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi and pensioning them by means of purchase instalment payments.²²

Taken together, it is our view that these imperatives explain Grey’s departure from the Crown purchasing standards of the time, his vast ‘blanket purchase’ of an entire region for

19. David Armstrong, “‘The Right of Deciding’: Rangitane ki Wairau and the Crown, 1840–1900’, report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, 2000 (doc A80), pp 57–58

20. Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp 86–88

21. Wakefield to New Zealand Company secretary, 23 February 1847, NZC3/7, no 17, ArchivesNZ (quoted in Phillipson, *The Northern South Island: Part 1*, p 88)

22. For detailed accounts of these strategies, see Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Government Printer, 1968), and Richard Boast, ‘Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal’, revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56).

sheep farming, his insistence on dealing with just three select Ngati Toa chiefs, his insistence on paying them and only them, and his deliberate ignoring of Ligar's report of the existence of other right-holders. We will deal with these matters further in our final report. In particular, we will there consider the question of the Crown's military actions against Ngati Toa, its kidnapping of their senior chiefs, and whether Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi acted under duress when they signed the 1847 Wairau deed.

(2) Was there an adequate inquiry into customary rights and their holders?

There were two inquiries of relevance to the Wairau purchase. In 1845, Commissioner Spain reported on the ownership of the district, on the basis of his limited inquiries at Otaki in 1843 and at Nelson in 1844. Governor Grey relied on Spain's report to justify his dealing with Ngati Toa. In 1847, the Government sent the Surveyor-General (Ligar) to investigate the Wairau district and report on a number of things, including the Maori in occupation and their numbers, identity, and rights. We consider each inquiry in turn.

(a) The Spain commission: The New Zealand Company did not press its claim for Wairau in front of Spain in 1844. No witnesses or evidence were produced about that district. Nonetheless, as we described in chapter 4, Spain and Clarke had questioned Ngati Toa leaders intensively at Otaki in 1843. In particular, they had questioned whether or not Te Rauparaha, Te Rangihaeata, Te Hiko, and others had intended to convey the Wairau to Colonel Wakefield. The answer was a resounding 'no', sufficient to convince the commissioner. Because the company was not at that time cooperating with the inquiry, this evidence was taken without its involvement, and without considering any company witnesses (see ch 4).

By the time Spain made it to Nelson in 1844, this situation had changed. Wakefield and Clarke were cooperating with the commissioner and with each other in the arbitration–compensation approach. As we have seen, Spain heard evidence from only one Maori witness, the western Te Tau Ihu rangatira Te Iti of Ngati Rarua, and he was not questioned about the Wairau. Meurant's preliminary investigation did not include the Wairau. Likewise, neither Clarke nor Spain visited or inquired there. Ngati Toa were not present. We know from Meurant's diary, however, that one of the Wairau's leading rangatira, Tana Pukekohatu, arrived in time to take part in the two-day hui that decided how to divide the set compensation.²³

23. Tony Walzl, 'Ngati Rarua Land Issues, 1839–1860', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol 1), p 130; see also 'Mr Commissioner Spain's Report to Governor FitzRoy, on the New Zealand Company's Claim to the Nelson District', 31 March 1845, Alexander Mackay, comp, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols (Wellington: Government Printer, 1872–73), vol 1, p 55

5.1.3(2)(b)

Other than the commission's questioning of leading Ngati Toa chiefs in 1843, therefore, there was no actual inquiry of Maori about the Wairau. As we have seen in chapter 4, that questioning was confined to whether or not the chiefs would admit a 'sale'. There was no investigation of customary rights or how they were distributed, what kinds of layers and overlaps existed, and who was resident or exercising rights of ahi ka. Nor was there any investigation on the spot. Nonetheless, Commissioner Spain concluded first that Rangitane (without ever meeting or questioning them) were 'reduced to a mere remnant, living in the interior without any fixed dwelling-places, and even now [1845] hunted down by Rauparaha and his retainers.'²⁴ This was a fanciful assertion, at great variance with the information discovered by Ligar in 1847. Spain was also unaware of the presence of Ngati Rarua at the Wairau. Yet, he argued that, from what he had learnt of Maori law, it was the residents who had the main right of alienation, be they Ngati Toa's allies or defeated peoples occupying on sufferance. Ngati Toa, in Spain's finding, had conquered the district, 'extirpated' or enslaved its original people, established both residences and cultivations, and were therefore its bona fide owners.²⁵

This was clearly an inadequate inquiry to serve as the basis for reaching such a conclusion. Part of Spain's object was to show the difference between the Ngati Toa leaders' opposition to the company's claim to Wairau and their lack of opposition (and admission of a conveyance) in the west. But he nonetheless made a finding about who owned the Wairau, on which Governor Grey claimed to rely in 1847.²⁶

(b) *The Surveyor-General's inquiry:* In February 1847, Lieutenant-Governor Eyre sent Surveyor-General Ligar to Wairau to identify the extent of the district and the number of Maori occupants and the area of their cultivations, and to sound out their readiness to sell.²⁷ Ligar toured the district and Kaparatehau with the company's Nelson agent, William Fox. He reported that, after the Wairau conflict, most of Ngati Toa had withdrawn from the district and Te Rauparaha had placed a tapu on it, though Puaha, acting for Te Rauparaha, had recently agreed to lift the tapu.

As we noted in chapter 2, Ligar found a mixed community of some 40 Ngati Toa and 10 Rangitane living at the whaling settlement of Port Underwood. Though he referred to Rangitane as 'slaves' of Ngati Toa, Ligar admitted that 'one of their number, Kaikora [*sic*], has acquired much influence, and may now be considered the head man of the little settlement.'²⁸ A party from Port Underwood had recently returned to the Wairau and resumed cultivation. They had heard of European interest in the district and had started cultivating

24. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 59

25. *Ibid*, pp 58–59

26. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 201

27. The following summary of Ligar's findings is taken from Ligar to Eyre, 8 March 1847, *Compendium*, vol 1, pp 202–204.

28. *Ibid*, p 203

there to assert their title – just as Ngati Toa had done prior to the Wairau conflict. Ligar did not come across these cultivations or any occupants during his journey in the Wairau district, though he admitted that he might have discovered them had he been able to get a Maori guide from Port Underwood. He had also been told about a small number of Rangitane living independently inland, who had dispersed themselves across the district, but he did not find or interview them.

Ligar compiled a list of chiefs who had a ‘joint interest’ in Wairau and whose consent would be required for the purchase. He listed them as follows: ‘The consent required of Puka, Nohoroa, Martin [Matene te Whiwhi], Thompson [Tamihana te Rauparaha], Puaha, Rauparaha, Nohoroa (Waterhouse), Te Kanae, Rangihaeata, Tamaihengia, Pukeko, Pukekowhatu, and Pikiwau (or Te Whawhanua, a rebel).’²⁹ Ligar added that, in addition to the above list, ‘there are many who have claims, but these are the chief.’³⁰

Phillipson identifies the ‘principal resident chiefs’ of the Port Underwood group as Te Kanae of Ngati Toa, Pukekohatu of Ngati Rarua, and Kaikoura of Rangitane.³¹ Ligar, however, did not distinguish the residents in this way and did not identify anyone as Ngati Rarua, though he did include Pukekohatu in his list. It is likely, as Macky points out, that some of the ‘many’ others who had claims were also Ngati Rarua. Macky adds that Ligar’s report ‘indicated that the ownership of the Wairau was far more widely spread than Grey would have liked to admit. Grey chose not to rely on it when justifying to London his decision to purchase the Wairau from Ngati Toa.’³²

Ligar reported to Grey that there were 80,000 acres of level land suitable for cropping in the Wairau district, plus 48,000 acres of level land and 240,000 acres of hill country suitable for pastoral farming – more than enough to satisfy the needs of the New Zealand Company. But Grey was not satisfied with this enormous area and looked beyond Kaparatehau to the east coast towards Kaikoura – a coastal strip some 100 miles long and containing some three million acres (see map 4). As we have noted, Spain had concluded without inquiry that Ngati Toa had possession of the Wairau. Grey now argued on the basis of Spain’s report, without any evidence, that Ngati Toa’s claim to the Kaikoura coast was ‘identical with their claim to the valley of the Wairau.’³³

The claimants and the Crown agree on two fundamental criticisms of Ligar’s report. First, they argue that it was incomplete and faulty – the ‘many’ unidentified right-holders remained that way, and tribal identities were not properly ascertained and explored. Secondly, they contend that the Government took no notice of the report in any case.

29. Ibid

30. Ibid. The spelling of names and remarks in round brackets were Ligar’s; we added the names in square brackets.

31. Phillipson, *The Northern South Island: Part 1*, p 89

32. Macky, pp 34–35

33. Grey to Earl Grey, 26 March 1847 (quoted in Phillipson, *The Northern South Island: Part 1*, pp 89–90)

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Both criticisms are justified in our view. The former problem might have been overcome if the Government had respected tino rangatiratanga and ensured that the right-holders were properly informed of the planned purchase and had been given an opportunity to assemble, debate it, and reach a consensus on whether it should go ahead. Had the Governor relied on the Ligar report, he would have called a hui in the presence of his officials and the 13 identified leaders and left it to the people to make an informed decision. To do so, of course, the Government would have had to make peace with Te Rangihaeata and to release the imprisoned chiefs from their captivity.

The Government would also have explored the rights of Rangitane, following up on the fact that Kaikoura was a leader (possibly the main leader) of the Port Underwood community, and the presence of independent Rangitane inland. The Governor needed to satisfy himself as to whether a purchase could be valid without including them. He was, after all, on notice from earlier reports of Chief Protector Clarke and Commissioner Spain that the rights of defeated peoples needed to be extinguished in certain circumstances.

But this course was not followed. Surveyor-General Ligar's incomplete inquiry was never followed up but merely set aside.

(3) Governor Grey's predetermined decision

We rely on the evidence of the Crown's historian, Mr Macky, that Grey never intended to take any notice of Ligar's inquiry. Macky's report shows that the main reason for the Ligar investigation was a clash between the Governor and the New Zealand Company's principal agent. In June 1846, William Fox's report for the company argued that Spain was incorrect in his assessment of who owned the Wairau. Spain had not investigated the company's claim, and yet he had laid out a guiding principle that the only Maori with a right to alienate land were those who resided on it. Spain had known that Te Rauparaha and Te Rangihaeata lived in the North Island. On Spain's principle, the Wairau belonged to residents – whom Fox claimed were living in one or two small pa, with only 10 acres cultivated in the entire district. This report was forwarded to Grey.³⁴

The Governor, however, instructed Colonel McCleverty to go to the Wairau and find out how many Maori were living there, how much land they had under cultivation, and whether North Island Ngati Toa were likely to relocate there. He was then to secure them sufficient land for their future needs, before carrying out a purchase. Macky suggests, however, that Grey nonetheless accepted the findings of the Spain report and believed Ngati Toa to be the sole owners of the Wairau, because in November 1846 he instructed McCleverty to take three particular Ngati Toa chiefs to the Wairau to make reserves. Further, Grey instructed McCleverty to purchase the Wairau from these three chiefs – Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi. McCleverty, however, did not have time to carry

34. Macky, pp 26–27

out these instructions.³⁵ Ligar's brief was the same as McCleverty's, except that he was not accompanied by Grey's selected chiefs, nor was he entrusted with the actual purchase.

Colonel Wakefield, on the other hand, did not want to see a transaction made with Ngati Toa (in particular, with the North Island leaders), lest that be seen as confirming the legitimacy of Ngati Toa's actions in the Wairau conflict of 1843. Instead, he advocated that the rights of the (assumedly few) residents were what needed to be purchased. Between December 1846 and February 1847, Wakefield put pressure on Grey, which Macky considers to have been successful. McCleverty's instructions were abandoned, and Grey agreed to send Government and company officials, in Wakefield's description, to 'report on the extent of that district: of what tribe are the natives who claim it, what numbers inhabit it: what cultivations it contains, and whether the owners will sell it'. But Wakefield also had to compromise – he had to agree that the company might have to make a second payment, 'to a portion of the natives who sold it to the company in 1839'.³⁶

As Macky notes, the Governor paid no heed whatsoever to Ligar's report of 13 leading right-holders and 'many' unidentified ones. Rather, he summoned the same three chiefs he had always planned to transact with (from at least three months before the Ligar inquiry), and in March 1847 he obtained their signatures to a deed. As we discussed above, these three rangatira were selected not because of their particular status or rights in the Wairau, or their authority over that district, but to serve Grey's political, military, and strategic objectives.

(4) *The effects of the Governor's predetermined decision on Ngati Toa customary right-holders*

We will provide a full account of the Wairau purchase in our final report. Here, we note the Governor's misleading report to the Secretary of State that the 'Ngatitua Tribe, after considerable discussion, agreed to dispose of the required territory, still reserving their claims to that portion of the country which is shown in the accompanying map'.³⁷ He added that he thought it advisable 'not only to purchase this [Wairau] district . . . but also to endeavour to purchase the whole tract of country claimed by the Ngatitua Tribe, and extending about 100 miles southward of that valley'. The Ngati Toa chiefs wanted £5000 for the district, but Grey, after consultation with Colonel McCleverty, agreed to pay £3000, in five annual instalments of £600 each.³⁸ Grey conveyed the impression that he had made the agreement with and paid the first instalment to the whole of the Ngati Toa 'Tribe', after 'considerable discussion'.

H Tacy Kemp, who was present during the negotiations, provides a much later account of where the negotiations took place and who was present. According to Kemp:

35. Ibid, pp 28–29, 39; see also Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 173

36. Macky, p 29

37. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 202

38. Ibid. According to the deed, the first payment was to be made on 18 March 1847, the date the deed was signed; the attached receipt has the same date.

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In 1845 [*sic*] the acquisition of the Wairau Plains took place. Sir George Grey had . . . made himself familiar with the facts connected with the Wairau massacre. Te Rauparaha, with his nephews – one of them Wi Te Kanae, a resident of Wairau – had been prisoners on board the *Calliope*, and the way seemed open for a reconciliation. His Excellency was anxious to throw a halo of peace over that disaster, and he thought that by extinguishing the native title it would be acceptable to all the parties concerned. Negotiations were entered upon with Rawiri Puaha, next of kin in succession to Rauparaha and Rangihaeata[,] . . . a member of the Wesleyan communion . . . and a highly intelligent and honourable man. . . . I was instructed to proceed to Porirua, and explain to Puaha the Governor's wishes, giving him time to consider the terms of the proposal, and then to invite him to a personal interview at Government House. In a few days he appeared, with certain approved members of his tribe . . . and waited on the Governor, who expressed to him in felicitous language his desire to wipe out the memory of so sad an event, and in such a way as to make it acceptable to the feelings of both races; Rawiri at once complied, leaving it entirely to His Excellency's discretion as to the best way of accomplishing the matter.³⁹

Kemp's recollection of the event stresses that it was a deal done behind closed doors at the Governor's residence, with only Puaha and a few other 'approved' Ngati Toa chiefs present. They must have included Tamihana Te Rauparaha and Matene te Whiwhi, the two other signatories. This was a far cry from a public tribal hui, and the standards required of the Crown in conducting purchases, as we discussed in chapter 3.

The purchase, therefore, was not conducted in public nor decided upon by a tribal or intertribal hui, and it did not take place at or near the district concerned. Did it nonetheless represent the considered views of the principal right-holders identified by Ligar, and the 'many' others who had rights? Because Te Rauparaha was detained and Te Rangihaeata was in hiding, Professor Boast (for Ngati Toa) says that:

Rawiri Puaha and the others seem to have taken it upon themselves to exercise a certain amount of leadership at this time, but it is elementary that they did not necessarily have the authority to commit Ngati Toa to the loss of the Wairau (or anything else for that matter).⁴⁰

Boast adds that, while 'the iwi as a whole might have been willing to endorse anything that Te Rauparaha might have done (even that is subject to qualification) this cannot simply be assumed in the case of these three younger chiefs.'⁴¹ He concludes that:

39. H Tacy Kemp, *Revised Narrative of Incidents and Events in the Early Colonizing History of New Zealand from 1840 to 1880* (Auckland: Wilson and Horton, 1901) (quoted in Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 221–222)

40. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 220

41. *Ibid*, p 228

The most obvious missing signature on the Wairau deed, of course, is that of Te Rauparaha himself. If the Wairau transaction was a bona fide and willing sale by Ngati Toa of their interests in the Wairau then one might expect Ngati Toa's great chief to head the list of signatories. He was, after all, in the government's custody: it was not that there would have been any difficulty in finding him. But there is nothing to indicate that the transaction was ever discussed with Te Rauparaha, and this raises real doubts about the transparency and fairness of the arrangement.⁴²

Boast also argued that the three chiefs who signed the deed 'may have been the spokesmen for the Ngati Kimihia–Ngati Huia kin network but possibly not at all for other sections of Ngati Toa'.⁴³ Since they were based in the Wellington–Kapiti region, they were also not necessarily representative of those Ngati Toa still resident in the Wairau, more specifically those at Port Underwood, who were led by the still detained Te Kanae (and, it seems, by the Rangitane chief, Kaikoura). We note that, during the imprisonment of Te Rauparaha and Te Kanae, resident right-holders looked to Puaha to lift the tapu before cultivating.⁴⁴ There was some rivalry between Puaha and Te Kanae after the latter's release. According to Macky, Te Kanae was not released until June, some three months after the sale of Wairau was completed.⁴⁵ We have seen no evidence that Te Kanae was consulted about the sale. Though he describes the sale in his memoir, and his release from detention in 1847, he does not mention having been consulted.⁴⁶

After his release, Te Kanae returned to the Wairau and led a group of dissenters (mostly Rangitane) who occupied the 'sold' land in protest at their exclusion from the sale and from the payments. As part of this protest occupation in 1850, Te Kanae also claimed entitlement at Waitohi (which was sold by Te Atiawa). The protest of the resident right-holders was eventually resolved by their agreement to move off the land after harvesting their crops, alongside a Government effort to get Rawiri Puaha and his fellow signatories to intervene and enforce 'their' sale. The Government took this approach despite Kemp's acknowledgement at the time that Te Kanae's 'capture and detention on board the *Calliope* prevented his being one of the Principal Sellers – otherwise I believe him to have had as great if not a greater claim than any of the young men who sold the land in that locality'.⁴⁷ The Government did not investigate such claims but chose to enforce the deed as signed in March 1847. Eventually, Te Kanae and Kaikoura signed a plan to certify the reserve boundaries at Tua Marina in 1851

42. Ibid, p 229

43. Ibid, p 228

44. Phillipson, *The Northern South Island: Part 1*, p 89

45. Macky, p 43

46. Wiremu Naera Te Kanae, 'The History of the Tribes Ngati-Toa-Rangatira Ngati-Awa-O-Runga-O-Te-Rangi and Ngati-Raukawa, Having Special Reference to the Doings of Te Rauparaha,' translated by George Graham (20 August 1888; reprinted 20 April 1928), Auckland Public Library collection, Alexander Turnbull Library, p 19

47. Kemp to Domett, 15 March 1850 (quoted in Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 187)

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– it was the consent of these right-holders that had to be obtained to arrangements on the ground, as the Government found.⁴⁸

We noted above that Ligar had listed 13 ‘Ngati Toa’ chiefs who had rights in the Wairau and whose consent was needed for any sale. These included Te Kanae and other Ngati Toa leaders who were resident at Port Underwood or whose people exercised resource-use in the Wairau district. But Grey ignored Ligar’s advice. Ten of the 13 chiefs listed by Ligar as ‘owners’ were not consulted over the sale of Wairau, nor were the local residents or the many others whom Ligar mentioned as having claims. As Phillipson concludes, the three signatories ‘did not fully represent all the Ngati Toa right-holders, let alone Ngati Rarua and Rangitane claimants.’⁴⁹

That conclusion is uncontested by the Crown. Macky, the Crown’s historian, is largely in agreement with Boast and Phillipson. He argues that, if Te Rauparaha and Te Rangihaeata had agreed to a sale, ‘it might well have been that the remaining Ngati Toa rights holders would have been persuaded to agree to a sale as well.’⁵⁰ Macky admits that, as early as July 1846 (when Te Rauparaha was captured and Te Rangihaeata was resisting Grey’s forces on the Kapiti coast), the two chiefs ‘had been taken out of the equation for any negotiations over Wairau.’⁵¹ At that time, Grey instructed his officials that, in any negotiations over Wairau, ‘if Te Rangihaeata claimed it would be rejected on the grounds of his being in arms and a traitor.’⁵² But Macky makes no comment on Grey’s refusal to negotiate with Te Rauparaha and two other Ngati Toa chiefs who were detained with him, Te Kanae and Tamaihengia. Since these three had not taken up arms against the Crown and were never charged with any offence, they could not have been regarded as rebels.

We find that the Crown purchased the Wairau behind closed doors and from just three Ngati Toa chiefs, knowingly violating the rights of other senior leaders and of the tribe. This was an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment. Had the Crown had regard to its partnership with Maori, and its obligations under article 2, it would have given effect to their tino rangatiratanga by convening a public hui at or near the district under negotiation (as it did for Pakawau). It would have ensured that the tribe had a chance to consider the Crown’s offer and come to a deliberate and informed decision by means of its own customary decision-making mechanisms. It would have ensured that the 13 principal leaders, as identified by its own inquiry, were present and consented to the transaction. Above all, it would have given all legitimate right-holders the opportunity for a genuine and informed choice. The Crown’s purchase of the Wairau from Ngati Toa fails to meet a single one of its Treaty obligations, and is in very serious breach of Treaty principles.

48. Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, pp 184–191; Armstrong, ‘The Right of Deciding’, pp 64–80

49. Phillipson, *The Northern South Island: Part 1*, p 95

50. Macky, p 37

51. *Ibid*, p 38

52. As noted in the Saxton diary, 29 July 1846 and quoted in Macky, p 38.

Further, it is our view that the three selected rangatira were not given a genuine choice either. The Governor predetermined who would have the right to make the decision and what that decision had to be. We will address this issue of duress and consent, and in particular whether the Government blackmailed the chiefs by holding the release of Te Rauparaha over their heads, in our final report, and make findings on it there.

(5) *The effects of the Governor's predetermined decision on Ngati Rarua right-holders*

We turn now to the question of whether the rights of others besides Ngati Toa were properly considered in the Wairau purchase. We begin with Ngati Rarua, one of Ngati Toa's allies, who were so closely related to Ngati Toa that they were sometimes considered part of them. Their historian, Tony Walzl, examined the Wairau transaction at some length and could find little evidence of Ngati Rarua involvement (and no evidence of their consent). Ligar's description of some 40 Ngati Toa and 10 Rangitane living at Port Underwood must, in Walzl's evidence, have included Ngati Rarua.⁵³ Pukekohatu, who Ligar listed as a 'Ngati Toa' chief, was 'distinctly Ngati Rarua.'⁵⁴ In the claimants' evidence, two of the 13 principal right-holders, as identified by Ligar, were Ngati Rarua: Pukekohatu and Pikiwau (Te Whawharua). On the validity of the purchase itself, Walzl concludes that, although Grey negotiated with 'important Ngati Toa chiefs, they could not have represented all rightholders including resident Ngati Rarua.'⁵⁵

Some of the 40 described by Ligar as 'Ngati Toa' at Port Underwood were Ngati Rarua, including the chief Pukekohatu. Though they may not have been a separate community at Port Underwood, this is immaterial since they were not consulted and their senior chief, Pukekohatu, did not sign the deed. Ballara argues that Ligar filtered and misinterpreted what he was told and who he identified.⁵⁶ Macky, on the other hand, suggested that Ligar identified these people as Ngati Toa because they must have told him that they were.⁵⁷ It is not necessary for the Tribunal to resolve the point, since Grey stuck with his predetermined plan to deal with three already chosen Porirua chiefs and ignored all other right-holders, no matter what their tribal affiliations.

We agree with Ngati Rarua's submission that the Ligar report put the Governor on notice that the consent of 13 leading chiefs was required (including Pukekohatu) and that there were 'many' other right-holders yet to be identified.⁵⁸ As with the wider community of Ngati Toa right-holders and leaders, the Ngati Rarua people were entitled to participate in the

53. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p184

54. Ibid, p 210

55. Ibid

56. Dr Angela Ballara, 'Customary Maori Land Tenure In Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 220

57. Macky, pp 33–36

58. Counsel for Ngati Rarua, closing submissions, pp 41–44

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decision-making and to give a free and informed consent (or refusal) to the purchase. We find that the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right-holders, including Ngati Rarua, in serious breach of article 2 of the Treaty. As we found above, this was a deliberate suppression of their tino rangatiratanga, and in violation of the principles of reciprocity, partnership, active protection, and equal treatment.

(6) *The effects of the Governor's predetermined decision on Rangitane right-holders*

The evidence of Mr Armstrong and the Rangitane claimants, and the submission of their counsel, is to the effect that Rangitane clearly had customary rights at the time of the Wairau purchase. Relying on Armstrong's evidence, counsel set out the various occasions on which Rangitane asserted their right to be consulted and paid, and their protest at being excluded, after the signing of the Wairau deed (see sec 5.1.1(3)).

From our discussion in chapter 2, we have no firm information on whether defeated peoples asserted any rights in the early 1840s in negotiations for the alienation of land. Although they attended and witnessed the transaction with Wakefield in 1841, for example, Meihana Kereopa did not claim that they participated in making the decision. It is unknown whether Kurahaupo people were included in Wakefield's gifts. As we have found in chapter 4, they were present at the Nelson hui of 1844 to resolve the division of Spain's compensation, and Ngati Kuia later claimed to have participated in those payments. Finally, in 1847, Ligar's interviews with the Port Underwood community suggested that its Rangitane members were not advancing a claim of their own. He noted, however, Kaikoura's authority as a leader of the community and the existence of independent people living inland whose status and rights he did not explore.

We note also:

- ▶ Spain's finding in the 1840s that defeated peoples retained rights where they remained in occupation (a view also reported to the Government by the chief protector), thus requiring the Government to at least consider and investigate this as a possibility;
- ▶ that 'fugitives' who had never been defeated were coming in and joining settled 'tributary' communities;
- ▶ that tributary communities continued to exist on their ancestral land and under their own chiefs; and
- ▶ that the conquerors relied to some extent on the spiritual power and knowledge of the defeated peoples, their sacred sites and tohunga, and their naming of the land, and began to arrange marriages to create whakapapa and political links. Kaikoura, for example, played a leading role in explaining and identifying the rohe to Ligar, and he also joined Te Kanae as the two chiefs who signed the plan certifying the boundaries of the reserve.

From at least 1849, Rangitane in the Wairau disputed the 1847 purchase by occupying 'sold'

land with the agreement of a similarly excluded Ngati Toa chief, and they also advanced a claim of their own to payment by the Crown. The Government asked the three signatory chiefs to move these people off the disputed land and they agreed to do so, but the matter appears to have been resolved by Te Kanae and Rangitane agreeing with the Government that they would move after harvesting their crops. Further, the attempt to survey a road through the Kaituna district was met with resistance from Ngati Kuia and Rangitane inhabitants. By the early 1850s, the Kurahaupo people were asserting a clear and independent claim to land in the Kaituna and Pelorus areas, to some disapproval from Ngati Toa. Kaikoura, though supposedly having no rights according to the 1847 Ligar report, nonetheless witnessed and approved the boundaries of the Wairau reserve in 1851, alongside Te Kanae.⁵⁹ Te Kanae was a leader for both tribes and had made an important peace-making marriage with Mere Te Rapu of Rangitane.

In our view, the tribes residing in the Wairau were working together in the late 1840s and early 1850s to protest the sale of their land without their consent (or payment). A layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive. The fact that Rangitane, in common with others at the Wairau, looked to Ngati Toa chiefs for leadership at this time, especially Te Kanae and Puaha, did not change the existence of their own customary rights. Those rights were guaranteed and protected by the Treaty. The Governor's predetermined decision to buy the Wairau from his three chosen Ngati Toa chiefs meant that Ligar's failure to properly examine and identify Rangitane's rights was immaterial. The Crown's purchase of their land, without their participation or consent, was in serious breach of article 2 of the Treaty, and of its principles. This breach was compounded by the Crown's failure to investigate Rangitane's post-sale protest or to uncover and satisfy their undoubted rights at that point. Instead, the Crown tried to enforce the sale by requesting its selected chiefs to enforce it. Although this was ultimately unnecessary and the protesters agreed to withdraw, both sides had made their point.

(7) *Were the payments properly distributed to customary right-holders?*

Ngati Rarua, Rangitane, and the majority of Ngati Toa leaders and right-holders were deprived of their tino rangatiratanga when they were not allowed any say in whether the Wairau would be sold. Nonetheless, the Crown purchased the district from three select chiefs and then enforced that purchase on resident protestors. Was this action of the Crown in any way mitigated by ensuring that all right-holders were paid, even if they were not consulted and had not consented?

We lack full evidence on this point. It could be argued that the Crown played it by the book: the deed was signed by the three chiefs and the instalment payments were made to them, despite an occasional threat to withhold payment. But it could also be argued that, in

59. Armstrong, 'The Right of Deciding', pp 64–80; Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 184–191

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accordance with custom, the three chiefs were merely trustees acting for the remainder of the right-holders and obliged to share the payment among them. From what evidence is available, this either did not happen or at least did not happen to any great extent. Tamihana Te Rauparaha, for example, offered his father £200, though that was not accepted. We have no evidence that any of the money was distributed to Ngati Toa (and Ngati Rarua) resident at Wairau, and there is evidence that it was not distributed to Rangitane.⁶⁰

The next question is whether the Crown, knowing that the three chiefs were pocketing the money, did anything about it? As Macky noted, the Government did ask Servantes to investigate just before the second instalment was due – a recognition that it did have an obligation to see that the payments were properly distributed.⁶¹ He found that the chiefs had not distributed the first instalment and recommended that they be required to do so under supervision for later instalments. But there is no evidence that this recommendation was implemented, and the Government seems not to have made any further inquiry, though Macky quite rightly says that it could and should have done so.⁶² In our view, the Crown had a responsibility to try to ensure that land purchase money handed over to a select few chiefs was equitably distributed to right-holders and, where possible, invested in the productive development of land reserved to them. After all, this is what Grey promised would result from the instalment payment system that he initiated with the Wairau purchase, but he seems to have done nothing about it once he had obtained the block.

We find that the Crown failed to ensure that the instalment payments for Wairau were properly distributed to right-holders, Ngati Toa or others. This failure was in breach of the principles of active protection and equal treatment. As a result, the great majority of Maori right-holders were not consulted about the purchase, were deprived of their tino rangatira-tanga, did not consent to the purchase, and were never paid as part of that purchase. Taken together, these Crown actions were in very serious breach of the Treaty of Waitangi and its principles.

(8) *Were these failures of the Wairau purchase mitigated by the inclusion of right-holders in the Waipounamu purchase?*

In 1848, Governor Grey issued a Crown grant of land to the New Zealand Company (see map 8). It included the entirety of the Te Tau Ihu land that he claimed to have purchased from Puaha, Te Whiwhi, and Tamihana Te Rauparaha. From that point on, the settlers had all legal rights to the land and Maori had none (save their reserve). In 1851, when the company's affairs were wound up, any unallocated land reverted to the Crown.⁶³ As we shall see,

60. Macky, pp 52–63

61. Lieutenant WFG Servantes was an army interpreter who acted as interpreter at the Wairau and Porirua purchases.

62. Macky, pp 52–63

63. Ibid, p 52

in the Waipounamu purchase of 1853–56, the three iwi with rights at the Wairau – Ngati Toa, Ngati Rarua, and Rangitane – signed deeds purporting to sell all their rights wherever they happened to be. The Rangitane deed specified: ‘all the lands of the Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of the Rangitane extend.’⁶⁴

For reasons that will be explained in section 5.2, we do not consider this to have been a free and willing sale, even within the wider ambit of the Waipounamu negotiations. Regardless, it was certainly not a free and willing sale of rights in Wairau land already granted by the Crown to others. It is simply and clearly inconsistent with the Treaty guarantees for the Crown to grant settlers land with unextinguished customary rights. Whatever the Wairau purchase deed may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it. As we have found, that included the majority of Ngati Toa, and also the resident Ngati Rarua and Rangitane right-holders. The action which extinguished their rights at British law was the Crown’s grant of the land to others in fee simple. In theory, there was no going back from that point. In practice, the Crown resumed ownership of a very large territory in 1851 and could have returned land to Maori who had not sold their rights and did not wish to do so, without any injustice to settlers. Instead, it maintained and defended its title.

Thus, although the Crown may have paid some excluded right-holders years later during the Waipounamu purchase, this could not mitigate the absolute suppression of their tino rangatiratanga in 1847 and 1848. We find that the Waipounamu purchase could not and did not make willing sellers of those whose rights had already been granted to others, in violation of the plain meaning of article 2 of the Treaty, and of the principles of reciprocity, partnership, and active protection.

Further, the Crown was in breach of the Treaty principle of equity by its action in granting the Wairau to the New Zealand Company (despite its knowledge from the Ligar report of unextinguished customary rights) and its maintaining of the grant (despite the protest occupations of Te Kanae and Rangitane). In 1845, FitzRoy had granted 151,000 acres to the company for its Nelson settlement, but the company was permitted to refuse the grant. That grant was then replaced by a much more favourable one in 1848.⁶⁵ Te Tau Ihu Maori, on the other hand, were not permitted to repudiate the 1847 Wairau deed or to reject the 1848 grant. Maori and settlers were not treated equally or fairly. In 1847–48, the Government took determined steps to ensure that the company’s commitments to its settlers were fulfilled. Settlers received their land not as a result of a free and informed Maori consent to the loss of theirs but rather in the knowledge that the foundation purchase deed rested on the signature of only three of 13 identified principal leaders whose consent was required. As the

64. ‘Receipt for £100 paid to Rangitane’, 1 February 1856, *Compendium*, vol 1, p 313

65. Mary Gillingham, ‘Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901’, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp 85–92

Crown acknowledged in its closing submission, the ruthless actions of Governor Grey set aside the Treaty promises and put the interests of settlers above those of Maori. We agree, and we find the Crown in serious breach of the Treaty principle of equity.

5.2 THE WAIPOUNAMU PURCHASE

The Waipounamu purchase of 1853–56 was preceded by the Waitohi purchase of 1848–50 and the Pakawau purchase of 1852 (map 5). Ngati Toa and Rangitane did not pursue claims before this Tribunal that they should have been included in the Waitohi purchase.⁶⁶ Nor did Te Atiawa claim that there were any issues with how their right-holders were identified and represented in that purchase.⁶⁷ We do not, therefore, discuss the Waitohi purchase in this preliminary report, but other issues about Waitohi and its Waikawa reserve will be considered in our final report. Similarly, as we noted in chapter 3, the Pakawau purchase of 1852 was not the subject of claims that customary right-holders were left out or unrepresented in the decision-making.⁶⁸ Indeed, the Crown's process there indicated what could be done. We leave other issues about that purchase to our final report.

In 1853, Governor Grey left New Zealand to take up a colonial governorship in South Africa. As part of the ceremonial surrounding his departure, he met with Ngati Toa in August of that year and requested that they surrender all their remaining customary rights in Te Tau Ihu to the Crown. Although the tribe was reluctant, its leaders eventually decided to agree to the proposed sale after two days of public debate at the well-attended farewell hui. The purchase deed acknowledged that resident tribes – including the defeated peoples – claimed the land ‘conjointly’ with Ngati Toa and that reserves (to be decided by the Crown) would be made for them. Further, two-fifths of the purchase price of £5000 was paid to Ngati Toa, with the remainder to be allocated to resident right-holders at a proposed general hui in Nelson. From that point on, the Government counted the entirety of Te Tau Ihu as ‘sold’. Although there were many overlapping customary rights known to officials, McLean's view was that Ngati Toa had an unquestionable suzerainty and an undeniable primary right to sell the land. Other tribes and resident Ngati Toa would be compensated for their interests and have reserves made for cultivation and subsistence, but their land was sold and they could not repudiate that sale. On the other hand, he admitted that without their concurrence the sale would not be complete or valid.

The proposed Nelson hui of Ngati Toa and Te Tau Ihu residents did not eventuate. Instead, during 1854 McLean paid the remainder of the purchase money to non-resident Te Atiawa

66. Counsel for Ngati Toa Rangatira, closing submissions; counsel for Rangitane, closing submissions

67. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 99–126

68. See the closing submissions of all claimant counsel.

who had returned to Taranaki and at a second North Island hui of Ngati Toa in December of that year. Finally, at the end of 1855 and the beginning of 1856, over 24 months after the land was counted as sold, McLean met with Te Tau Ihu residents and signed deeds with them. He had already spent the entire purchase price of £5000, so the Government permitted him an additional sum of £2000 for the resident right-holders. McLean kept their payments very small and refused to vary the low price he had set for each group. After much resistance, he agreed to except Taitapu on the west coast and Wakapuaka in Tasman Bay from having been 'sold'. Rangitoto had not been included in 1853, and Ngati Koata (who therefore had a choice) refused to include it now and, despite pressure from McLean, they stuck to that resolution.

By early 1856, the Government had signed deeds (or receipts) with Ngati Toa, Te Atiawa, Ngati Rarua, Ngati Tama, Ngati Koata, Rangitane, and Ngati Kuia. No deed was ever signed, or reserves allocated, for Ngati Apa. The entire region of Te Tau Ihu was then considered Crown land, apart from Taitapu, Wakapuaka, Rangitoto, and small occupation reserves (map 6). This process generated many claims in our inquiry. In this report, we concentrate on the claims about how customary rights were identified and dealt with by the Crown, and the manner in which the 'consent' of right-holders was obtained.

5.2.1 The claimants' case

We have already addressed some general points about Crown purchasing in chapter 3. Here, we consider the more detailed position of the claimants in relation to the Crown's treatment of customary rights in the Waipounamu purchase. We begin with Ngati Toa, who submitted that the Crown was correct to deal with them first.

(1) *Ngati Toa's position*

As we discussed in chapter 2, Ngati Toa claimed a general right of alienation over the whole of Te Tau Ihu, based on the paramount authority of Te Rauparaha over the conquest and the northern alliance. Ngati Toa argue, essentially, that the Crown was right to deal with them before others: 'historically, the ultimate right to control alienation of the land remained with Ngati Toa, although the Crown also had obligations to recognise the rights of the other [conquering] iwi.'⁶⁹ The Waipounamu purchase was widely and publicly debated, but Ngati Toa argue that their agreement was obtained under pressure and with great reluctance. They have no claim, however, that the correct right-holders were not identified and dealt with by the Crown in 1853–54.⁷⁰ Ngati Toa's other issues about the transaction will be considered in our final report.

69. Counsel for Ngati Toa Rangatira, closing submissions, p 45

70. Ibid, p 103

(2) *The claims of Ngati Rarua, Ngati Tama, Te Atiawa, Ngati Koata, Rangitane, and Ngati Kuia*

In contrast to the position of Ngati Toa, these iwi argued that their rights were not properly identified, that they were placed in a position where they had no choice but to agree to a sale made by non-residents, and that the resultant ‘consent’ was absolutely deficient in terms of the Treaty. In Te Atiawa’s and Ngati Rarua’s submission, a more correct process was followed in the Waitohi and Pakawau purchases. The resident right-holders were approached first, the transactions were publicly debated on the spot and all right-holders given an opportunity to put their case at a general hui, and those present at the hui then agreed among themselves with whom the Crown should deal. In both cases, the Crown abided by the decision of the people arrived at by their own customary processes. Te Rauparaha’s claim to involvement in – even control of – the Waitohi purchase was, in Te Atiawa’s submission, rightly rejected. Having demonstrated a better way, and with the knowledge gained as a result of Waitohi and Pakawau that Ngati Toa’s claims to primacy were not accepted by resident Maori, the Crown then deliberately followed a wrong and improper process in the Waipounamu purchase, with devastating effects.⁷¹ This view of the Waipounamu purchase was shared by Kurahaupo iwi, as well as by Ngati Toa’s ‘allies’.⁷²

In Ngati Tama’s view, this was part of a coercive pattern that was followed throughout the 1840s and 1850s, because the Crown failed to ever conduct a full and exhaustive inquiry into the nature and extent of their (or anyone’s) rights, either in the Spain commission or prior to any purported alienation or purchase of their interests after it. This was exacerbated by the New Zealand Company’s and the Crown’s improper tactics when transacting land, which included:

- ▶ the supposed ‘prior purchasing’ of vast undefined areas from non-resident Maori;
- ▶ knowingly transacting with non-resident Maori who were not mandated to alienate the land, rights, and interests of resident right-holders; and
- ▶ forcing ‘sales’ by presenting Ngati Tama (and other residents) with a *fait accompli*, offering only a ‘take it or leave it’ option, and failing to present any option other than that their land was already alienated.⁷³

Ngati Tama submitted: ‘It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.’ The interests in land that the Crown claimed were conveyed to it by Ngati Toa at Porirua in 1853 were extensive and without boundary definition. The interests supposedly thus conveyed included lands of Maori who had not signed the deed. The Ngati Toa chiefs could not cede the interests of those iwi. The Crown had obligations under the Treaty, and its principles of partnership,

71. Counsel for Te Atiawa, closing submissions, pp 35–40, 157–169; counsel for Ngati Rarua, closing submissions, pp 56–65; see also Gillingham, pp 163–170

72. See, for example, counsel for Rangitane, closing submissions, pp 21–25

73. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), p 37

good faith, and active protection, not to negotiate the 1855–56 deeds of cession ‘in a climate where there was no free choice.’ Iwi were misled by the chief land purchase commissioner, Donald McLean, and his agents, particularly Thomas Brunner and William Jenkins, who told them that the land had already been alienated. There was simply no means for non-signatories to the earlier deeds to effectively prevent the inclusion of their lands within the vast and undefined areas purportedly covered by such deeds. Williams’ evidence is that Ngati Tama vigorously contested the Crown’s assertion that Ngati Toa had a ‘general right of alienation’, but McLean dismissed their protests. He stuck to the line that he could deal with them only on the basis that they were indicating agreement and adherence to the Ngati Toa transaction: ‘They were not allowed to repudiate the cession nor to renegotiate the general extinguishment of customary rights contained in that deed.’⁷⁴

This was, in the view of the claimants, history being repeated. Captain Wakefield had used this tactic in relation to alleged purchases from ‘absentees’ living at Kapiti and Queen Charlotte Sound to pressure local iwi to accept such ‘sales.’ Spain then accepted the validity of the 1839 purchases as well, and ‘proceeded to impose the consequences of those “sales” on other iwi who were living in the Nelson districts and who had not been involved in any way in the transactions.’ There was a cumulative effect. First came the retrospective validation of the New Zealand Company’s purchases through the London agreement, the Spain commission, and the 1848 Crown grant. Secondly, there were the deeds of 1853–56, supposedly conveying land already granted by the Crown to the company in 1845 and 1848. The ultimate effect was the total and permanent alienation of these lands, without that ever being properly explained by the Crown to Maori and without Maori right-holders actually consenting to it.⁷⁵

The Crown’s failure to inquire into the nature and distribution of customary rights and authority in Te Tau Ihu prior to the Waipounamu purchase was, in the claimants’ view, a deliberate tactic. The Crown has accepted that it did not conduct such an investigation but defended itself by arguing that it did identify and deal with resident right-holders before the purchase was *concluded*. In Ngati Tama’s submission, this is not an adequate defence. Officials of the time understood that customary tenure was complex and feared that it might be too difficult to resolve before entering into purchase negotiations. Walzl quoted McLean as admitting this point. Counsel argued: ‘This awareness on the part of the Crown of the complexity of customary right-holding coupled with the failure to adequately investigate such matters increases the severity of the Crown’s breach of its obligations because it acted knowingly.’⁷⁶

In the evidence of Ballara and Walzl, the Crown had sufficient expert advice available to it for a proper inquiry prior to initiating the Waipounamu purchase. But the Crown

74. Ibid, pp 46–47

75. Ibid, p 47

76. Ibid, p 53

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deliberately chose not to inquire or negotiate on the spot, because of political expediency and the desire to get a quick and cheap outcome. Again, the fact that the Crown had such expertise available and did not apply it increases the severity of the Treaty breach. This was a breach of the principle of active protection, argued Ngati Tama, in which the Crown failed to ensure that they kept their lands and resources until such time as they themselves wished to alienate them by free and informed choice, while retaining such as they needed for their present and future needs.⁷⁷

The Crown's failure was one of both substance and process. In terms of process, it treated purchases as effective even though certain groups had yet to be paid or even informed and consulted. In substance, descriptions of what was being alienated were neither adequate nor accurate and were complicated more by apparently retransacting areas already taken in similar *fait accomplis*.⁷⁸

Rather than carrying out a full and fair inquiry, McLean chose to initiate the Waipouamu transaction with non-residents most likely to be *willing*. Resident Maori, in the claimants' view, were left with no choice but to 'sell' or even just get receipts. A transaction on that basis was unfair and fundamentally flawed, since the options were to extinguish rights by receiving a payment or have those rights extinguished anyway without getting anything.⁷⁹

The issues as raised by Ngati Tama were largely shared by the other claimants. Ngati Koata, for example, deny the Crown's assertion that they were willing sellers on the ground that there was no provision for their meaningful or independent participation in the alienation process. Rather, there were elements of compulsion – they had to accept a deal made by others to get a payment or they would receive nothing. There was neither adequate opportunity for them to participate nor to consent as truly willing sellers. The basis for this was the Crown's failure to inquire into customary rights – who held them, what they were, and whether (or how far) they could or should be conveyed to the Crown.

McLean acted deliberately in this respect – it was a tactic rather than a mistake. Immediately after the 1853 deed was signed, Richmond reported the discontent of resident Maori and warned that, if they were not dealt with immediately, they might repudiate the 'sale'. McLean already knew that rights in the area were complex and overlapping, but he continued to ignore the residents. Ultimately, he paid groups later for outstanding claims, rather than actually negotiating their willing and informed consent to the transfer of their customary rights.⁸⁰ Ngati Koata conclude: 'The fundamental point has been proven, that McLean had a sophisticated understanding of competing rights and his failure to properly ascertain the rights of each community and deal fairly with various right-holders for the alienation of those rights, was done knowingly.'⁸¹

77. Counsel for Ngati Tama, closing submissions, p 54

78. *Ibid*, p 55

79. *Ibid*, pp 56–58

80. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 63–68

81. *Ibid*, p 70

The submissions of Ngati Rarua and Te Atiawa were in broad agreement with these points.⁸² Ngati Kuia and Rangitane emphasised that McLean and Ngati Toa did eventually recognise their claims as valid, which, in their view, acknowledged their legitimacy.⁸³ Otherwise, there was broad agreement that the Crown failed to investigate rights properly, initiated the purchase with non-residents as a deliberate tactic, and used the resultant 'sale' to deprive resident right-holders of any genuine opportunity to consent or dissent, to their great prejudice. None of these claimants suggested, however, that their own deeds were not properly negotiated with their leaders, nor properly representative of right-holders. Other complaints, such as the alleged failure to make sufficient reserves or pay a just price, will be addressed in our final report.

(3) *The 'unique' claim of Ngati Apa*

Finally, we note Ngati Apa's unique complaint that they alone have never had their rights recognised, extinguished, or compensated. Nonetheless, 'Ngati Apa say that, as a people, they existed, continued always to exist, and still exist in the Te Tau Ihu area.'⁸⁴ They were entirely overlooked in the Waipounamu Purchase (and everything that preceded it). This gave a special emphasis to Ngati Apa's claim about the Crown's failure to inquire properly into customary rights and the Crown's admissions on that point. Ngati Apa's Treaty rights were entirely ignored by the Crown, except for a very limited recognition in the Arahura deed in 1860, and the vesting of minuscule reserves at Port Gore in 1889. The fact of those 'niggardly' recognitions at all, they argue, places Ngati Apa's entitlement to proper consideration beyond question.⁸⁵

The fundamental Ngati Apa claim is that all of the land which they occupied (including, especially, the hinterlands), and with which they had traditional associations and resource-use, was acquired by the Crown without any proper separate attempt to purchase their rights or make reserves for them, other than by a side wind at Arahura in 1860. This meant that all the resources with which Ngati Apa had traditional associations, and which they were continuing to live on and support themselves from, were taken in breach of the Treaty. There was no proper inquiry as to right-holding, which would, they argue, have revealed their continued existence, ancestral associations, and resource-use. All of Ngati Apa's other claims flow from the Crown's fundamental failure to ascertain all the customary right-holders in Te Tau Ihu, or even purposefully ignoring them.⁸⁶

82. Counsel for Ngati Rarua, closing submissions, pp 65–71; counsel for Te Atiawa, closing submissions, pp 159–166

83. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 49–51

84. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 3

85. Ibid

86. Ibid

5.2.2 The Crown's case

As we noted in chapter 3, the Crown's case evolved and changed over time. At first, the Crown denied that it had failed to investigate customary rights properly and argued that Grey and McLean obtained a good knowledge of Maori law and the descent groups with rights in Te Tau Ihu.⁸⁷ Its final position, however, was to accept that it did not inquire properly as to customary rights during its major purchases.⁸⁸ Grey and McLean were possessed of a good general knowledge but, in the Crown's admission, exploited it to obtain land from Maori at the latter's expense. Counsel also admitted that Grey and McLean set aside Treaty promises when purchasing land and subordinated the interests of Maori to settlers.⁸⁹ Further, the Crown conceded that occupation was discoverable on the ground, upon proper inquiry, and that, while some rights were contested, an inquiry had been feasible.⁹⁰

However, the Crown did not accept Mr Armstrong's contention that it should have been able to reach a consensus resolution of competing claims. Rather, it relied on Professor Boast's view that McLean was right not to try to fix where everyone's rights were located, so long as adequate care was taken over making *reserves*.⁹¹ To a large extent, the Crown did not depart from its submission that its treatment of people's rights began with the company purchases but carried on into the 1850s, at which point McLean resolved undealt with or residual rights by purchasing all of them. This was, in the Crown's view, a proper and satisfactory resolution.⁹²

Nonetheless, the Crown argued that the legitimacy of its actions did in fact depend on finding out the identity of the correct right-holders and purchasing their interests before transferring title to settlers. It 'consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land.'⁹³

The Crown conceded:

McLean did not approach Crown purchase with the idea of developing a clear understanding of the state of customary rights. McLean had a 'reasonable grasp' of who the main descent groups were. His objective was to rapidly acquire quiet possession of the area, by buying up rights of those present and asserting rights. While there was a degree of understandable pragmatism at work, the method and the result appear to have contributed to the situation where iwi were pitted against each other in competition for scarce resources. The method can be criticised for failure to properly inquire and the result was an early state of virtual landlessness due to the policy of purchasing entire districts.

87. Crown counsel, submission concerning generic issues, 20 September 2002 (paper 2.371), pp 5–9

88. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 12–13

89. *Ibid*, p 4

90. Crown counsel, closing submissions, pp 16–17

91. Crown counsel, submission concerning generic issues, p 9

92. *Ibid*

93. *Ibid*, p 8

The relationships between the northern iwi and the original tangata whenua iwi (whether living amongst the northern iwi, or those fugitives who fled inland) were not given due consideration.⁹⁴

Initially, the Crown argued that the help that McLean sought and obtained from Ngati Toa to assist in completing the Waipounamu transaction was not brought about not by pressure on Ngati Toa nor as a result of a fiction that the land had already been sold by Ngati Toa. It was more likely, in the Crown's view, that Ngati Toa's involvement was necessary because McLean and Maori of other tribes recognised or acknowledged their interest. Having them present did not amount to duress on other iwi.⁹⁵

After consideration of Mr Macky's evidence, the Crown changed this position. Its stance on the facts of the Waipounamu purchase (in terms of customary rights) differed ultimately from the resident claimants' in only one main respect. The historical evidence broadly showed that McLean improperly tried to use his transactions with non-residents to try to pressure resident right-holders to agree to sales. In the Waipounamu purchase, he dealt with non-residents first and then sent in surveyors to lay off reserves, treating the alienation of the land as a *fait accompli*. He also brought senior chiefs with him to support him when he finally had to deal with the resident right-holders in person. The Crown quotes its own witness, Mr Macky, to this effect. The difference between the Crown and the claimants is not that McLean tried to do this but how *successful* he was. Macky argues that McLean's strategy failed in western Te Tau Ihu, where Maori did manage to keep Wakapuaka and Taitapu out (and presumably could have managed more, had that been their wish). In the east, Macky acknowledged the role of the Ngati Toa deed and the 1853–54 signatories in pressuring residents but considered that some outcomes were nonetheless willing sales. The Crown adopted Macky's position on the facts without drawing any conclusions about how those facts should be interpreted in respect of Treaty principles.⁹⁶

In terms of Ngati Apa's claim to have been avoidably overlooked, the Crown did not at first accept that there were 'any significant numbers of Maori living in and deriving their livelihood from the hinterland areas who were deprived of their entitlements by reason of lack of proper inquiry as to Maori customary rights in the hinterland areas.'⁹⁷ Such groups were certainly small groups (as was the population of the Te Tau Ihu region generally). However, without having made an inquiry at the time, the Crown conceded that 'it cannot be asserted with confidence that such groups, however small, were not deprived of entitlements'. This was particularly pertinent to Ngati Apa, who were not recognised in any Crown deeds aside from the Arahura purchase.⁹⁸

94. Crown counsel, opening submissions, p 13

95. Crown counsel, submission concerning generic issues, pp 43–46

96. Crown counsel, closing submissions, pp 113–115; see also Macky, pp 204–205

97. Crown counsel, opening submissions, p 14

98. *Ibid*, pp 14–15

5.2.3 Was there an adequate inquiry into customary rights before or during the Waipounamu purchase?

One of the most controversial aspects of the Waipounamu purchase was the Government's decision that 'the Ngatitōa Tribe of Porirua', in the words of McLean, 'had unquestionably, as the earliest invaders, a prior right to the disposal of the district.'⁹⁹ If that claim was correct (as Ngati Toa argues), then the Crown was right to commence the purchase with Ngati Toa, and perhaps even to sign a deed with them first, and Ngati Toa did claim to alienate the customary rights of those who 'conjointly' claimed the land. As their historian, Professor Boast, described it, the 1853 deed:

was not intended to be an extinguishment of only Ngati Toa rights; rather it was an extinguishment of all rights conducted via the medium of negotiations with Ngati Toa as having the 'principal claim', with representatives of other groups participating in the discussions and who would receive a portion of the money *from Ngati Toa*. [Emphasis in original.]¹⁰⁰

We turn now, therefore, to the question of whether there was an adequate inquiry into customary rights before the Government made this decision.

The parties in our inquiry agreed that the answer to this question was 'No'. The next questions are:

- ▶ Was the Crown on notice that Ngati Toa's claim was contested?
- ▶ Did the Crown fail to investigate a situation known to be controversial?

The clear answer to those questions, as Te Atiawa submitted, was 'Yes'. During the late 1840s and early 1850s, Ngati Toa's claim to primary rights in Te Tau Ihu was disputed by Te Atiawa in eastern Te Tau Ihu and by a number of tribes in the west. The claims of Te Rauparaha (from Kapiti) and Te Kanae (from Wairau) to be included in the Waitohi purchase were neither investigated nor accepted by the Crown and were simply ignored. In Te Atiawa's submission, this was the correct response.¹⁰¹ Ngati Toa did not make a submission on the point.

In western Te Tau Ihu, various iwi (including Ngati Rarua, Ngati Toa, and Ngati Apa) wrote to the Government to set out their claims, which related to the Crown's interest in purchasing the west coast of Te Waipounamu. More particularly, attention became focused on the Pakawau block in 1852.¹⁰² In that instance, the Governor's response to Ngati Toa was to advise them to go to Nelson and sort it out with Superintendent Richmond and the other iwi. The result, as we discussed in chapter 3, was the Pakawau purchase, arrived at from

99. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301

100. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 260

101. Counsel for Te Atiawa, closing submissions, pp 35–40, 157–169. For Te Kanae's claim, see section 5.1.3.

102. For Ngati Toa Rangatira, see Ngarongo Iwikatea Nicholson, brief of evidence and appendices, 11 June 2003 (doc P4 and attachments); for Ngati Rarua, see Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 231–237; for Ngati Apa, see David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa Ki Te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), p 2.

a consensus reached at an intertribal hui in Nelson. The respective overlapping rights of Ngati Toa and the other iwi were resolved by the exercise of tino rangatiratanga through customary mechanisms and were respected by the Crown in the deed that followed (see ch 3). There was also, as Ngati Rarua submitted, a risk for the Crown: from a combined position of strength, the intertribal hui refused to alienate the west coast unless the Crown met its asking price.¹⁰³

The claims of Ngati Toa had thus been dealt with variously in the 1840s and 1850s. In 1844–45, Spain recognised them to the extent of legitimating the company's purchase from them, so long as the residents (whom he decided had the primary authority) had also consented and been paid. This was in accord with the views of Chief Protector Clarke (which also were known to the Government), as we discussed in chapter 4. Further, in 1846 Clarke junior reported to Grey that resident Maori denied Te Rauparaha's right to alienate their lands and claimed rights greater than those of Ngati Toa. 'Thus,' argues Ballara, 'an alternative view had been available to the Governor and to the Chief Land Purchase Commissioner [McLean] and his officials from as early as 1846.'¹⁰⁴

In 1847, three chiefs of Ngati Toa were recognised as having exclusive rights to sell the Wairau and east coast as far south as Kaiapoi, in defiance of the rights of residents (including other Ngati Toa). In 1848–52, on the other hand, the Crown refused to recognise any Ngati Toa rights north of the Wairau purchase (in the Waitohi block) and refused to accept Ngati Toa's claims to primacy at Pakawau and the west coast, leaving it to iwi to debate and resolve that matter themselves. The Governor was also aware of resident right-holders' protest about the Wairau sale and of Rangitane's reported claims. Although continuing to enforce the purchase, the Government recognised residents' rights on the ground by getting Te Kanae and Kaikoura to certify the boundaries of the large reserve and permitting them to share it (see sec 5.1.3).

It must have come as something of a surprise, then, when in 1856 McLean recorded the Government's view that 'the Ngatitua Tribe of Porirua . . . had unquestionably, as the earliest invaders, a prior right to the disposal of the district.'¹⁰⁵ In 1853, he reported that the Porirua chiefs were '*acknowledged by the Natives generally* to have the principal claim to those districts [Te Tau Ihu]' (emphasis added).¹⁰⁶ This was demonstrably untrue, and he must have known it.¹⁰⁷ Yet, in 1856 McLean reiterated that resident Maori:

did not assume to themselves a power of sale except over the lands they actually occupied; yet some of them, when not confronted by the leading Ngatitua chiefs, professed to have independent and exclusive rights, while the majority, and even the parties making

103. Counsel for Ngati Rarua, closing submissions, pp 63–64

104. Ballara, 'Customary Maori Land Tenure In Te Tau Ihu,' p 190

105. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301

106. McLean to Civil Secretary, 11 August 1853 (quoted in Phillipson, *The Northern South Island: Part 1*, p 135)

107. See also Ballara, 'Customary Maori Land Tenure In Te Tau Ihu,' pp 187–188, 190

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such assertions, when closely examined, always acknowledged that the general right of alienation vested in the Ngatitōa chiefs of the Northern Island. In fact, their relative rights, through intermarriage, 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.¹⁰⁸

The Crown's historian admits that this was pure expediency: 'it is doubtful whether McLean's assertions of the pre-eminence of Ngati Toa rights should be taken at face value.' McLean was 'simultaneously arguing both that Ngati Toa had a general right of alienation that was accepted by most Maori in Te Tau Ihu, and that no valid title could be obtained without the consent of resident Maori.'¹⁰⁹

This view of Ngati Toa's customary rights was relied upon by Governor Grey at his farewell hui in 1853, when he broached the purchase of all Ngati Toa's rights in Te Tau Ihu and negotiated a deed with that tribe. McLean was aware, for example, of the roherohetanga carried out by Te Rauparaha (see ch 2) and interpreted it to mean that Ngati Toa retained primary rights to the land.¹¹⁰ The meaning of this event was something that he needed to inquire about with all affected right-holders before coming to a decision. Alternatively, he needed to give right-holders the opportunity to resolve their entitlements themselves. As we have found in chapter 3, the correct standard of purchasing prior to 1847, and under the Treaty, was to ascertain the affected right-holders and to give them an opportunity to debate and agree before signing a deed of purchase.

The next question for the Tribunal is whether, in signing two deeds with Ngati Toa in 1853 and 1854 and thereafter considering the land as 'sold', the Crown met that standard. As Macky notes, McLean took the dual approach of asserting that the land had been sold by Ngati Toa while acknowledging that the consent of resident right-holders (including defeated peoples) was necessary before the purchase could be considered complete or 'valid'.¹¹¹ The question, in Treaty terms, was whether consent after the event could truly be free and informed, and whether refusal was actually an option. But first we must consider McLean's claim that the so-called Ngati Toa deeds of 1853 and 1854 were in fact representative of almost all Te Tau Ihu right-holders. He made this claim in 1854, and again in 1856, to throw (in our view) a veil of legitimacy over his dubious actions.

5.2.4 How representative were the 1853 and 1854 hui?

First, we note McLean's claim, by which he tried to legitimise the 1853 and 1854 transactions as the foundation of the Waipounamu purchase. McLean described the 1853 deed

108. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301

109. Macky, p 141

110. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301

111. Macky, p 141

as concluded with both ‘the Ngatitōa and Ngatitama Tribes.’¹¹² Then, he described the second (1854) deed as arising from ‘a large concourse of Natives from different parts of the Nelson Province’ that assembled at Porirua for a tangi. ‘At this meeting,’ he argued in 1856, ‘there were present so many influential representatives of the various tribes, that it afforded a favourable opportunity for discussing the merits of their respect claims.’¹¹³ In 1854, he claimed to have agreed to deal with this hui at Porirua instead of calling one at Nelson because he could never have assembled such a representative hui at Nelson.¹¹⁴ The ‘presence of the principal chiefs of so many different tribes (including those of the conquerors as well as those of the remnants of the conquered and original possessors of the soil), might not again occur.’¹¹⁵ Thus, in 1853–54, McLean claimed to have obtained the consent of the principal non-resident, resident, conquering, and defeated chiefs before he went to Te Tau Ihu. The validity of McLean’s actions, therefore, hinged in large part on these two transactions. How accurate was his representation of events?

Dr Phillipson notes that only two groups – the Ngati Toa and Ngati Rarua right-holders of the Wairau and Te Hoiere districts – did not need a fresh deed and payment in 1855–56. That in itself is compelling, in our view, as to the representativeness of the 1853 and 1854 hui. Nonetheless, McLean tried to exaggerate the number of other leaders present from Te Tau Ihu. He implied that the 1853 deed was approved by chiefs from other tribes such as Ngati Rarua, Ngati Tama, Te Atiawa, and even Rangitane. Some of their chiefs may have been present but, if so, it seems that few of them signed the deed. Angela Ballara identified two signatories, Paremata Te Wahapiro of Ngati Tama and Te Whawharua of Ngati Rarua, but Macky suggests that they may have identified themselves as Ngati Toa for the occasion. It appears that both chiefs were living mainly in the North Island at the time.¹¹⁶ The Ngati Koata chief Rawiri Te Ouenuku was present and may have been instrumental in getting Rangitoto excluded from the sale, but he did not sign.¹¹⁷

Tony Walzl, Ngati Rarua’s historian, suggests that ‘some time before [the signing of the Ngati Toa deed on] 10 August 1853, Ngati Rarua and Ngati Toa settled their competitive claims of 1851 and 1852 with a mutual arrangement.’¹¹⁸ Walzl thinks that some Ngati Rarua chiefs could have been present at the Porirua hui and agreed to Ngati Toa’s signing without being fully aware that the land they claimed on the West Coast had been included. Although the deed said that Ngati Toa had sold their land ‘at the Waipounamu,’ no boundaries were specified.¹¹⁹ Just a few days after the deed was signed, a group of Ngati Rarua headed by

112. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 300

113. *Ibid*, p 301

114. McLean to Commissioner of Crown Lands, 15 December 1854, *Compendium*, vol 1, p 304

115. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 303. We note that this letter is mistakenly attributed to 1857 in the *Compendium*.

116. Macky, p 147

117. *Ibid*

118. Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, p 293

119. *Ibid*; ‘Ngatitōa Deed of Sale’, 1853, *Compendium*, vol 1, p 308

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Tana Pukekohatu wrote to Richmond to say that they accepted that Te Iti had settled with Rawiri Puaha for Pelorus and the remaining part of the Wairau. But they did not accept that Ngati Toa could deal with Arahura and Rotoroa: 'It is for us to settle about those places . . . we only have to do with the West Coast and to take payment for the same . . . Let the £2,000 they have already received suffice for the Ngatitooa.'¹²⁰ The Ngati Tama chief, Wiremu Katene Te Puoho of Wakapuaka, also repudiated the Ngati Toa agreement, saying:

I will not give up Whakapuaka for the Queen. Those men agreed to sell it without my authority. Do not think I am of less importance than they are. No – we are all equal. Do not say that I am endeavouring to exalt myself. However when these men meet here, then we will dispute the matter with each other for their act and deed is an intrusion.¹²¹

Ngati Koata from Rangitoto and the Croisilles coast also denied a sale, when Crown officials insisted that all that remained to do was make reserves.

When the Ngati Toa deed was signed in August 1853, it was agreed that a further hui would be held in Nelson in January 1854 to apportion the remaining £3000 (to be paid in annual instalments) and to decide on the boundaries of any reserves. But this hui was not held, largely because McLean was otherwise engaged, particularly with land purchase problems in Taranaki. It is evident, however, that he feared that a full scale hui, involving all resident claimants, would allow them to state so many competing claims that no agreement might be reached. In the meantime, claimant groups assembled at Nelson at considerable cost on no fewer than three occasions, each time expecting McLean to arrive.¹²² It was more than two years before McLean finally held a hui in Nelson to conclude transactions with some, but not all, of the resident iwi. In the meantime, McLean sent surveyor Thomas Brunner and interpreter William Jenkins around Te Tau Ihu to make a unilateral selection of reserves, though local Maori had received none of the payment specified in the first Waipounamu deed. Brunner's and Jenkins' actions did little to ameliorate the widespread anger and alarm of local Maori at the fact that they had not been consulted about the Ngati Toa deed and at McLean's continuing failure to hold the promised Nelson hui.¹²³

While McLean was in Taranaki, he took the opportunity to sign a series of agreements with returned Te Atiawa for their interests in Waipounamu. We discuss these in our final report. When McLean returned to Wellington in December 1854, he still refused to go to Nelson. He decided to take advantage of a large assembly of Ngati Toa and others for a tangi to advance the Waipounamu purchase. At the request of the assembled Ngati Toa, McLean completed the arrangements for the payment of the remaining £3000 owing on Waipounamu. Though McLean claimed that important chiefs from the South Island were

120. Te Tana et al to Richmond, 10 October 1853 (quoted in Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 252)

121. Wiremu Te Puoho et al to Richmond and Stafford, 19 October 1853 (quoted in Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 253)

122. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 303

123. Phillipson, *The Northern South Island: Part 1*, pp 151–152

present, it seems that they were mainly Ngati Toa from Wairau and the sounds. Once again, the Crown and Ngati Toa from the North Island were calling the tune, and the residents of Te Tau Ihu were required to follow their lead. McLean agreed to Ngati Toa's request to pay them £2000, leaving only £1000 to be paid to others resident in Te Tau Ihu. McLean argued that this arrangement was necessary because of 'the presence of the principal chiefs of so many different tribes (including those of the conquerors as well as those of the remnants of the conquered and original possessors of the soil)'. As Phillipson suggests, McLean was 'stretching the truth', since the 'receipt' that was signed included few names from principal right-holders in Te Tau Ihu.¹²⁴

Under this second deed, as we noted above, a further £2000 was to be paid to Ngati Toa, though McLean gave Pukekohatu of Ngati Rarua (and Ngati Toa), who was present at the tangi, a personal discretionary payment of £200. Later, he was given another £400 to distribute to Ngati Rarua and £100 to distribute to Ngati Tama at Wakapuaka. Phillipson points out that the £400 was for Ngati Rarua wherever they lived in Te Tau Ihu, but it was doubtful whether Pukekohatu had this kind of authority over those who lived in Tasman and Golden Bays. He had even less authority to accept money on behalf of Ngati Tama at Wakapuaka and Phillipson could find no evidence that those payments ever got to the intended recipients.¹²⁵ Walzl suggests that this money was not actually paid to Pukekohatu in 1854 and may in fact have formed most of the £600 paid to Ngati Rarua and Ngati Tama in November 1855. The Crown's historian thought that there was no way of knowing, owing to the failure to properly record either payment (if there were in fact two). This failure would have 'left the Government red faced if there had been a dispute later on.'¹²⁶

The 1854 deed contained two somewhat obscure promises. First, the signatories would give up the land when homesteads for them and their children were laid out. This appears to be a reference to the blocks of land and scrip that were promised to Ngati Toa chiefs as a reward for their support for the first transaction. McLean subsequently used these rewards to get the Ngati Toa chiefs to help him impose the transaction on local occupants. This was implied in the second promise: that the signatories would 'satisfy and prevent the demands of all Natives whatsoever who may hereafter claim the land' which they had made over to the Queen.¹²⁷ For instance, McLean rewarded the Ngati Toa chief, Te Kanae, and Pukekohatu, the Ngati Rarua chief from Cloudy Bay, with a 50-acre reserve each for their help in obtaining the belated consent of resident Ngati Kuia and Rangitane of the Pelorus and Wairau districts.¹²⁸ We discuss these personal awards more fully in our final report.

The second Ngati Toa deed was signed or marked by 57 persons. There is some difficulty in ascertaining the full names, iwi affiliations, and residences of the signatories, but the

124. Ibid, p 138; McLean to Commissioner of Crown Lands, 15 December 1854, *Compendium*, vol 1, p 304

125. Phillipson, *The Northern South Island: Part 1*, pp 138–9

126. Macky, pp 209–210

127. 'Receipt for £2000 Paid to Ngatitua Tribe', 13 December 1854, *Compendium*, vol 1, p 312

128. Phillipson, *The Northern South Island: Part 1*, pp 138–9

leading Ngati Toa chiefs who signed the first deed also signed this one. A notable addition was the aged Te Rangihaeata, who, according to McLean, had used his influence ‘to bring the negotiation to a satisfactory conclusion.’¹²⁹ Te Rangihaeata was rewarded with a discretionary payment of £200 taken from the allocation for Ngati Toa.¹³⁰ He had also been given a scrip award of 50 acres and another 200 acres following the negotiation of the first deed, though he had not signed that.¹³¹ We discuss this and other scrip awards in our final report.

Besides Pukekohatu, there were some other signatories whose primary affiliation was not to Ngati Toa. These included a Ngati Koata chief, Rawiri Te Ouenuku, who was also supposed to have been present in 1853. Though Paremata Te Wahapiro of Ngati Tama, who signed the first deed, was now dead, his son Tipene signed the second one and received payment.¹³² Otherwise, all or nearly all the signatories were Ngati Toa, most of whom lived on the north side of Cook Strait. McLean had referred to a Ngai Tahu chief, Taiaroa, as the ‘principal aboriginal chief of the Island’ (by which he meant the main leader of defeated peoples in the South Island), but if he was in fact present, he did not sign the deed.¹³³ He was not, in any case, a leader or right-holder in Te Tau Ihu. This ascription of authority to Taiaroa shows McLean’s somewhat desperate need to add a gloss of legitimacy to his actions, and his failure to do so.

After concluding the transaction, McLean stated that, ‘although the chiefs from the Middle Island have fully entered into this arrangement, there will be some questions to settle with a few minor tribes residing at Wakapuaka, Queen Charlotte Sound, and other portions of the island’. But he was satisfied that these could ‘be duly adjusted by the principal chiefs to this arrangement, who have undertaken to accompany me, when my duties here will admit of my going over to Nelson, to settle with their respective tribes and followers resident at the Middle Island.’¹³⁴ In the meantime, the remaining £1000 had already been paid to Te Atiawa, though mainly to absentees who had returned to Taranaki. There was nothing left for the various iwi who were actually resident in Te Tau Ihu.

We find that the 1853–54 hui were adequately representative of the Ngati Toa tribe. They were not, however, representative of other iwi or communities resident in Te Tau Ihu. To proceed on the basis that the entire northern South Island was irrevocably sold as a result of these arrangements was a very serious breach of article 2 of the Treaty. McLean misrepresented the outcome to the Government. He pretended that the defeated peoples were represented when they were not, and in any case their supposed leader (a southern Ngai Tahu chief) did not sign the deed. Nor did the signatures of three chiefs – Tana Pukekohatu,

129. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 304

130. Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, p 259

131. Macky, p 172

132. *Ibid*

133. McLean to Commissioner of Crown Lands, 15 December 1854, *Compendium*, vol 1, p 304; ‘Receipt for £2000 Paid to Ngatitua Tribe’, *Compendium*, vol 1, p 311

134. McLean to Commissioner of Crown Lands, 15 December 1854, *Compendium*, vol 1, p 304

Tipene Paremata Te Wahapiro, and Rawiri Te Ouenuku – suffice for the consent of the resident northern iwi. At best, the arrangement was still what it had been in 1853 – an arrangement with Ngati Toa. Proceeding as if his misrepresentations were fact, McLean cast a veil of legitimacy over what was an invalid transaction in both Maori and British law of the time. In so doing, the Crown committed a breach of the Treaty, with serious consequences for Ngati Apa, Ngati Kuia, Rangitane, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata.

5.2.5 ‘Hobson’s choice’: Did the Crown act correctly in ‘compensating’ resident right-holders after the event? Did officials exploit custom to the disadvantage of Maori?

It follows from our discussion in chapter 3 that the correct process for the Crown was to send officials:

- ▶ to investigate desired blocks and ascertain local kainga and chiefs; then
- ▶ to convene a tribal or intertribal hui at or near the places it wished to purchase; then
- ▶ to permit the tribes to decide their own entitlements and reach a consensus on the purchase at that (or at more than one) hui; and then
- ▶ to abide by the result; or, alternatively
- ▶ to provide a Maori-controlled legal process to determine disputes if they could not be resolved by customary means.

We accept both Mr Armstrong’s and Dr Loveridge’s evidence that this method of proceeding was known at the time and Ngati Rarua’s submission that it was correctly followed in the case of Pakawau and the West Coast in 1852.¹³⁵ The Crown’s failure to respect tino rangatira in this way in 1853–56, and to purchase instead from non-resident chiefs and then enforce that purchase on residents, was a deliberate tactic employed by the Government to obtain the most land possible for as little money as possible.

The Crown conceded this point, with some qualifications, on the basis of Macky’s evidence. As this was a critical admission for our inquiry, we quote the salient points at length:

The way that McLean set about completing the negotiations for the Waipounamu purchase was different from what had been originally planned. Rather than hold a general hui in Nelson of all the interested tribes in Te Tau Ihu, McLean travelled around the region and negotiated with most of the tribes on their own land. He only negotiated in Nelson with western Te Tau Ihu Maori, and with Ngati Koata who had travelled to Nelson while McLean was on his way to see them.

This change of plan by the Government seems to have been a recognition that it needed to put more effort into securing the consent of resident Maori to the Waipounamu purchase

135. Mr Armstrong’s statements were recorded in cross-examination: transcript of generic hearing (transcript 4.4), pp 231–236. See also Dr Donald Loveridge, ‘An Object of the First Importance’: Land Rights, Land Claims and Colonization in New Zealand, 1839–1852’, report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), pp 72–74, and counsel for Ngati Rarua, closing submissions, pp 56–65.

than it had first anticipated. The Government had always recognised that it needed the consent of resident Maori to the Waipounamu purchase before it could take possession of the land subject to the purchase. However it still seems to have been hoping to manipulate the context of the negotiations with resident Maori so that it was assumed that the land had been sold, and that all that remained to be done was for resident Maori to negotiate a share of the purchase money that Ngati Toa had agreed to.

The change of plan was not necessarily an abandonment of this manipulative strategy. However it was probably a recognition that the Government could not be as effective in promoting the assumption that the land had already been sold as it had originally hoped . . . McLean's approach to negotiations seems to have varied in different places. The August 1853 deed was undoubtedly part of the context for all the negotiations McLean undertook, but in each negotiation that he conducted McLean was probably looking expediently for the line of least resistance in the particular circumstances of the negotiation.

He did not take any Ngati Toa chiefs with him to the negotiations in the west. Maori had previously offered land for sale in this district, but the Government had been unable to agree on price with them. It seems unlikely that his opening gambit in these western negotiations was that Maori should sell their land solely on the basis of the Ngati Toa contract. Indeed Turangapeke and Katene both made it clear that they were not prepared to sell land on this basis. Nevertheless the fact that these two chiefs made this point clear reflects the point that McLean did resort to the Ngati Toa sale once he was unable to persuade resident Maori to part with their land by other means of persuasion.

The exclusion of Taitapu and Wakapuaka from the sale indicates that there were limits on how far McLean was prepared to push in order to purchase all the land he wanted. Nevertheless, even if McLean was not prepared to resort to physical force to take the land, the bitter argument that McLean had with Katene over Wakapuaka shows that he was prepared to be very aggressive in his attempts to secure the consent he wanted to the purchase.

Much of the negotiating with the tribes in the east of Te Tau Ihu was done in the presence of the North Island Ngati Toa chiefs. The degree to which the sale by Ngati Toa in August 1853 set the tone for the negotiations that took place in the summer of 1855–56 was probably the strongest in the Wairau. Here McLean actually read out the original deed during an argument over the reserves to remind Maori of what had been agreed in August 1853. Wairau Rangitane were only asked to sign a receipt rather than a new deed of sale.¹³⁶

For the remainder of the eastern Te Tau Ihu negotiations, Macky suggested that there was scant evidence but that Ngati Toa chiefs clearly participated in the negotiations and witnessed the Pelorus and Kaituna deed (with defeated Kurahaupo peoples) and the Queen Charlotte Sound deed with Te Atiawa. For the former, Macky suggested that they

136. Macky, pp 265–266

had indicated their willingness to sell and McLean probably had (and had anticipated) no trouble with them. For the latter, he accepts that McLean may have used the Ngati Toa chiefs as a 'reminder to Ngati Awa of the context which the August 1853 deed provided to the negotiations', but thinks it unlikely that McLean would risk their return to Taranaki if, as Loveridge argues, he threatened to simply take their land without consent.¹³⁷

For Ngati Koata, there were no Ngati Toa witnesses, and Macky suggests that McLean was confident of getting a sale, given the participation of Te Ouenuku in the 1853 negotiations, and a suggestion to Jenkins of a 'willingness to sell' in 1854.¹³⁸ In all cases, however, Macky notes that McLean refused to budge on price. He does not consider what this implied for the question of how free these negotiations actually were.¹³⁹ The Crown repeats Macky's conclusions verbatim in its closing submission, without further gloss.¹⁴⁰

Broadly, the Crown accepts that the Government made the 1853 deed part of the context of all the negotiations in Te Tau Ihu, and particularly fell back on it wherever there was resistance. In the east, it used not only the deed but senior Ngati Toa chiefs as part of the negotiations, who then witnessed the resultant deeds (or receipts) with Rangitane, Te Atiawa, and Ngati Kuia. Our main concern with Macky's analysis is that he uses evidence from 1854, from the process in which the Government was trying to enforce the sale on resident right-holders, as indications that Ngati Koata and Ngati Kuia were willing sellers.¹⁴¹ In our view, this analysis cannot stand. The language in which Brunner and Jenkins reported the views of these right-holders was mainly negative; in other words, local iwi insisted on receiving part of the purchase money from the Crown before they would permit surveying or agree to the restricted reserves proposed by officials. There is little to suggest a genuinely free and willing desire to sell land in these circumstances. Things were mostly couched in terms of denial and of separate payment for land counted already sold by officials.¹⁴²

Counsel for Ngati Tama, Ngati Koata, Ngati Kuia and Ngati Apa made submissions on whether the Crown was properly informed of and took full account of Maori customary rights to land when proceeding with the Waipounamu purchase. Generally they concluded that the Crown, and particularly its leading agents such as Grey and McLean, were reasonably well informed, but that they exploited that knowledge and distorted custom to facilitate the Crown's purchase of the land. The Crown did not contest this argument and nor do we. The parties agree that there was no failure of knowledge or understanding on the part of officials in 1853. Rather, there was a ruthless pragmatism (as accepted by the Crown) which

137. Ibid, p 266

138. Ibid, p 267

139. Ibid

140. Crown counsel, closing submissions, pp 114–115

141. Macky, pp 266–267

142. Brunner to Commissioner of Crown Lands, 11 January 1855, *Compendium*, vol 1, p 294; 'Interpreter's Report of Information Obtained during a Visit to Kaiaua, Pelorus, Kaituna, Wairau and Queen Charlotte Sound &c, 1854–55', *Compendium*, vol 1, pp 297–299

led to improper purchasing strategies and the triumph of expedience over Treaty rights. Wellington missionary Hadfield summed this up in 1860, when he informed Parliament that the main qualification for the primary right of decision-making in McLean's eyes was a willingness to sell. Whether conquerors or conquered, residents or non-residents, McLean tended to first recognise and ascribe primacy to the rights of those who were willing to sell.¹⁴³

We found in chapter 4 that Spain, though reasonably well informed on Maori custom, did not apply that knowledge fully and consistently in making his award. We also found in relation to the Wairau purchase that the Crown accepted the claim of absentee Ngati Toa (indeed but three of their chiefs) to the east coast as far south as Kaiapoi, thus exploiting their quest for utu against Ngai Tahu for their earlier losses. At that time, the Crown ignored the rights of resident Ngati Toa, Ngati Rarua and Rangitane to participate in the negotiation, though it did allow them to share the Wairau reserve. We accept Ngati Tama's submission that there was a pattern here, in which history repeated itself, with Waitohi and Pakawau demonstrating that a different pattern was nonetheless possible had the Crown chosen to recognise and deal properly with right-holders' tino rangatiratanga.

With the Waipounamu purchase, the Crown again exploited and built upon its recognition of a Ngati Toa paramountcy. It initiated the purchase with them and forced the resident iwi to accept compensatory payments, just as Spain had done to 'complete' the company purchase from Ngati Toa. The cumulative effect of this exploitation of Ngati Toa paramountcy in the 1840s and 1850s was to deliver nearly all of Te Tau Ihu to the Crown. This rewarded absentees at the expense of occupants, the very antithesis of Maori custom as Spain, Grey and McLean understood it. A ruthless expediency had replaced the Crown's Treaty-based obligation to respect Maori customary rights to land and their rangatiratanga over it.

The situation might have been mitigated to some extent if McLean had abandoned the tactic after concluding the first deed in 1853. The majority of the purchase money remained to be allocated at a proposed intertribal hui at Nelson. At that point, although the resident iwi would have been at a disadvantage because of Ngati Toa's deed, they might still have been able to repudiate or renegotiate the sale. As the leading Ngati Tama rangatira put it in October of that year: 'when these men meet here then we will dispute the matter with each other – for their act and deed is an intrusion.'¹⁴⁴ Richmond reported the locals' view that they ought to have been consulted before any sale. He feared that if McLean did not hold the promised hui, the resident iwi might refuse the sale altogether.¹⁴⁵ Instead, the Government's leading purchase officer left the residents to wait for years while he paid the entirety of the remaining purchase money to non-residents (other than a small payment to Ngati Hinetuhi

143. Phillipson, *The Northern South Island: Part 1*, pp134, 152

144. Wiremu Te Puoho to Richmond and Stafford, 19 October 1853 (quoted in Macky, p 152)

145. Macky, pp 151–154, 159

of Port Gore). At the same time, he sent officials to lay off reserves in Te Tau Ihu, explaining that their land was sold and all that remained was for the Government to make reserves. Resident right-holders resisted this tactic, but put all their faith in McLean.¹⁴⁶ By the time he actually arrived to get the residents to sign deeds individually (more aptly called receipts), over two years had gone by since Ngati Toa 'sold' the land in 1853, and the purchase money was all gone. The Government agreed – reluctantly – to give McLean an extra £2000 so that he could compensate those whom he characterised as outstanding claimants. He did not spend all of it.

The exploitation of custom extended beyond that more specifically relating to rights in land and relationships between rangatira and their kin groups, and between Ngati Toa and the rest. In the Wairau purchase, Grey exploited Maori customary concepts of utu. He got 'utu' for 'his dead' at Wairau, while recognising Ngati Toa's right to utu at Kaiapoi, taking all the land in between. It is true that Ngai Tahu got some utu back again when the Government recognised their claims right up the east coast in the North Canterbury and Kaikoura purchases and on the West coast as far as Kahurangi with the Arahura purchase (to be discussed in our final report). But such utu regained was merely reinforcing the Crown's title on both coasts.

With the initiation of the Waipounamu purchase, we find Grey exploiting other important Maori customs. At Porirua, as he prepared to leave for South Africa, Grey asked Ngati Toa for what amounted to a parting gesture of homage and respect. On the basis of a similar performance at Wairarapa a few days later, Mr Walzl cited Takirangi Smith's characterisation of it 'as an ohaaki within the context of a poroporoaki'.¹⁴⁷

It was in this context that Grey asked Ngati Toa to reward him with a present: the whole of Waipounamu. That was a big parting gift, we might say, and one that had equally wondrous effects when Grey played that card again in the Wairarapa. Although Ngati Toa had been pressing the Government to recognise their claims (by purchasing the West Coast), the evidence is clear that they did not wish to relinquish Te Hoiere and other valued districts in eastern Te Tau Ihu. Eventually, they gave in.¹⁴⁸ McLean noted:

nothing but an anxious desire on the part of His Excellency to secure these advantages [the wealth of Te Tau Ihu] to the European inhabitants, and an equal desire on the part of the Natives to meet His Excellency's wishes, and take advantage of his presence before his departure for England, would have induced them to have ceded the more available and valuable parts of those districts, not even if they were hereafter offered a much higher remuneration . . .¹⁴⁹

146. See, for example, Ballara, 'Customary Maori Land Tenure In Te Tau Ihu', pp 227–228

147. Walzl, 'Ngati Rarua Land Issues, 1839–1860', p 302

148. Phillipson, *The Northern South Island: Part 1*, pp 133–144

149. McLean to Civil Secretary, 11 August 1853, AJHR, 1881, G-2, p 12

Valedictory statements at farewell ceremonies in both Maori and Pakeha cultures are naturally given to excesses of emotions but they should be left at that, and not used as the basis for a monumental land grab. We will consider this further, along with the question of whether Ngati Toa were 'willing sellers', in our final report.

With the Waipounamu purchase, it was left to McLean to follow up Grey's grand gesture with Ngati Toa, firstly by completing and signing the Ngati Toa deed for Grey, and then by following it up with the remaining 'receipts' with Ngati Toa and the other claimant iwi. McLean was as adept as his master in exploiting Maori culture and custom and turning historical antipathies to the Crown's advantage. He did this in ways that will be detailed in our final report, where we will provide an account of the negotiations and deed-signings of 1853–1856. Here, we note that McLean dealt first with absentee chiefs, Te Atiawa as well as Ngati Toa, sometimes rewarding them with grants or presents, and inflating their mana against local residents. He brought in the big guns, particularly from Ngati Toa, to intimidate the locals in eastern Te Tau Ihu. This was a key and deliberate aspect of his strategy. In part, these chiefs witnessed the deeds to maintain the fiction that they had already sold the rights being compensated, but in part it also served as recognition of the rights of resident tribes which they had already admitted as conjoint with theirs back in 1853.

We conclude that Grey and McLean exploited their not inconsiderable knowledge of Maori custom, culture and language to facilitate the Waipounamu purchase. They exploited Ngati Toa's need to reassert their leadership and rights in the wake of their disastrous loss of mana to the Crown in 1846–47, and accepted Ngati Toa's claims to primary rights and authority without investigation, despite their certain knowledge that those claims were contested. This disadvantaged Ngati Toa's erstwhile northern allies as well as the defeated Kurahaupo peoples, who were in occupation and increasingly assertive of their rights. McLean well knew that if he had followed up the first Ngati Toa transaction, as had been promised, went to Nelson and quickly dealt with the rights of the occupant iwi, he would have run into vigorous assertions of their claims. Instead he chose to whittle them away by dealing with the absentee Ngati Toa and Te Atiawa for over two years, keeping the locals waiting and then beating them down to what was left of the slightly increased purchase money.

In sum, we find that the Crown and particularly its agents, Grey and McLean, exploited their knowledge of Maori culture and custom, exaggerating the rights of Ngati Toa and diminishing those of the resident iwi of Te Tau Ihu in order to facilitate the Waipounamu purchase. They did so without due inquiry, despite their knowledge that Ngati Toa's claim was contested. In the circumstances, it was difficult for Ngati Toa to resist Grey's request that they sell Waipounamu and impossible for the resident iwi to do more than accept the 'compensation' finally offered for their interests, at rates determined by McLean. Neither Ngati Toa nor the resident iwi were in a position to freely sell land to the Crown, as envisaged by article 2 of the Treaty. The Crown's purchase procedures were also in breach of

the principles of partnership (since both parties did not negotiate freely as equals), active protection, and equal treatment (since Ngati Toa and the resident iwi were not treated with equal fairness in terms of their respective customary rights).

As we noted in section 5.1, these Crown actions compounded earlier Treaty breaches. The attachment of signatures to a deed or receipt, and the payment of non-negotiable compensation, was not a free, informed, and willing sale of land already granted to others by the Crown in 1848, any more than it was a free, informed and willing sale of land treated as sold by Ngati Toa in 1853. We accept Ngati Tama's submission, citing the evidence of Dr Williams:

the Waipounamu purchases involved the purchasing of customary title interests in respect of land much of which had already been Crown granted to the New Zealand Company in 1845 and then again in 1848. By 1853 there were numerous communities of Pakeha settlers living in all parts of the Nelson settlement. Their lands had been surveyed and subdivided . . . Pakeha applications of English tenure forms of exclusive ownership were considered unchallengeable and irreversible from the Crown's point of view. The choice for the resident Maori tribes, yet again, was a Hobson's choice. Accept payments to extinguish customary title or receive nothing. The 1848 Crown Grant was not renegotiable. The opening of the rest of the wastelands of New Munster to settlers was also not negotiable.¹⁵⁰

5.2.6 Was there more freedom of choice in western Te Tau Ihu?

As we understand the Crown's position, it accepted that McLean had acted improperly in trying to force the sale as a *fait accompli* upon resident right-holders, but argued that this tactic failed in the west. In particular, the Crown relied on three instances where large reserves were successfully made – Rangitoto, Wakapuaka, and Taitapu – to argue that residents on the western side could have held out against McLean if they had chosen to do so. They were, therefore, willing sellers.¹⁵¹

In our view, there is no truth to this argument as far as Ngati Koata and Ngati Tama are concerned. First, Rangitoto was in fact left out of the 1853 transaction, although we have no evidence on why that was done.¹⁵² It may have been, as Macky suggests, because there was a Ngati Koata chief present who managed to get it excluded. The point here is that McLean could not use the 1853–54 transactions with Ngati Toa to pressure Ngati Koata on that matter. The evidence is that the tribe was successful in retaining their island, but 'agreed' to the blanket purchase of all their rights on the mainland for the paltry sum of £100, in

150. Quoted in counsel for Ngati Tama, closing submissions, pp 47–48

151. Crown counsel, closing submissions, pp 113–115; see also Macky, pp 204–205

152. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata Ki Te Tonga, c 1820–1950', research report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p74

comparison to the almost £10,000 paid to non-residents (in money, scrip, and individual reserves for chiefs). Wakapuaka, on the other hand, was quite a small block of land, and, in McLean's admission, no more than Ngati Tama really required as a reserve for their subsistence.¹⁵³ Even so, he put them under a lot of pressure to sell it for £100 and just 100 acres of reserve – pressure which they succeeded in resisting.¹⁵⁴ Their success compared favourably with the limited reserves permitted others, but was nothing more than that. In other words, this was a reserve, not a successful resistance to selling the land.

The only genuine exception, in our view, is the exclusion of Taitapu from the sale. McLean did not really know where it was, and nor, in the end, did he care much about it.¹⁵⁵ Riwai Turangapeke of Ngati Rarua was therefore allowed to deny 'the right of the Wellington tribes to sell the Taitapu Block, and it was finally handed back to him'.¹⁵⁶ One such successful exclusion is too slight a piece of evidence on its own for us to conclude that there was greater freedom of choice in western Te Tau Ihu. In Macky's view, McLean only gave way where nothing short of physical force would be required to enforce 'the Ngati Toa sale'.¹⁵⁷

On the other hand, we note that McLean did appear to apply more pressure in the east. No deeds were signed with local Ngati Toa or Ngati Rarua leaders or communities for eastern Te Tau Ihu lands. Further, the negotiations with Ngati Koata, Te Atiawa, Rangitane, and Ngati Kuia were preceded by an officials' tour, in which the surveyor and interpreter told them that their lands were already sold, and they had no choice but to accept reserves (the final say on which belonged to the Government). Although this was not all that successful in terms of results, it served to increase the climate of pressure on resident right-holders, which explains their acceptance of almost any deed or price in 1856. In the end, what choice did they really have? McLean also brought the leading Ngati Toa chiefs to pressure the locals in the east and witness their deeds, but either he or they would not do the same in the west. As we have noted, our view of this action is mixed. In part, it represented an attempt to pressure the residents and claim authority over them, but, equally, it ended up as an admission of the validity of their claims. This was particularly so in the case of Rangitane, according to McLean's record of the views of Te Kanae and Puaha, as we described in chapter 2.

The historical evidence is clear that Te Tau Ihu Maori wanted settlers, economic development, a relationship with the Crown, and were prepared to sell some of their land to obtain these things.¹⁵⁸ The tragedy of the Waipounamu purchase is that they were denied their right to decide which pieces and how much land they would sell, and for what price, through

153. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, pp 300, 302

154. Macky, pp 204–205, 260–262

155. Phillipson, *The Northern South Island: Part 1*, p 162

156. AJHR, 1936, G-6B, p 48 (quoted in Phillipson, *The Northern South Island: Part 1*, p 162)

157. Macky, pp 150, 266

158. Dr Donald Loveridge, "Let the White Men Come Here": The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), pp 177–179, 186, 221–222, 234–235

McLean's tactic of enforcing the 1853 transaction with Ngati Toa. McLean was willing to resort to anything short of physical force to obtain all their land. We rely on the evidence of the Crown's historian to that effect, and note that there is some agreement between Crown, claimant, and Tribunal historians on McLean's tactics and their effects. We find the Crown in serious breach of the plain meaning of article 2 of the Treaty, and of the Treaty principles of partnership, reciprocity, active protection, equity, and equal treatment. The prejudice for Te Tau Ihu Maori was the loss of their land and resources without their free and informed consent, and for grossly inadequate compensation. We will explain this further in our final report.

5.2.7 How representative were the 1855–56 arrangements with resident right-holders?

As we noted above, the claimants have not argued that there were deficiencies in the negotiations with the resident right-holders, in terms of the proper involvement of their respective leaders and the negotiation of wide and representative consent to the deeds. We accept this position, on the evidence, and conclude that the 1855–56 arrangements were not deficient in that respect.¹⁵⁹ We will provide greater detail on the deeds and their signing in our final report.

5.2.8 The Crown's treatment of defeated peoples: the unique claim of Ngati Apa

Finally, it is to the Crown's credit that it recognised and negotiated with Ngati Kuia and Rangitane in 1856. As we have noted, however, it did not do so in such a way as to provide for their tino rangatiratanga, or to gain their free, informed, and willing consent to the alienation of their customary rights. The Crown's recognition of their mana was belated and came at the price of their lands. Nonetheless, it did enable them to get a small payment and reserves. Ngati Apa was not accorded even this minimal recognition in 1855–56.

The remaining question for our preliminary report is whether Ngati Apa in particular were disadvantaged by the Crown's admitted failure to properly investigate customary rights. It is quite clear from our hearings that Ngati Apa have, as they claim, survived intact as a people with mana.¹⁶⁰ The historical evidence identifies two distinct communities of Ngati Apa in the mid-nineteenth century, both clearly intact and living under their own leaders. There was a small group living at Port Gore, in eastern Te Tau Ihu. This community had its own chief, resided with Ngati Hinetuhi until the Waipounamu purchase, and then continued to occupy the land after the latter tribe's departure for Taranaki. In the west, there

¹⁵⁹. See, for example, Macky, p188

¹⁶⁰. Kath Hemi, brief of evidence, 25 March 2003 (doc N9); June Robinson, brief of evidence, 8 March 2003 (doc N8)

was a community of Ngati Apa living in the Kawatiri region, led by its own chief (Puaha Te Rangi), and with rights extending into the hinterland (see ch 2).

Further north, there were Ngati Apa living in western Te Tau Ihu. We know that some were living on the land later called the Taitapu block, with Ngati Rarua and others. There was also, according to Native Land Court records, a small community of mixed Kurahaupo descent living near Wakatu in the 1840s, but which appears to have departed soon after Commissioner Spain's award. In addition, there were survivors living in small numbers in the interior, continuing to use customary resources and living under their own authority, though now circumscribed in terms of their movements and rights (see ch 4).¹⁶¹ In Mr Armstrong's report for Ngati Apa, the main historical evidence of that tribe's survival as a community with customary rights in western Te Tau Ihu, was the size and apparent independence of Te Kawau's followers in Golden Bay.¹⁶² It emerged in the course of our hearings, however, that there had been a mistake in identifying this chief, who was actually Ngati Rarua. In Dr Ballara's view, this reduced the evidence about Ngati Apa to possibilities; it was possible that those living at Taitapu and places north were communities with customary rights, but equally they may have lost their status and rights. It is no longer, in her view, possible to be sure.¹⁶³

The Crown accepted in its submissions that it failed to inquire adequately as to customary rights before or during the Waipounamu purchase. Further, it admitted that by failing to investigate the hinterland, where free survivors of Ngati Apa were recorded as living, it may well have deprived Ngati Apa of their customary entitlements. Finally, the Crown conceded that it did not identify and deal adequately with the rights of defeated peoples.¹⁶⁴ Ultimately, however, the Crown did not make a submission on whether it should have signed a deed with Ngati Apa for their rights in Te Tau Ihu, or made reserves for them.

As we have found in chapter 2, defeated peoples living as tributary communities on their own lands, under their own chiefs, retained customary rights. This was clearly the case for Rangitane and Ngati Kuia in Marlborough and Tasman Bay. Further, Ngati Kuia and their relations rely on the *tuku* of Tutepourangi as sustaining their ongoing rights in Te Tau Ihu. There is no doubt that the Crown ought to have recognised and dealt with these people, and McLean noted from 1853 that their consent was necessary for a valid purchase. As Macky notes, McLean was prepared to pay virtually anyone who asserted a right, so long as they put their hands up. Why were Ngati Apa not included in that process?

In eastern Te Tau Ihu, McLean purchased the rights of Ngati Hinetuhi at Nelson in 1854, signing a deed with just two of their chiefs.¹⁶⁵ This was his one exception to the two-year

161. See also David Armstrong, 'Ngati Apa Ki Te Ra To', report commissioned by the Ngati Apa Ki Te Waipounamu Trust Claims Committee, 1997 (doc A29); Armstrong, 'The Fate of Ngati Apa Reserves'

162. Armstrong, 'Ngati Apa Ki Te Ra To', pp 23–44

163. Ballara, 'Customary Maori Land Tenure In Te Tau Ihu', pp 255–257, 270–271, 283–284

164. Crown counsel, opening submissions, pp 12–13, 15

165. 'Receipt for £100 Paid to Ngatiawa Tribe', 16 November 1854, *Compendium*, p 310

delay in dealing with residents. Interests at Port Gore, therefore, were not investigated or identified on the spot before they were purchased. This is the likeliest explanation for McLean's failure to identify and pay Ngati Apa for their customary rights. When Brunner and Jenkins visited there in January 1855, they discovered the existence of Ngati Apa and noted that the proposed reserve was for both tribes.¹⁶⁶ We know also that Ropoama Te One paid part of the Waipounamu purchase money for Queen Charlotte Sound to this Ngati Apa community.¹⁶⁷ In our view, this confirms their right to have been included and paid for the sale of their land. We find the Crown's failure to investigate and identify the customary rights of Ngati Apa in eastern Te Tau Ihu, to consult them and obtain their consent, or to pay them and make reserves for them (the Native Land Court granted the reserve almost entirely to Ngati Hinetuhi), to have been in serious breach of article 2 of the Treaty of Waitangi. These actions of the Crown also breached the Treaty principles of partnership, reciprocity, active protection, and equal treatment.

In western Te Tau Ihu, McLean did not investigate or identify customary interests west of Nelson. The closest to an on-the-ground inquiry came from John Tinline, who was sent to investigate claims that Spain's award included land which had not in fact been sold, and surviving customary rights that had been wrongly included in the Crown grant. Neither the claimants nor the Crown made any submissions about Tinline's investigations per se. The question for the Tribunal is: if Ngati Apa were present and had rights, ought not his inquiries (or Sinclair's in the 1840s) to have uncovered that fact? Here, we rely on the evidence of Dr Ballara. She argues that neither of these officials made a proper investigation into relative claims or customary rights, citing several examples from Golden Bay.¹⁶⁸ Her evidence on this point has not been disputed. It may well be, therefore, that Meihana Kereopa was correct in 1883 when he stated that the Native Land Court's inquiry into Taitapu was Ngati Apa's first opportunity of making a claim.¹⁶⁹

We found in chapter 4 that the Spain Commission failed to investigate the customary rights of iwi in the New Zealand Company's district, before recognising a valid purchase and awarding districts in Golden and Tasman Bays to the company. Now, in 1853–56, this failure was replicated by McLean, who did not visit any of the lands alienated to the Crown west of Nelson, and by Tinline (in 1855), who repeated Sinclair's failure and did not investigate claims to land or inquire into and identify customary rights.

We noted for eastern Te Tau Ihu that Brunner and Jenkins did identify the presence of Ngati Apa in Port Gore, and intended including them in the reserve. Was McLean similarly under notice of Ngati Apa's claims in the west? For an answer to this question, we note the evidence of Mr Armstrong, who located a letter from North Island Ngati Apa to McLean

166. 'Interpreter's Report', *Compendium*, vol 1, p 299

167. Phillipson, *The Northern South Island: Part 1*, p 42

168. Ballara, 'Customary Maori Land Tenure In Te Tau Ihu', pp 261–266

169. *Ibid*, p 284

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in 1852, setting out the southern branch of their tribe's claims to land on the West Coast of Te Waipounamu. This may have been in relation to the Crown's proposed purchase of the West Coast at that time, and the interests of Ngati Apa were identified as far north as Taitapu.¹⁷⁰ It is not clear to this Tribunal whether the authors of the letter considered Ngati Apa's interests as having expired north of Taitapu, nor do we know exactly how extensive a district they meant when they used that name.¹⁷¹ As discussed above, Ngati Rarua chief Riwai Turangapeke succeeded in withdrawing Taitapu from the sale. Ngati Apa were not consulted, although McLean knew of their claim to interests in that area. He was, as we have seen, not very clear on exactly where it was or whether it was worth pressing the Crown's claim to it. Nonetheless, McLean had clearly been notified that Ngati Apa had an extensive claim on the West Coast, which required investigation.

How do we account, therefore, for McLean's statement in 1856 that only the interests of Ngai Tahu remained to be satisfied in the west?¹⁷² It may be that Ngati Apa's claim had slipped his mind. The fact remains that there was never an adequate (or indeed any) inquiry into customary rights in western Te Tau Ihu in 1853–56. Ngati Apa were not recognised, paid, or given reserves. The effects of this are plainly seen in the 1880s and 1890s, when they alone were left out of the Land Court's awards. Rangitane and Ngati Kuia at least gained title to reserves set aside for them at the time of purchase, although they were excluded from the 'unsold' land still in customary title, and from the tenths. By the time evidence was recorded about Ngati Apa's claims and rights in the 1880s and 1890s, Dr Ballara suggested, it was too late to ascertain the truth of those claims.

From our discussion here and in chapter 2, the following facts appear to have been established:

- ▶ Too little time had gone by since the conquest, for Ngati Apa's rights to have been entirely foreclosed as at the 1840s and 1850s.
- ▶ Ngati Apa survived as a people, and have maintained a consistent (if under-investigated) claim to customary rights in Te Tau Ihu in the nineteenth and twentieth centuries.
- ▶ A community of tributary Ngati Apa lived at Port Gore, were recognised as a distinct tribe by officials, were paid part of the purchase money by Ropoama Te One, and (when stinted by the Native Land Court) were given more of the reserve by the departed Ngati Hinetuhi. Thus, they achieved greater recognition from their conquerors than from the Government.
- ▶ A community of Ngati Apa survived under its own chief (Puaha Te Rangī) on the West Coast of the South Island, with claims extending into western Te Tau Ihu.

170. Armstrong, 'The Fate of Ngati Apa Reserves', p 2

171. See, for example, Armstrong, 'The Fate of Ngati Apa Reserves', pp 4–5, where James Mackay (a key figure here) used the name Taitapu for 'Massacre [Golden] Bay'.

172. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 303

- ▶ Unsubdued (though fugitive) Ngati Apa continued to reside and use resources in the interior of western Te Tau Ihu in the 1840s, and eventually joined their settled relatives on the coast.
- ▶ Ngati Apa people were living at Taitapu and elsewhere in coastal western Te Tau Ihu, but their numbers must have been small, their rights and status were not investigated in the 1840s and 1850s, and they were overlooked by officials.
- ▶ By the time Ngati Apa made claims to the Native Land Court for a share of western Te Tau Ihu lands, the recorded evidence was too slight to allow those claims to be fully evaluated today.

This Tribunal faces a difficult task in evaluating Ngati Apa's claim against the Crown. On the one hand, it is no longer possible to say exactly what rights Ngati Apa retained in western Te Tau Ihu, as these were not investigated or recognised at the time. On the other hand, Ngati Apa found themselves written out of history as a result. Apart from Port Gore, which will be considered in our final report, Ngati Apa individuals had to come in under other lines to establish any kind of claim to land in Te Tau Ihu after 1856. Theirs is indeed a unique claim in this respect, and their survival all the more remarkable for it.

We are not in a position to evaluate the relativity of Ngati Apa's claims and rights in western Te Tau Ihu, vis-à-vis the tribes that were recognised by the Crown. All we can say is that they did have surviving rights (of some degree), that McLean was on notice of their claim, and that the Crown failed to investigate their claim or ascertain their rights. This failure on the part of the Crown resulted in the extinguishment of Ngati Apa's customary rights during the waipounamu purchase, without their consent and without paying them compensation or providing them with even the minimal reserves made for the subsistence of other tribes. This was a very serious breach of their article 2 rights, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.

5.3 THE IMPACT OF BLANKET PURCHASING ON CUSTOMARY RESOURCE-USE RIGHTS

As we discussed in chapter 3, the claimants argue that their customary resource-use rights across vast districts were alienated in the 1840s and 1850s as part of the Crown's purchase programme, without their full and informed consent. The resultant reserves were inadequate in size, location, and nature, to either preserve a sufficient base for the continued use of resources in the traditional manner, or for European-style farming. The Crown accepted these allegations in part, conceding that it had failed to ensure that sufficient land was reserved for these purposes, and that this was a breach of Treaty principles. The Crown was not prepared to concede all of the claimants' allegations, however, as to exactly how and why they had lost their customary rights.

5.3.1 The claimants' case

We return in this section to matters raised previously in chapter 3. There, we discussed the claimants' arguments that the Crown had failed to inquire into both the identity of customary right-holders, and the nature and extent of the rights at issue. At first, the Crown maintained that it did carry out such an inquiry, especially during the reserve-making process, but ultimately it conceded the point.

Building on that base, the claimants argue in particular that the Crown failed to identify the full range of customary resource-use rights, and to ensure iwi agreement to alienate or extinguish those rights in its purchases. Ngati Koata, for example, argue that their customary practice of travelling throughout the region, inter-dependently with other iwi, using a wide variety of places for harvesting, fishing, rongoa and other things, was a customary right that should have been protected by the Treaty. It was not something that Ngati Koata and other tribes wanted to surrender (or knew they were surrendering) to the Crown in any of the blanket purchase transactions. As far as possible over time, citing the evidence of Puhanga Tupaea, Ngati Koata have continued to exercise this right in restricted circumstances. The Crown's interpretation of its transactions eventually compelled Maori to relinquish these rights absolutely some years later, without consent or compensation. Had the Crown carried out its Treaty duty and properly informed itself of customary rights in Te Tau Ihu, and of those rights which Ngati Koata wanted and indeed needed to retain for their physical, economic, spiritual, and cultural wellbeing, this outcome could have been prevented without any great harm to settlement.¹⁷³ As Rangitane submitted, many such sites were, in McLean's words, 'valueless to Europeans.'¹⁷⁴

Ngati Rarua made similar allegations, citing governments' views of 'waste lands' as a major cause of the problem.¹⁷⁵ Ngati Koata relied on the evidence of historian Cathy Marr, who stated under cross-examination:

The evidence seems to suggest in the early period that there was an idea of shared use [of natural resources] for mutual benefit in the sense that Maori didn't seem to mind settlers using the waterways as well but that didn't at that time seem to be a direct Crown assertion of rights as opposed to Maori rights. It seemed to be much more an idea of mutual benefit and there's nothing that I've found that suggests that Maori accepted that that meant the loss of all authority. In fact there's more evidence immediately post that early deed period [post-1856] where Maori seemed to regard their authority as remaining pretty well intact.¹⁷⁶

Ngati Kuia made a similar submission, based in part on the findings of the *Ngai Tahu Report*. In determining the foreseeable needs of Maori, the Crown needed to investigate and

173. Counsel for Ngati Koata, closing submissions, pp 18–20, and passim

174. Counsel for Rangitane, closing submissions, pp 29–30

175. Counsel for Ngati Rarua, closing submissions, pp 6–9, 40–41

176. Counsel for Ngati Koata, closing submissions, pp 131–132

consider demographic factors, the lands being occupied or 'enjoyed', the principal sources of food and their location, and Maori dependence on fishing, seasonal hunting and migratory food-gathering. Any considerations of sufficiency, in the circumstances then prevailing, should have included guaranteed possession of, and access to, mahinga kai. McLean was well aware of Maori needs in this respect. In Ngati Kuia's view, it is 'inexplicable' that he should have taken such a harsh and ungenerous approach to reserve-making. The result was a virtual waste lands policy, in which the Crown only reserved land that was in actual, full-time occupation (and not even all of that), and did nothing to identify or reserve resource-use areas or needs, or other significant sites. The extent of Ngati Kuia's landlessness, for example, then became apparent when the progress of settlement hemmed them in on their actual reserves.¹⁷⁷

Rangitane agreed, submitting that after the 1856 deed, they still believed that they could use their food-gathering sites throughout the region as before.¹⁷⁸ The large reserve allegedly promised by McLean, with its forests for birding, streams for eeling, land for cultivation, waka landing sites for sea access, and waterways and sheltered bays for fishing and shellfish gathering, would have guaranteed the continuation of some of their customary practices. McLean admitted that they could not with 'justice' be expected to do with less, but then reduced the area actually reserved to a mere pittance.¹⁷⁹

5.3.2 The Crown's case

The Crown argued at first that its officials wanted to honour Treaty obligations, and were always aware that Maori must retain their pa, cultivations, burial grounds, and additional suitable reserves.¹⁸⁰ By the time its purchases were completed, both officials and Maori generally believed that enough land had been reserved for their foreseeable needs. Subsequent failure to survey reserves, and in some cases the purchase of those reserves, meant that many Maori were eventually left with insufficient land, or access to land, either to maintain their traditional economy or to develop farming and other pursuits for the new economy. The Treaty promised that Maori could continue to act tribally, to abandon that way of life, or to steer a middle course. Although the Crown could not anticipate social and economic changes like the advent of forestry or the dairy industry, there was no lack of recognition of the known Maori needs for sustenance in terms of their customary lifestyle. But officials thought that the tenths, plus existing pa, burial grounds, and cultivations, should be sufficient for that.¹⁸¹

177. Counsel for Ngati Kuia, closing submissions, pp 45, 57–58

178. Counsel for Rangitane, closing submissions, pp 26–27

179. Ibid, pp 28–30

180. Crown counsel, submission concerning generic issues, p 43

181. Ibid, pp 35–36, 43

The Crown changed its position significantly in later submissions. In its closing submission, the Crown cautioned us against the dangers of hindsight, but conceded the evidence that its own actions in making reserves were improper and avoidable by the standards and in the circumstances of the time. In earlier submissions, counsel argued that the failure to ensure that Maori retained sufficient land was something that happened only after the purchasing process. Now, however, the Crown conceded that it arose also from ‘a failure to adopt a more generous approach to reserves in the Crown purchase era’. In particular, the Crown made a key concession that has influenced our findings. It adopted completely Dr Ballara’s criticisms of the process:

It is accepted that Dr Ballara is justified when she criticises the Crown acquisition process in the following terms:

‘The most serious fault of all revealed in the Crown’s process of land acquisition was the failure to think far enough into the future; the failure to create an estate of reserves to replace what Maori had lost through Crown action in pressuring sales. The estates of land lost by Maori should have been replaced with an alternative source of wealth and prosperity for their people that was capable of expansion according to need. It is worth repeating again the words of Alexander Mackay in 1874, because if he could think of the solution as early as then, it could have been thought of earlier (and in fact was present earlier, in the advice of Lord Normanby to Hobson in 1839, that “the acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves”). After describing the reasons why Maori in the South Island were impoverished by 1874 – because their small reserves meant that when their lands for cultivation lost their fertility there were none to replace them, and because they were cut off from their other traditional sources of supply by close settlement around them – Mackay wrote:

“All this might have been obtained [*sic* – ‘obviated’ in original] in the case of the Southern Natives, had the precaution been taken to set apart land to provide for the wants of the Natives, in anticipation of the probable effect of colonization on their former habits. It would have been an easy matter for the Government to have imposed this tax on the landed estate, on (ie, at the time of) the acquisition of Native territory. Such reserves would have afforded easy relief to the people who [had] ceded their lands for a trifle, and formed the only possible way of paying them with justice.”¹⁸²

The Crown’s acceptance of this argument is critical to the claimants’ case, in particular (for the issues addressed in this report) whether customary rights of travel, harvest, hunting,

182. Crown counsel, closing submissions, p 4. The original quote from Dr Ballara, as reproduced by the Crown, is contained in her report ‘Customary Maori Land Tenure In Te Tau Ihu’ at pages 280 and 281.

fishing, migratory resource-use, and shifting agriculture ought to have been reserved or provided for at the time of purchase.

The Crown conceded that it had a Treaty duty to ensure Maori retained sufficient land, or access to land, to continue their 'traditional economy' for as long as they wished. Counsel adopted the following statements from the *Muriwhenua Fishing Report*:

The Treaty envisaged the protection of tribal authority, culture and customs. It also conferred on individual Maori the same rights and privileges as British subjects. Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially, it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partners' choices could be forced.¹⁸³

A key point in this Treaty principle of options, the Crown concluded, was that the partners' choices could not be forced. It seems reasonable to suppose that the speed and extent of the Crown's purchases in Te Tau Ihu did have this very effect of limiting the range of options open to Maori, 'particularly as this related to their ability to maintain a tribal or collective way of life on tribal lands.'¹⁸⁴ The size, location, and range of uses to which reserves could be put, did not allow of it. The Crown's 'failure to ensure that Te Tau Ihu Maori retained or were allowed [to retain] sufficient land for their present and future needs constituted a breach of the principles of the Treaty of Waitangi.'¹⁸⁵

5.3.3 The Tribunal's view

The Crown's concessions on this point are such that we do not need to discuss it in detail. Nonetheless, it is a critical matter both with regard to Treaty breaches and the prejudicial effects of those breaches. The historical evidence is clear on the matter, thanks largely to Alexander Mackay's reports on it to the governments of the day. He made a series of reports from 1865 to 1887, which stressed (among other things) that the reserves were too small or too unsuitable for Maori to continue their customary economy, run pigs, or develop pastoral farming. The immediate concern was mitigated, he reported, because Maori kept exercising their traditional resource-use rights far and wide on 'sold' land until closer occupation by settlers prevented them. Swamp drainage, destruction of waterways, and other environmental modification accompanying settlement, further restricted Te Tau Ihu Maori's ability to access and enjoy their customary food sources. In addition to his official reports to the

183. Quoted in Crown counsel, closing submissions, p 116

184. Crown counsel, closing submissions, p 116

185. Ibid, p 120

Government, Mackay gave evidence on this matter to a select committee in 1884, and wrote a commission of inquiry report on Marlborough Maori landlessness in 1887. The Tribunal's and claimants' historians have emphasised the importance of Mackay's evidence.

The claimants themselves, in their oral submissions to the Tribunal, outlined the nature of their customary resource-use rights, the significance of those rights to Maori metaphysical and physical relationships with their world, and the degree to which they have attempted to maintain and protect those rights over the generations. Witnesses such as Mr Jim Elkington and Mrs Puhanga Tupaea explained how their ability to do this has been restricted by the Crown, first as a result of losing land and access, and then by a variety of legislative and policy restrictions even on the tiny fraction of land that they retained.¹⁸⁶ We will consider the second of these points in our final report.

First, there is the question of whether Maori intended to alienate their customary resource-use rights across the entirety of the so-called blanket purchase regions. The Crown's concessions do not extend to this issue. We reserve the determination of this point to our final report. Here, we consider the question of how Maori and the Crown acted with regard to those customary rights after the blanket purchases, and the impact of the purchases on Maori tikanga and resource-use. The Crown's historians did not address this issue in their reports. There was, however, broad agreement between the historical evidence of Phillipson (for the Tribunal), Bassett and Kay (for Ngati Koata), Walzl (for Ngati Rarua), Campbell (for Ngati Kuia), Armstrong (for Rangitane), Hewitt and Morrow (for Te Atiawa), and Ballara and Marr (for the claimants in general), all of which supports the claimants' allegations. These historians cite official evidence from the 1860s to the 1890s, that Maori continued to exercise customary rights on 'sold' land as if (in their view) they retained those rights, until settlement and changes to the environment forced them to stop. Denied access to or control of former customary resources, and with insufficient land to maintain their customary economy or develop European-style farming, the result for Maori was grinding poverty.¹⁸⁷ The Crown has accepted that evidence, reproducing one particular part of it from Dr Ballara's report (see sec 5.3.2).¹⁸⁸

186. James Elkington, briefs of evidence, undated (docs B34, B34(a), and attachments); Puhanga Tupaea, briefs of evidence, undated (docs B15, B15(a))

187. See Dr Grant A Phillipson, *The Northern South Island: Part II*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27); Bassett and Kay; Walzl, 'Ngati Rarua Land Issues, 1839-1860'; Tony Walzl, 'Ngati Rarua Land and Socio-Economic Issues, 1860-1960', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol 2); SKL (Leah) Campbell, "A Living People": Ngati Kuia and the Crown, 1840-1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77); Armstrong, 'The Right of Deciding'; Anna Hewitt and Dr Diana Morrow, 'Te Atiawa and the Customary Use of Natural Resources in Te Tau Ihu, 1840-2000', report commissioned by the Te Atiawa Manawhenua Ki Te Tau Ihu Trust, 2000 (doc D5); Ballara, 'Customary Maori Land Tenure In Te Tau Ihu'; Cathy Marr, 'Crown-Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', report commissioned by the Treaty of Waitangi Research Unit on behalf of the Crown Forestry Rental Trust, 1999 (doc A61). Official evidence includes an 1863 report by James Mackay, in addition to the later reports of Alexander Mackay.

188. The material cited by Ballara and accepted by the Crown comes from Mackay's report to the Under Secretary of Native Affairs, 24 June 1874, AJHR, 1874, G-2C, p 2.

In brief, we noted in section 3.3.2 that Governor Grey was fully aware of the need for Maori to have a significant land base, so that they could continue to shift their crops and exercise their hunting, fishing, and other resource-use rights. His justification for the large Wairau reserve of 1847 was as follows:

The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds, – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these.¹⁸⁹

Nonetheless, McLean repurchased the Wairau reserve in 1853, by which time a virtual waste lands policy was firmly entrenched in Crown purchasing. Ward noted that the Waipounamu purchase replaced the Government's 'brief dalliance (in the Wairau purchase) with making large reserves for the continuance of the traditional Maori economy.'¹⁹⁰ Maori (in the South Island at least) were no real threat to the Crown, and thus the Government's scruples on this point were set aside. As the Crown conceded in its closing submission, the ruthless pragmatism of Crown purchasing in this period resulted in significant Treaty breaches. McLean did not act from ignorance. He was aware of the need for reserves for fishing spots and other forms of resource-use, as well as to preserve wahi tapu and recognise ancestral association, but acted in such a way as to leave Maori with an impossibly small land base for such purposes.¹⁹¹

Without elaborating too much, we note the early evidence on this point from officials. From Grey's information (cited above), the results of restricting Maori to a land base inadequate for their customary economy were entirely predictable before the Waipounamu purchase. Alexander Mackay was soon reporting that predictable outcome, as Ballara explained and the Crown accepted. From Mackay's evidence, inter alia, the governments of the day were aware that:

- ▶ Te Tau Ihu Maori wanted to preserve their tikanga, and they continued to exercise their customary rights over 'sold' land and waterways as before.
- ▶ Officials tolerated this exercise of customary rights, but resisted any assertion that 'sold' land or waterways remained in Maori ownership (in the Native Land Court and in response to petitions in the 1880s).

189. Grey to Earl Grey, 7 April 1847, BPP, vol 6, sess 892, pp 16–17; see also above sec 3.3.2

190. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 134

191. See, for example, Campbell, pp 126–127; Phillipson, *The Northern South Island: Part 1*, pp 130–132

- ▶ As 'sold' land became occupied by settlers, Te Tau Ihu Maori's continued exercise of their customary rights was restricted until they were 'hemmed in' on their reserves, with insufficient land to maintain their customary economy or develop European-style farming.
- ▶ The spread of settlement resulted both in competition between Maori and settlers for traditional food supplies, and in a cultural clash between European and Maori over the purposes and species for hunting and fishing.
- ▶ The spread of settlement also resulted in changes to the environment, including the stocking of waterways with new species of fish, the draining of swamps, and the alteration or draining of other waterways, all of which reduced the ability of Te Tau Ihu Maori to continue exercising their customary rights.
- ▶ The result for Te Tau Ihu Maori was 'impoverishment' and landlessness.¹⁹²

Nineteenth-century governments did not deny this evidence, although they did little or nothing to redress these Treaty breaches. In 1884, for example, Mackay gave evidence to the Native Affairs Committee on a Ngati Kuia petition for extra land, testifying that their reserves were too small and their traditional food supplies had been cut off or interfered with as the surrounding lands became occupied by settlers.¹⁹³ The committee concluded that the reserves had been sufficient only for 'so long as the natives had the run of the neighbouring unoccupied lands. The lands are now hemmed in by European occupiers and they are thus confined absolutely to their own holdings.'¹⁹⁴ It advised the Government to provide extra land to the petitioners. We will consider the failure of subsequent 'landless natives reserves' initiatives in our final report.

We find, on the basis of broad agreement between the parties and our own review of the historical evidence, that the Crown acted in serious breach of Treaty principles. It did not allow Maori to retain sufficient land and access to land for the maintenance of their customary economy and resource-use rights, or indeed for their engagement in modern farming practices, thereby reducing their options to bare subsistence. This failure was entirely avoidable in the circumstances of the time, as the Crown accepts. It was a breach of Treaty principles in its own right, and a prejudicial effect of the officials' 'waste lands' approach to Maori land, and of the Crown's blanket purchase process (especially in the Waipounamu purchase). It was also a prejudicial effect of the Crown's failure to properly inquire into Maori customary rights, and to therefore identify those lands and resources which they

192. These conclusions are drawn from Phillipson, *The Northern South Island: Part II*, pp 1–33; Bassett and Kay, pp 184–186, 195–197, 200; Walzl, 'Ngati Rarua Land Issues, 1839–1860', pp 346–347; Walzl, 'Ngati Rarua Land and Socio-Economic Issues, 1860–1960', pp 47, 68, 74, 92, 95, 105–106, 129–130, 133–135, 138–140, 147–151; Campbell, pp 184–190, 194–198, 200–206; Armstrong, 'The Right of Deciding', pp 125–128, 134–135, 139–140, 149; Hewitt and Morrow, pp 59–61; Crown counsel, closing submissions, p 4 (citing Ballara); and Marr, pp 23–68, 72–75, esp pp 54–68.

193. Armstrong, 'The Right of Deciding', pp 139–140

194. Ibid, p 140

wished or needed to retain for (in Normanby's words) their own comfort and subsistence. The result was serious and avoidable poverty, as reported to governments of the day by their own officials.

We find that the Crown breached the Treaty principles of partnership, reciprocity, options, and active protection, to the very serious prejudice of all Te Tau Ihu Maori. This has, in effect, been conceded by the Crown. There was also, as explained in the claimants' evidence, a serious social and cultural prejudice in the prevention of Maori from exercising their tikanga – indeed, their way of life – as they preferred to live it. Again, this point was broadly conceded by the Crown.¹⁹⁵ We consider these breaches of Treaty principles, and the prejudice to Te Tau Ihu Maori, to have been very serious and to require large and culturally appropriate redress.

195. Crown counsel, closing submissions, p 116

CHAPTER 6

SUMMARY OF FINDINGS

In this chapter, we summarise our findings. The purpose of this preliminary report is to assist the negotiations of the parties by providing our findings on customary rights and the Crown's treatment of them, as requested by the claimants in January 2006.

6.1 WHO HAD CUSTOMARY RIGHTS?

In chapter 2, we outlined our view of customary right-holding in the Te Tau Ihu district, setting out the complexities of the history and relationships of the eight iwi. There is no single, universally accepted narrative of the events of the 1820s and 1830s. Nor is there a single, universally accepted interpretation of how customary law applied to the rights of the conquerors, the defeated (still-occupant) peoples, and those Ngati Toa chiefs (especially Te Rauparaha) who led the taua. In that situation, we weighed the evidence of the tangata whenua experts and their historians and reached a view on how customary law applied to the rights of the claimants at the time of the New Zealand Company and Crown transactions.

There is a danger, in summarising our view here, that the subtleties and qualifications will be overlooked. Nonetheless, we provide a brief outline of our conclusions. First, we noted that customary law was relatively settled, and the main points were shared by all iwi, at the time of the northern migrants' arrival in Te Tau Ihu. The battles, tuku, settlement, acts of ahi ka, respect for tohunga, and subsequent intermarriage all appear to have been conducted according to the tikanga of the time. Although the defeated peoples later challenged whether the take (causes of the invasions) were tika, it was our view that both sides were in fact operating according to a shared tikanga and that their rights were derived from a known system of customary law.

As at 1820, the Kurahaupo iwi – Rangitane, Ngati Apa, and Ngati Kuia – were the tangata whenua of Te Tau Ihu. Their authority over (and exclusive possession of) the district was altered in the 1820s and 1830s by the arrival of the migrant iwi from Kawhia and Taranaki. Ngati Koata settled first, in a region gifted to them by the leading Kurahaupo rangatira of

the day, Tutepourangi. This tuku formed a lasting relationship between Ngati Koata and (particularly) Ngati Kuia, with reciprocal rights and obligations. In the testimony of both iwi, the tuku and relationship have continued to the present day. Although their evidence did not agree on the exact nature of their respective rights, it was our view that both the givers and the recipients of the tuku had customary rights in the area concerned. Both had mana. Both had authority. Leadership and the balance of authority rested with Ngati Koata, as the protectors of those Kurahaupo who made the gift.

The other migrant iwi – Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa – arrived slightly later and established customary rights by conquest (raupatu), followed by occupation (residence or seasonal visits and resource-use). Over time, their whakapapa became embedded in the whenua through intermarriage with the defeated peoples, the burial of placenta (whenua) and the dead, residence, and the development of spiritual links.

For their part, the defeated peoples – Ngati Kuia, Rangitane, and Ngati Apa – remained in unbroken occupation of their ancestral land. In part, their rights survived at the time of the company and Crown transactions because of the survival of small, independent communities in the interior. Also, in the more coastal areas of Te Tau Ihu there were tributary communities under their own rangatira and exercising rights of occupation, thus ensuring the survival of their take tupuna and their ahi ka. Although they recognised the authority of leading migrant chiefs, especially of Ngati Toa, they still had mana and were increasingly independent after 1840. At the time of the company and Crown transactions, too little time had elapsed for their rights to have been totally extinguished in any case. The Kurahaupo people had customary rights in the 1840s and 1850s, and those rights were protected and guaranteed by the Treaty of Waitangi. In our view, the available records showed that their rights were mainly acknowledged by the northern rangatira of the time, either implicitly (by not challenging and removing people as they did in other cases) or sometimes explicitly, so long as their own authority was also recognised. It was not until the competition for too-small reserves in the 1880s and 1890s that a more exclusive line was advanced uniformly by the conquering tribes.

Among the northern iwi, we found that they were largely equal and independent in the establishment of their own customary rights. The leadership of Ngati Toa and Te Rauparaha was acknowledged by most, although Te Atiawa had come into fairly serious conflict with the latter by the 1830s, and was disputing not just Ngati Toa's leadership but Ngati Toa's rights and occupation on the ground in eastern Te Tau Ihu. In our view, the roherohetanga by which Te Rauparaha allocated the lands of eastern Te Tau Ihu was an act of mana on his part, summarising (and perhaps shaping) a consensus of where the conquering tribes should settle. It did not imply primary rights to sell land, which became the key issue of the 1840s and 1850s – such rights rested with the communities in occupation and with their leaders (wherever they lived). The overwhelming evidence from the nineteenth century (and today) is to that effect.

In the west, where Te Rauparaha and Ngati Toa were not directly involved in the taua, they did not seek to settle, either permanently or by means of frequent visits and use of resources. Nonetheless, the history of western Te Tau Ihu shows clearly that all the migrant iwi had a right to settle there after the conquest. Later arrivals could reasonably expect to receive a tuku. Te Rauparaha and Ngati Toa, as overall leaders of the whole expedition, would still have possessed that right at the time of the company and Crown transactions. Although this was not a primary authority, as claimed by that tribe, it was our view that Ngati Toa had a layer of customary rights in western Te Tau Ihu that were rightly acknowledged by the Crown.

For some years, groups maintained a migratory lifestyle, in which they had pa, kainga, cultivations, and areas of resource-use on both sides of Te Tau Ihu and Raukawa Moana (Cook Strait). Ngati Rarua, Ngati Koata, and the resident Ngati Tama, were mainly focused on their lands in eastern and western Te Tau Ihu, while Ngati Toa were mainly based in the North Island. The many hapu of Te Atiawa appear to have been intent on living and using resources on both sides of the strait. For the Kurahaupo peoples, there were tributary communities living in the more coastal areas, and small, independent communities in the interior. The principles from which the rights of these various people were derived, a system of Maori customary law, was settled and relatively well known to Spain, McLean, Grey, and other Crown officials. Also, leaders and their kainga were known and settled by the time the company (and then the Crown) agents arrived. We did not accept, therefore, the Crown's argument that customary rights were either unsettled or so much in flux as to be undefinable. The situation continued to evolve on the ground, as was customary, but was ascertainable upon due and timely inquiry.

6.2 THE CROWN'S FAILURE TO CARRY OUT ITS TREATY DUTY: GENERIC ISSUES

In chapter 3, we analysed the Crown's duty in terms of the principles of the Treaty in the circumstances of the time. We found that in the period 1840 to 1846 there was broad agreement that the correct Maori owners must be identified for consent and payment before the Crown could confirm that a valid alienation had taken place (to the New Zealand Company or to private purchasers), or before the Crown itself could purchase land. In our reading of the evidence, the accepted standard for Crown purchasing up to 1846 was that there should be:

- ▶ a clearly delineated and relatively small block of land;
- ▶ a prior investigation of the title to that land;
- ▶ the identification of all the right-holders; and
- ▶ an agreement between them as to their relative distribution of rights or, in the event of a dispute, reference to a proposed register or Maori court.

The actions of Grey and McLean substantially departed from this standard after 1846, in serious breach of the principles of the Treaty and to the significant prejudice of those Te Tau Ihu iwi who as a result lost land and resources without having given their proper and meaningful consent.

What was not entirely resolved by 1846, however, was whether the correct ‘owners’, and the nature of their rights, should be determined by Maori law or by British law and policy. The so-called ‘waste lands policy’ was critical to the outcome of that debate. The correct answer, in Treaty terms, was known at the time and was articulated by Lord Stanley when he told the British Parliament:

I am not prepared to say that there may not be some districts wholly waste and uncultivated – there are such in the northern island – but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions – boundaries and limits in some places natural, in others artificial – as satisfactory and well defined, as were, one hundred years ago, the bounds and marches of districts occupied, by great proprietors and their clans, in the Highlands of Scotlands [*sic*]. (hear, hear.) With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [ie, by Crown grant] that which it does not possess itself. (cheers).¹

Lord Stanley agreed with the New Zealand Company that there might be unowned waste lands in the South Island but that this could be determined only by an inquiry into Maori customary law and right-holding on the spot. The Treaty guaranteed Maori possession of

1. *New Zealander*, 13 December 1845 (quoted in Dr Donald Loveridge, “An Object of the First Importance”: Land Rights, Land Claims and Colonization in New Zealand, 1839–1852, report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), p 264 fn 645)

whatever they ‘owned’ according to their own law. The Secretary of State instructed the Governor to register all Maori land and to purchase land for the company’s requirements if necessary. In all such purchases, he was to:

in giving to the Company your best assistance . . . and in facilitating the negotiations with the natives, you will not fail to bear in mind the importance of endeavouring to ascertain, so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.²

These, then, were standards by which Grey’s actions in the purchasing of Te Tau Ihu land in 1847–53 may be judged.

Maori customary law was guaranteed and protected by the Treaty. Instead of respecting that law or ascertaining Maori rights under it, Governor Grey and Donald McLean applied a virtual waste lands policy to the blanket purchasing of Maori land and to the amount of land that they permitted Maori to retain. Grey’s conduct of the Wairau and Waipounamu purchases was ultimately based on his belief that Maori resource-use rights and customary claims to uncultivated ‘waste land’ were invalid. He did not, as instructed, investigate those claims according to Maori custom and reach a considered and informed determination of that point. The application of a virtual waste lands policy to Maori customary rights during Crown purchases and reserve-making was in serious breach of Treaty principles. Relevant aspects of the Wairau (1847) and Waipounamu (1853–56) purchases were, therefore, in serious breach of Treaty principles.

Under the Treaty of Waitangi and by the standards of the time, any purchase of Maori land or confirmation of private purchase required the Crown to ascertain:

- ▶ the correct right-holders according to Maori custom;
- ▶ the rights that they wished to convey to the Crown;
- ▶ the rights that they wished to retain; and
- ▶ the rights that they needed to retain to ensure, in Normanby’s words, their own comfort and subsistence.

In addition, the Crown had to ensure that the decision of what to convey and what to retain had been made by, to paraphrase Normanby, the appropriate customary decision-makers according to their own established usages (tino rangatiratanga).

These were the standards that the Treaty guaranteed and that British policy in the 1840s was officially committed to meeting. In chapter 3, we noted that the Crown failed on all

2. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253 (quoted in Michael Macky, ‘Crown Purchases in Te Tau Ihu between 1847 and 1856’, report commissioned by the Crown Law Office, 2003 (doc s2), pp 24–25)

these counts in Te Tau Ihu. First, it admitted that it did not properly inquire into the identity of the correct right-holders, or the nature of their customary rights, when it confirmed the New Zealand Company's transactions (1844) and made its own major purchases (1847–56). Secondly, we found that there were mechanisms available to the Crown for it to have recognised, respected, and protected the tino rangatiratanga of Te Tau Ihu Maori in transactions for their land. At the least, the Crown possessed the resources and skill sets for it to have investigated customary title by commissions of inquiry or by detailed, official, on-the-ground inquiries, but it failed to do so. Also, suggestions for a Maori court, which could have been used to resolve disputes and have Maori decide their own entitlements, were not carried out.

The best way to have dealt with matters, however, was for Te Tau Ihu Maori to have exercised their tino rangatiratanga in partnership with the Crown, deciding their own entitlements through their own customary mechanisms with officials in attendance (as happened with the Pakawau purchase in 1852). Such empowerment carried the risk, however, that Maori might say 'No', as they did at that hui to the proposed purchase of the west coast. This risk was unacceptable to Grey and McLean, who thereafter deliberately undermined or circumvented tino rangatiratanga in the Waipounamu purchase in order to obtain virtually the whole of Te Tau Ihu for the Crown.

In sum, we found that, in the circumstances of the time, the Crown considered the prior investigation of Maori customary rights, as determined by Maori customary law, to be a vital prerequisite to its acceptance of any decision to sell. Yet, it failed to carry out such investigations in an adequate manner, if it carried them out at all. The Crown's failure to abide by its own standards, more particularly during the transactions of 1844 to 1856, was in serious breach both of the Treaty principles of partnership, autonomy, reciprocity, and active protection and of its guarantee of Maori tino rangatiratanga.

In particular, the Crown failed to actively protect Maori interests (by ensuring that their entitlements were fairly identified by themselves and according to their own laws) before commencing to buy them. It failed to act in partnership with Maori or to respect their autonomy when it failed to establish official mechanisms, the decisions of which would be binding on both sides, for the negotiation of purchases and the resolution of disputes. It failed to respect and provide for tino rangatiratanga, not permitting Maori to debate and decide their own entitlements through their own institutions, before it obtained deeds and made payments. That it could have done all of these things is demonstrated above all by the Pakawau hui at Nelson and by proposals for advance title registration or dispute resolution by Maori-controlled courts. The Crown's refusal to meet the bare minimum of its obligations under the Treaty enabled it to obtain almost the entire land and resource base of Te Tau Ihu, in breach of the Treaty and to the serious prejudice of the eight Te Tau Ihu iwi.

6.2.1 Was the Crown's failure mitigated if it identified right-holders after accepting a decision to sell or even by the end of a later transaction?

It was clear from our discussion in chapter 3 that by 1847 the Crown had accepted that it was bound by the Treaty and by the Maori law governing customary rights in property. It had also, on many occasions, articulated the view that it would neither buy Maori land nor confirm the extinction of Maori title by Crown grant to others unless there was proof that the correct right-holders had been identified and paid. Further, it was the proposed practice of Governors Shortland, FitzRoy, and Grey that the correct Maori right-holders had to be identified before either purchasing land or (in the case of private purchasers) confirming a purchase. We noted the proposed purchase processes of Shortland and Clarke, the registration instructions of Russell and Stanley, the purchase instructions of Normanby and Stanley, and the proposed confirmation processes of FitzRoy and Grey. All required the identification of Maori title prior to the Crown's acceptance of a decision to sell or, in the case of confirmations, prior to its acceptance that a sale had taken place and before a Crown grant to the purchaser could ensue.

The Crown and claimants agreed that this did not happen in Te Tau Ihu. At first, the Crown denied it, but it eventually conceded the point, particularly on the evidence of Dr Ballara. The evidence of its own witnesses, Dr Gould and Mr Macky, also confirmed the point. The Crown argued, however, that its failure was mitigated by identifying and paying all right-holders by the end of the final (Waipounamu) purchase.

We did not accept this submission. The Crown, in Lord Stanley's words, had no right to grant lands that it did not itself possess. The idea that its transactions could somehow be validly or fairly completed after Maori land had been granted to settlers, or after it was judged as irrevocably sold, was incompatible with either the Treaty or British principles of justice. We accepted the submission of Ngati Tama: 'It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.'³ Anything less than the free and informed consent of Maori to the alienation of their land, given before the Crown claimed to own that land or grant it to others, was in violation of articles 2 and 3 of the Treaty, the rights of all British subjects, and the tino rangatiratanga of Maori tribes. The compensation of 'after-claimants', subsequent to their land being counted as sold and with a non-negotiable sum, was in obvious violation of the Treaty principles of reciprocity (inherent in pre-emption), partnership, and active protection.

Having considered these generic aspects of the claims in chapter 3, we then turned to the detailed processes by which the Crown purchased (or confirmed the purchase) of land.

3. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), p 46

6.3 THE SPAIN COMMISSION

In chapter 4, we assessed the claims of Te Tau Ihu iwi that to their lasting prejudice the Spain commission incorrectly confirmed and validated the New Zealand Company's pretended purchase of land. The Crown argued that it 'consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land'.⁴ It also admitted that 'the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available'.⁵ These two concessions were of great importance to our consideration of the Land Claims Commission. In the Crown's view, Commissioner Spain and other officials 'considered themselves bound by the Treaty and the British Government's instructions to protect Maori interests by a full investigation'.⁶ These standards, Crown counsel conceded, were not met. Spain acted with a 'degree of ruthless pragmatism that saw the Treaty either sidelined or made secondary to the needs of the settlers and the New Zealand Company'.⁷

6.3.1 The Crown's concessions and agreements between the parties

Overall, the claimants and the Crown agreed that Spain's inquiry into customary rights and Maori's understanding of – and agreement to – the New Zealand Company's transaction was totally inadequate, and that this had prejudicial effects for Te Tau Ihu Maori. We accepted this substantive agreement on the facts. Although the Crown did not concede specific Treaty breaches, we made findings that the Treaty has been breached (summarised below).

Further, we accepted the parties' agreement on the following details:

- ▶ In terms of informal inquiries, Meurant visited only some districts in Tasman Bay and nowhere in Golden Bay, and Clarke did not have time to inquire informally.
- ▶ In terms of the formal investigation, Spain heard only one Maori witness, despite many others being present who could and should have been heard. Even the evidence of that one Maori witness was not given its due weight: Spain dismissed Te Iti's evidence on the basis of an unsubstantiated accusation that it was untruthful, an accusation made by the company agent and the protector, without them calling any evidence to corroborate their accusation. Tasman Bay tribes, therefore, did not have a proper opportunity to put their evidence on their understanding of what (if anything) had been agreed with Captain Wakefield, what (if any) rights Ngati Toa could or did alienate, whose rights were affected, and who had authority to decide such matters.

4. Crown counsel, submission concerning generic issues, 20 September 2002 (paper 2.371), p 8

5. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 12

6. Crown counsel, submission concerning generic issues, p 18

7. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 2

- ▶ Golden Bay communities had no opportunity to be heard at all, and definitely did not consent in advance to an arbitrated settlement or the amount of compensation determined for them to receive.
- ▶ The explanation for this inadequate inquiry was political; by the time it reached Nelson, the commission was determined on a quick settlement, rather than to inquire and report fully on the validity of the company's transactions.
- ▶ The Crown should have inquired into and established how Maori customary rights related to their share of the Nelson Tenth at the time. To have left it for 50 years was wrong and unfair.

The Crown made other concessions. First, it conceded that Spain and Clarke could (and should) have inquired into the rights of the Kurahaupo tribes, a point not necessarily accepted by the northern allies. Secondly, the Crown thought it 'probable' that Tasman Bay Maori were given no choice but to agree to arbitration, compensation, and even the amount of compensation, but it considered the evidence 'inconclusive'. Similarly, it was 'possible' that right-holders were left out, who neither consented nor were compensated. The claimants, on the other hand, considered the evidential foundation strong enough to take these conclusions further. They believed that the Tribunal could come to a definite view that Tasman Bay Maori did not consent to a switch from investigation to arbitration-compensation and that the 'arbitration' was in fact a coercive process in which they were given no choice but to accept deeds of release and a dictated amount of compensation. Having reviewed the evidence, we accepted the claimants' submissions to that effect.

6.3.2 The Crown's Treaty duty

In chapter 4, we found that the Crown had a Treaty duty to ensure that the New Zealand Company had made a valid purchase of land (and from the correct 'vendors') before confirming its title. The Crown thought so too, both then and now. In its submissions in our inquiry, the Crown relied on Normanby's instruction that there be an investigation, the Colonial Office's insistence to the company that it could not have title without one, and Spain's own view that to award title without first investigating and confirming its validity would have been in breach of the Treaty. We accepted this submission. These were the standards against which the Crown's actions must be judged.

The Crown conceded that it did not meet these standards, but suggested that the switch from inquiry to arbitration was not necessarily in breach of the Treaty. Much depended on whether Maori supported such a switch and participated in (rather than being objects of) the arbitration and, ultimately, consented to the final arrangements. Much depended also on the objective of the switch. Was it carried out with a view to properly balancing the Crown's obligations to its Maori and settler subjects and to its commitments in the November Agreement and the Treaty?

6.3.3 Hobson's breach of the Treaty

Prior to Commissioner Spain's investigation, Governor Hobson permitted the New Zealand Company to select land and form settlements in the northern South Island in the mistaken view that the November Agreement of 1840 prevented him from interfering. The Crown's historical evidence was that Hobson's view was incorrect. Further, Chief Protector Clarke had advised Hobson that the company's claims were dubious. Hobson could (and should) either have waived pre-emption so that the company could acquire land from resident Te Tau Ihu right-holders or have arranged to obtain that land by Crown purchase. He did neither, instead permitting Captain Wakefield's gift and settlement arrangements, later erroneously interpreted as an extinction of Maori title by Spain.

6.3.4 Spain's report and award were in breach of the Treaty

Despite carrying out what the Crown admitted was an inadequate inquiry, Spain recommended an award of 151,000 acres to the company, on the basis that:

- ▶ the 1839 Kapiti deed had transferred land and extinguished Ngati Toa's rights; and
- ▶ Captain Wakefield's 1841 gifts were in fact understood by Maori to have been an absolute purchase of exclusive title to that land.

Spain's report was demonstrably wrong as to the facts in both instances. Nonetheless, his findings (and not the 'gratuitous' deeds and payments of 1844) formed the basis for the Crown's grants of land to the company (in 1845 and 1848). This outcome was in breach of the Treaty. Neither the Kapiti deed nor the 1841 gift-giving was a valid absolute alienation of Maori customary rights. Under British law, the Kapiti deed was so faulty as to be invalid, and the Treaty's grant of pre-emption meant that only the Crown could buy land after 1840. Wakefield's 1841 gifts had no legal effect if characterised as payments for land. Under Maori law, the claimants' evidence was that they had made a customary tuku of land to the company, some of which was to be shared, other pieces of which were to be exclusive, but all of which remained under a layer of Maori rights and authority. We found from the historical evidence that these facts were discoverable at the time, had Spain inquired properly. The Crown grants, therefore, actively extinguished Maori customary title by granting it to others, without the consent or proper compensation of Te Tau Ihu rights-holders. This violated the tino rangatiratanga of Te Tau Ihu Maori, expropriated their property, and was in breach of the Treaty principles of partnership, reciprocity, equity, and active protection. This Treaty breach prejudiced all iwi with valid customary claims in the company districts.

The only thing that might have prevented or ameliorated this Treaty breach was if the Crown had treated properly with Te Tau Ihu Maori for their surviving customary rights in 1844, during Spain's 'arbitration' process, to which we now turn.

6.3.5 Tino rangatiratanga and the arbitration process

As we noted in chapter 3, the Nelson hui about the Pakawau purchase was a good example of how the Crown could act with respect for tino rangatiratanga by ensuring that all potential right-holders had been visited and knew what the Crown wanted, followed by an intertribal hui for them to discuss, agree, and arrange the matter for themselves. We therefore posed the question: Was this standard met at the Nelson ‘arbitration’ hui of August 1844?

In our view, there was nothing wrong in principle with a settlement ‘out of court’, provided both parties agreed to follow that procedure and fully participated in the negotiation or were represented by advisers of their choosing. In the case of Spain’s 1844 arbitration, the Crown conceded:

it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.⁸

We considered the evidence to be firmer than was admitted by the Crown. Similar to the circumstances in Wellington, we found that the Crown acted in breach of Treaty principles in that:

- ▶ it failed adequately to consult with Maori having customary interests in Tasman Bay and Golden Bay before deciding to switch from an inquiry into the validity of the New Zealand Company’s transactions to a form of arbitration;
- ▶ it proceeded to implement the arbitration process without the informed consent of Maori with interests;
- ▶ it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, because he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty;
- ▶ it failed to respect, protect, and provide for tino rangatiratanga when it imposed an amount of compensation, and it restricted the decision-making of the intertribal hui to a single point, the proportionate distribution of that set compensation;
- ▶ it failed to permit even that exercise of tino rangatiratanga to Golden Bay hapu and leaders, whose refusal to accept or divide up the compensation was followed by its being awarded anyway and their land being awarded to the company; and

8. Crown counsel, closing submissions, pp 49–50

6.3.6

- ▶ it accepted Spain's award as a legitimate basis for a Crown grant to the company, even though that award was based on an inadequate inquiry and its decision was wrong on the facts.

As a consequence, all such Maori were prejudicially affected by the arbitration proceedings and award, with the expropriation of their title to 151,000 acres of land, without their meaningful consent and to their social, cultural, and economic harm.

6.3.6 Were customary rights nonetheless extinguished by the 1844 deeds of release?

Having reviewed the circumstances of the 1844 negotiations, we were not satisfied that the deeds of release – explained as a gratuitous payment rather than an extinguishment of rights – can be shown to have changed the customary aspects of the *tuku*, to the certain knowledge of the Maori signatories. As in 1841, there was an avoidable failure to secure a meeting of minds. This time, the failure was mainly due to Commissioner Spain and it was soon evident to the Government in the 1850s. In the Maori view, there remained unalienated customary rights in the lands adjudicated by Spain and awarded to the New Zealand Company. In the Crown's view, all rights had been extinguished by purchase (as found by Spain), and the land was then legitimately granted to settlers (minus reserves). As a result of Spain's failure to inquire properly and find the truth, and his subsequent explanation of the 1844 payments, Maori and the Crown were still 'talking past each other' by the 1850s. By then, however, all unalienated customary rights had, at law, been expropriated and granted to others by Crown grant in 1845 and 1848. The issuing of these Crown grants, based on the faulty Spain inquiry and award, compounded the Treaty breaches enumerated above.

6.3.7 Who was affected by the Treaty breaches?

All *iwi* with customary rights in Tasman Bay and Golden Bay were prejudiced by these Treaty breaches. Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata were clearly among that number and (at the time) had the leading authority in those districts.

Ngati Toa were also affected. They had customary rights in western Te Tau Ihu. The Kapiti deed marked an intention on the part of Te Rauparaha and other Ngati Toa leaders to make a *tuku* of western Te Tau Ihu land to the New Zealand Company, but there was no valid alienation of all of Ngati Toa's rights, nor even agreement on which parts of Te Tau Ihu were intended for settlement. There was no justification whatsoever for equating 'Taitapu' with any part of the Golden Bay land awarded to the company and justification only for equating 'Wakatu' with that part of Tasman Bay accepted under that appellation by the resident *iwi*. Spain wrongly found otherwise, as we noted in chapter 4.

The Kurahaupo tribes also had surviving customary rights in Tasman and Golden Bays, and were wrongly overlooked by Spain, Clarke, Meurant, and the Wakefields, as the Crown

conceded. These iwi were therefore also affected by the Treaty breaches. Further, the Crown's historian pointed to the fact that Spain's award was recommendatory, that Governor FitzRoy was aware of the Kurahaupo claim and could have intervened in Te Tau Ihu on behalf of the defeated peoples, as he did in Taranaki. We agreed, and found the Crown in breach of the Treaty for this act of omission, compounding the earlier breaches with regard to the Kurahaupo iwi.

6.3.8 Customary entitlements and the Nelson Tenth

As noted above, the Crown and claimants agreed that the beneficiaries of the tenths should have been identified at the time and that the failure to do so was a serious one. We considered that in 1844, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary authority in the lands awarded to the company. The rights of the first three tribes were based on take raupatu, followed by itinerant resource-use, residence, and cultivation, and by the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land. The rights of Ngati Koata, however, were derived from take tuku, and from itinerant resource-use, occasional residence in the company lands, intermarriage, and the burial of the placenta and the dead in the land.

The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Their leader, Tutepourangi, had made a tuku to Ngati Koata that was still live at the time, and a basis of relationship and rights for both. It was not clear how far they were still in occupation, especially in Golden Bay. According to Meihana Kereopa's evidence, Kurahaupo peoples were still in occupation of part of Tasman Bay until after the Spain award (as a result of which, it appeared, they had to leave the district). There were Ngati Apa families scattered around, some still in 'slavery', despite the Treaty promise that they had the rights of British subjects. Their right to continue peacefully recovering from the conquest was, as with the Ngati Toa right to take up ahi ka, foreclosed by the Spain decision of 1844 and the Crown grants of 1845 and 1848.

As described in chapter 2, in 1844 Ngati Toa still had a latent right to visit for resource-use or to take up residence and cultivation (which together or severally make up ahi ka). The evidence was that, had they chosen to take up this latent right in the 1840s, their former allies in western Te Tau Ihu, especially their close relatives among Ngati Rarua and Ngati Koata, would likely have accommodated them with a tuku. There would have been little choice, given the leading role of Te Rauparaha in the raupatu (even if not personally involved in the west) and the way those tribes considered it tika to accommodate other conquest chiefs who came to settle after the first wave. But, without taking up this latent right, Ngati Toa of the 1840s were too far away from western Te Tau Ihu to maintain any kind of authority over their relations or allies, nor could they claim primary or leading rights in the land.

6.4

It was not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we thought the leading share in the tenths was indeed correctly decided in 1892, although we made no comment on the proportion as between the four northern allies. But, because the tenths were considered part-payment for the New Zealand Company lands and an endowment for the ‘vendors’, we considered that Ngati Toa and the Kurahaupo iwi should also have had a share. We found in chapter 4, therefore, that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths, in breach of the Treaty principles of partnership, equal treatment, and active protection, and to the obvious prejudice of those iwi. In our view, it would be neither possible nor appropriate to satisfy those claims from the assets of the Wakatu Incorporation. Other issues with regard to the tenths will be dealt with in our final report.

6.4 THE WAIRAU PURCHASE

One of the most enduring of the claimants’ grievances was Governor Grey’s blanket purchase of the enormous Wairau block, followed by his grant of millions of acres to the New Zealand Company. There was broad agreement between the claimants and the Crown on many of the historical facts. The Crown made some important concessions, accepting criticism from various witnesses (including its own historian), but it made only two concessions of Treaty breach: first, that Grey’s detention of Te Rauparaha without trial was in breach of the Treaty and, secondly, that Grey’s purchases were carried out with a ruthless pragmatism that sidelined Treaty promises and, in doing so, subordinated the interests of Maori to those of the settlers. Although the Crown did not specify the Treaty principles concerned, this was clearly a breach of the principles of equity, partnership, and active protection.

6.4.1 The Crown’s concessions

The Crown conceded that:

- ▶ its indefinite detention of Te Rauparaha without trial was a Treaty breach, and that it used his detention to apply ‘moral pressure on Ngati Toa chiefs to agree to a cession of land’⁹;
- ▶ Surveyor-General Ligar’s investigation identified 13 principal ‘owners’ of the Wairau, along with many other claimants, but Grey ignored Ligar’s report and purchased the Wairau from only three of the principal ‘owners’; and

9. Crown counsel, closing submissions, p 101

- ▶ payment may not have been distributed widely enough and Rangitane certainly were not paid.

The Crown also criticised Ligar's inquiry as inadequate (even if the Governor had taken any notice of it) because it failed to:

- ▶ explain the overlapping interests or the relative interests of Ngati Toa, Ngati Rarua, and Rangitane;
- ▶ explain what authority the Kurahaupo rangatira Ihaia Kaikoura had over the land as an accepted leader of the Port Underwood community;
- ▶ explain why Pukekohatu was identified as Ngati Toa;
- ▶ explain whether the Rangitane 'fugitives' living independently in the interior had rights; and
- ▶ identify the 'many who have claims'.¹⁰

The Crown concluded that the Wairau purchase was 'not without its controversies such as to whether all right-holders were identified, whether consideration was distributed widely, delays in surveying and the coercive context associated with the Ngati Toa chiefs'.¹¹ Counsel suggested, however, that the 'fair' purchase price of £3000, the Wairau residents' desire for settlers, and the setting aside of a large and sufficient reserve for all the residents were factors in mitigation of the Government's actions. The Crown did not, therefore, draw a conclusion that the admitted 'controversies' were in breach of the Treaty.

6.4.2 Did the Crown carry out an adequate inquiry into customary rights before or during Grey's negotiations to purchase the Wairau?

In chapters 2, 3, and 5, we accepted the claimants' evidence that customary right-holding was decided according to a system of law common to all districts, though with regional variations, and that sufficient Maori and settler expertise was available for the Government to have inquired adequately as to customary law and those who held rights under it. Such rights continued to change and evolve according to custom during the 1840s. This did not mean that things were in 'flux' or were impossible to settle upon due inquiry or by the exercise of tino rangatiratanga through intertribal hui and other customary decision-making mechanisms. Nor did infrastructural limits prevent the Government from carrying out inquiries, given the fact that both the Spain and the Ligar inquiries actually happened.

Of the two, Grey chose to rely on Spain's report, even though the commissioner had not actually investigated the Wairau, other than his questioning of Ngati Toa chiefs in 1843. That questioning was confined to whether or not a 'sale' had taken place. There was no investigation of customary rights, yet Spain concluded that the Wairau was in the 'bona fide

10. Ibid, pp103-104

11. Ibid, p104

6.4.3

possession' of Ngati Toa alone. Rangitane did not meet his criteria for customary rights, as he believed them all to be fugitives and not in occupation (which was demonstrably untrue). He made no mention of Ngati Rarua, also in occupation at the time. Ligar, on the other hand, visited parts of the district (on the Government's instructions) and identified the presence of Rangitane in occupation with Ngati Toa, the rangatiratanga of Ihaia Kaikoura, the ascription of primary authority over a sale to 13 chiefs, and the existence of 'many' other unspecified claimants.

The claimants and the Crown agreed on two fundamental criticisms of Ligar's report. First, they argued that it was incomplete and faulty – the 'many' unidentified right-holders remained that way and tribal identities were not properly ascertained and explored. Secondly, the Government took no notice of the report in any case. Both criticisms were justified in our view. The former problem might have been overcome if the Government had respected tino rangatiratanga and ensured that right-holders were properly informed of the planned purchase and had an opportunity to assemble, debate the purchase, and reach a consensus on whether it should go ahead. Instead, in a manner for which Crown counsel used the words 'pressure' and 'coercive', Grey forced through a purchase in the North Island from just three of the 13 principal right-holders, all three of whom were Ngati Toa.

6.4.3 Treaty breaches in the Wairau purchase: Ngati Toa Rangatira

The inquiries that took place were clearly inadequate in the circumstances, but that was only the beginning of the problem. As we noted, Grey ignored Ligar's findings, such as they were, in favour of purchasing from Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi. He did so in order to secure certain military, strategic, and political objectives, as we outlined in chapter 5. The Governor had already decided to buy from those three chiefs even before the Ligar inquiry took place.

Grey's actions knowingly violated the rights of other senior leaders of Ngati Toa and of the tribe as a whole. The Wairau purchase, as conducted by Grey, was an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment. Had the Crown had regard to its partnership with Maori, and its obligations under article 2, it would have given effect to their tino rangatiratanga by convening a public hui at or near the district under negotiation (as it did for Pakawau). It would have ensured that the tribe had a chance to consider the Crown's offer and come to a deliberate and informed decision by means of its own customary decision-making mechanisms. It would have ensured that the 13 principal leaders, as identified by its own inquiry, were present and/or consented to the transaction. Above all, it would have given all legitimate right-holders the opportunity for a genuine and informed choice. The Crown's purchase of the Wairau from Ngati Toa failed to meet a single one of its Treaty obligations to that tribe and was in very serious breach of Treaty principles.

6.4.4 Treaty breaches in the Wairau purchase: Ngati Rarua

In chapter 5, we accepted the submission of counsel for Ngati Rarua that the Ligar report put Grey on notice that the consent of 13 leading chiefs was required (including Pukekohatu of Ngati Rarua) and that there were ‘many’ other right-holders yet to be identified. As with the wider community of Ngati Toa right-holders and leaders, the Ngati Rarua people were entitled to participate in the decision-making and to give a free and informed consent (or refusal) to the purchase. We found that the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right-holders, including Ngati Rarua, in serious breach of article 2 of the Treaty. This was a deliberate suppression of their tino rangatiranga and was in violation of the principles of reciprocity, partnership, active protection, and equal treatment.

6.4.5 Treaty breaches in the Wairau purchase – Rangitane

Rangitane clearly had customary rights in the district at the time of the Wairau purchase. Following the signing of the 1847 deed and the beginning of settler intrusion on the ground, Rangitane (and other residents) asserted their right to have been consulted and paid, and their protest at being excluded. The Crown had already granted their land to others, and it ignored or actively sought to suppress their protests. The tribes residing in the Wairau appear to have worked together in the late 1840s and early 1850s to protest the sale of their land without their consent (or payment).

We found that a layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive. The fact that Rangitane, in common with others at the Wairau, looked to Ngati Toa chiefs for leadership at this time, especially Te Kanae and Puaha, did not change the existence of their rights, which were guaranteed and protected by the Treaty. The Governor’s predetermined decision to buy the Wairau from three select Ngati Toa chiefs meant that Ligar’s failure to properly examine and identify Rangitane’s claim was immaterial. The Crown’s purchase of their land, without their participation or consent, was in serious breach of article 2 of the Treaty, and of its principles. This breach was compounded by the Crown’s failure to investigate Rangitane’s post-sale protest fairly or to uncover and satisfy their undoubted rights at that point. Rather, the Crown tried to enforce the sale by requesting Ngati Toa to remove the protestors.

6.4.6 Treaty breaches in the Wairau purchase – the failure to ensure that all customary right-holders shared in the payment

Ngati Rarua, Rangitane, and the majority of Ngati Toa leaders and right-holders were deprived of their tino rangatiranga when they were not allowed any say in whether the Wairau would be sold. The Crown purchased the district from just three chiefs and then

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enforced that purchase on resident protesters. Was this action of the Crown in any way mitigated by ensuring that all right-holders were at least paid, even if they were not consulted and had not consented?

From what evidence was available to us, the Crown was aware that the three signatories were not distributing the money to other right-holders or had at least been accused of not doing so. Servantes investigated the complaints and recommended that further instalment payments be supervised so that the Government could satisfy itself that the money was being properly distributed. But this recommendation does not appear to have been implemented. We found that the Crown had a responsibility to try to ensure that land purchase money handed over to a select few chiefs was equitably distributed to right-holders and, where possible, invested in the productive development of land reserved to them. After all, this was what Grey promised would result from the instalment payment system that he initiated with the Wairau purchase. He seems to have done nothing about it once he had got the block. Instead, the Crown failed to ensure that the instalment payments were properly distributed to right-holders, Ngati Toa or others. This failure was in breach of the principles of active protection and equal treatment.

As a result, the great majority of Maori right-holders were deprived of their tino rangatiratanga and were not consulted about the purchase, did not consent to it, and were never paid as part of it. Taken together, these Crown actions were in very serious breach of the Treaty of Waitangi and its principles.

6.4.7 Were these Treaty breaches mitigated by the inclusion of Wairau right-holders in the Waipounamu purchase?

In 1848, Governor Grey issued the New Zealand Company a Crown grant that included the entirety of the Te Tau Ihu land that he claimed to have purchased from Puaha, Te Whiwhi, and Tamihana Te Rauparaha. From that point on, the settlers had all legal rights to the land and Maori had none (save their reserve). In 1851, when the company's affairs were wound up, any unallocated land reverted to the Crown. In the Waipounamu purchase of 1853–56, the three iwi with rights at the Wairau – Ngati Toa, Ngati Rarua, and Rangitane – signed deeds purporting to sell all their rights wherever they happened to be. Whatever the circumstances of the Waipounamu purchase, it was certainly not a free and willing sale of rights in Wairau land already granted by the Crown to others. It was simply and clearly inconsistent with the Treaty guarantees for the Crown to grant land with unextinguished customary rights to settlers. Whatever the Wairau purchase deed may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it. As we have found, that included the majority of Ngati Toa, and also the resident Ngati Rarua and Rangitane. Their rights were extinguished at British law by the Crown's 1848 grant of their land to others in fee simple. In theory, there was no going back from that point. In practice,

when the Crown resumed ownership of a very large territory in 1851, it could have returned land to Maori who had not sold their rights and did not wish to do so, without any injustice to settlers. Instead, it maintained and defended its title.

Thus, although the Crown may have paid some excluded right-holders years later during the Waipounamu purchase, this did not mitigate the absolute suppression of their tino rangatiratanga in 1847 and 1848. We found that the Waipounamu purchase could not and did not make willing sellers of those whose rights had already been granted to others, in violation of the plain meaning of article 2 of the Treaty, and of the principles of reciprocity, partnership, and active protection. Further, in favouring the company and settlers by granting the Wairau to them, despite knowing of the right-holders identified by Ligar, and in maintaining that grant despite protest from Te Kanae and Rangitane, the Crown breached the Treaty principle of equity. As it conceded more generally, it subordinated the interests of Maori to those of the New Zealand Company and settlers.

6.5 THE WAITOHI AND PAKAWAU PURCHASES

In 1848–50, the Crown negotiated the purchase of Waitohi in Queen Charlotte Sound with the leaders and people of Te Atiawa. Ngati Toa and Rangitane did not pursue claims before this Tribunal that they should have been included in the Waitohi purchase. Nor did Te Atiawa claim that there were any issues with how their right-holders were identified and represented in that purchase. We did not, therefore, discuss the Waitohi purchase in this preliminary report. Other claims about the Waitohi purchase (and its Waikawa reserve) will be considered in our final report.

In 1852, the Crown purchased the Pakawau block in western Te Tau Ihu for the sum of £550. The decision to sell was well canvassed among resident right-holders and eventually made by a large and representative hui, which also refused to sell the West Coast for the offered price. The Pakawau purchase was not the subject of claims that customary right-holders were left out or unrepresented in the decision-making, but there are other claims about that purchase, which will be dealt with in our final report.

6.6 THE WAIPOUNAMU PURCHASE

In 1853, Governor Grey left New Zealand. As part of the ceremonial surrounding his departure, he met with Ngati Toa in August and requested that they surrender all their remaining customary rights in Te Tau Ihu to the Crown. Although the tribe was reluctant, their leaders eventually decided to agree to the proposed sale after two days of public debate at the well-attended farewell hui. The 1853 purchase deed acknowledged that resident tribes

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– including the defeated peoples – claimed the land ‘conjunctly’ with Ngati Toa and that reserves would be made for them (to be decided by the Crown). Two-fifths of the purchase price of £5000 was paid to Ngati Toa, with the remainder to be allocated to resident right-holders at a proposed general hui in Nelson.

From that point on, the Government counted the entirety of Te Tau Ihu as ‘sold’. Although there were many overlapping customary rights known to officials, McLean’s view was that Ngati Toa had an unquestionable suzerainty and an undeniable primary right to sell the land. Other tribes and resident Ngati Toa would be compensated for their interests, and have reserves made for cultivation and subsistence, but their land was sold and they could not repudiate that sale. Without their concurrence, on the other hand, McLean admitted that the sale would not be complete or valid.

The proposed Nelson hui of Ngati Toa and Te Tau Ihu residents did not eventuate. Instead, during 1854 McLean paid the remainder of the purchase money both to non-resident Te Atiawa who had returned to Taranaki, and at a second North Island hui of Ngati Toa in December of that year. Finally, at the end of 1855 and the beginning of 1856, over 24 months after the land was counted as sold, McLean met with Te Tau Ihu residents and signed deeds with them. He refused to vary the small amount of money they were allowed, which had been allocated to him after having paid the entire purchase price to non-residents. After much resistance, he agreed to except Taitapu on the west coast and Wakapuaka in Tasman Bay from having been ‘sold’. Rangitoto was not included in 1853, and Ngati Koata (who therefore had a choice) refused to include it now, and stuck to that resolution despite pressure from McLean. By early 1856, the Government had signed 13 deeds (or receipts) with Ngati Toa, Te Atiawa, Ngati Rarua, Ngati Tama, Ngati Koata, Rangitane, and Ngati Kuia. No deed was ever signed, or reserves allocated, for Ngati Apa. The entire region of Te Tau Ihu was then considered Crown land, apart from Taitapu, Wakapuaka, Rangitoto, and small occupation reserves.

6.6.1 The Crown’s concessions

The Crown accepted that it did not inquire properly as to customary rights during its major purchases, including this, the biggest one of them all. Grey and McLean were possessed of a good general knowledge of custom but exploited it to obtain land from Maori at the latter’s expense. The Crown also admitted that Grey and McLean set aside Treaty promises when purchasing land, and subordinated the interests of Maori to settlers. Further, the Crown conceded that occupation was discoverable on the ground, upon proper inquiry, and that, while some rights were contested, an inquiry had been feasible. Given the complexity of the situation, however, the Crown qualified its concession with the argument that McLean eventually resolved undealt with or residual rights by purchasing all of them. This was, in the Crown’s view, a proper and satisfactory resolution.

Based on the evidence of its own historian, the Crown accepted that McLean improperly tried to use his transactions with non-residents to try to pressure resident right-holders to agree to sales. In the Waipounamu purchase, he dealt with non-residents first and then sent in surveyors to lay off reserves, treating the alienation of the land as a *fait accompli*. He also brought senior chiefs with him to support him when he finally had to deal with the resident right-holders in person. The main difference between the Crown and the claimants was not that McLean tried to do this but how *successful* he was. In the Crown's view, the strategy was not always successful, and some Te Tau Ihu resident iwi were willing sellers.

6.6.2 Was there an adequate inquiry into customary rights before or during the Waipounamu purchase?

The parties in our inquiry agreed that the answer to the question of whether there was an adequate inquiry into customary rights before or during the Waipounamu purchase was 'No'. The follow-up questions were:

- ▶ Did the Crown know that Ngati Toa's claim was contested?
- ▶ Did the Crown fail to investigate a situation known to be controversial?

The clear answer to those questions was 'Yes'. During the late 1840s and early 1850s, Ngati Toa's claim to primary rights was disputed by Te Atiawa in eastern Te Tau Ihu and by a number of tribes in the west. Most notably, the Government ignored Ngati Toa's claim in the Waitohi purchase and sent them to Nelson to debate and resolve matters with their allies and relations on the spot for the Pakawau purchase. In the case of Waipounamu, however, it accepted a claim at face value that it knew to be contested in order to force through a purchase of almost the entirety of the northern South Island. This was a deliberate and calculated Treaty breach of enormous prejudice to the iwi of Te Tau Ihu.

6.6.3 How representative were the 1853 and 1854 hui?

McLean, aware of the dubiousness of his actions, tried to legitimise the foundational 1853 and 1854 deeds by claiming that they had been agreed and signed at hui representing all the tribes. This was a pure fiction. After assessing the evidence in chapter 5, we found that the 1853 and 1854 hui were adequately representative of the Ngati Toa tribe. They were not, however, representative of other iwi or communities resident in Te Tau Ihu. To proceed on the basis that the entire northern South Island was irrevocably sold as a result of these arrangements was a very serious breach of article 2 of the Treaty. McLean misrepresented the outcome to the Government. He pretended that the defeated peoples were represented when they were not. The chief whom he characterised as their leader was actually a southern Ngai Tahu chief, who did not sign the 1854 deed in any case. Nor did the signatures of three chiefs – Tana Pukekohatu, Tipene Paremata Te Wahapiro, and Rawiri Te Ouenuku – suffice for the

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consent of the resident northern iwi. At best, the arrangement was still what it had been in 1853 – an arrangement with Ngati Toa.

Proceeding as if his misrepresentations were fact, McLean cast a veil of legitimacy over what was an invalid transaction in both Maori and British law of the time. In doing so, the Crown committed a breach of the Treaty, with serious consequences for Ngati Apa, Ngati Kuia, Rangitane, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata.

6.6.4 ‘Hobson’s choice’: Did the Crown act correctly in paying resident right-holders after the event?

It follows from our findings (summarised above) that the correct process for the Crown in the circumstances of the time was to send officials:

- ▶ to investigate desired blocks and ascertain local kainga and chiefs; then
- ▶ to convene a tribal or intertribal hui at or near the places it wished to purchase; then
- ▶ to permit the tribes to decide their own entitlements and reach a consensus on the purchase at that (or at more than one) hui; and then
- ▶ to abide by the result; or alternatively
- ▶ to provide a Maori-controlled legal process to determine disputes if they could not be resolved by customary means.

We accepted both expert evidence that this method of proceeding was known at the time and Ngati Rarua’s submission that it was correctly followed in the case of Pakawau and the West Coast in 1852. The Crown’s failure to respect tino rangatiratanga in this way during the Waipounamu purchase in 1853–56, and to purchase instead from non-resident chiefs and then enforce that purchase on residents, was a deliberate tactic employed by the Government to obtain the most land possible for as little money as possible.

The historical evidence was clear that Te Tau Ihu Maori wanted settlers, economic development, and a relationship with the Crown, and were prepared to sell some of their land to obtain these things. The tragedy of the Waipounamu purchase was that, through McLean’s tactic of enforcing the 1853 transaction with Ngati Toa, they were denied their right to decide which pieces and how much land they would sell, and for what price. McLean was willing to resort to anything short of physical force to obtain all their land. We relied on the evidence of the Crown’s historian to that effect and noted that there was some agreement between Crown, claimant, and Tribunal historians on McLean’s tactics and their effects.

Crown counsel conceded the tactic but not its outcome. In our view, the situation might have been mitigated to some extent if McLean had abandoned the tactic after concluding the first deed in 1853. The majority of the purchase money remained to be allocated at a proposed intertribal hui at Nelson. Although the resident iwi would have been at a disadvantage because of Ngati Toa’s deed, at that point they may still have been able to repudiate

or renegotiate the sale. As the leading Ngati Tama rangatira put it in October of that year: ‘when these men meet here then we will dispute the matter with each other – for their act and deed is an intrusion.’¹² Major Richmond reported the locals’ view that they ought to have been consulted before any sale. He feared that, if McLean did not hold the promised hui, the resident iwi might refuse the sale altogether.

Instead, the Government’s leading purchase officer left the residents to wait for years while he paid the entirety of the remaining purchase money to non-residents (other than a small payment to Ngati Hinetuhi of Port Gore). At the same time, he sent officials to lay off reserves in Te Tau Ihu, explaining to local Maori that their land was sold and that all that remained was for the Government to make reserves. Resident right-holders resisted this tactic but put all their faith in McLean. By the time he actually arrived to get the residents to sign deeds individually (more aptly called receipts), over two years had gone by since Ngati Toa ‘sold’ the land in 1853, and the purchase money was all gone. The Government agreed – reluctantly – to an extra £2000 for McLean to compensate those whom he characterised as outstanding claimants.

In sum, the Government virtually forced Ngati Toa’s ‘sale’ of everything everywhere on the resident iwi of Te Tau Ihu, who might otherwise have made willing and informed choices in accordance with their Treaty rights. In taking this action, we found the Crown in serious breach of the plain meaning of article 2 of the Treaty, and of the Treaty principles of partnership, reciprocity, active protection, equity, and equal treatment. The prejudice for Te Tau Ihu Maori was the loss of their land and resources without their free and informed consent (and for grossly inadequate compensation, which we will explain in our final report).

6.6.5 Did officials exploit custom to the disadvantage of Ngati Toa as well as the resident right-holders?

With the initiation of the Waipounamu purchase, we found that Grey exploited important Maori customs to obtain the initial vast cession from Ngati Toa. This was described as ‘an ohaaki within the context of a poroporoaki.’¹³ Although Ngati Toa had been pressing the Government to recognise their claims, the evidence was clear that they did not wish to relinquish Te Hoiere and other valued districts in eastern Te Tau Ihu. Grey and McLean exploited Ngati Toa’s need to reassert their leadership and rights in the wake of their disastrous loss of mana to the Crown in 1846–47 and accepted Ngati Toa’s claims to primary rights and authority without investigation, despite their certain knowledge that those claims were contested. In the circumstances, it was difficult for Ngati Toa to resist Grey’s request

12. Wiremu Te Puoho to Richmond and Stafford, 19 October 1853 (quoted in Macky, p 152)

13. Tony Walzl, ‘Ngati Rarua Land Issues, 1839–1860’, report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol1), p 302

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that they sell Waipounamu. Eventually, they gave in. Valedictory statements at farewell ceremonies in both Maori and Pakeha cultures are naturally given to excesses of emotions. But they should be left at that, and not used as the basis for pressuring Maori leaders into a massive land transfer.

This disadvantaged Ngati Toa's erstwhile northern allies as well as the defeated Kurahaupo peoples, who were in occupation and increasingly assertive of their rights. The Crown clearly exploited and built upon its recognition of a Ngati Toa paramountcy. It initiated the purchase with them and forced the resident iwi to accept compensatory payments, just as Spain had done to 'complete' the New Zealand Company purchase from Ngati Toa. The cumulative effect of this exploitation of Ngati Toa claims to paramountcy in the 1840s and 1850s was to deliver nearly all of Te Tau Ihu to the Crown. This rewarded absentees at the expense of occupants, the very antithesis of Maori custom as Spain, Grey, and McLean understood it. A ruthless expediency had replaced the Crown's Treaty-based obligation to respect Maori customary rights to land and their rangatiratanga over it.

Fundamentally, neither Ngati Toa nor the resident iwi were in a position to freely sell land to the Crown as they wished, as envisaged by article 2 of the Treaty. The Crown's purchase procedures were in breach of the principles of partnership – since both parties did not negotiate freely as equals – active protection, and equal treatment, since Ngati Toa and the resident iwi were not treated with equal fairness in terms of their respective customary rights.

6.6.6 How representative were the 1855–56 arrangements with resident right-holders?

The claimants did not argue that there were deficiencies in the negotiations with the resident right-holders, in terms of the proper involvement of their respective leaders and the negotiation of wide and representative consent to the deeds. We accepted this position, on the evidence, and concluded that the 1855–56 arrangements were not deficient in that respect.

6.7 THE UNIQUE CLAIM OF NGATI APA

Ngati Apa claimed that they were uniquely prejudiced by the Crown's admitted failure to investigate customary rights properly before confirming or conducting purchases. We found that the Kurahaupo tribes were treated alike in the failure of the Spain commission to carry out a proper investigation. In the Waipounamu purchase, however, the evidence was clear that Ngati Apa were indeed prejudiced in a unique way by the actions of Grey and McLean. The Government signed deeds with Ngati Kuia and Rangitane, paid them a small sum for their interests, and made reserves for them. It did none of those things for Ngati Apa.

The Crown conceded as a general proposition that it did not identify and deal adequately with the rights of defeated peoples. Also, counsel admitted that, by failing to investigate the hinterland, where free survivors of Ngati Apa were recorded as living, it may well have deprived Ngati Apa of customary entitlements. The Crown did not, however, make a submission on whether it should have signed a deed with Ngati Apa for their rights in Te Tau Ihu or made reserves for them.

In our view, too little time had gone by since the conquest for Ngati Apa's rights to have been entirely foreclosed as at the 1840s and 1850s. Ngati Apa survived as a people and have maintained a consistent (if under-investigated) claim to customary rights in Te Tau Ihu. A tributary community of Ngati Apa lived at Port Gore, and another community survived under its own chief (Puaha Te Rangi) on the West Coast of the South Island, with claims extending into western Te Tau Ihu. Undefeated (though fugitive) Ngati Apa continued to reside and use resources in the interior of western Te Tau Ihu in the 1840s and eventually joined their settled relatives on the coast. Ngati Apa people were living at Taitapu and elsewhere in coastal western Te Tau Ihu, but their numbers must have been small. Critically, their rights and status were not investigated in the 1840s and 1850s, and they were overlooked by officials. By the time Ngati Apa made claims to the Native Land Court in the 1880s for a share of western Te Tau Ihu lands, Dr Ballara's view was that the evidence had become too slight for us to evaluate those claims fully today.

This Tribunal, therefore, faced a difficult task in evaluating Ngati Apa's claim against the Crown. On the one hand, it was no longer possible to say exactly what rights Ngati Apa retained in western Te Tau Ihu, since these were not investigated or recognised at the time. On the other hand, Ngati Apa found themselves written out of history as a result. Apart from Port Gore, which will be considered in our final report, Ngati Apa individuals had to come in under other lines to establish any kind of claim to land in Te Tau Ihu after 1856. Theirs was indeed a unique claim in this respect, and their survival all the more remarkable for it.

We were not in a position to evaluate the relativity of Ngati Apa's claims and rights in western Te Tau Ihu vis-à-vis the tribes that were recognised by the Crown. On the basis of the available evidence, we found that they did have surviving rights (of some degree), that McLean was on notice of their claims in both western Te Tau Ihu and Port Gore, and that the Crown failed to investigate their claims or ascertain their rights. This failure on the part of the Crown resulted in the extinguishment of Ngati Apa's customary rights during the Waipounamu purchase, without their consent and without paying them or providing them with even the minimal reserves made for other tribes. This was a very serious breach of their article 2 rights, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.

6.8 THE IMPACT OF BLANKET PURCHASING ON CUSTOMARY RESOURCE-USE RIGHTS

The claimants argued that they had customary rights of migratory resource-use extending throughout Te Tau Ihu that they did not wish to alienate in the transactions of 1847–56. The Crown, in their view, failed to investigate or ascertain those rights and failed to make provision for them by reserving sufficient land (or access to land) for them to maintain their customary economy. As a result, much of economic, cultural, and spiritual value was lost.

The Crown largely conceded these points. It accepted that the reserves were insufficient for either the customary economy or European-style farming and that this arose from ‘a failure to adopt a more generous approach to reserves in the Crown purchase era.’¹⁴ In particular, the Crown adopted completely Dr Ballara’s criticism:

The most serious fault of all revealed in the Crown’s process of land acquisition was the failure to think far enough into the future; the failure to create an estate of reserves to replace what Maori had lost through Crown action in pressuring sales. The estates of land lost by Maori should have been replaced with an alternative source of wealth and prosperity for their people that was capable of expansion according to need.¹⁵

This criticism was not a new one. The Crown accepted Ballara’s point that Alexander Mackay had thought the solution obvious in 1874 and that it had been equally obvious to Normanby in his instructions of 1839. South Island Maori were impoverished because their reserves were too small and colonisation was cutting them off from their customary resources. The Crown, argued Mackay, could have foreseen this ‘probable effect of colonisation on their former habits’ of migratory resource-use. ‘All this might have been obviated,’ he told the Government, ‘had the precaution been taken to set apart land to provide for the wants of the Natives,’ in anticipation of that probable outcome:

It would have been an easy matter for the Government to have imposed this tax on the landed estate, on [ie, at the time of] the acquisition of Native territory. Such reserves would have afforded easy relief to the people who [had] ceded their lands for a trifle, and formed the only possible way of paying them with justice.¹⁶

In addition, the Crown conceded that it had breached the Treaty principle of options by taking away the ability of Te Tau Ihu Maori to exercise their tino rangatiratanga and choose their path of development, whether it be by maintaining their traditional culture and economy, assimilating to the new economy, or walking in both worlds.

As well as this broad agreement between the claimants and the Crown on some key issues, we had historical evidence that Governor Grey and other officials were aware of the need for Maori to retain a large land base. Without it, they could not continue their customary

14. Crown counsel, closing submissions, p 4

15. Ibid

16. Alexander Mackay, 1874 (quoted in Crown counsel, closing submissions, p 4)

lifestyle. Both the Governor and the Colonial Office had accepted that to deprive them of it, without a full and fair alternative, would be unjust. Nonetheless, the Government applied a virtual 'waste lands' policy to its purchases and reserve-making. Perforce, its officials accepted Te Tau Ihu Maori continuing to exercise their customary rights on 'sold' land after 1856, until the spread of settlers and environmental modification restricted Maori to their inadequate reserves. The resultant poverty was soon obvious and, in the evidence of Alexander Mackay (as accepted by the Crown), entirely avoidable.

We found, on the basis of broad agreement between the parties and our own review of the historical evidence, that the Crown acted in serious breach of Treaty principles. It did not allow Maori to retain sufficient land and access to land for the maintenance of their customary economy and resource-use rights, or indeed for their engagement in modern farming practices, thereby reducing their options to bare subsistence. This failure was avoidable in the circumstances of the time, as the Crown accepted. It was a breach of Treaty principles in its own right, and a prejudicial effect of the officials' 'waste lands' approach to Maori land and of the Crown's blanket purchase process (especially in the Waipounamu purchase). It was also a prejudicial effect of the Crown's failure to properly inquire into Maori customary rights and to therefore identify those lands and resources which they wished or needed to retain for (in Normanby's words) their own comfort and subsistence. The result was serious and avoidable poverty, as reported to governments of the day by their own officials.

In sum, we found that the Crown breached the Treaty principles of partnership, reciprocity, options, and active protection, to the serious prejudice of all Te Tau Ihu Maori. This was, in effect, conceded by the Crown. There was also, as explained in the claimants' evidence, social and cultural prejudice in Maori being prevented from exercising their tikanga – indeed, their way of life as they preferred to live it. Again, this point was broadly conceded by the Crown, as a breach of the Treaty principle of options. These Treaty breaches, and the prejudice to Te Tau Ihu Maori, were serious and require large and culturally appropriate redress.

6.9 CONCLUSION

As at 1840, Maori customary rights in Te Tau Ihu were regulated by their own law and were protected and guaranteed by the Treaty of Waitangi. The Crown had sufficient resources and expertise to have investigated those rights, which were discoverable upon due inquiry. Above all, the Crown needed to respect and provide for tino rangatiratanga, by working in partnership with Maori leaders and institutions, so that Te Tau Ihu Maori could decide both their own customary entitlements and whether they wished to alienate them to the Crown. Instead, the Crown failed to investigate customary rights properly, failed to provide for partnership or tino rangatiratanga, and exploited custom where possible to obtain

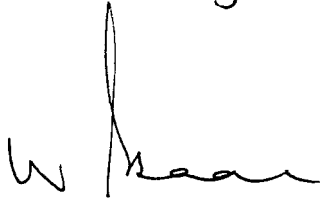
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almost the whole of Te Tau Ihu. In doing so, the Crown committed serious breaches of the plain terms of the Treaty, and of the principles of partnership, autonomy, reciprocity, active protection, options, equity, and equal treatment.

These Treaty breaches were serious, resulting in significant economic, social, cultural, and spiritual harm to the iwi of Te Tau Ihu. We will consider the full range of issues and Treaty breaches, and the full extent of prejudice, in our final report.

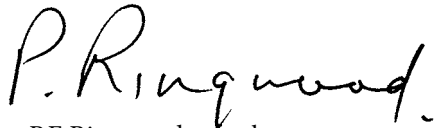
Dated at Wellington this 19th day of March 2007



WW Isaac, presiding officer



J Clarke, member



PE Ringwood, member



MPK Sorrenson, member



R Tahuparae, member



APPENDIX

SCHEDULE OF HEARINGS

Hearing	Venue	Date
Ngati Rarua	Wesley Centre, Blenheim	21–25 August 2000
A six-month gap following Ngai Tahu’s challenge to the Waitangi Tribunal’s jurisdiction.		
Ngati Rarua	Motueka War Memorial	12–16 February 2001
Ngati Koata	Whakatu Marae, Nelson	26 February–2 March 2001
A 15-month gap for litigation to resolve the question of the Tribunal’s jurisdiction, after which the Tribunal decided to hear generic issues of relevance to all iwi before resuming its iwi-specific hearings.		
Generic hearing	Nelson	10–14 June 2002
Generic hearing	West Plaza, Wellington	25–26 July 2002
A five-month gap, during which the Tribunal considered the evidence from the generic hearing and prepared a statement of issues.		
Te Atiawa	St Thomas Church, Motueka	9–13 December 2002
	Te Atiawa Marae, Picton	27–31 January 2003
Generic issues and whanau claims	Seifrieds Winery, Nelson	17–19 February 2003
Ngati Tama	Pohiaka Hall, Takaka	16–21 March 2003
Ngati Kuia/Ngati Tutepourangi	Seifrieds Winery, Nelson	6–11 April 2003
Rangitane	Rangitane Runanga, Grovetown	5–9 May 2003
Ngati Apa	Omaka Marae, Blenheim	26–29 May 2003
Wakatu Incorporation	Seifrieds Winery, Nelson	11–13 June 2003
Ngati Toa Rangatira	Takapuwhia Marae, Porirua	23–27 June 2003, 22 July 2003
Te Tau Ihu claims inside the statutory Ngai Tahu takiwa	Brancott Winery, Blenheim	5–8 August 2003
Ngati Awa and whanau claims	Seifrieds Winery, Nelson	25–26 August 2003
Ngai Tahu	Omaka Marae, Blenheim	13–17 October 2003
Crown	Whakatu Marae, Nelson	17–20 November
Closing submissions	Rutherford Hotel, Nelson	23–26 February 2004, 1–3 March 2004
	West Plaza, Wellington	4 March 2004

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