

TE UREWERA

TE UREWERA

VOLUME III

WAI 894

WAITANGI TRIBUNAL REPORT 2017



National Library of New Zealand Cataloguing-in-Publication Data
*A catalogue record for this book is available from the National
Library of New Zealand*

ISBN 978-1-86956-325-7 (pbk)

ISBN 978-1-86956-326-4 (PDF)

www.waitangitribunal.govt.nz

Typeset by the Waitangi Tribunal

This report was previously released online in pre-publication format in six parts
between 2009 and 2015 as *Te Urewera – Pre-publication Version*

This edition published 2017 by Legislation Direct, Lower Hutt, New Zealand

Printed by Printlink, Lower Hutt, New Zealand

Reprinted with corrections 2018

21 20 19 18 5 4 3 2

Set in Adobe Minion Pro and Cronos Pro Opticals

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ABBREVIATIONS

AC	<i>Appeal Cases</i> (England)
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
app	appendix
art	article
ATL	Alexander Turnbull Library
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
DNZB	<i>The Dictionary of New Zealand Biography</i> , 5 vols (Wellington: Department of Internal Affairs, 1990–2000)
doc	document
DOC	Department of Conservation
DOSLI	Department of Survey and Land Information
DSIR	Department of Scientific and Industrial Research
ECEF	East Coast Expeditionary Force
ECLTIA	East Coast Land Titles Investigation Act
ECNZ	Electricity Corporation of New Zealand
ed	edition, editor
encl	enclosure
fn	footnote
fol	folio
GPS	global positioning system
GV	Government valuation
ha	hectare
intro	introduction
LINZ	Land Information New Zealand
ltd	limited
MA	Department of Maori Affairs file, master of arts
no	number
NZED	New Zealand Electricity Department
NZFS	New Zealand Forest Service
NZ ConvC	<i>New Zealand Conveyancing Cases</i>
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
p, pp	page, pages

ABBREVIATIONS

para	paragraph
PC	Privy Council
PEP	Project Employment Programme
pt	part
RDB	<i>Raupatu Document Bank</i> , 139 vols (Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
sess	session
SGGSC	Sir George Grey Special Collections
TEP	Temporary Employment Programme
trans	translator
UCS	Urewera Consolidation Scheme
UDNR	Urewera District Native Reserve
UDNRA	Urewera District Native Reserve Act 1896
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 894 (Te Urewera) record of inquiry, a select copy of which is reproduced in appendix II. A full copy is available on request from the Waitangi Tribunal.

CHAPTER 10

'HE KOOTI HAEHAE WHENUA, HE KOOTI TANGO WHENUA' – THE NATIVE LAND COURT AND LAND ALIENATION IN THE RIM BLOCKS OF TE UREWERA, 1873–1930

Tetahi ropu taurekareka ko Te Kooti Whenua Maori. He Kooti haehae whenua. He Kooti tango whenua. Ko te hunga whakakino, whakawai, i o matou hapu, i o matou iwi, i o matou tipuna.

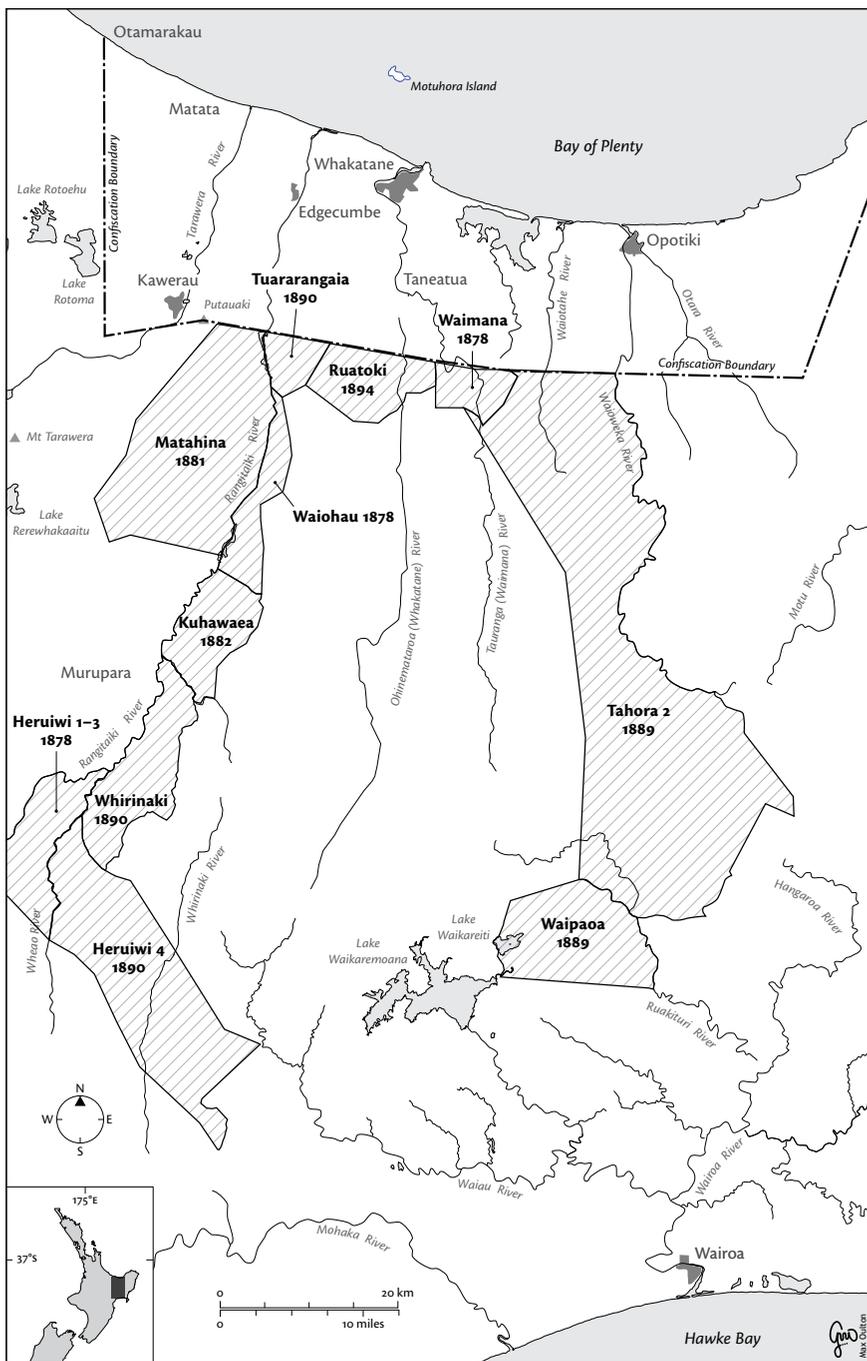
An invidious group is the Native Land Court. It is a court that slashes land, it is a court that takes land. It is a court that makes us evil: it tempts us, tempts our hapu, our tribes, and our ancestors.

Ani Te Whatanga Hare¹

10.1 INTRODUCTION

In this chapter, we review claims about the Native Land Court and about the massive loss of land that took place in the Urewera 'rim' blocks before 1930. These blocks, totalling around half a million acres, encircled the Urewera District Native Reserve. Each 'block' was constructed by a survey plan. It represented the drawing of lines through land claimed by multiple hapu and iwi, so that boundaries could be defined, titles issued, and the land could be used in the colonial economy. Buyers or tenants needed certainty as to what they were transacting, and with whom. As we saw in chapters 8 and 9, Tuhoe, Ngati Whare, and Ngati Ruapani supported Te Whitu Tekau. They resisted the process of obtaining Crown-derived titles from the Native Land Court, as well as the sale or lease of land. Other iwi, including Ngati Manawa, wanted to lease their land (and make strategic sales). They went to the court as the only means of getting a title that could be used for that purpose. The result, as we shall see, was the gradual encirclement of the interior Te Urewera lands by blocks created through survey and court awards, which could be sold or leased by the individuals listed on their titles. Despite the overwhelming Maori preference for leasing, only 18 per cent of this land remained in Maori ownership by 1930.

1. Ani Te Whatanga Hare, brief of evidence, 8 December 2003 (doc B27), pp 26–27; Ani Te Whatanga Hare, simultaneous translation of oral evidence, Tataiahape Marae, Waimana, 11 December 2003



Map 10.1: Te Urewera 'rim' blocks (including Ruatoki) with dates dealt with by the Native Land Court

How do we account for the success of the court in hearing applications for, and granting, titles to so much land, despite strong and sometimes concerted Maori opposition? And how is the alienation of 82 per cent of the land to be explained, given the repeated statements of Maori communities and leaders that they wanted to keep and in some cases develop their ancestral lands? To a very large extent, the answer to these questions lies in a critical part of the Native Land Court regime: the removal of the authority of tribal communities over their land. As the Native Land Laws commission put it in 1891, 'The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people. . . . The strength which lies in union was taken from them.'²

The claimants told us that individuals could never govern or alienate tribal land under custom. Yet, the native land laws provided for individuals to apply for the investigation of title, and for the absolute ownership of communal land to be granted to lists of individuals holding shares in a block. Worse, the law did not allow those individuals to form collective or corporate bodies to restore community control. Nor did any individual have an individual piece of land that they could farm; all the law allowed was for each person to sell or lease a paper share, and nothing else. As we shall see, this was effectively the case in the rim blocks of Te Urewera until 1900. There was a short but important hiatus from 1900 to 1905, followed once again by the disempowerment of tribes and hapu communities from 1909 and 1913 onwards. It is a sorry record, which does little credit to the Crown.

Crown counsel made the following important concessions:

- ▶ Maori who did not wish to participate in the Native Land Court could not in fact avoid participating, at the risk of losing their lands, and were forced to incur its costs;
- ▶ the Native Land Act 1873 contributed to individualisation of title and the alienation of land;
- ▶ survey costs were a heavy burden for some (perhaps many) Maori communities, and the Crown could have eased this burden;
- ▶ in Crown purchasing, dealings with individuals were more common in the 1890s, the period when most Urewera 'rim' purchases occurred;
- ▶ the native land laws did not allow Maori the option of a corporate model of management until 1894;
- ▶ Crown policy was generally in favour of the alienation of Maori land; and
- ▶ over time, the Crown failed to recognise the significance of Maori community and kinship in relation to land.

As we shall see, the Crown qualified many of these concessions, or offered explanations in mitigation. It did not make any admissions of Treaty breach.

Fortunately, we were assisted in our task of evaluating claims about the Native Land Court by previous findings of the Waitangi Tribunal. Although the Crown

2. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p x (Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 625)

relitigated many of them in our inquiry, we do not see the need to revisit those generic findings which in our view applied equally in Te Urewera. Before defining the matters still at issue in this chapter, we set out the earlier Tribunal findings on which we rely.

10.2 PREVIOUS TRIBUNAL FINDINGS ACCEPTED BY THIS TRIBUNAL

This Tribunal is by no means the first to undertake an examination of the Native Land Court regime. At the time we were hearing evidence in Te Urewera, only a limited number of Tribunal reports contained in-depth studies of the court's operations in particular areas, most notably *Rekohu*, *Turanga Tangata Turanga Whenua*, and the *Mohaka ki Ahuriri Report*.³ In the last few years, four additional reports have been published containing extensive examinations and analyses of the Native Land Court system and its operation and effects in the Central North Island, Hauraki, Kaipara, and Te Tau Ihu.⁴ In each of those inquiries, the Tribunal received evidence about the general purpose of the land court system and the social context within which it took effect, as well as detailed evidence of the court's processing of land in the particular district, and the Crown's conduct with regard to that land. Each Tribunal has made findings of a general nature as well as findings specific to its inquiry district.

We are fortunate to be reporting at a time when there is a wealth of published Waitangi Tribunal reports about the Native Land Court system. Having studied the evidence presented to us and the earlier Tribunals' reports, we are satisfied that a number of generic issues about the court regime have now been so well-explored and authoritatively determined that there can be no justification for our retraversing them. Therefore, we begin our consideration of the Native Land Court as it operated in Te Urewera by setting out a number of key conclusions reached by the Tribunal in previous reports, about the operation of the Native Land Court system, and its impact on customary owners and their authority over their land and waterways, that we accept apply equally in Te Urewera.

That leaves us to concentrate, in the body of this chapter, on the operations of the court and Crown agents in Te Urewera, and to identify any local features that are similar to, or different from, those which the Tribunal has identified in other districts.

At the time the Native Land Court first exercised its jurisdiction in Te Urewera, the Native Land Act 1873 was in force. It was not the first legislation to provide for

3. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001); Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004)

4. Waitangi Tribunal, *He Maunga Rongo*; Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006); Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006); Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008)

customary land to be converted to a form of title that could be transferred to settlers or the Crown: it followed the Native Lands Acts of 1862, 1865, 1866, 1867, and 1869.⁵ As the Turanga Tribunal has noted, the 1873 Act affirmed the underlying premises of the earlier native land legislation, which were that:

Maori land would remain open to private purchasers, title would continue to be investigated by an independent court operating in accordance with English judicial norms; that title would be ultimately transformed into an English form of tenure; and the preoccupation of the law would remain the supervision of the process of transfer from Maori into Crown and settler hands.⁶

Although the first Native Lands Act in 1862 had established a differently composed court, by 1865 the Native Land Court was an English-style court with Pakeha judges and 'native assessors' appointed by the Governor. Under the 1873 Act, an assessor or assessors could 'sit at a Court' only when required by a judge and when they did sit, their concurrence was not necessary to the validity of any order or judgment of the court.⁷ This was amended in 1874, to require one or more assessors to sit in every court, and the concurrence of at least one assessor in every judgment.⁸ We accept that the role of assessors could sometimes be important, although often the minute books reveal little about it. We also accept that in some districts there was a level of Maori input to court decisions, by means of out-of-court agreements. The Hauraki Tribunal found:

that the Maori assessors could and occasionally did play a significant role in the court, and that the court commonly allowed or required claimants to draw up lists of names outside the court for inclusion on titles, a practice that may have contributed to genuine Maori consensus.⁹

Nonetheless, from 1886, the agreement of the assessor was no longer required for a range of decisions, including (for example) the imposition of survey liens.¹⁰ Then, from 1894, the assessor's concurrence was no longer required at all.¹¹ The role of the assessor was the only formal involvement of Maori in the court's decisions, other than as litigants. The original 1862 court took the form of a panel of local rangatira, chaired by a Pakeha magistrate.¹² From 1865, however, assessors were rangatira drawn from outside the district in which the court was operating. All

5. For an examination of the pre-1873 native land legislation, see Waitangi Tribunal, *Hauraki Report*, vol 2, ch 15.

6. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 398

7. Native Land Act 1873, s 15

8. Native Land Act Amendment Act 1874, s 5

9. Waitangi Tribunal, *Hauraki Report*, vol 2, p 777

10. Native Land Court Act 1886, s 9

11. Native Land Court Act 1894, s 18

12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 412

judges were Pakeha. This, then, was a court of ‘outsiders’, as the Rekohu Tribunal found.¹³

We turn now to consider a series of conclusions that have been established by previous Tribunal inquiries, and which we accept are equally applicable to the Te Urewera Inquiry District:

- ▶ A system to decide titles to distinct parcels of land was necessary for the use of that land in the colonial economy.
- ▶ The main purpose of the native land laws was to facilitate the transfer of land from Maori to settlers.
- ▶ The underlying customary title to land was communal, usually held at hapu level, and could not be freely alienated without recourse to the collective.
- ▶ The Treaty recognised tribal and communal land rights, to which individual rights were subordinate.
- ▶ The establishment of the Native Land Court was contrary to tino rangatira-tanga and in breach of the principles of the Treaty. This point has three main components:
 - the Native Land Court was imposed on Maori without their agreement or consent;
 - the court usurped Maori communities’ right to determine and control their title to land; and
 - the court was an inappropriate forum for the determination of customary title.
- ▶ The Native Land Act 1873 introduced a form of individualised land title which was in breach of Treaty principle.
- ▶ The native land laws did not provide for community management of Maori land before 1894, which was in breach of the principles of the Treaty.
- ▶ The Treaty provided for the settlement of New Zealand and the alienation of land for that purpose. At least some alienations, whether by lease or sale, were voluntary and of potential benefit to Maori. Nonetheless, if the sale of land continued to the point where communities were seriously harmed, then the explanation must be something other than the voluntary agency of those communities.
- ▶ The Crown had a duty to ensure that tribes retained a sufficient land base for their social, cultural, and economic needs, both for customary purposes and to develop in the new economy.

We discuss these points in turn.

10.2.1 A system to decide titles to distinct parcels of land was necessary for the use of that land in the colonial economy

In many areas throughout New Zealand, Maori wanted to use their land in the colonial economy. The pre-1865 system, in which Crown purchase agents had decided which Maori had the right to alienate particular blocks of land, was discredited by the early 1860s. As the Hauraki Tribunal observed, some kind of

13. Waitangi Tribunal, *Rekohu*, p 146

system was required to avoid a repeat of the Government's disastrous Waitara purchase, which had triggered war in Taranaki.¹⁴ The Turanga Tribunal found that engagement in the new economy required 'precise boundaries and certainty of ownership'.¹⁵ Any title system had to deliver on these two points. The Hauraki Tribunal accepted that some simplification of overlapping customary rights might be needed for that purpose, so long as Maori were consulted about (and gave their agreement to) the nature and form of any new titles. They also had to have a genuine choice as to whether they would bring their land under a new title system.¹⁶

10.2.2 The main purpose of the native land laws was to facilitate the transfer of land from Maori to settlers

The Hauraki Tribunal considered detailed evidence from the Crown (which has also been filed in this inquiry) to the effect that the Government was motivated in introducing the native land laws by a 'civilising mission': Maori would receive the benefit of a Western, individualised form of title. In other words, the Crown's aim was benevolent, and its actions were taken in good faith. The Tribunal accepted that this was one of the Crown's aims, but found that its main aim in creating the Native Land Court was to facilitate the transfer of land from Maori to settlers.¹⁷ To avoid a charge that the 'civilising mission' was merely a cloak for settler self-interest, various tests had to be met: Maori consent to and cooperation with the design and implementation of the native land laws; serious discussion with Maori about the constant amendment of the legislation to ensure that the changes were what they wanted; and evidence that the Acts did include 'realistic provisions for Maori advancement as well as that of settlers'.¹⁸ The Crown's policies and practices did not meet these tests. The Hauraki Tribunal concluded that the 'civilising mission' was a motivation secondary to that of facilitating the acquisition of remaining Maori land.¹⁹

The Turanga Tribunal also evaluated the Crown's aims from the evidence available in its inquiry, and came to the same conclusion. It was known that Maori did not want the court; thus, its introduction was primarily for the benefit of settlers, and its machinery was deliberately designed to bring about the transfer of the bulk of Maori land into settler ownership.²⁰

10.2.3 The underlying Maori customary title was communal and could not be alienated without recourse to the collective

In chapter 2, we reflected on the relationship between the peoples of Te Urewera and the land, and on the role of rangatira who, in accordance with tikanga,

14. Waitangi Tribunal, *Hauraki Report*, vol 2, p 710

15. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 439; see also *He Maunga Rongo*, vol 2, p 441

16. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 781–782

17. *Ibid*, pp 663–671, 710, 778

18. *Ibid*, p 671

19. *Ibid*, p 778

20. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 408, 526–532

THE whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside. Therefore, in speaking of the Native Land Court, this test to it must, I consider, be applied – viz, that there should be a final and definite ascertainment of the Native title in such a way as to enable either the Government or private individuals to purchase Native land.'

T W Lewis¹

1. T W Lewis, Under-Secretary, Native Department, statement in evidence to the Native Land Laws Commission, 1891 (David Williams, brief of evidence, 20 February 2004 (doc c3), p26)

exercised authority on behalf of their hapu, and protected their lands and resources. The complex web of rights in land that were organised by tikanga has been the subject of considerable evidence in and findings by the Waitangi Tribunal during the past 30 years. We adopt this account of Maori communal and individual land rights from the *Muriwhenua Land Report*:

The fundamental purpose of Maori law was to maintain appropriate relationships of people to their environment, their history and each other. In this it was by no means unique amongst the laws of the world but the emphasis was different. There was no equivalent to the English common law whereby people could hold land without concomitant duties to an associated community, or no parallel to the English social order wherein large land holdings could influence one's status in local society. For Maori, the benefits of the lands, seas, and waterways accrued to all of the associated community and the individual's right of user was as a community member. Similarly, rangatira held chiefly status but might own nothing. It was their boast that all they had was for the people. As the proverb went, the most important thing in the Maori world was not property but people. . . .

The Maori feeling for the land has often been remarked on, and should need no more elaboration than an outline of the philosophical underpinnings of land-related values. In terms of those values, it appears to us, Maori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves not as owning the land but as being owned by it. They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people. Similarly, whenua, or land, meant also the placenta, and the people were the tangata whenua, which term captured their view that they came from the earth's womb. As users of the earth's resources rather than its

owners, they were required to propitiate the earth's protective deities. This, coincidentally, placed a constraint on greed.

Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law and a fertile field for its development. As demonstrated to us in numerous sayings, tribal pride and landmarks were connected and, as with other tribal societies, tribe and tribal lands were sources of self-esteem. In all, the essential Maori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Maori land-tenure system. Such was the association between land and particular kin groups that to prove an interest in land, in Maori law, people had only to say who they were. . . .

The community's right to land, in pure terms, was by descent from the earth of that place . . . The individual's right was different, and is generally seen as a right of user arising from membership of the associated community – so that, for the individual, descent alone was not enough. Descent gave a right of entry, but, since Maori had links with many hapu and could enter any one, use rights depended as well on residence, participation in the community and observance of its standards. . . .

The main right, however, lay with the community in general. As a consequence, deceased forebears and generations to come had as much interest in the land as any current occupier. This view, once again, compelled punctilious observance of constraints on resource depletion.

Thus, while there existed a complex variety of individual rights to use or take resources in different ways and at diverse times – rights that individuals regarded as their own – the individuals' enjoyment of any part of the district was because they belonged to the local community. Access to that community was primarily through descent, and then also, but less perfectly, by incorporation. There was no right of land disposal independent of community sanction.²¹

10.2.4 The Treaty recognised tribal and communal land rights, to which individual rights were subordinate

The extract from the *Muriwhenua Land Report* (above) makes plain that the customary land rights of an individual were derived from, and subordinate to, the rights of the community. The Waitangi Tribunal has long recognised that article 2 of the Treaty promises to protect Maori tribal and communal land rights, which are the primary rights that underpin Maori society. In 1987, drawing on the korero of John Rangihau of Tuhoe, the Orakei Tribunal found:

The acknowledgement in the Maori text, of the 'tino rangatiratanga' of the Maori over their lands necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy.

21. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 21–24

These . . . include the holding of the land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group with the consent of its chiefs could alienate land.²²

10.2.5 The creation of the Native Land Court was contrary to tino rangatiratanga, in breach of the principles of the Treaty

This point has three inter-related elements:

- ▶ the Native Land Court was imposed on Maori without their agreement or consent;
- ▶ the court usurped Maori communities' right to determine and control their title to land; and
- ▶ the court was an inappropriate forum for the determination of customary title.

On the first matter, we accept the Hauraki Tribunal's statement of the circumstances surrounding the introduction of the Native Land Acts, and its conclusion that the absence of consultation with Maori was inconsistent with Treaty principle. The Hauraki Tribunal noted that, at the national level, Maori involvement in the planning of the new native land regime was confined to the Kohimarama conference in 1860, which was 'convened mainly to rally support for the Government's stand in Taranaki.'²³ That conference was not attended by chiefs from Taranaki or Waikato; nor, we can add, was there attendance from Te Urewera (see chapter 3). And although, at the conference, there was a generally positive reaction to the idea of a State-sponsored tribunal ascertaining tribal rights, there were different views about the composition of such a body, and that subject was to be discussed further at local and national level. But there was no other national conference.²⁴ Instead, Governor Grey set up his new institutions (which, as we saw in chapter 3, were discussed with Te Urewera leaders in 1862 but taken no further there).

The Hauraki Tribunal considered that if the introduction of the new institutions was intended by the Crown to be a form of consultation or testing of local level Maori opinion about the two main planks of the native land system (the registration of titles followed by direct dealing with settlers), then 'the answers returned were negative or indifferent, rather than positive.'²⁵ That Tribunal also noted that one witness before it, a Crown historian, had devoted over 100 pages of evidence to the analysis of numerous draft Bills and paper schemes that passed between governors, Ministers, officials, and the Colonial Office in the years 1859 to 1862 'without a single mention of their being referred to Maori.'²⁶ The Tribunal concluded:

22. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 190

23. Waitangi Tribunal, *Hauraki Report*, vol 2, p 672

24. *Ibid*, p 673

25. *Ibid*, p 674

26. *Ibid*. The Tribunal referred to a report by Dr Donald Loveridge, which was also filed in our inquiry: 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand' (commissioned research report, Wellington: Crown Law Office, 2000) (doc A124).

It may reasonably be supposed that there was some informal discussion in each district between officials, settler politicians, and rangatira about land tenure and land law generally, but the claimants are amply entitled to their view that there was no formal consultation between the Government and Maori leadership on the embryo Native Lands Act itself; such consultation might have come about if, for example, a Kohimarama-type assembly had been convened to consider a draft Bill. It will be recalled there were no Maori members of Parliament at this time.²⁷

Turning to the second matter, we accept the Taranaki Tribunal's finding that the Treaty vested the authority over Maori lands in Maori, including the right of Maori to maintain their own way of reaching agreements. Therefore,

To the extent that it presumed to decide for Maori that which Maori should and could have decided for themselves, the Native Land Court encroached on Maori autonomy and was acting contrary to the Treaty of Waitangi. It follows that the legislation that permitted of that course was also inconsistent with Treaty principles.²⁸

The Turanga Tribunal explained further that the Crown, as a result of the cession of 'sovereignty' or 'te kawanatanga katoa', secured the right to make laws for the regulation of Maori title, including the transfer of that title. But that right was subject to important restrictions:

By the terms of the second article, the Crown offered two crucial guarantees in the context of the native title system. The first was that Maori title would be respected. This was most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain.²⁹

The result was 'the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.'³⁰ Thus, 'the Native Lands Acts, in providing for the operation of the Native Land Court, expropriated from Maori the power of deciding questions of title.'³¹ The Crown installed an alien institution as the determiner of Maori title.

Turning to the third matter, the Rekohu Tribunal focused on the fact that, from 1865, the native land system not only failed to utilise existing Maori institutions to resolve title disputes, but also created an inappropriate body for that role:

27. Waitangi Tribunal, *Hauraki Report*, vol 2, p 674

28. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 282

29. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 534

30. *Ibid*

31. *Ibid*, p 533

An aspect of rangatiratanga was that, to the extent practicable, Maori would control their own affairs. That must have included the development of their own institutions to resolve disputes between tribes. We have seen how runanga were developed to handle disputes within the tribes, and how the Native Lands Act 1862 envisaged a panel of chiefs to resolve land rights disputes between tribes. Both envisaged a form of court under Maori control for the resolution of Maori disputes.

We have also seen, however, that Chief Judge Fenton drafted a new Act – the Native Lands Act 1865 – that would vest control of Maori dispute resolution in Pakeha judges. This change, which was implemented by the Crown, was contrary to Treaty principles in our view.

The first constraint on the ability of the Native Land Court to manage Maori custom was that the judges were outsiders looking in.³²

We accept that Native Land Court judges in the nineteenth and early twentieth centuries were prevented from carrying out satisfactorily the primary function of the Native Land Court – to determine the customary ownership of the land – partly because of who and what they were. Contemporary settlers were simply not equipped to comprehend the imperatives and nuances of Maori kinship and reciprocity. An indication of the complexity of the task entrusted to the Native Land Court judges has been provided by the Central North Island Tribunal:

The transformation of layers of customary rights into the inflexible new titles was a job for experts, not for outsiders. It required a knowledge not only of whakapapa, but of which relationships were crucial ones, and of the dynamics that underlay those relationships. It required a knowledge of which divisions of land would work, and which would not. It required an understanding of the vicissitudes of the distant and the recent past, and how they had impacted on different groups; and of the emergence of newer groups as part of the age-old processes of hapu formation. It required also a finely balanced appreciation of how rights surrendered in one area might justly be compensated for in another. Above all, it required consensus among those whose rights were at stake – even if, on occasion, this might take time.³³

In light of this, we accept the Rekohu Tribunal's assessment that

No matter how well meaning the judges may have been, and no matter the extent of their former experiences with Maori, the tendency, which was only natural, was to conceptualise of native custom in terms of their own concepts and experience. The tendency was also to cope with customary complexities by reducing them to overly simplistic rules, and then to apply them without the customary pragmatism of Maori or the Maori sense of justice.³⁴

32. Waitangi Tribunal, *Rekohu*, pp 144–146

33. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 485

34. Waitangi Tribunal, *Rekohu*, p 146

THE 1873 *Native Land Act* introduced two significant changes to Maori land tenure. First, it allowed Maori customary land to be alienated, and secondly, it individualised that alienation process.¹

Waitangi Tribunal¹

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2008), vol 2, p 533

In the circumstances, as the Te Tau Ihu Tribunal found, mistakes and distortions of custom took place.³⁵

10.2.6 The 1873 Native Land Act introduced a form of individualised land title, which was in breach of the principles of the Treaty

Two possible ways to establish the ownership of Maori land were introduced by the 1873 *Native Land Act*: the memorial of ownership and the Crown grant.

A memorial of ownership was drawn up by the Native Land Court after a judge had investigated a claim to particular (surveyed and mapped) land, and satisfied himself as to who were its 'owners according to Native custom'. The memorial listed the names of all the individuals who the court identified as owners, their hapu, and (when the majority of owners required it) their so-called 'relative shares' (section 47). Drawn on the memorial, or annexed to it, was a plan of the land concerned, based on the survey and map that had to be provided to the court. Every memorial of ownership contained the condition that the owners had no power to sell or make any other disposition of the land other than a lease for no more than 21 years (section 48). However, the Act expressly provided that this did not preclude the land being sold where all the owners agreed; nor did it prevent any partition of the land (section 49).

The result, as the Central North Island Tribunal explained, was that

'Memorials of ownership' were records of the membership list of landowning hapu at the time the court award was made. But although the land technically remained customary land, those named on the memorial now held individual shares in the land which, contrary to the rules of aboriginal title and the pre-emption clause of the Treaty, became alienable to private buyers and lessees.³⁶

Upon the application of owners, the title to land under a memorial of ownership could be converted to a freehold title by order of the Native Land Court,

35. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780

36. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 447

followed by the Governor issuing a Crown grant for the land. Crown grants could only be made for blocks or partitions which had 10 or fewer owners or were held under certificates of titles issued under earlier native land legislation.³⁷

There has been much debate in earlier Tribunal inquiries as to whether the 1873 Act promoted individualisation of title and fostered excessive alienation.³⁸ The Turanga Tribunal focused specifically on the question whether the title system introduced by the 1873 Act resulted in Maori alienating more land in Turanga than if community title had been recognised from the outset.³⁹ As to the nature of the title conferred by memorials of ownership, the Turanga Tribunal concluded that such memorials provided ‘a kind of virtual individual title’ that ‘individualised the sale of Maori land’.⁴⁰ In a similar vein, the Hauraki Tribunal found that the memorial of ownership created a ‘hybrid title’ that ‘was not a truly individual title, but a form of multiple title which allowed each individual to sell his or her interests piecemeal’.⁴¹

The closing submissions in the Te Urewera inquiry were made after the publication of the Turanga report and well before the publication of the Hauraki report. The Crown submitted to us, as it had to the Turanga and Hauraki Tribunals, that the memorial of ownership under the 1873 Native Land Act provided ‘a type of communal title’.⁴² An individualised title, it was argued, was one that could be alienated by an individual owner without reference to other owners. The 1873 Act, however, required the land court to be satisfied that all owners who had agreed to sell or lease land did in fact agree to that course of action. Thus, it was submitted, the 1873 Act did not allow alienation by any individual without reference to other owners: all those who agreed to alienate had to confirm that in court before the alienation could occur.⁴³

We endorse the Turanga Tribunal’s rejection of the Crown’s argument.⁴⁴ The changes made to customary tenure by the 1873 Act, the Turanga Tribunal concluded, expropriated from Maori communities ‘both the community title itself and the community’s right to control land sale and retention strategies’.⁴⁵ The main planks of the Tribunal’s position were as follows:

- ▶ There was no requirement that purchasers deal with the community of owners as a community in securing agreement for sale.⁴⁶

37. Native Land Act 1873, s 80

38. See the debate between Bob Hayes, Paul Goldstone, Dr Michael Belgrave, Professor Ward, and others, discussed at length by the Turanga and Hauraki Tribunals: *Turanga Tangata Turanga Whenua*, ch 8; *The Hauraki Report*, vol 2, ch 16.

39. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 469–532

40. *Ibid*, pp 441, 443

41. Waitangi Tribunal, *Hauraki Report*, vol 2, p 784

42. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 15

43. *Ibid*

44. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 439–444, 519–521

45. *Ibid*, p 533

46. *Ibid*, p 443

- ▶ Individual trading of interests was not discouraged: while section 87 rendered unenforceable (but not illegal) private dealings in land before it was Crown-granted in freehold, if the court was satisfied that, of the owners listed on the memorial of ownership, all involved in the deal agreed to it, the deal would be upheld as valid. Further, advance payments to individual owners were counted as part of the price offered by a prospective purchaser: if they had not counted, it would have discouraged dealing in land before it was freehold.⁴⁷
- ▶ The Crown was not bound by section 87: its dealings with individuals before land was Crown-granted were effective once those individuals partitioned out their interests.⁴⁸
- ▶ The Act contemplated ‘any number of collective owners’ wanting to partition out their interests for sale (section 59), and no single community decision to sell was required before that could occur.⁴⁹

While the 1873 Act required a majority of owners (but not the entire community) to agree to allow sellers to partition out their interests for sale (section 65),⁵⁰ from 1880, an individual could partition out his or her interests without restraint.⁵¹

From these, the Tribunal concluded:

Thus, any formal power of chiefs, by tikanga, to prevent individuals from selling was overridden in effect by the philosophy of the 1873 Act and the specific terms of section 59. Nor did the community by consensus have any veto against the sale of individual interests. By the terms of section 65, if a majority agreed to allow the sellers to partition out their interests for the purpose of sale, the court could do so. Within seven years, this majority requirement was dropped. Any individual could partition out his or her interests.⁵²

47. *Ibid*, p 442

48. In his evidence for the Crown in the Hauraki inquiry, also filed in our inquiry, Robert Hayes stated: ‘Prior to the 1873 Act, the Crown was free to purchase individual interests either before or after the land in question had passed through the Court. The 1873 Act did not alter that position.’ In support, Hayes cited sections in each of the 1865, 1866, 1867, and 1873 Native Land Acts that enabled the court to complete inchoate agreements between Crown land purchase officers and natives, and also sections of the Immigration and Public Works Acts 1871 and 1872 that, for specified purposes, allowed Crown purchase of land not held under a certificate of title. Hayes also adverted to a general principle of the common law that the Crown is not bound by an Act of Parliament unless the contrary is stated or necessarily implied in the Act: Robert Hayes, ‘Evidence on the Native Land Legislation Post-1865 and the Operation of the Native Land Court in Hauraki’ (commissioned research report, Wellington: Crown Law Office, 2001) (doc A125), pp 84–85.

49. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443

50. Hayes, ‘Native Land Legislation Post-1865’ (doc A125), pp 71–72

51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 442. The reference to 1880 onwards is to sections 43 and 44 of the Native Land Court Act 1880 and section 12 of the Native Land Division Act 1882 (both discussed in Waitangi Tribunal, *Hauraki Report*, vol 2, at p 731).

52. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443

As the Turanga Tribunal found, the effects were far-reaching. The 1873 Act (and its successors):

- ▶ made Maori titles usable in colonial commerce only through sale or lease;
- ▶ made sale or lease achievable only by the transfer of individual undivided interests;
- ▶ rendered community decision-making irrelevant thereby; and
- ▶ did all this in the face of the clearly expressed wishes and actions of all but a few Maori.⁵³

10.2.7 The native land laws did not provide for community management of Maori land before 1894, which was in breach of the principles of the Treaty

The fact that land held under a memorial of ownership could be sold by means of the serial purchase of individual owners' interests underpins the point, conceded by the Crown in our inquiry and in previous inquiries,⁵⁴ that the Native Land Act 1873 did not provide a corporate management mechanism for owners. Nor did the law allow Maori to create their own corporate bodies by putting their land in trust. Such an attempt to restore a form of communal title over the land was held by the Supreme Court to be illegal.⁵⁵

In previous inquiries, the Crown has defended its good intentions, arguing that the destruction of Maori communalism was seen as necessary, and in the best interests of Maori. The individualisation of Maori titles to land was held to be for their own social and economic improvement. This was the thinking of the time, and thus unavoidable, whether or not we agree with it today. It was not reasonable, argued the Crown, to have expected politicians to think and act other than according to the honestly held views of their time. In response to such arguments, the Central North Island Tribunal made three points, with which we agree.

First, the Tribunal noted the response of Apirana Ngata in 1913, to a statement by one of his parliamentary colleagues on the perils of communalism, that this was 'Pakeha claptrap', and not how Maori saw things. Maori views on how their land should be managed were, under the Treaty, of paramount importance.⁵⁶

Secondly, the Tribunal observed that contrary views could be (and were) expressed by settler politicians.⁵⁷ The Tribunal noted the proposals of WL Rees, member of the House of Representatives, to recognise tribal titles and set up tribal management committees in the 1880s:

Rees emphasised that British law and policy-makers were in fact entirely comfortable in dealing with common property through a variety of legal mechanisms. There was no genuine or insurmountable problem in that respect. These mechanisms included corporations and joint stock companies, community bodies (such as county

53. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 446

54. See, for example, Waitangi Tribunal, *Hauraki Report*, p 729.

55. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 488–489; see also *He Maunga Rongo*, vol 2, pp 521–532

56. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 431; see also vol 1, pp 178–189

57. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 786–787

‘THE object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which before the passing of that Act, were extra commercium – except through the means of the old land purchase system, which had entirely broken down – within the reach of colonisation. The other great object was the detribalisation of the Maoris – to destroy, if it were possible, the principle of communism which runs through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualization of titles to the land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.’

Henry Sewell¹

1. Henry Sewell, Minister of Justice, 29 August 1870 (Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 669)

or borough bodies), and the Crown itself. If nineteenth-century politicians were to be truly fair and consistent, Rees argued, then all such bodies by which European community lands were held in common and administered by representatives should be dissolved, and their assets held by all interested individuals as separate, saleable titles.

Clearly, if Rees could think in that way and propose community titles for Maori land in the 1880s, it was at least possible for the Crown to have kept the Treaty guarantee of tino rangatiratanga over tribal lands. In 1894, a decade later, Sir Robert Stout told Parliament that, in his view, Maori must be dealt with ‘as they are, and not as we would like them to be’, which meant dealing with them as communal bodies . . . ‘the Maoris are a communal people, and we ought to allow them committees to manage their land – committees of owners.’⁵⁸

Thirdly, the Central North Island Tribunal noted the many occasions in the nineteenth century when settler governments seriously contemplated giving legal powers of control and land management to corporate Maori bodies. We need say no more on this point, as we have already traversed it in chapters 8 and 9, except to note Ballance’s block committees of 1886, the provision for incorporations in 1894, the committee management system set up for the Urewera District Native Reserve in 1896, and the Maori land councils of 1900.⁵⁹

We agree with the Central North Island Tribunal that Maori management of their lands by community bodies was entirely feasible in the circumstances of the

58. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 422

59. *Ibid*

time. In our inquiry, the Crown submitted that early native land legislation sought to strike a balance between provisions for communal ownership and recognition of the rights of individuals, but accepted

that a reasonable criticism of the early regime is that the statutes themselves did not provide, in addition to the other forms of title, the option of a tight corporate management akin to the incorporation model established in 1894. This type of model might [have] involve[d] a committee with powers to deal with the land, accompanied by an inability of individual owners to exit the corporate body by partition.⁶⁰

Nonetheless, the Crown also argued that the law did compel private buyers to deal with collectives, and that the Government's own purchases were made from communities, not individuals. We will return to these questions in the main body of the chapter. We will also consider whether the native land laws provided effectively for community management and decision-making in the rim blocks after 1894, when the provision for incorporations was first made.

10.2.8 The Treaty provided for the settlement of New Zealand and the alienation of land for that purpose. At least some alienations, whether by lease or sale, were voluntary and of potential benefit to Maori. Nonetheless, if the sale of land continued to the point where communities were seriously harmed, then the explanation must be something other than the voluntary agency of those communities.

As the Muriwhenua Fishing Tribunal found, the Treaty provided for two peoples in one land, envisaging that some Maori land would be alienated to settlers, for the mutual benefit of both peoples.⁶¹ Article 2 of the Treaty provided for Maori to control the pace and extent of settlement: they were to retain their land for so long as they chose to do so. As we discussed above in sections 10.2.3 and 10.2.4, this power of choice rested with Maori communities and their rangatira. As we also noted in section 10.2.7, the native land laws did not provide a legal mechanism for communities to make such decisions. The power of choice was transferred to individuals. Yet it has been hard for New Zealanders, grappling with the complexities of their history, to understand what this really meant. Maori individuals chose to sell, and were paid. Does the fault for excessive land loss therefore lie with Maori?

The Turanga Tribunal has provided the definitive answer to this question, which we adopt:

- ▶ Land selling, in and of itself, was not necessarily damaging to Maori communities. In fact sales, if controlled, could benefit communities in the new economy.
- ▶ Communities, if left to themselves, might have been expected to make strategic sales

60. Crown counsel, closing submissions (doc N20), topics 8–12, p 13

61. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, 2nd ed, pp 194–195; see also *Te Tau Ihu o te Waka a Maui*, vol 1, p 5

to meet a range of requirements: providing cash flow (given that there were few alternatives to producing this from their land) and injecting funds for development.

- ▶ Having said that, no rational community bound by kinship would choose to sell land to a level that threatened the continued existence or well-being of that community, if there were reasonable alternatives. In other words, no community would choose to sell land to the point of self-destruction.
- ▶ If, on the facts, land sales occurred at a level that undermined community existence or well-being, then this cannot have been the result of rational community choice. The explanation for divestment on this scale must lie elsewhere.⁶²

As we noted in section 10.2.2, the court system was designed (among other things) to facilitate the alienation of land from Maori to settlers. The removal of the power of choice from communities and their leaders, guaranteed to them in the Treaty, and its transfer to individuals, meant the removal from them also of control of the speed and extent of alienation. This broke an explicit Treaty promise to hapu and their rangatira.⁶³ We shall test how the system worked in Te Urewera later in this chapter. Here, we note that this was an intended outcome, not a design flaw. The Turanga Tribunal pointed to the findings of Justice Richmond, who observed the effect of the native land laws very clearly in 1873: ‘the procedure of the Court has snapped the faggot band, and has left the separate sticks to be broken one by one.’⁶⁴ It was a graphic and compelling image, showing the extent to which the process was understood and thus knowingly left to operate from the 1870s to the end of the nineteenth century.

10.2.9 The Crown had a duty to ensure that tribes retained a sufficient land base for their social, cultural, and economic needs, both for customary purposes and to develop in the new economy

We agree with the Central North Island Tribunal, which found as follows:

- ▶ The essential Treaty ‘bargain’ also anticipated the alienation of land for settlement, in which Maori would retain a sufficient land and resource base for their customary life-style and – as they chose – for development in the new economy. Both peoples were expected to prosper and benefit.
- ▶ In its dealings for Maori land – whether directly or in regulating private transactions – the Treaty requires the Crown to actively protect Maori iwi and hapu in retention of a sufficient base, to act scrupulously and with utmost honour, to deal fairly and equitably, and to obtain full, free, and informed consent to any transactions. These principles were enunciated throughout the nineteenth and twentieth centuries, in the language

62. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 510–511

63. *Ibid*, p 446

64. Justice Richmond, ‘Hawke’s Bay Native Lands Alienation Commission Act, 1872: Reports by Chairman of Commission, Mr Justice Richmond’, 1873 (Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 432)

of the times, and were both reasonable and achievable. These are the standards by which the Crown's purchase of Maori land, and its regulation of private alienations, must be measured.⁶⁵

We also agree with the Central North Island Tribunal that the findings of the Stout–Ngata commission (1907) provided a standard by which the Crown's actions in respect of Maori land for the rest of the twentieth century should be assessed. The Tribunal stated that the commissioners clearly explained the nature of the Crown's duty to Maori. The commissioners:

- ▶ Accepted the duty of the State to provide land for its increasing population, but asserted its duty also to ensure that at the same time it 'does no injustice to any portion of the community, least of all to members of the race to which the State has peculiar obligations and responsibilities.'⁶⁶
- ▶ Pointed to the Crown's responsibility not just to the present generation, but to those who followed; and not just to individual owners, but to communities of owners.
- ▶ Urged that Maori lands, because they were tribal, were different from individually held property; 'in one sense they may be said to be impressed with a trust'. Thus the Crown had a duty to ensure that the tribe was not destroyed. It must ensure that individuals were not empowered to alienate what remained of the tribal land base.⁶⁷

10.3 ISSUES FOR TRIBUNAL DETERMINATION

Having set out the findings of earlier Tribunal inquiries on which we rely, we turn now to the matters still at issue in Te Urewera. In the sections that follow the key facts (section 10.4), we pose each issue as a question, then set out a summary answer, the essential differences between the parties, our analysis of relevant evidence and submissions, and our findings.

The issues are:

- ▶ Why did the Native Land Court commence operations in Te Urewera? Why and how did the peoples of Te Urewera engage with it?
- ▶ Was the Crown made aware of court decisions that were alleged to have resulted in significant injustice, and did it provide appropriate remedies?
- ▶ What were the Crown's purchase policies and practices in Te Urewera?
- ▶ What were the costs to Maori of securing new titles to their land in the Native Land Court? Were these costs fair and reasonable?
- ▶ What protection mechanisms were there for Maori in respect of the alienation of land, and how effective were those mechanisms in Te Urewera?
- ▶ What were the impacts on the peoples of Te Urewera of the operation of the Native Land Court, and of the alienation of their rim blocks?

65. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 442

66. *Ibid*, p 440

67. *Ibid*

Before addressing each of these questions in turn, we set out the key facts about the Native Land Court regime's operation in the Urewera rim blocks.

10.4 KEY FACTS

As we described above, this chapter deals with the Native Land Court's investigation of title to the rim blocks, which encircled the core lands of what became, in 1896, the Urewera District Native Reserve. It also covers the alienation of land in those blocks, from the 1870s to the 1920s. Much of the chapter is concerned with the content and effects of the native land laws, by which the Crown established and maintained a regime to govern titles (including survey, investigation, partition, and succession) and alienation. The laws were amended almost annually, with periodic replacement of the whole statutory regime. In 1873, 1880, 1886, 1888, 1894, 1900, 1905–07, 1909, and 1913, the regime was either totally replaced with new legislation or very significantly amended.

Many of the facts about these laws (or their interpretation) were contested in our inquiry. The Native Land Laws commission found in 1891, when the system was still operating:

So complete has the confusion both in law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been. Were it not that the facts are vouched upon the testimony of men whose character is above suspicion and whose knowledge is undoubted, it would be well nigh impossible to believe that a state of such disorder could exist.⁶⁸

This was because, as many witnesses told the commission, complex laws had been amended so often and in such contradictory ways. There was a series of interlocking Acts passed over many years:

- ▶ the Native Land Acts, which governed the Native Land Court and the new Maori land titles system, and the alienation of Maori land;
- ▶ the Immigration and Public Works Acts and Native Land Purchase Acts,⁶⁹ which specified some of the powers of the Crown when purchasing Maori land; and
- ▶ the Native Lands Frauds Prevention Acts, which provided for trust commissioners to vet and certify purchases of Maori land against statutory standards.

In later sections of this chapter, we will explore key features and some of the detail of these Acts, and the regime established by them. In this section, we outline briefly the facts about the title investigation and alienation of the land that became

68. 'Report of the Commission on Native Land Laws,' AJHR, 1891, G-1, ppxi–xii (Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 468)

69. Various names: the Government Native Land Purchase Act, the Native Land Purchase Act, and the Native Land Purchase and Acquisition Act.



Samuel Carnell (ATL, PA.10-098)

Donald McLean. McLean was the architect of the Native Land Act 1873, which replaced the original 1865 legislation and provided the foundation for subsequent iterations of the legislative regime. The purpose of the legislation – to investigate Maori customary title to blocks of land – remained the same, but the 1873 Act required the court to issue a memorial of ownership listing every individual found to have an interest in a block. It was under the 1873 Act that the first Te Urewera rim blocks passed through the Native Land Court. Despite protective mechanisms incorporated in the Act, the court and the titles it issued undermined community authority and thus the ability of Maori to protect their lands from alienation.

the 11 rim blocks. Some of this information is summarised in tables, to provide an easy reference point for readers.

10.4.1 Land dealt with under the 1873 regime

As we saw in chapter 8, Donald McLean's Native Council Bills failed in 1872 and 1873. That marked the end (for the time being) of attempts to set up Maori bodies to decide their own land entitlements. At the same time, McLean was preparing a major new Native Land Act to replace the regime set up in 1865. This new Act was the principal law governing the Native Land Court and the alienation of Maori land from 1873 to 1886. It was amended significantly in 1880 but the fundamentals of the 1873 regime were retained until 1886 (and beyond).

In brief, the Native Land Act 1873 provided for a court of record consisting of a judge and one or more assessors. The judges were mostly former officials or military officers, and only a minority were legally trained. Assessors were rangatira from outside the district. From 1874, at least one assessor had to agree to the court's decision. From 1883, Maori district committees could also do a preliminary investigation, for the information of the court.

The court's main task was to investigate Maori customary title to blocks of land, as mapped on a survey plan. Title investigation could not proceed without a survey, although partitions were allowed without one. Any Maori could apply for a

Who Could Apply for Title Investigation?

1873: 'Any [two or more] natives.'

1880: Any three or more Maori.

1883: Any single Maori.

1886: 'Natives [two or more] claiming to be owners of, or interested in, Native land.'

1894: Any 'person claiming an interest therein'.

survey and an investigation of title. We will traverse the rules for surveys in section 10.8. In essence, the cost of surveys was to be agreed in advance, and the court could award land to the Crown or to surveyors to recoup such costs. In conducting its title investigations, the court could hear evidence and examine witnesses, or it could give effect to voluntary agreements reached out of court. For most of the nineteenth century, lawyers were banned from the Native Land Court or could appear only with the permission of the judge. Cases were conducted by 'Native agents' (for the Maori claimants and counter-claimants) and by purchase agents or officials (for the Crown). Later, the court's business became increasingly concerned with partitions, successions, conveying of land to settlers or the Crown following purchase, and survey liens.

Any aggrieved party could apply for a rehearing. The decision whether or not to grant a rehearing was made by the Governor in council (1873 to 1880) and then the chief judge (from 1880 onwards). A rehearing was held by a judge and assessor (1873 to 1880) and then by two judges and one or more assessors (1880 to 1886).

The court issued a memorial of ownership, which had to list every man, woman, and child with an interest in the block before it. These interests were not identified on the ground, and were held to be equal until further defined by the court. They were supposed to be defined in this way before partition. From 1880, memorials were renamed certificates of title. Land under this form of title could not be sold privately unless all owners consented, or a majority agreed to partition the land for the purpose of a sale.⁷⁰ Any transaction before these conditions were met was technically 'void' (of no effect and unenforceable), although not illegal. As we saw in section 10.2, and as we discuss further in section 10.9, the ownership of land was effectively individualised from the moment a title issued, and each owner could alienate his or her interest.

In tandem with the Native Land Acts, the Crown's powers to purchase Maori land were supplemented by the Immigration and Public Works Acts and by the

70. The law as to who could apply for a partition (and under what circumstances) varied from time to time, but the variations are not relevant to this chapter. For a fuller discussion, see Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 457–459.

Government Native Land Purchase Act 1877. The Crown gave itself certain advantages, including the power to make advances on land that had not passed through the court, the power to proclaim a monopoly over land that it wanted to purchase, and the power to buy undivided interests and seek a partition from the court.

The native land laws also provided a series of protection mechanisms. Briefly, these included:

- ▶ *Restrictions on alienation*: From 1878, the court had the power to recommend that restrictions be placed on titles, preventing alienation without the consent of the Governor in council. From 1880 to 1886, the court had a positive duty to inquire as to whether Maori would be made landless without restrictions, and to impose restrictions where necessary.
- ▶ *Reserves*: From 1873, officials with the title of district officer were supposed to work with Maori communities to identify key land for reservation, to ensure sufficient land was retained for immediate use and as endowments for the future. The position of district officer was abolished in 1886.
- ▶ *Vetting of purchases*: From 1870, trust commissioners had to check transactions to ensure that the price had been paid, that it had not consisted of alcohol or weapons, and that it was fair. They also had to certify that Maori had understood the transaction, that signatures had been properly witnessed, that no trust had been contravened, and that no Maori owner would be rendered landless. The Native Land Court did its own series of parallel checks. The position of trust commissioner was abolished in 1894.

This was the system in operation from 1873 to 1886. During that period, land in the west of our inquiry district was passed through the court, and parts of it were then alienated to the Crown and private buyers. We concentrate here on the basic information about each of these blocks: when they were passed through the court, to whom they were awarded, and when they were sold.

The first three blocks passed through the court in 1878:

- ▶ Waimana (10,491 acres) was claimed by Tuhoe and Te Upokorehe. It was awarded to 12 Tuhoe chiefs in a list submitted by Tamaikoha. He then applied for a rehearing (acknowledging that his list was incomplete), as did Te Upokorehe claimants. A rehearing was held in 1880, at which the list of owners was expanded to 66 names, including seven Te Upokorehe individuals.
- ▶ Waiohau 1 (14,464 acres) was awarded to Ngati Haka Patuheuheu and Tuhoe. Some Ngati Manawa and other individuals were included in the list of owners. Waiohau 2 (1,100 acres) went to Ngati Pukeko. Tuhoe made several applications for rehearing but the chief judge dismissed them.
- ▶ Heruiwi 1–3 (25,161 acres) had been largely deserted during the recent wars. Before it went through the court, the Crown leased it from Ngati Manawa and proclaimed it as under negotiation for purchase. The block was awarded to 56 individuals (mainly of Ngati Manawa and Ngati Apa, with a few Ngati Hineuru).

In 1881, the Native Land Court investigated the title of Matahina (78,860

The Value of £1 in Today's Terms

In this chapter, we discuss rents, purchase prices, commercial land values, and the costs of surveys and court processes. We believe it is helpful if readers have a sense of the significance of the amounts involved, in today's terms.

The Reserve Bank of New Zealand provides an inflation calculator which can be used to calculate, in today's dollars, the value of money in the past. The figures produced by using the calculator are guides, not official calculations.

The figures presented here are taken from the general (CPI) category of the inflation calculator. The Reserve Bank's website advises that, for the years after 1914, the general (CPI) category uses the 'all groups' Consumer Price Index ('CPI') published by Statistics New Zealand. However, for the years 1862 to 1914, the CPI has been estimated and is not an 'official' figure or of the same quality as the published CPI.

With that caveat in mind, the following figures are the estimated cost in the first quarter of 2010 of a basket of goods and services that would have cost £1 in the first quarter of each of the years listed:

1865	\$ 98.52
1875	\$120.15
1885	\$166.84
1895	\$170.08
1905	\$154.83
1915	\$132.87

For example, a basket of goods and services that cost £1 in 1885 would cost \$166.84 today.

acres).⁷¹ The claims of Ngati Haka Patuheuheu, Ngati Hamua, Ngati Rangitahi, and Ngati Hinewai (a hapu of Rangitahi) were rejected. The court awarded title to Ngati Awa, including those Ngati Hamua 'who have become incorporated with Ngati Awa'.⁷² Ngati Rangitahi petitioned the Government, and Haka Patuheuheu applied for a rehearing. Their application was dismissed by the chief judge in 1882. After this rebuff, Ngati Haka Patuheuheu claimed to have negotiated an agreement with Ngati Awa, making a rehearing unnecessary. Nonetheless, the Government decided to grant a rehearing by special legislation, which took place in 1884. This

71. Originally 85,000 acres, part of it was cut out because it had already been dealt with by the court as part of Kaingaroa 1.

72. Philip Cleaver, 'Matahina Block' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc A63), p 45

Block name	Original area (acres)	Crown purchase	Private purchase	Deficit found on resurvey	Remaining Maori land
Waimana	10,491		5,440		5,051
Waiohau 1	14,464		7,000		7,464
Kuhawaea	22,309		21,694	29	586
Heruiwi 1–3	25,161	20,910		767	3,484

Table 10.1: Alienations in the rim blocks of Te Urewera, 1878–88

time, Ngati Haka Patuheuheu were awarded 2,000 acres (Matahina C and C1). Ngati Hamua received 1,500 acres (Matahina B), while 1,000 acres went to Ngati Rangitihi (Matahina D). As the Treaty claims of Ngati Awa have been settled, we make no further observations about Matahina A and Matahina B.

The final block dealt with under the 1873 regime was Kuhawaea (22,309 acres), south of Waiohau on the Rangitaiki River. The great bulk of it, Kuhawaea 1 (21,694 acres), was awarded to 92 owners (identified as Ngati Manawa) in 1882. A small piece (586 acres) was awarded to 33 owners (identified as Ngati Apa). The court's decision was challenged by Tuhoe, who claimed to have not been notified of the hearing, and by Ngati Rangitihi, whose claim had been rejected. The chief judge refused both applications for rehearing. He was later found to have acted illegally, because he did not hear the applicants. A Tuhoe petition about this in the 1890s was referred to the Urewera commission for investigation.

Thus, the court decided titles to five blocks between 1878 and 1884. For three of those blocks – Waimana, Kuhawaea, and Heruiwi 1–3 – pre-court leases were turned into sales by the buying up of individual interests. Just under half of Waimana and almost all of Kuhawaea was bought by private lessees. The Crown was the lessee for Heruiwi 1–3. It purchased the bulk of the block by 1881, and the remaining pieces in the 1890s. Waiohau and Matahina had a different history. Half of Waiohau was purchased by a settler through fraud (see chapter 11). The small Matahina C, C1, and D blocks, however, remained intact in the nineteenth century. (Readers are referred to the maps at the conclusion of this chapter.)

10.4.2 Title investigations under the 1886–88 regime and alienations under the Liberals

After Kuhawaea in 1882, no more title investigations were held in the rim blocks until 1889–90, when hearings began for the whole of the eastern side of the district, and the remaining lands in the west. Ruatoki, ever the exception, was not heard until 1894, the last of the rim blocks to pass through the court (but still heard under the 1886–88 regime.) As we saw in chapter 8, Tuhoe fought a long battle over the survey and hearing of Ruatoki. This helped trigger negotiations between the Crown and the leaders of Te Urewera, resulting in a new arrangement in 1896 to ban the Native Land Court from the uninvestigated parts of the Rohe Potae.

The Native Land Court Act 1886 repealed all previous native land laws. It was amended significantly by a new government in 1888. The fraud prevention laws were also overhauled in 1888, but the Government Native Land Purchase Act of 1877 remained in force until 1892. The combined 1886–88 regime governed title investigations for most of the land in the rim blocks. Basically, the native land laws and the court continued to operate much as we have described above. Relevant changes included revisions to the regime for approving surveys and survey costs, the possibility of using a sketch plan for investigating title, the temporary abolition of restrictions on alienation (restored in 1888), a requirement that the chief judge hold a hearing on applications for rehearing, and the specific exemption of Crown purchases from inquiry by the trust commissioners.

In 1892, the Liberal Government expanded the powers of the Crown, including giving it a new power to cancel restrictions so that it could purchase land. In 1894, the Liberals also restored Crown pre-emption. They abolished the trust commissioners, set up an appellate court to replace the rehearings system, and made an assessor's agreement no longer necessary for court decisions. In 1893, a Validation Court was set up (virtually the Native Land Court in another guise) to allow faulty or incomplete purchases to be validated.

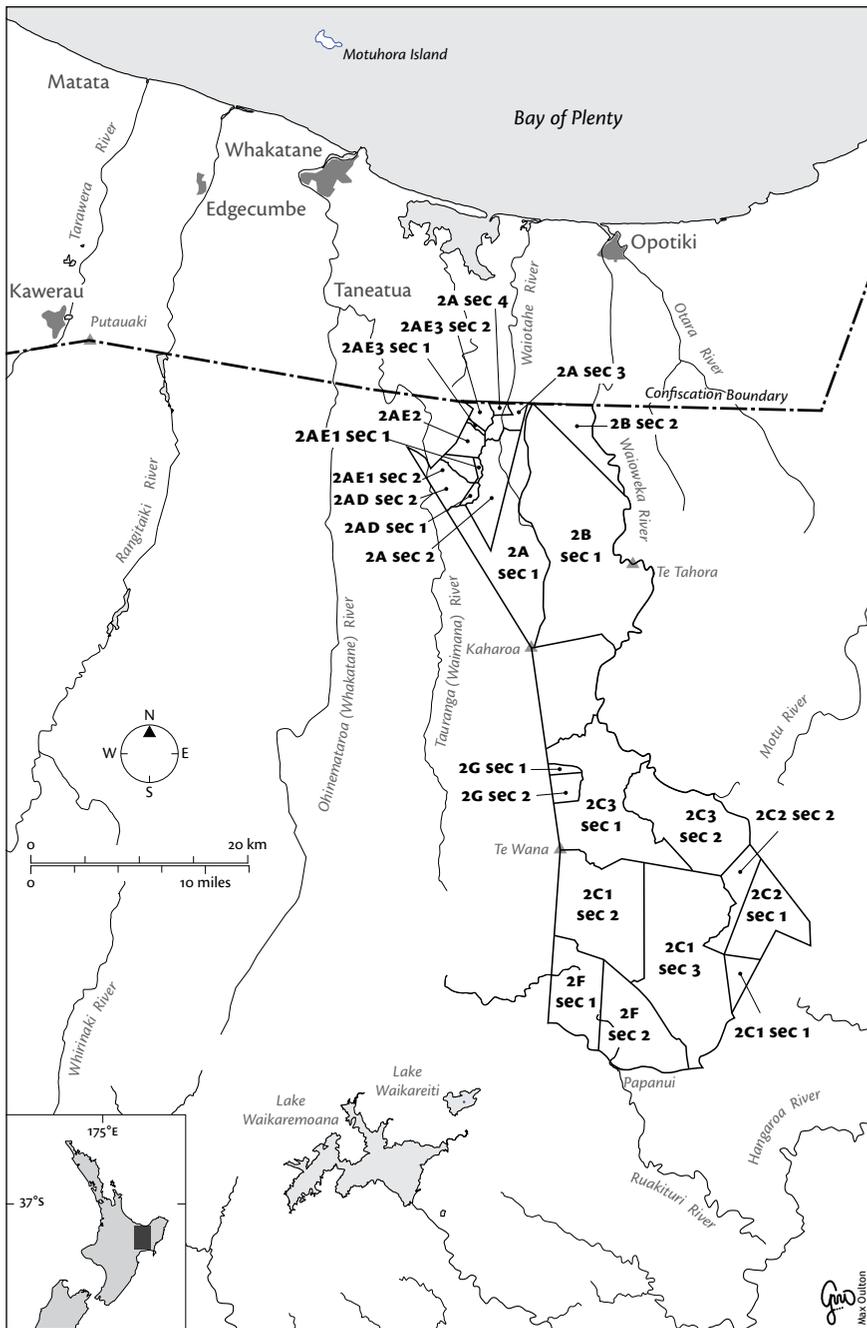
Other changes in this period, such as the ability of private purchasers to obtain partitions, were not relevant to Te Urewera. There were no private purchases in the rim blocks in the 1890s. Significant changes are discussed later in this chapter, in the relevant sections.

The following blocks had their title investigated by the court in 1889 to 1891:

- ▶ *Tahora 2*: Estimated at 213,350 acres, this large district formed much of the eastern boundary of the Urewera District Native Reserve. Many groups claimed land in this 'block', including Tuhoe, Whakatohea, Te Aitanga a Mahaki, Te Whanau a Kai, and Ngati Kahungunu. Parts of it were known to the tribes as Te Wera, Te Papuni, and Te Houpapa. Crown purchase agents negotiated with tribal leaders to buy land under those names, and advances were made. Ultimately, however, a secret survey by Charles Alma Baker took place in the late 1880s, enabling applications to the court by individuals of Ngati Patu. After much protest about the survey and the hearing, an out-of-court arrangement was made between the tribes. The main part still contested in court was the award of 2F to Ngati Kahungunu. There were several applications for rehearing, which resulted in adjustment to the lists of owners, but did not disturb the tribal awards. Some applications were not granted (including that of Tuhoe). Ngati Tamaterangi's claim was rejected at the rehearing. There was also a rehearing of the survey lien, which led to a reduction in its value. Restrictions on alienation were placed on the titles of most subdivisions.

The outcome was the award of land to named individuals of the following tribes:

- Tahora 2A: Tuhoe and Te Upokorehe.
- Tahora 2AD: Tuhoe.
- Tahora 2AE: Tuhoe.



Map 10.2: The Tahora 2 block, including partitions

- Tahora 2B: Whakatohea (Ngati Ira).
- Tahora 2C: Te Whanau a Kai and Te Aitanga a Mahaki.
- Tahora 2F: Ngati Kahungunu.
- Tahora 2G: Tuhoe (see table 10.3 for acreage of partitions).

The Crown purchased interests in Tahora 2 in the 1890s, and also obtained a large amount of land in partial satisfaction of survey costs (see table 10.2). Its interests were partitioned in 1896. The residue of Tahora 2C, 2F, and 2G was placed in the Carroll–Pere Trust (see chapter 12).

- ▶ *Waipaoa*: Located to the south of Tahora 2, this block of 39,302 acres was surveyed by Ngati Kahungunu leaders in the mid-1880s. Tuhoe claimed to have not received notice of the hearing, at which Ngati Kahungunu (and some Ngati Ruapani) obtained title to Waipaoa. There were no applications for rehearing. The Crown was awarded Waipaoa 1 and 2 in satisfaction of survey costs, with part of the boundary running through Lake Waikareiti. From 1897 to 1903, the Crown purchased interests in Waipaoa (see table 10.2). In 1903, the court abolished previous partitions and awarded new blocks (Waipaoa 3 and 4) to the Crown, leaving the non-sellers with around half of Waipaoa (as Waipaoa 5).
- ▶ *Heruiwi 4*: This block (also called Heruiwi East) contained 75,000 acres. It overlaid the territories of several iwi. Tuhoe lands were to the north-east, Ngati Manawa to the north-west, and Ngati Hineuru to the south-west and south-east, where their lands shaded into those of hapu associated with Ngati Kahungunu. The hearings in 1890 to 1891 were contested, and the block was subdivided as follows:
 - Heruiwi 4A: Ngati Hineuru.
 - Heruiwi 4B, 4D, and 4F–I: Ngati Manawa.
 - Heruiwi 4C: Tuhoe descendants of Tauheke.
 - Heruiwi 4E: Ngati Kahungunu (see table 10.3 for partition acreages).
 Restrictions on alienation were placed on the titles for 4A–C, and 4F. There were many applications for rehearing, all of which were dismissed. In the 1890s, the Crown purchased 4D, 4E, 4G, 4H, and 4I, almost the whole of 4F and 4B, and over half of 4A. Only Tuhoe’s block (4C) remained intact (see table 10.3).

- ▶ *Whirinaki*: This block (31,500 acres) was regarded by iwi as part of the Te Whaiti district. It was surveyed in 1887, on the application of Ngati Apa, and proceeded to hearing in 1890. The main contest was between Ngati Apa and Ngati Manawa, which was virtually an internal struggle between rival leaders of closely related kin. The court awarded three-fifths to Ngati Apa and two-fifths to Ngati Manawa. Ngati Apa were granted a rehearing, which resulted in virtually the same decision, and left it to the iwi to divide the block in two. Restrictions on alienation were placed on both Whirinaki 1 and 2. The Crown obtained more than two-thirds of Whirinaki in the 1890s, partly through survey costs but mostly by purchase (see table 10.2).

Block name	Original area (acres)	Maori land in 1888	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Retained as Maori land in 1904
Heruwi 1–3	25,161	3,484	3,484	—	—	0
Heruwi 4	75,000	75,000	69,670	67	—	5,263
Kuhawaea	22,309	586	—	—	—	586
Matahina C, C1	2,000	2,000	—	—	—	2,000
Matahina D	1,000	1,000	—	—	—	1,000
Tahora 2 (less 2B, 2B1)*	152,544	152,544	69,809	5,922	—	76,813
Tuararangaia 1	3,500	3,500	—	—	—	3,500
Waimana	10,491	5,051	—	—	—	5,051
Waiohau 1	14,464	7,464	—	—	78	7,386
Waipaoa	39,302	39,302	13,990	5,822	—	19,490
Whirinaki	31,500	31,500	17,060	4,790	—	9,650
Total	377,271	321,431	174,013	16,601	78	130,739

* We have not included figures for the large Tahora 2B block (approximately 46,904 acres) and 2B1 (13,902 acres), which were awarded to Ngati Ira of Whakatohea, who were not claimants in our inquiry.

Table 10.2: Alienations in the rim blocks of Te Urewera, 1888–1904. Although public works takings are not discussed in this chapter, they are included in the tables for the sake of completeness.

Block name	Original area (acres)	Maori land in 1888	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Retained as Maori land in 1904
Heruiwi 4A	5,880	5,880	3,657	67	—	2,156
Heruiwi 4B	9,276	9,276	8,868	—	—	408
Heruiwi 4C	2,195	2,195	—	—	—	2,195
Heruiwi 4D	6,200	6,200	6,200	—	—	0
Heruiwi 4E	3,143	3,143	3,143	—	—	0
Heruiwi 4F	7,634	7,634	7,130	—	—	504
Heruiwi 4G	10,520	10,520	10,520	—	—	0
Heruiwi 4H	14,509	14,509	14,509	—	—	0
Heruiwi 4I	15,643	15,643	15,643	—	—	0
Tahora 2A	24,668	24,668	11,666	921	—	12,081
Tahora 2AD	3,456	3,456	206	230	—	3,020
Tahora 2AE	3,584	3,584	2,081	105	—	1,398
Tahora 2C	96,424	96,424	48,452	3,465	—	44,507
Tahora 2F	22,556	22,556	6,996	1,099	—	14,461
Tahora 2G	1,856	1,856	408	102	—	1,346
Whirinaki 1	18,900	18,900	8,685	2,945	—	7,270
Whirinaki 2	12,600	12,600	8,375	1,845	—	2,380

Table 10.3: Alienations in the blocks partitioned at original title hearing, 1888–1904. The figures in this table present the same information as those in table 2, but are particularised for the partitions made at the original title hearings.

- ▶ *Tuararangaia*: This block (8,656 acres) lay to the south of the Bay of Plenty confiscation line, and to the west of the Rangitaiki River. The interests of a number of tribal groups overlapped in this border area. A disputed survey was conducted in 1885 but the block was not heard until 1890 to 1891, when Judge Gudgeon awarded Tuararangaia 1 to Tuhoe, Tuararangaia 2 to Ngati Pukeko, and Tuararangaia 3 to Ngati Hamua and Warahoe. There were two applications for rehearing from Ngati Awa, both of which were dismissed. Due to the settlement of Ngati Awa claims, we do not address the further history of Tuararangaia 2 and 3. Restrictions were placed on the title of Tuararangaia 1, and no part of it was alienated in the nineteenth century.
- ▶ *Ruatoki*: We have already discussed the disputed survey of Ruatoki in chapter 8. The court awarded title to Tuhoe hapu in 1894, and restrictions were placed on its alienation. Appeals were heard in 1897 but Ruatoki became part of the Urewera District Native Reserve, and its title was reinvestigated by the Urewera commission (see chapter 13).

10.4.3 Twentieth-century alienations

By 1894, title to all of the rim blocks had been decided. After that, the court's role was mainly to partition land, either for purchases or for hapu/whanau subdivisions, to allocate survey costs, and to decide successions. By the turn of the century, the Liberal Government's purchase policies had aroused such universal Maori condemnation that the Crown introduced a self-imposed moratorium on purchasing in 1899. (This lasted until 1905.) After negotiations with the leaders of the Kotahitanga (Maori parliament movement), new legislation was introduced in 1900, more reflective of Maori wishes. Maori land councils were set up for districts, with some members to be elected by local Maori, and others to be appointed by the Crown. The majority of members were to be Maori. If they chose to, iwi could vest their lands in these councils to be leased on their behalf. The councils could not sell this land. In 1905, the councils were turned into district Maori land boards, with no elected Maori representatives, and only one Maori appointee (of three). In most districts, the Crown could resume purchasing, except that an experiment in compulsory vesting was tried in Tairāwhiti and Northland. In our inquiry district, the unsold half of Waipaoa (Waipaoa 5) was compulsorily vested in the Tairāwhiti District Maori Land Board in 1906. Almost all of it was later sold while vested in the board.

In 1909, the Liberal Government overhauled and consolidated the native land laws in a major new enactment, the Native Land Act 1909. One key feature of this Act for Te Urewera was that it cancelled all restrictions on alienation. From then on, the Maori land boards were supposed to check transactions to ensure that Maori were not rendered landless. Also, a new system was set up to replace the collection of individual signatures on deeds. At the request of the Crown or private purchasers, the board summoned meetings of assembled owners (with a quorum of five) to vote on proposed sales or leases. The board had to confirm decisions before they could be given effect. In 1913, the Reform Government reintroduced Crown purchase of individual interests. Private buyers still had to use

Block name	Original area (acres)	Maori land in 1904	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works*	Crown land by gift	Private purchase	Deficit or surplus found on resurvey	Retained as Maori land in 1930
Heruiwi 1-3	25,161	0	—	—	—	—	—	—	0
Heruiwi 4	75,000	5,263	2,195	489	—	—	—	+73	2,652 [‡]
Kuhawaea	22,309	586	—	—	3	—	592	+9	0
Matahina C, C1	2,000	2,000	—	1,334	14	—	—	—	652
Matahina D	1,000	1,000	—	920	—	—	—	—	80
Tahora 2 (less 2B)	152,544	76,813	6,630	—	521	3	23,698	-1,597	44,364 [‡]
Tuararanga 1	3,500	3,500	—	881	—	2,619	—	—	0
Waimana	10,491	5,051	—	—	49	—	873	—	4,129
Waiohau 1	14,464	7,386	—	—	6	—	173	+193	7,400 [‡]
Waipaoa	39,302	19,490	17,398	—	—	—	—	—	2,092 [‡]
Whirinaki	31,500	9,650	1,534	—	8	—	48	+335	8,395 [‡]
Total	377,271	130,739	27,757	3,624	601	2,622	25,384	987	69,764

* This category (in this table and in table 10.5) includes land taken for public works for which the owners did not ask to be compensated.

‡ As at 1930, there were undivided Crown interests in the Heruiwi 4A2B, Tahora 2A-E3(2), Waipaoa 5A2, Waipaoa 5C, and Whirinaki 1(4B1B) blocks. The Crown had also been provisionally awarded 348 acres in Waiohau 1A as payment for survey costs, but the award had been suspended while the Crown negotiated with the owners of the Waiohau 1A11, 1A12, and 1A13 blocks over the purchase of more land. The marked figures indicate that the Crown was part-owner of the land.

Table 10.4: Alienations in the rim blocks of Te Urewera, 1904-30

TE UREWERA

10.4.3

Block name	Original area (acres)	Maori land in 1904	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Crown land by gift	Private purchase	Deficit or surplus found on resurvey	Retained as Maori land in 1930
Heruiwi 4A	5,880	2,156	—	489	—	—	—	+73	1,740
Heruiwi 4B	9,276	408	—	—	—	—	—	—	408
Heruiwi 4C	2,195	2,195	2,195	—	—	—	—	—	0
Heruiwi 4D	6,200	0	—	—	—	—	—	—	0
Heruiwi 4E	3,143	0	—	—	—	—	—	—	0
Heruiwi 4F	7,634	504	—	—	—	—	—	—	504
Heruiwi 4G	10,520	0	—	—	—	—	—	—	0
Heruiwi 4H	14,509	0	—	—	—	—	—	—	0
Heruiwi 4I	15,643	0	—	—	—	—	—	—	0
Tahora 2A	24,668	12,081	6,447	—	—	—	—	3,317	2,316
Tahora 2AD	3,456	3,020	—	—	15	—	3,101	+220	124
Tahora 2AE	3,584	1,398	—	—	—	—	1,082	+696	1,012
Tahora 2C	96,424	44,507	183	—	458	—	19,514	+2,971	27,323
Tahora 2F	22,556	14,461	—	—	48	3	—	2,591	11,819
Tahora 2G	1,856	1,346	—	—	—	—	—	+424	1,770
Whirinaki 1	18,900	7,270	1,534	—	2	6	—	+335	6,063
Whirinaki 2	12,600	2,380	—	—	—	—	48	—	2,332

Table 10.5: Alienations in the partitions of the rim blocks, 1904–30

The Alienation of Tahora 2 Lands while Vested in the East Coast Trust

In 1896, the individual shares purchased by the Crown were partitioned out of Tahora 2. For the southern Tahora 2 lands (2C, 2F, and 2G), the residue blocks, which amounted to 60,000 acres, were vested in the Carroll–Pere trust. In 1902, that land was transferred (along with lands outside our inquiry district held in trust by Carroll and Pere) to a board of Pakeha businessmen, called the East Coast Native Trust Lands Board. In 1906, the board was replaced with a single commissioner. While vested in this trust, some 20,000 acres (one-third of the land) was sold between 1905 and 1930. The figures for these alienations are included in tables 3 and 4, and in our statistical analyses for this chapter, but we examine Treaty claims about the sales and the trusts in chapter 12. Despite the alienations, this land represented the majority of land still in Maori ownership in the rim blocks in 1930.

the meetings of owners system.⁷³ Native Minister William Herries did away with the Maori member of the board, reducing each board to two members, the local land court judge and registrar.

Under the 1909 regime, a significant amount of land was alienated in Te Urewera (see table 10.4). Outside this system, the East Coast Trust sold sections of Tahora 2C to the Crown and private buyers (see chapter 12).

Having subtracted Ruatoki and the land awarded to Ngati Awa and to Ngati Ira, we conclude that Maori in our inquiry district retained 69,764 acres of the rim blocks (18.5 per cent) by 1930. In reality, the amount of remaining Maori land was less than this, since the Crown was part-owner in several blocks, not having yet partitioned its undivided interests. In terms of its completed purchases, the Crown had bought 220,680 acres (59 per cent) of the land awarded to our claimants in the rim blocks. It had also acquired 20,225 acres (5.4 per cent) directly for survey costs. Private purchases accounted for a further 59,518 acres (15.8 per cent). A total of 1,783 acres (0.5 per cent) had disappeared because of inaccurate surveys. This amount was greater than the 679 acres (that we know of) taken for public works. In addition, Maori had gifted 2,622 acres to the Crown. We note too the significance of the many twentieth-century purchases: the Crown bought more than a fifth of the Maori land that was left in 1905 between 1909 and 1930, while private purchasers acquired another 19.4 per cent on top of this. Also in the twentieth century, the Crown acquired 5.2 per cent through survey liens, gifts (principally Tuararangaia 1), and public works takings. Significant inroads were made on

73. For land with fewer than 10 owners, the Crown or private purchasers could deal directly with the owners from 1909 onwards. In Te Urewera, this power was mainly used to purchase or lease land in the subdivisions of the Waimana block.

Period	Maori land at start of period	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Crown land by gift	Private purchase	Deficit found on resurvey	Maori land at end of period
1878–88	377,271	20,910	—	—	—	34,134	796	321,431
1888–1904	321,431	174,013	16,601	78	—	—	—	130,739
1904–30	130,739	27,757	3,624	601	2,622	25,384	987	69,764
1878–1930	377,271	222,690	20,225	679	2,622	59,518	1,783	69,764

Table 10.6: Total alienations in the rim blocks of Te Urewera, 1878–1930

a narrow Maori land base in the twentieth century, after the larger-scale purchases of the 1880s and 1890s.

10.5 WHY DID THE NATIVE LAND COURT COMMENCE OPERATIONS IN TE UREWERA, AND WHY AND HOW DID THE PEOPLES OF TE UREWERA ENGAGE WITH IT?

SUMMARY ANSWER: The native land laws allowed 254,806 acres (the Waimana, Tahora 2, Kuhawaea, and Tuarangaia blocks) to be brought before the court on the basis of applications from individuals who either had no valid claim to the land or did not have their tribe's agreement to take the land to court. This was almost half of the land in the rim blocks, which is of itself evidence of a very serious failing on the part of the Crown's native land laws. Even where claims were filed by chiefs with a mandate to do so, this did not mean that the system was fair for other groups who also had rights in the land under claim. The rim blocks constituted border areas where customary rights overlapped. Unwilling groups were forced into court (to avoid losing their lands) in Waimana, Kuhawaea, Heruiwi 4, Whirinaki, Tuarangaia, Ruatoki, Waipaoa, and Tahora 2 (some 422,058 acres or 78 per cent of the rim blocks). There was an element of agreement among all parties in Heruiwi 1–3, Waiohau, and Matahina that these lands must come before the court, once one party in those lands had initiated a survey. Groups who did not make counter-claims, such as Ngati Whare, lost everything. Those who failed to appear (sometimes because they had not been notified) also lost everything.

Equally important, the Crown used its pre-title dealings to bring about applications to the court. This was the key factor in pulling Heruiwi 1–3 and Matahina into the court (which together make up almost 20 per cent of the rim block land), and also important for Kuhawaea, Tahora 2, and Waipaoa (a total of 70 per cent of the area in the rim blocks). One-off factors, such as the Government's approval of the secret survey of Tahora 2, in the face of universal Maori opposition, also contributed to forcing unwilling groups into the court.

Thus, the tribes with land in the rim blocks were forced into the court in a

manner that breached the fundamental Treaty guarantee of tino rangatiratanga. The native land laws were clearly at fault. In addition, the Crown's manipulation of the system to force more land into the court was in breach of its Treaty duties.

10.5.1 Introduction

As discussed in the report *Turanga Tangata Turanga Whenua*, the content of the native land laws was not the subject of consultation with tribal leaders in the various regions, and nor was their consent obtained for the creation of the Native Land Court or for its introduction into their districts (see section 10.2). Nationwide, many Maori leaders resisted the court and protested against its destructive impact, while still resorting to it as the only legal means for bringing their lands and peoples into the new economy. In Te Urewera, the leaders of Tuhoe and Ngati Whare (including Ngati Haka Patuheuheu) reached a collective decision that surveys, leases, land sales, and the court would be banned from their Rohe Potae. This organised opposition to the court remained the stance of Tuhoe and Ngati Whare from the 1870s to the 1890s (see chapter 8).

On the western and eastern sides of the Rohe Potae, the interests and rohe of other tribal groups overlapped with those of the groups which had formed Te Whitu Tekau. In the west, Ngati Manawa were divided about land sales. Some leaders wanted to maintain their alliance with the Crown, and to use the court to lease or sell land. Others followed the Hawke's Bay repudiation movement and sought to prevent further title investigations and sales. Ngati Awa and Ngati Pukeko were similarly divided. Ngati Rangitihī joined the rest of Te Arawa in trying to lease land but prevent sales and keep it out of the court. In the east, the tribal leaders of Turanga were officially opposed to the court but felt they had no choice but to use it to protect hapu interests, despite their protests. Ngati Kahungunu of upper Wairoa and the Whakatohea hapu of Opotiki also resisted title investigation and sales in our inquiry district.

We turn now to a key question for our inquiry. Given the strong and consistent opposition of many Maori to the Native Land Court, why was it able to commence operations in Te Urewera, and why and how did the peoples of Te Urewera engage with it?

10.5.2 Essence of the difference between the parties

In our inquiry, the claimants argued that the native land laws established a system that forced their participation, whether they were willing or unwilling. Almost all the claimants in our inquiry submitted that they had opposed the court politically, but had had no choice but to turn up and defend their claims to customary land or risk its permanent loss. Counsel for Ngati Manawa, however, accepted that his clients had made willing use of the court, although they were, he argued, no better off for having done so.⁷⁴ Ngati Whare, at the opposite extreme, had enforced an

74. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 23–24

absolute boycott of the court, and in doing so had lost all their lands outside the Urewera District Native Reserve.⁷⁵

According to the claimants, elements of the court and the Crown's purchase systems were integrated so as to force as much land into court as possible, with a view to acquiring it for settlement. Counsel for Wai 36 Tuhoe submitted: 'So began the Crown's programme of securing the co-operation of loyalist chiefs, advancing tamana [payments], securing leases and promoting claims through the Native Land Court.'⁷⁶ This 'imposition and implementation' of the court was entirely self-serving on the Crown's part, designed to break Maori autonomy and to part Maori from their lands.⁷⁷

The key features of these integrated systems, as complained of by the claimants, were:

- ▶ Two or three individuals could force land into the court, even where they did not represent their own hapu, let alone anyone else, and even where they were later found not to be owners of the land.⁷⁸
- ▶ Government officials made advance payments (tamana) on land, either for lease or purchase, with the intention of forcing it into court. This was most explicit in the Crown's leases, where the Government stipulated that it would not pay rent until the land received a court title. Purchase advances also triggered applications to the court, either by those who were the recipients of the advances, or by groups who feared the sale of their land by others if they did not get a court title for it first. Even the Government's proclamation of an intention to negotiate could force people to apply to the court.⁷⁹
- ▶ Even where those who had signed leases or received advances (and then made applications to the court) did represent a group of owners, the law forced all other groups into court to defend their interests or risk losing them. This was common in border regions such as the western and eastern extremities of the Urewera inquiry district.
- ▶ All claimants were dragged unwillingly into the court in at least one of the rim blocks.⁸⁰ Some claimants faced this experience repeatedly.⁸¹

By means of these systems, the Crown got around Maori resistance and opposition

75. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), pp 44–55

76. Counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), p 13

77. *Ibid*, pp 11–14

78. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 63–64, 82–83; counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), pp 65–66; counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), pp 18–20

79. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 112–113, 117–120; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 34–35, 38; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), pp 15–17

80. See, for example, counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), p 75.

81. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 65.

to the court, even though that opposition was sincere and stated repeatedly to the Government.⁸²

In addition, the claimants complained of features of the court purchasing systems, which they felt had seriously damaged their interests in particular cases. Ngati Kahungunu, Tuhoe, Te Whanau a Kai, and Te Aitanga a Mahaki criticised the secret survey of Tahora 2, and the Government's ultimate approval of the survey and plan, which forced that huge block into court against the wishes of the many groups with valid interests in the land.⁸³ Tuhoe and Ngati Haka Patuheuheu complained of the notification procedures, which they argued had failed in the cases of Kuhawaea, Waiohau, and Waipaoa, resulting in their losing customary land.⁸⁴ While almost all claimants wanted an alternative process to the Native Land Court (and the individualised titles that it created), Ngati Whare in particular argued that without a proper inquisitorial process, they lost everything.⁸⁵

The Crown acknowledged that the Native Land Court regime could require those who otherwise did not want to participate to do so, or risk losing their lands.⁸⁶ There was, however, a demonstrable need for a forum to determine competing claims, and use of the Native Land Court showed a willingness on the part of many groups to resort to it for that purpose, even among Tuhoe.⁸⁷ Also, applications to the court were usually from tribal leaders, not from unrepresentative individuals.⁸⁸ The laws had a number of provisions to prevent false or exaggerated applications going ahead, although the Crown accepted that those provisions had not stopped Tahora 2 from being brought before the court by individuals found not to be owners.⁸⁹

In the Crown's view, groups had a right to bring their lands before the court. The Crown's obligation was to protect their right to do so, and to free minorities from a collective veto where that was their wish.⁹⁰

In terms of the operation of its purchase programme, the Crown accepted that commercial transactions would draw Maori into the court. That, after all, was its purpose – to enable Maori and non-Maori to make binding contracts on the basis of secure titles. But the Crown denied that it used land transactions to force land into court, especially with a view to breaching the boundaries of Te Whitu Tekau's

82. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 10–11, 34–35

83. See, for example, counsel for Te Aitanga a Mahaki, submissions by way of reply, 8 July 2005 (doc N22), pp 2–12.

84. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 37–38, 85; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 36

85. Counsel for Ngati Whare, closing submissions (doc N16), p 52; see also counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 8, 19; counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), p 9

86. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 10, 25

87. *Ibid*, pp 3, 8–9, 17–19, 25, 56

88. *Ibid*, pp 3, 24–25

89. *Ibid*, pp 26–28

90. *Ibid*, pp 9–10, 17–19

Rohe Potae. Rather, the Crown emphasised the role of private leases in Waimana, Waiohau, and Kuhawaea, and its willingness to withdraw from its own negotiations where Maori and settlers wanted it to. Counsel did accept that Government leases required the land to be taken to court before rent would be paid, but argued that this was simply necessary to ensure that the Crown was paying rent to the correct owners. Nonetheless, the Crown accepted that it had encouraged Heruiwi 1–3 and Matahina into the court through its pre-title dealings. By contrast, the same thing did not happen to Te Wera and Te Houppapa (Tahora 2), which suggests that the system did not always have such an effect.⁹¹

In terms of specific claims, the Crown argued that there was no evidence of a general failure in notification procedures. In the cases of Kuhawaea and Waipaoa, counsel suggested that the evidence does not in fact prove that Tuhoē were not notified.⁹² With regard to the survey of Tahora 2, the Crown accepted that it had had significant consequences for the claimants, but denied that Government officials had acted improperly or illegally in approving the survey and plan. There had been ‘sharp practice’ by the surveyor, but, while there was considerable opposition, there was – on balance – a sufficient level of consent for authorising the survey.⁹³

10.5.3 Tribunal analysis

10.5.3.1 *The Rangitaiki Valley and Te Waimana*

On the western side of our inquiry district, the Rangitaiki Valley was the home of many tribal communities; the network of their overlapping rights was extensive. The land had been much fought over in the nineteenth century, most recently in the conflict between Te Kooti, Urewera tribes, and the Crown. From 1873, soon after the end of this war, until 1877, the Native Land Court was not allowed to sit in this district. The Native Land Act 1873 gave the Crown power to stop the court from sitting if its operation posed a threat to the peace. The extension in 1874 of the original ban for four years, across a large part of the central North Island (including the Rangitaiki Valley), was partly designed to prevent conflict among Te Arawa, many of whom were adamantly opposed to the court, but the primary reason was the Crown’s wish to secure its purchase monopoly in the region.⁹⁴ Thus, it did not suspend pre-title dealings in this land, and it was these dealings which ultimately brought about applications from some tribes in the Rangitaiki Valley, forcing others into the court. To the east, the Waimana block was part of this history of pre-title dealings, although it was not affected by the suspension of the court. Unlike the other blocks, it was forced into court by an application from individuals later found not to be owners. To the west and south of Waimana, the Heruiwi 1–3 and Matahina blocks were brought into court as a result of Crown purchase operations. Kuhawaea came before the court as a combined result of

91. Crown counsel, closing submissions (doc N20), topics 8–12, pp 10–11, 18–19, 24–26, 66–74

92. Ibid, pp 3, 29–30

93. Ibid, pp 28, 41, 49, 55–61

94. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 461–466

Crown and private purchase negotiations. Waiohau, too, was the subject of private pre-court dealings.

10.5.3.1.1 THE SYSTEM OF PRE-TITLE DEALINGS BRINGS ABOUT APPLICATIONS TO THE COURT, 1873–82

The title of Professor Judith Binney's report is 'Encircled Lands'.⁹⁵ The Native Land Court was seen as laying siege to the Rohe Potae, surrounding it with surveyed blocks and forcing its borders ever inwards. In this conception of the history of Te Urewera, the court was a tool in the Crown's purchasing programme.⁹⁶ Alec Ranui, in his evidence for Ngati Haka Patuheuheu, put it this way:

Our ancestors couldn't work out what was in the mind of the Crown. Once, they even closed the Native Land Court so that the Crown alone was able to buy land. We weren't allowed to sell to anyone else.

That was the beginning of buying land around the fringes of Te Urewera and up to the gateway of Te Urewera. What the Government wanted was the entire land mass of Te Urewera.

The Crown went from here [Waiohau] to Horomanga and to Hikurangi [in the Urewera District Native Reserve]. First chipping away at it, and then swallowing the entire land.⁹⁷

On the western side of the inquiry district, the system of pre-title dealings was the key mechanism by which the Crown sought to obtain land for settlement in the Rangitaiki Valley, and push its authority and influence further inland from the confiscated coast. For the claimants, this was a calculated policy designed to undermine and destroy their Rohe Potae.⁹⁸ The primary evidence for this is a report from J Wilson to Native Minister McLean.⁹⁹ Wilson was a purchase agent whose activities were important in bringing Kuhawaea and Waimana into the Native Land Court. We have already referred to this document in chapter 8, where we discussed its import for the policies of Te Whitu Tekau. But we quote it at length here, as it gives a rare glimpse into the strategies underlying what sometimes seem like random attempts to purchase anything and everything. Wilson wrote in June 1874:

I have the honor to make the following General Report, and in doing so I would respectfully explain that it has been permitted to extend over a longer period in

95. Judith Binney, 'Encircled Lands, Part 1: A History of the Urewera from European Contact Until 1878' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A12); Judith Binney, 'Encircled Lands, Part 2: A History of the Urewera, 1878–1912' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15)

96. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 11–14

97. Alec Ranui, brief of evidence, 14 March 2004 (doc C14(a)), p 21

98. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 11–14, 34

99. *Ibid*, pp 13, 34

order that I might have something more certain to say on a number of transactions, each more or less important, and each as yet-imperfect in itself; but all tending in one direction; viz [namely] the setting aside of the ring-boundary – the rohe-potae – which the Uriwera Seventy [Te Whitu Tekau] have set up to enclose in many instances the lands of other tribes.

I would not imply that the Uriwera Seventy meant to claim the ownership of land that does not belong to them. On the contrary they say some of this land is not ours, but we are more or less connected with its owners, and as the boundaries between us are not always clearly defined and there may be some dispute in some cases about them, therefore we draw this rohe-potae to prevent leases and sales, and within it we assume entire control of all lands.

In this way the Seventy try to hinder the owners of about 920,000 acres on the Whakatane and Rangitaiki side from doing as they like with their own – and these owners are principally friendly natives who are most anxious to lease their lands for the sake of an income.¹⁰⁰

A number of key points emerge from this short policy summary. One is that the desperation of ‘friendly’ tribes to lease their land (not sell it) was the means by which the Crown obtained land and introduced the court into the Rangitaiki Valley. The second is that the emphasis, at least as a land purchase agent saw it, was practical, not political. Wilson was not interested in undermining Maori autonomy, except so far as that was necessary to break down resistance to land sales. The Crown made this point in its submissions, arguing that Wilson’s letter showed a determination to purchase land no matter what, rather than a grand political conspiracy against Te Whitu Tekau.¹⁰¹

Thirdly, Wilson mentioned what has always been a key point in the Crown’s defence of its actions: that all groups should be free to do ‘as they like with their own’. In their closings, Crown counsel put to us that it was ‘necessary also for the Crown to be responsive to individuals or groups whose aims or goals differed from the majority by freeing them from a collective veto.’¹⁰² Further, the Crown argued that ‘it would require exceptional circumstances to deny the right of communities of owners to pass their lands through the Court.’¹⁰³ In taking this stance in the nineteenth century, the Crown acted deliberately to undermine the tino rangatira-tanga of tribal communities, and also treated the ‘right’ of individuals and part-owners to alienate land without the consent of all as if it were long-standing, rather than introduced recently in the Native Land Acts. From Wilson’s letter, however, we note also that Te Whitu Tekau accepted overlapping customary rights within their outer boundaries. What was necessary was a mechanism supported by all the tribes, that would allow them to come together and make collective decisions

100. Wilson to Native Minister, 1 June 1874 (Judith Binney, comp, supporting papers to ‘Encircled Lands, Part 1’, various dates (doc A12(a)), pp 43–44)

101. Crown counsel, closing submissions (doc N20), topics 8–12, p 10

102. *Ibid*, p 19

103. *Ibid*, p 10

on how (or whether) to use that land, and for whose benefit. As we saw in section 10.2, that mechanism was not the Native Land Court.

Resistance to the court was expressed by many leaders in Te Urewera. As we have seen in chapter 8, Te Whitu Tekau represented the collective will of Tuhoe and Ngati Whare. Leaders of border hapu sometimes went against that will, but the policy of resistance to leases, sales, and the court remained in place to 1896 and beyond. Indeed, so determined was that resistance that Premier Richard Seddon, after visiting Te Urewera in 1894, finally agreed to a unique system of title investigation for the district in 1895 (see chapter 9). From 1877 to 1896, however, if the peoples of Te Urewera wanted to make any commercial use of their land, they had no choice but to use the Native Land Court. Counsel for Wai 36 Tuhoe submitted: 'We argue that the Crown should have honoured the decision by Tuhoe (through its recognised body politic and endorsed by all of its senior chiefs) to not allow its lands to proceed through the Native Land Court and should have instigated something akin to the Urewera District Native Reserve Act much earlier.'¹⁰⁴

In the 1870s, there was concerted pressure from Crown agents, of the kind described by Wilson, to breach the 'ring-boundary' and acquire land. Settlers were also interested in direct dealings in Te Waimana and the Rangitaiki Valley. As Robert Hayes described, the Crown placed itself in a privileged and powerful position vis-à-vis both these settlers and Maori.¹⁰⁵ The Turanga Tribunal also relied on Mr Hayes' evidence:

We were reminded by Mr Hayes, at an early stage in our inquiry, that the rules relating to the private purchase of Maori land interests as provided by sections 59 to 68 of the 1873 Act did not constrain the Crown. Crucially, the Crown was not affected by section 87, which declared the purchase of individual interests void until confirmed by the court. Nor did it need to await judicial investigation of ownership. In fact, the Crown could buy land from its owners even before the owners had been ascertained in the court. The Crown had one other valuable advantage. By the terms of section 42 of the Immigration and Public Works Amendment Act 1871, and section 3 of the Government Native Land Purchases Act 1877, it could exclude private purchasers [and lessees] from acquiring interests in any block in which the Crown was actively negotiating to lease or purchase. Put bluntly, the Crown could, by proclamation in the *Gazette*, give itself a monopoly whenever it wished to.¹⁰⁶

A key feature of the Crown's purchasing machine, and its integration with the Native Land Court, was that the Government entered into leases as a stepping stone to purchases. As counsel for Ngati Manawa submitted, those leases were a mere pretence. The Crown had no intention of actually becoming a tenant, by farming or subletting so that settlers could develop the land. Rather, the lease was considered solely as a foothold that would almost inevitably turn into a

104. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 35

105. Crown counsel, closing submissions (doc N20), topics 8–12, pp 65, 71

106. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 474

purchase.¹⁰⁷ Nor, in most instances, did the Crown intend to pay its rent. This was a particularly important feature of the system in the Rangitaiki Valley, where the Native Land Court was suspended from 1873 to 1877. The Government leases usually included clauses that the Crown would not pay rent until title was determined, and that the owners could not deal with anyone else during the period of the (30-year) leases. This was the key means by which the lessee forced the lessors into court once its suspension was lifted – unless they got a title, the Crown would not pay them rent. Even then, getting rent out of the Crown was no easy matter – but owners were not to know that before they applied to the court.¹⁰⁸ We shall examine how the system worked in detail in section 10.7. Here, we note that this was a tool that the Crown used to pull land into the court.

In the 1870s, all tribes in the Rangitaiki Valley tried to insist on leases instead of purchases. We have already noted the policies of Te Whitu Tekau. In addition, Ngati Rangitihī supported Te Arawa in their stance of leases (not sales) and a ban on the court.¹⁰⁹ Ngati Manawa tried to insist on leases, but their ‘friendly’ chiefs were more willing than others to use the court to finalise them.¹¹⁰ Although we are not dealing with the claims of Ngati Awa in this report, we note that they too tried to lease rather than sell Matahina.¹¹¹ Resistance to the court (and to sales) was broken down by the application of considerable pressure over a number of years. In particular, this was achieved by the creation of Government leases that did not actually lead to development of the land or income from rents, and the exclusion of any other kind of dealing in (or use of) the land while it was under these leases.

10.5.3.1.2 WAIMANA

The first block to actually pass through the court was Waimana. Ironically, this block was something of an exception to the pattern that we have just outlined. As we have seen in chapter 8, Tamaikoha’s people occupied some of the most valuable farm land remaining to Tuhoe after the confiscation. In his attempts to develop this land for pastoral farming, Tamaikoha entered into a cooperative arrangement with Frederick Swindley. The latter ran his cattle on most of the block (about 8,000 acres of it) under an informal lease. Te Whitu Tekau eventually sanctioned this lease, on the condition that the land not be surveyed or taken to the court. Tamaikoha – and Rakuraku, after he moved back onto the land – abided by this agreement.¹¹² At first, their rivalry did lead to an early application for hearing, but

107. Counsel for Ngati Manawa, closing submissions (doc N12), pp 20–21; see also Michael Macky, summary of ‘Crown Purchasing in the Central North Island Inquiry District, 1870–1890, Relevant to the Urewera Inquiry District’, February 2005 (doc L13), pp 3–5

108. Macky, summary (doc L13), pp 3–5; Tracy Tulloch, ‘Heruiwi 1–4’ (commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc A1), pp 23–24, 28–30

109. Andre Paterson, brief of evidence, 26 March 2004 (doc C38), p 6

110. David Armstrong, ‘Ika Whenua and the Crown, 1865–1890: A Summary of the Evidence’, 16 July 2004 (doc F8), pp 3–4, 6–9

111. Cleaver, ‘Matahina Block’ (doc A63), pp 20–22, 47–49

112. Jeffrey Sissons, ‘“Waimana Kaaku”: A History of the Waimana Block’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 26–28, 31–38

this was withdrawn in 1874 with the agreement of all parties.¹¹³ In 1877, however, Joseph Kennedy, who was living in Gisborne, put in an application for the survey and hearing of Te Waimana on behalf of Te Upokorehe.¹¹⁴ This caused some consternation among Tuhoe. Tamaikoha and Rakuraku felt that they had no choice but to file their own application, and to control their own survey of the land.¹¹⁵ Even so, Hetaraka Te Wakaunua protested against this land being surveyed.¹¹⁶

The Crown has conceded in our inquiry that its legislation permitted unwilling tribes to be forced into the court process, or to risk losing everything. Counsel maintained, however, that applications were made by leaders on behalf of groups with rights, and not by unrepresentative individuals or groups without rights.¹¹⁷ Counsel for claimants suggested that there is no evidence that Joseph Kennedy was a leader of Te Upokorehe, and pointed out that he was not found to be an owner in the block (either upon hearing or rehearing).¹¹⁸

According to the Crown, this situation should not have been possible because of its 1873 system of pre-investigation checks:

- ▶ District officers were supposed to identify all hapu and iwi interests in lands proposed for survey and hearing, with the assistance of assessors and chiefs, and supply that information to the court.
- ▶ The applications had to include a description of the land and the names of the interested tribes and hapu, and to name any other interested persons. Applications had to be notified publicly by officials and in the *Gazette* and *Kahiti*.
- ▶ Judges were to make preliminary inquiries as to whether the application was in accordance with the wishes of the ‘ostensible owners’, and whether a hearing would disturb the peace, before ordering a survey.¹¹⁹

As far as we can tell, none of these features was operative in the Waimana case or protected the interests of Tuhoe in that block, except that the owners did find out in time to put in their own claim. The 1873 Act allowed claims to be filed by any two individuals (amended in 1880 to require a minimum of three).¹²⁰ Also, the year before the Waimana hearing, the requirement for judges to make preliminary inquiries was abolished.¹²¹ (This part of the Act had been resisted by the judges in any case, and was virtually a dead letter.¹²²) There is no evidence of a district officer making a preliminary inquiry for Waimana. When Tuhoe found out about

113. Brent Parker, ‘Timeline relating to the Waimana Block’, 19 January 2005 (doc κ4(a)), p 2

114. Sissons, ‘Waimana Kaaku’ (doc A24), pp 41–42. From Parker’s evidence, it appears that Kennedy first made an application for hearing in 1875, but a survey was not ordered until 1877 (perhaps on a fresh application for survey from Kennedy). This triggered the Tuhoe application for a survey and hearing in 1877: Parker, ‘Timeline’ (doc κ4(a)), pp 2–3.

115. Sissons, ‘Waimana Kaaku’ (doc A24), pp 42–43

116. Parker, ‘Timeline’ (doc κ4(a)), p 4

117. Crown counsel, closing submissions (doc N20), topics 8–12, pp 10, 25

118. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 19

119. Crown counsel, closing submissions (doc N20), topics 8–12, p 26

120. Native Land Act 1873, s 34; Native Land Court Act 1880, s 16

121. Native Land Act Amendment Act 1878 (No 2), s 6

122. Hayes, ‘Native Land Legislation Post-1865’ (doc A125), pp 20, 80–81, 87

Title Investigation and Application Vetting

Below, we summarise the relevant provisions concerning whether individuals could apply for title investigation and whether those applications were vetted.

Native Land Act 1873

Section 34: 'any natives' (two or more) can apply for title investigation.

Section 37: A district officer is to examine claims and report to the judge (including whether there are counter-claims).

Section 38: A judge is to hold a preliminary investigation to make sure the application is in accord with the wishes of the 'ostensible owners'. If the judge is satisfied that the application is bona fide, and if the district officer has not reported unfavourably, and if the peace will not be disturbed, then the claim should proceed.

Native Land Act Amendment Act 1878 (No 2)

Section 6: Judges no longer have to make a preliminary inquiry unless there is a 'particular or urgent' reason for doing so.

Native Land Court Act 1880

Section 16: Any three or more Maori may apply for title investigation.

Native Land Laws Amendment Act 1883

Section 17: Any single Maori may apply for title investigation.

Native Committees Act 1883

Section 14: Native district committees may inquire into title (where a block is passing or is about to pass through the court) and may report their findings to the court for its information.

Native Land Court Act 1886

(Repealed all earlier Acts except Native Committees Act)

Section 17: 'Natives claiming to be owners of, or interested in, Native land' may apply for title investigation. (Minimum of two individuals.)

Native Land Court Act 1886 Amendment Act 1888

Section 26: The registrar is to forward all applications for investigation of title to the relevant native district committee. If the committee sends a report on it, the court shall consider the report before proceeding. If parties consent, the court may determine the application on the basis of the report (without any further investigation), or may truncate the investigation.

Native Land Court Act 1894***(Repealed all earlier Acts except Native Committees Act)***

Section 17: Any single 'person claiming an interest therein' can apply for the court to exercise its jurisdiction on any matter, including for title investigation.

Kennedy's application, which was approved for survey and hearing, they had no choice but to file their own claim, or have the land investigated on a rival claim and survey. According to Sissons, who examined the relationship between Tuhoe and Swindley, it is likely that without the court investigation, 'Tuhoe leaders and Swindley would have continued to adhere to their lease agreement for the mutual long-term benefit of both parties'.¹²³

As we shall see, however, the court title made Tuhoe vulnerable to the purchase of individual interests. In self-defence against other purchasers (particularly Mrs Jemima Shera), Swindley had to start buying up interests as soon as the land had passed the court. In Sissons' view, this could have been avoided if tribal leaders had been allowed to keep the land out of the court.¹²⁴ We note, however, that in giving up on Te Waimana, the Crown had not resiled from its policy of trying to breach the Rohe Potae at all possible kuaha (entry-points). Rather, McLean agreed to bow out for the meantime and allow private interests free reign in this block. This was because Swindley's business partner (Kelly) had agreed to the Government acquiring parts of it later for settlement.¹²⁵ This very agreement would probably have forced the land into court at some point, even if Joseph Kennedy had not filed his application in 1877.

10.5.3.1.3 HERUIWI 1–3, WAIIOHAU, MATAHINA, AND KUHAWAEA, 1873–82

Waimana was brought under the native land laws by the application of individuals, and not by pre-title dealings. For Heruiwi 1–3, Matahina, and Kuhawaea, however, the Crown's pre-title dealings were the critical factor. In Waiohau, a private lease pulled the land into court.

As we have seen, the Native Land Court was not allowed to sit in the Rangitaiki Valley before 1877. In the meantime, Crown agents entered into lease agreements with some of the customary owners of Heruiwi 1–3 and Matahina, as well

123. Sissons, 'Waimana Kaaku' (doc A24), p 43

124. *Ibid*, pp 42–43, 58–59

125. McLean to Wilson, 24 December 1873 (Binney, supporting papers to 'Encircled Lands, Part 1' (doc A12(a)), p 42). The arrangement was that the Government would buy the parts suitable for agriculture, while Kelly (and Swindley) kept the parts suitable for pastoral farming. Both parties believed that the Swindley lease would be turned into a purchase, and that title would inevitably be granted by the Native Land Court.

as making advances on Kuhawaea and Waiohau. In March 1874, Henry Mitchell and Charles Davis paid £100 as a deposit on the lease of Heruiwi 1–3. A lease was signed in February 1875, with a second payment of £50. After that, the Crown only paid another £10, even though it was supposed to be paying £100 a year. Unlike most of the Mitchell–Davis leases, this one lacked the usual stipulation that the Crown would not pay rent until title was decided by the court. Nonetheless, Tracy Tulloch noted that the payment dates in the lease were crossed out, and no money was in fact paid.¹²⁶ Ngati Manawa’s historian, Peter McBurney, observed that the Crown did not pay its rent on the tribe’s other leases either. As a result, ‘Increasingly dependent on the colonial cash economy, and denied the rent owed them by the Crown, Ngati Manawa had little option but to put their land through the Native Land Court soon after it was reinstated.’¹²⁷

As we have seen, the suspension of the court was lifted in 1877. Ngati Manawa had already had Heruiwi 1–3 surveyed the year before, and in August 1877 the tribe applied for a hearing. The Government also applied for a hearing to determine the Crown’s interest, but in 1878 the court sat to hear the Ngati Manawa application. There is no doubt that this hearing was a deliberate act on the part of Ngati Manawa’s leaders.¹²⁸ Tuhoe did not make a counter-claim, and Tama Nikora’s reports do not mention any Tuhoe interest in Heruiwi 1–3.¹²⁹ Ms Tulloch identified a Ngati Hineuru counter-claim, but this seems to have been settled out of court by the inclusion of a few Hineuru individuals in the title.¹³⁰ It is not clear to us whether Ngati Hineuru were properly able to participate in decision-making for this block, given that most of them were still living in exile on the coast.¹³¹

The other block brought before the court in 1878 was Waiohau. In 1873 to 1874, Ngati Haka Patuheuheu had debated whether to lease land east of the Rangitaiki River – Waiohau and Kuhawaea – with other Te Whitu Tekau leaders.¹³² In Bernadette Arapere’s view, Te Whitu Tekau was ‘genuinely concerned about the borderland hapu who were considered vulnerable to the government’s pressures to lease.’¹³³ Counsel for Ngati Haka Patuheuheu, relying on the evidence of Kathryn Rose and Robert Pouwhare, submitted that these border hapu sometimes had to defy the tribal collective. They had returned from Te Putere in dire economic straits, and they faced pressure from Crown and private negotiations with their neighbours (Ngati Manawa and Ngati Awa).¹³⁴ Counsel suggested:

126. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 23–24, 28

127. Peter McBurney, brief of evidence, 2004 (doc F7), p 9

128. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 23–28

129. See Tama Nikora, ‘Tuhoe and the Rangitaiki’, March 2004 (doc c30); Tama Nikora, brief of evidence for the third week of hearing, 18 March 2004 (doc c31).

130. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 27–28; counsel for Ngati Hineuru, closing submissions (doc N18), p 16

131. Counsel for Ngati Hineuru, closing submissions (doc N18), p 22

132. Bernadette Arapere, ‘A History of the Waiohau Blocks’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), p 23

133. *Ibid*, p 24

134. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 112, 117–120

In not participating in such transactions Ngati Haka Patuheuheu were facing a threat that they would lose control over much of their lands. Not unsurprisingly, given that the hapu was a struggling community, advances were no doubt welcome and the community would have sought the benefit from the leasing of their lands.¹³⁵

In 1874, lease arrangements were finalised with settlers willing to take the risk that their dealings were 'void' under the Native Land Act. Wi Patene and Mehaka Tokopounamu promoted the lease, which eventually ended up in the hands of W F Chamberlin. Binney and Arapere agreed that it was pressure from Chamberlin which brought this land into the court in 1878.¹³⁶ It may have been surveyed without the knowledge of the wider Tuhoe leadership, although this is not certain.¹³⁷ In any case, it was pre-title dealings by people desperate to acquire rents that ultimately brought this land into court, despite the Te Whitu Tekau ban.

At the same time as Mitchell and Davis were trying to get leases of Heruiwi and Waiohau, they also dealt with various tribal communities for a lease or purchase of Matahina/Pokohu. This large piece of land (some 85,000 acres) was a point of intersection between tribal groups, many of whom had permanent residences in different parts of the block.¹³⁸ In 1874 to 1875, a lease was negotiated with Ngati Awa, led by Rangitukehu. It contained the usual clauses forbidding other dealings in the land, and specifying that rent would not be paid until the court decided title. As part of their negotiations, Mitchell and Davis paid an advance of £50 to Wi Patene for Ngati Haka Patuheuheu. They also met with Ngati Rangitihui, who were receptive to the idea of leasing 'Pokohu', as the land was known to them.¹³⁹

Inconclusive dealings with a number of groups resulted in great tension in the region. A series of hui was held to try to resolve the matter in 1876, including a two-day hui at Te Umuhika, attended by 300 people. A jury of 10 chiefs and assessors confirmed that all the payments so far had been made to people with valid rights in the land. Wi Patene later recalled this hui, which he called a 'Commissioner's Court', and pointed out that it had found in his favour.¹⁴⁰ Counsel for claimants noted that this kind of inter-tribal hui, with a jury of leading chiefs, was one of many contemporary alternatives to the Native Land Court. But people had to go to the court because only it had legal powers.

In 1877, the suspension of the Native Land Court was lifted. In April 1878, the Crown precipitated land court action by proclaiming Matahina as under

135. *Ibid*, p112

136. Arapere, 'Waiohau' (doc A26), p 24; Binney, 'Encircled Lands, Part 2' (doc A15), p 46

137. Arapere, 'Waiohau' (doc A26), p 36. Arapere's interpretation here may be based on a misreading of 'money' as 'survey' in the source she relied upon. See Makarini Te Waru and others to Fenton, 1 August 1878 (Gwenda Paul, comp, supporting papers to 'Te Houhi and Waiohau 1B', 9 vols, various dates (Wai 46 RO1, doc H4(f)), vol 6, p 37).

138. When this block was heard by the court, the claimants discovered that several thousand acres of it had been included in the Kaingaroa 1 purchase. Hence, Matahina was reduced to 78,860 acres.

139. Cleaver, 'Matahina' (doc A63), pp 18–20

140. Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A119), pp 72–73

negotiation for purchase. While still paying small advances on the rent to Ngati Haka Patuheuheu, it negotiated a deed of sale with eight Ngati Awa leaders in 1879.¹⁴¹ As part of this purchase negotiation, Ngati Awa applied for a survey and hearing of title. As we have noted above, both Ngati Rangitihī and Ngati Haka Patuheuheu were part of wider groupings that formally opposed sales and the court. Yet, as a result of the Crown's leasing activities and its payment of advances on rent, and the inability of anyone to actually get regular rents, all the groups living on 'Matahina' cooperated with Ngati Awa's survey. While Rangitukehu led the survey, Ngati Haka Patuheuheu, Ngati Rangitihī, Ngati Hinewai, and Ngati Hamua all took part in conducting the surveyors over what they believed were their pieces, and even had their alternate lines surveyed. According to Wi Patene, Rangitukehu had had no choice but to accept their control of parts of the survey. It seems, therefore, that the Crown's efforts to turn the lease into a sale forced the land into court, but that all the involved groups cooperated in the survey. The non-selling, leasing groups had no choice but to accept a court investigation if they wanted the Crown to pay its rent. Ngati Awa, on the other hand, had had to apply for a title as part of its agreement to sell land to the Crown.¹⁴²

In Kuhawaea, to the south of Waiohau, J A Wilson had opened negotiations in 1874, and the land was proclaimed as under Crown monopoly later in the year. Wilson believed that he had made enough advances to make the block worthless to his competitor, Hutton Troutbeck, who had entered into an informal private lease. Unlike the Crown, Troutbeck actually had to pay his rent (£300 a year), but he faced the double insecurity of an informal lease over land proclaimed as under Crown monopoly. As a result, he made concerted efforts to get the land surveyed and passed through the court, and to get the Government to accept a refund of its advances (technically to be paid back by the owners, but actually by him). Some of the younger leaders of Ngati Manawa supported Troutbeck, but the tribe was deeply divided. Unlike the position they had taken in Heruiwi 1–3, the senior Ngati Manawa leaders now opposed a survey and the court. From 1878 to 1882, the district officer (and others) consistently advised the Government not to act on the applications for survey, due to the weight of opposition within the tribe.¹⁴³ Ngati Manawa's experience of the court by this time had been one of loss; instead of leading to the completion of leases and the payment of rents, its titles were facilitating quick and large-scale sales to the Crown.

In 1878, Harehare Atarea and a Ngati Manawa committee wrote to the Government:

Na e hoa, kaore matau e pai kia ruritia taua takiwa, kare rawa atu matau e pai. Ka waiho taua takiwa mo matau mo a matau tamariki. He kupu tuturu tena na matou katoa – wahine, tane, kuia, tamariki, koroua.

141. *Ibid*, p 81; Cleaver, 'Matahina' (doc A63), pp 20–21

142. Cleaver, 'Matahina' (doc A63), pp 21–31, 35. Due to food shortages, hearings were cancelled in 1880, so that the block was not heard until 1881.

143. Binney, 'Encircled Lands, Part 2' (doc A15), pp 35–42

The Settlement of Ngati Awa Claims

In 2003, the Crown and Ngati Awa entered into a deed of settlement. This agreement settled all Ngati Awa historical claims (including those of Ngati Pukeko). In 2005, Parliament passed the Ngati Awa Claims Settlement Act, which (among other things) removed the jurisdiction of the Waitangi Tribunal to inquire further into the historical claims of Ngati Awa. In our inquiry, Ngati Awa appeared with a watching brief and made submissions on matters of relevance to their mana and customary rights (which we consider further below, in section 10.6). We have no jurisdiction to comment on issues as between Ngati Awa and the Crown. We do, however, need to explain how events regarding the Matahina block (and other events involving Ngati Awa) affected the claimants in our inquiry. Any findings of Treaty breach should not be taken to include Ngati Awa.

Now friend, we do not agree to that area being surveyed, we do not agree at all. That place is to remain for ourselves and our children. This is the firm intention of all of us – women, men, elderly women, children, elderly men.¹⁴⁴

Harehare still stood firm in 1881, trying to stop the surveying of Kuhawaea: ‘This is a word of ours to you about the survey of the Kuhawaea block, we do not approve neither will [we] ever consent to the survey being carried out, because the Creator does not make land a second time for me hereafter.’¹⁴⁵ But, as Professor Binney pointed out, the Government was ultimately more interested in recovering its ‘lien’ on the block than in preventing a disputed survey. In 1882, the Native Minister decided to accept a refund and lift the proclamation on Kuhawaea, so he approved the survey.¹⁴⁶

Pre-title dealings and land court applications often had a domino effect. In the face of the Troutbeck lease, Crown advances, a proclamation of the block as under negotiation, and Ngati Manawa applications for hearing, Ngati Haka Patuheuheu put in their own application to the court in 1878.¹⁴⁷ Nonetheless, it was a Ngati Manawa claim that was surveyed and heard in 1882. Neither group had really wanted this land in the court, but Troutbeck’s alliance with select Ngati Manawa leaders – and the Crown’s approval of a disputed survey in the face of considerable opposition – had forced it there.

144. Harehare Atarea and the Committee of Ngati Manawa, 27 November 1878 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 39)

145. Harehare Atarea and others to Native Minister, 14 April 1881 (Peter McBurney, ‘Ngati Manawa and the Crown, 1840–1927’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C12), pp 288–289)

146. Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 41–42

147. *Ibid*, p 38

Ngati Haka Patuheuheu did not contest Ngati Manawa's claim at the hearing in 1882. By this time, the two groups had reached an agreement over the land. There is considerable evidence of this oral agreement from both sides.¹⁴⁸ In essence, Haka Patuheuheu agreed not to contest Ngati Manawa's claim to certain lands (including Kuhawaea), in return for an assurance that they would be put in the title. This did not happen at the Kuhawaea hearing, where only Wi Patene and Mehaka Tokopounamu were included in the list.¹⁴⁹ Ngati Haka Patuheuheu applied for a rehearing as a result.

Tuhoe also applied for a rehearing of Kuhawaea. They claimed that they had not received a copy of the *Kahiti* advertising this hearing, and so had not attended.¹⁵⁰ We will return to the question of rehearings below, in section 10.6. Here, we note that notification procedures were sometimes chancy in Te Urewera. Counsel for claimants relied on the evidence of Clementine Fraser, who concluded that this period was 'marked by inconsistent communication systems.'¹⁵¹ We agree with the Crown that there is no evidence of a systemic problem in our inquiry district – almost all the Urewera hearings were attended by at least some representatives of the people who needed to be there.¹⁵² But where there was a failure of notification, as there was in three notable instances in our inquiry district, the effects were catastrophic for any who missed the opportunity to have their case heard and who lost land as a result.¹⁵³ Kuhawaea was one such instance.

In sum, 152,385 acres of land in Te Urewera had come before the court by 1882. This represented about 28 per cent of the rim blocks.¹⁵⁴ Despite the resistance of tribal leaders to the imposition of the court, especially those of Te Whitu Tekau, they could not prevent pre-title dealings and the inevitable court applications that followed. For Waiohau and Kuhawaea, private leases (and intertribal competition) created the pressure that forced these blocks into court. In Kuhawaea, the Crown was also a major player in achieving that outcome, having made advances, proclaimed the land as under negotiation for purchase, and then withdrawn its opposition at a crucial moment, allowing Troutbeck and some younger Ngati Manawa leaders to force through a survey and court hearing in the face of great tribal opposition. In Matahina, the Crown had made advances on the rent to many groups but refused to pay the rent regularly until the court had investigated title. This, as well as its purchase negotiations with Ngati Awa, overturned the 1876 hui deci-

148. This evidence is summarised by counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp100–104. It includes evidence from Robert Pouwhare (witness for Ngati Haka Patuheuheu), Kathryn Rose (witness for Ngati Haka Patuheuheu), and Peter McBurney (witness for Ngati Manawa).

149. Rose, 'A People Dispossessed' (doc A119), pp79–80; Binney, 'Encircled Lands, Part 2' (doc A15), pp42–43

150. Nicola Bright, 'The Alienation History of the Kuhawaea No 1, No 2A, and No 2B Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc A62), pp51–52

151. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp38, 85; Clementine Fraser, 'Tuhoe and the Native Land Court 1866 to 1896: A Summary', February 2004 (doc C10), p7

152. Crown counsel, closing submissions (doc N20), topics 8–12, p30

153. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p85

154. This percentage does not include the 'four southern blocks'.

Notification Failures

Under the native land laws in force from 1873 to 1889, notification of hearings was mainly the responsibility of the court and the Government. The most common form of notification was advertisement in the Maori *Gazette* (*Kahiti*). There was also an informal notification system, based on communication between officials and Maori, and between Maori in their own networks. From the evidence before us, there were three serious failures in the notification system. The first was Kuhawaea in 1882. Tuhoe applied for a rehearing, based on the claim that they had been sent the wrong issue of the *Kahiti*. The second was the partition hearing for Waiohau in 1886, the decision in which Ngati Haka Patuheuheu appealed on the basis that they had not been present because they had not received notice. The third was the hearing of Waipaoa in 1889. In that instance, Tuhoe did not apply for a rehearing, but Numia Kereru later explained to the Urewera Commission that they had not attended because they had not known of the hearing. We agree with counsel for claimants that failure to attend – for this reason or any other – could result in serious consequences.

sions and forced the land into court. Similarly, in Heruiwi 1–3, the Government's refusal to pay rent on its lease compelled Ngati Manawa to seek title investigation. Waimana was something of an exception, because Tuhoe managed to keep their private lease out of the court until their hand was forced by an application from outside the block. The individuals who led this application, Joseph Kennedy and his brother, were not found to be owners.

The cases of Waimana and Kuhawaea demonstrate that the law allowed people to get hearings who did not have a mandate from the great majority of owners. The main factor, though, in imposing the court on Te Urewera in practice, was the manner in which the Crown conducted its pre-title dealings. Unwilling groups were forced into court in several cases as a result. Those who made applications, such as Ngati Manawa and Ngati Haka Patuheuheu, dealt with the court for a mix of more positive reasons as well – they wanted and needed to start using their lands in the colonial economy. But, as counsel for Ngati Haka Patuheuheu submitted, there was no real choice involved: it was either the land court or informal leases with private settlers. According to Sissons, such leases were not as precarious as they seemed, so long as the relationship between landlord and tenant was good. But Chamberlin and Troutbeck engineered title investigation with the same persistence as the Crown. At least, however, they did pay rent. A Crown lease, on the other hand, forced land into court unless the owners were willing to tie their lands up without ever getting any rent.

In the claimants' view, this was a system without choices: they had to go to the court if they wanted to use their lands in the economy; they had to accept

individualised title in the form of a memorial of ownership (as no other was on offer) if they went to the court; and they had to participate (either as claimants or counter-claimants) or risk losing everything.¹⁵⁵

From 1882 to 1889 there were no more court hearings on the western side of the inquiry district. Then, in the short space of two years, another 115,156 acres was passed through the court. This land was made up of three blocks: Heruiwi 4, Whirinaki, and Tuararangaia. It is to these blocks that we now turn.

10.5.3.1.4 HERUIWI 4, WHIRINAKI, AND TUARARANGAIA, 1882–91

In 1879, the Government paid its last advances in Te Urewera. As we shall see, the Native Minister reviewed purchase practices and decided to stop the system of pre-title dealings and advances. He also decided to stop entering into leases (as the first step in a purchase). From the early 1880s, the Government confined itself to buying up the shares of individuals whose land already had a court-determined title. In the case of leases and purchases started under the old system, however, the Government still pursued them where the land looked a valuable prospect for settlement. Otherwise, purchase operations were rationalised and some pre-title leases and purchases abandoned, so long as advances were repaid (either in money or land).¹⁵⁶ As we have seen, the Government withdrew from Kuhawaea on that basis in 1882. Thus, one of the primary forces that had pulled Rangitaiki blocks into the court was discontinued.

With the easing of this pressure, there were no more court hearings on the western side of the district for several years. Tuhoe continued to resist surveys, sales, and the court. As we saw in chapter 8, they constituted a new tribal committee in 1888, with the involvement of all the leading chiefs. Rakuraku wrote to the Native Minister, on behalf of the committee, that

all surveys are to be considered and dealt with by the Committee only, not by any one or two individuals or more [and also gold prospecting] . . . Friend the Native Minister do you sanction the resolutions which we have passed, seeing that the sole object of these two resolutions is to prevent bloodshed in connection with our lands and prevent other people or hapu's dealing with them and thereby produce trouble . . . Do you carefully consider the matters and as the matters referred to are favourable to us, let them also receive favourable consideration from you, for the general good of the two peoples Native and European.¹⁵⁷

New surveys and hearings were undertaken by Ngati Manawa in the 1880s. Harehare Atarea and other Ngati Manawa leaders had tried in vain to prevent the sale of Heruiwi 1 and the hearing of Kuhawaea. But, as counsel for Ngati Manawa

155. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 56

156. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 607–613

157. Rakuraku Rehua and others to the Native Minister, Te Waimana, 30 September 1888 (Judith Binney, comp, supporting papers to 'Encircled Lands, Part 2: A History of the Urewera, 1878–1912', various dates (doc A15(a)), pp 4–5)

submitted, poverty, debt, and intermittent crop failures drove them to deal ever more extensively in their lands – and that, in turn, required them to take those lands to court.¹⁵⁸ As early as 1882, Harehare sought to subdivide Heruiwi 4, the large (75,000-acre) stretch of territory to the south of Heruiwi 1–3. This resulted in a survey and applications for hearing in the mid-1880s.¹⁵⁹ Then, the situation worsened with the Mount Tarawera eruption and competition for scarce resources between Ngati Manawa and their close relatives, Ngati Apa. This resulted in a Ngati Apa survey of Whirinaki (31,500 acres) in 1887, and an application for hearing.¹⁶⁰

Harehare Atarea at first obstructed this survey but eventually agreed to let it go ahead.¹⁶¹ It seems unlikely, though, that Ngati Manawa were unwilling parties to Whirinaki going to court. Atarea wanted to have a single survey of all Ngati Manawa's claims, rather than just of Whirinaki (controlled by Ngati Apa).¹⁶² Also, when writing to the court in 1885 about the hardship incurred by the location of its sittings, Atarea had referred to future Whirinaki hearings, even though no claim had been filed about that block. He clearly saw it as inevitable that all land in which Ngati Manawa had an interest would end up coming before the court.¹⁶³

According to Mr McBurney, those who rallied around the tribal name 'Ngati Apa' at this time were concerned at how much land had been sold to the Crown, and were anxious to throw off the leadership of Harehare Atarea. Also, they saw that land sales always followed in the wake of court hearings, and that benefit could only come if as many shares as possible were awarded to a smaller number of owners. Thus, two closely related groups that had previously acted together now vied for ownership in the court, and the right to deal exclusively in the lands. As further evidence for this explanation, and the straitened circumstances of the applicants, McBurney noted that there was no longer much concern with putting representatives of closely related iwi in the titles. Feasts to celebrate land sales became more like 'wakes' than the displays of mana common earlier.¹⁶⁴

Whirinaki and Heruiwi 4 were both heard in 1890. Harehare Atarea had been pressing for Heruiwi to be heard since 1885, when the survey was completed. We have no definite information on why it took so long for this block to be heard.¹⁶⁵ Whirinaki, too, was surveyed in 1887 but not heard until 1890. Ms Tulloch suspected that the timing of the hearings arose from the Government's increased interest in Te Urewera lands at the end of the decade.¹⁶⁶ As we saw in chapter 8, there was indeed a more concerted pressure on Tuhoe from 1889 onwards, focused on gold, access to the Rohe Potae, and – ultimately – the push for surveys, court

158. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–30

159. Tulloch, 'Heruiwi 1–4' (doc A1), pp 46–47

160. Tracy Tulloch, 'Whirinaki' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A9), pp 23–25

161. *Ibid*, p 25

162. *Ibid*, p 28

163. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 274

164. *Ibid*, pp 270–273

165. Tulloch, 'Heruiwi 1–4' (doc A1), pp 48–49

166. Tulloch, 'Whirinaki' (doc A9), p 34

titles, and land. In the face of Government pressure and Tuhoe resistance, Tulloch noted the significance of Atarea's speech to Premier Seddon at Galatea in 1894, in which he stressed Ngati Manawa's alliance with the Crown, and their opening of the country by means of surveys (and the court):

through the co-operation of the Ngatimanawa and Ngatiwhare, this country is now opened up . . . All the surveys in this country were effected by the Ngatimanawa in obedience to the behest of the Government against all opposition; and every survey we have carried through successfully. All this land you see here was handed over unconditionally to the Government. We always acted under the instructions of the Government.¹⁶⁷

In Heruiwi 4, Ngati Manawa claimed solely through their ancestor Tangiharuru, and tried to exclude the descendants of Apa. This shut out Ngati Hineuru, who had been admitted (as individuals) in Heruiwi 1–3. Thus, Ngati Hineuru made a counter-claim. They were not dragged unwillingly into court, however, as they had originally assumed that they were included in the Manawa claim, and so had cooperated with the survey.¹⁶⁸ Ngati Marakoko, a hapu related to both Ngati Manawa and Tuhoe, accompanied the survey party over the land claimed by them, and also did not contest the survey or hearing. The wider Tuhoe leadership had not known of the survey until after it was completed, when it was too late to try to prevent it. Ngati Marakoko had acted without their knowledge.¹⁶⁹ Thus, while Tuhoe were not willing to have surveys or hearings, they had little choice but to turn up or risk losing their customary rights to the land.

Whirinaki was also heard in 1890. Ngati Apa claimed the block exclusively, shutting out all of their very close kin. There were counter-claims from Ngati Manawa, Ngati Rangitihī, and Tuhoe. In Ms Tulloch's view, Tuhoe either had to participate in this hearing or risk losing their interests, hence their unwilling attendance at court. Ngati Rangitihī, too, seemed to have had no say in the survey or the bringing of this land to court.¹⁷⁰

The other block heard by the court in 1890 was the much smaller Tuararangaia block (8,656 acres). The first application for survey was filed in 1884 by Te Whaiti Paora, a chief of Ngati Hamua and Ngati Haka Patuheuheu, on behalf of Ngati Hamua, Warahoe, and Tuhoe. He did not, however, represent all the people in whose name he made the application. Charles Alma Baker surveyed the block in 1885, conducted over the land by Te Whaiti Paora and the young Patuheuheu chief, Mehaka Tokopounamu. As Peter Clayworth explained, it was soon evident

167. AJHR, 1895, G-1, p 65 (Tulloch, 'Whirinaki' (doc A9), p 34)

168. Tulloch, 'Heruiwi 1–4' (doc A1), p 47

169. *Ibid*, pp 47, 54–56. Ngati Marakoko are a hapu of Ngati Manawa, intermarried with Nga Potiki of Tuhoe. Their claim to land in the south of Heruiwi 4 was made jointly with Tuhoe, but on the basis of descent from Tangiharuru (Ngati Manawa) to the west, and from Tauheke (Nga Potiki) to the east. The court awarded Heruiwi 4c to the descendants of Tauheke.

170. Tulloch, 'Whirinaki' (doc A9), pp 27–28, 34

that the tribes had not known about this application. The survey was obstructed by Ngati Awa and Warahoe. Theodolites were broken and the party taken back to Te Teko. After some negotiation, Ngati Awa agreed to the survey and the party returned to the block, only to be stopped again by Tuhoe. This obstruction resulted in the contraction of the block (by moving the eastern line), but it was allowed to go ahead on the insistence of Ngati Haka Patuheuheu.¹⁷¹ Tuhoe, as Tamaikoha put it, still 'objected to the survey as a survey'; in other words, they still objected to it in principle.¹⁷²

Despite this objection, Tuhoe had no choice but to turn up in court or lose their interests. Tamaikoha, one of the leading opponents of the survey, gave evidence for Tuhoe at the hearing. Because of the way the system operated, Tuhoe were counted as one of three claimant tribes for the block, on the application of a chief who clearly had not represented them when he filed it. The counter-claimants were Ngati Pukeko and Ngati Awa. Some Warahoe supported Paora's claim, while others supported the Ngati Awa counter-claim.¹⁷³ It is not clear how many Ngati Haka Patuheuheu had originally supported the application. As we have seen, Mehaka Tokopounamu supported Te Whaiti Paora. Te Makarini Te Waru also ended up supporting the survey, when the young people got into trouble. He may have been instrumental in reducing its scope, telling the court: 'I confined myself to present boundaries because I know the antipathy of Tuhoe to surveys over their lands.'¹⁷⁴ In any case, there was no choice but to support the claim at hearing or lose the land to others. As Dr Clayworth pointed out, this hearing was a sequel to those of Matahina and Waiohau, and part of an ongoing contest between Tuhoe and Ngati Awa for control of the Rangitaiki lands.¹⁷⁵ To stay away was to forfeit that contest.

10.5.3.1.5 TOTAL BOYCOTT : THE NGATI WHARE CASE

In our inquiry, the Crown accepted that unwilling groups had to attend the court or risk losing their lands.¹⁷⁶ The group who perhaps were the most tenacious in their refusal to engage with the court were Ngati Whare, who made no claims or counter-claims in any of the blocks in which they had interests. By 1891, all of these blocks – Heruiwi 1–3, Kuhawaea, Heruiwi 4, and Whirinaki – had passed through the court.¹⁷⁷ Some people with Ngati Whare affiliations did appear in court, 'albeit not claiming as Ngati Whare.'¹⁷⁸ As a result, a few tribal members were put onto title lists as individuals – the law did not provide for them to represent the

171. Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), pp 48–49, 54–56, 58, 61

172. *Ibid*, p 49

173. *Ibid*, pp 48–78

174. *Ibid*, p 49; see also pp 54–56

175. *Ibid*, pp 51–52

176. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 10, 25

177. Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: A History' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A27), pp 87–92

178. Counsel for Ngati Whare, closing submissions (doc N16), p 48

majority of the tribe, who did not get on these lists.¹⁷⁹ Ngati Whare's non-attendance was described as a boycott by Peter McBurney.¹⁸⁰ Ngati Whare strictly upheld Te Whitu Tekau policies, refusing to make claims or counter-claims, or to apply for rehearings when title decisions became known. As a result, although more individuals got in than they had realised until researching their Treaty claims, and in two cases (Whirinaki and Kuhawaea) hapu were included in lists, Ngati Whare lost their customary rights in these lands.¹⁸¹

There is little doubt that they had had valid rights. Ngati Manawa and other witnesses said so at the time in the Native Land Court and the Urewera commission.¹⁸² In the court, for example, Ngati Manawa leaders had actually claimed Heruiwi 4 on behalf of Ngati Whare as well as Ngati Manawa.¹⁸³ In the second Urewera commission (1907), Harehare Atarea said:

In the days of our old men, Harehare, Tamoti, Te Mokena, Puritia, Kuratau, Te Wikiriwhi; Te Parata and Ngati Manawa and Ngati Whare. I saw these old men. Their word then was that Te Whaiti belonged to Ngati Manawa and Ngati Whare. This word of theirs applied to Kaingaroa, Whirinaki, Heruiwi and Kuhawaea.¹⁸⁴

Ngati Whare argued that the Crown must take responsibility for their losses, having set up a system by which those present in court could acquire absolute title to lands shared with people who were absent. The interests of those who did not or could not attend the court were not protected. Indeed, McBurney suggests that there was an element of deliberate 'ignoring' on the part of the court: 'The Court responded by ignoring those who refused to recognise it, which effectively abrogated their rights.'¹⁸⁵ Whether or not that is so, claimant counsel suggested that Ngati Whare's boycott of the court should not have been allowed to deprive them of their rights. Rather, the fault lay with the court's process, which was limited to the evidence (claimants and objectors) appearing before it.¹⁸⁶

The rights of Ngati Whare were discoverable upon inquiry, even if they had not turned up in court. Indeed, Heruiwi 4 was claimed in their name (as well as Ngati Manawa's). The problem was that little evidence was taken in court unless blocks were contested. A 'reasonable body' of evidence was heard for Whirinaki and Heruiwi 4, but:

179. Counsel for Ngati Whare, closing submissions (doc N16), pp 49–51

180. McBurney, brief of evidence (doc F7), p 24

181. Counsel for Ngati Whare, closing submissions (doc N16), pp 44–55, sch 1, p 141. Ngati Whare told us that Ngati Wharekohiwi were included in a list for Whirinaki and a group of Ngati Te Au were included in Kuhawaea, but were not distinguished as such within the lists of owners.

182. Counsel for Ngati Whare, closing submissions (doc N16), pp 49–51

183. Tulloch, 'Heruiwi 1–4' (doc A1), p 50; Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), pp 33–34, 90

184. Mair, minute book 2, 1907 (Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), p 34)

185. McBurney, brief of evidence (doc F7), p 24

186. Counsel for Ngati Whare, closing submissions (doc N16), p 52

Even then it does not appear that the Court ever tried to inquire beyond the evidence before it. While this was standard procedure for the Court, it was inadequate for Ngati Whare. The failure of the Crown to ensure that the Court operated in a truly inquisitorial capacity rather than simply addressing the evidence as submitted to it, particularly when there is knowledge of the opposition of certain groups in the area to the operation of the Court, is a failure of active protection.¹⁸⁷

The Crown did not address this claim directly in its closing submissions. Counsel did, however, point to the preliminary investigations of district officers and judges provided for under the 1873 Act, which were of a more inquisitorial nature than court hearings and were supposed to ensure that applications were bona fide. In particular, the district officers were supposed to identify iwi and hapu with interests in the land, for the information of the court.¹⁸⁸

In terms of the blocks at issue in the Ngati Whare claim, we note that the duty of judges to conduct preliminary inquiries was abolished in 1878. It had no relevance, therefore, to the hearing of Kuhawaea, Heruiwi 4, and Whirinaki.¹⁸⁹ Mr Hayes, in his evidence for the Crown, noted that its abolition was criticised at the time, because it did away with a safeguard to 'ensure that all parties having an interest in the land were able to be represented in Court'.¹⁹⁰ The judges, however, had refused to carry out this part of the Act anyway. We note their concern that it might be seen to compromise their impartiality.¹⁹¹

Similarly, the position of district officer was abolished by the time that Heruiwi 4 and Whirinaki came before the court.¹⁹² As the Crown pointed out, there is evidence that a district officer advised against the survey of Kuhawaea, due to the substantial opposition to it.¹⁹³ But there is no evidence of any information provided to the court as to customary rights in that block. Judgments were clearly reached in court on the basis of the evidence alone (or the out-of-court arrangements) presented to it. The Pouakani Tribunal observed that this was a well-known feature of the court in its early decades.¹⁹⁴

10.5.3.1.6 RUATOKI, 1891–94

By the time title was awarded for Tuararangaia in 1891, 267,541 acres of western lands had passed through the Native Land Court. This represented just under half (49.4 per cent) of the rim blocks. In this year, as we saw in chapter 8, the

187. Ibid

188. Crown counsel, closing submissions (doc N20), topics 8–12, p 26

189. Under section 6 of the Native Land Act Amendment Act 1878 (No 2), judges were no longer required to conduct a preliminary investigation, unless there was a 'particular or urgent' reason for doing so.

190. Hayes, 'Native Land Legislation Post-1865' (doc A125), p 95

191. Ibid, pp 20, 80–81, 87

192. The role of district officers was abolished when the Native Land Act 1873 was repealed in 1886.

193. Crown counsel, closing submissions (doc N20), topics 8–12, p 27

194. Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker's Ltd, 1993), p 241

Government tried to overcome Tuhoe resistance to surveys and the court by sending a major delegation, led by the Governor, to visit Te Urewera. Although the Governor and Native Minister were not permitted further than Ruatoki, a major split ensued within the Tuhoe leadership. Hitherto, their leaders had resisted surveys (where they found out about them in time) and had protested, but had largely turned up in court to defend claims to land that overlapped with the rohe of other iwi. The exception was Waimana, where Tamaikoha and Rakuraku had insisted on filing a claim, rather than risk losing this land to a claim from outsiders. Ruatoki, however, was core Tuhoe land in which they admitted no other claims. For the court to operate there was an unthinkable violation of their collective decision-making. Nonetheless, there had been applications to the court by Ngati Awa, Ngati Pukeko, and Ngai Tai, although Ngati Awa did not press for a survey, admitting to Resident Magistrate Bush that Ruatoki could only be surveyed by Tuhoe. The Crown's historian, Cecilia Edwards, noted that Tuhoe knew of and were worried about these applications. They played a part in triggering the Tuhoe applications of 1891 (see chapter 8).

As we have seen, a fraught period of intra-tribal conflict, obstruction of surveys, arrests, and imprisonment followed, as the Government tried something it had not really dared before in the case of contested surveys: it insisted on surveying in the teeth of any and all opposition. As a result, Ruatoki was heard by the court in 1894, bringing a further 21,450 acres under its individualised titles. This meant that 53.3 per cent of the rim blocks had now passed the court on this side of our inquiry district.

10.5.3.2 *The eastern lands*

On the eastern side of the Urewera inquiry district, a quarter of a million acres of land passed through the Native Land Court in 1889. This took the form of two blocks, Tahora 2 and Waipaoa.¹⁹⁵ Tahora 2 was a vast area of land, encompassing 213,350 acres. The rohe of the iwi of Te Urewera, Wairoa, Opotiki, and Turanga met and overlapped there to a very significant extent. By the time that it came to be surveyed (1887), it was already bounded by the confiscation line in the north and by Native Land Court surveyed blocks on its eastern and southern sides. Only the western boundary remained to be defined. Tribal districts known to their inhabitants as Te Wera, Te Houpapa, Te Waimaha, and Te Papuni were all contained within it.

To the south, Tahora 2 was bounded by the Waipaoa block, which had been surveyed by 1885. Waipaoa contained some 39,000 acres, east of Lake Waikaremoana and north of the Ruakituri and Taramarama blocks. Ngati Kahungunu, Ngati Ruapani, and Tuhoe all claimed customary rights and authority in parts of this land.

195. Tahora 1 was a small piece of land that never existed except in theory. The boundaries of Tahora 2 and Waipaoa are described in the Key Facts section.

10.5.3.2.1 THE SYSTEM OF PRE-TITLE DEALINGS BRINGS ABOUT APPLICATIONS TO THE COURT, 1879–87

Tahora 2 and Waipaoa were the subject of intermittent Crown attention from 1879 to 1888, but – unlike the case with some of the western lands – this did not result directly in the passing of the land through the court. The hearing of Tahora was brought about by the Crown's legitimising of a secret survey in 1888, and by an application from individuals later found to have no rights. This in turn triggered applications that brought Waipaoa before the court in the same year.

The eastern lands were subject to much less attention from Crown or settlers, and less pressure, than the western blocks. There were no attempts from settlers to get informal leases or to run sheep and cattle in these remote, rugged lands. As we discussed in chapter 7, the Crown's main focus in the east in the mid-1870s (in terms of our inquiry district) was the four southern blocks. Having effectively acquired this land in 1876, the Government seems to have intended to continue dealing with Ngati Kahungunu, pushing north into Waipaoa and Tahora 2. Brent Parker noted a proclamation in 1876, under the Immigration and Public Works Act 1871, in which the Crown notified its intention to negotiate for the purchase of Te Waimaha and Te Papuni lands.¹⁹⁶ The boundary markers indicate that these districts were contained in what later became the Tahora block.¹⁹⁷

Despite the 1876 proclamation, the Government does not appear to have pursued leases or purchases in the proclaimed lands until 1879. In that year, two Crown purchase officials negotiated offers to sell land in 'Te Wera' and 'Te Houpapa'. George Preece, based in Opotiki, negotiated with two Tuhoe and Whakatohea leaders, Rakuraku Rehua and Hira Te Popo. Colonel Thomas Porter, based in Gisborne, negotiated with a group of Turanga chiefs, led by Wi Pere. The two purchase deals were concluded on the same day, 25 June 1879, and seemed to cover much the same area of land (under two different block names).¹⁹⁸

According to Professor Binney, the Tuhoe offer was likely brought about by tribal competition for this land, and the knowledge that it was also being negotiated at Turanga with Wi Pere.¹⁹⁹ This may be so, although the two purchase agents were not working together, and Preece was much annoyed with the Turanga competition, calling their claim to sell Te Houpapa 'absurd'.²⁰⁰ He advised the Government that 'Natives of half a doz tribes will object to the boundaries.'²⁰¹

196. Brent Parker, 'Tahora No 2 Block' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L7), p 2. Mr Parker observed that Te Papuni was wrongly spelt as Te Papanui in the proclamation, but the boundary markers indicate that the district referred to was in the Tahora block.

197. Parker, 'Tahora No 2' (doc L7), p 2

198. Peter Boston and Steven Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 13–17

199. Binney, 'Encircled Lands, Part 2' (doc A15), pp 70–71

200. Ibid, p 71; Boston and Oliver, 'Tahora' (doc A22), pp 16–17

201. Kathryn Rose, 'Te Aitanga-a-Mahaki and Tahora 2: Extracts from Reports Written by Kathryn Rose for Te Aitanga-a-Mahaki Claims Committee', compiled 2002 (doc A77), p 5

For the Turanga peoples, this purchase came during a period in which they were trying to protect their lands by making strategic choices to control and limit transactions. Kathryn Rose explained that Te Houpapapa was believed to contain about 100,000 acres. Wi Pere, on behalf of Ngati Maru, Ngati Rua, Te Whanau a Kai, and Ngai Tapuae, offered the Crown about 20,000 acres, hoping to raise capital to pay for a survey and to develop the rest.²⁰² Inevitably, this would involve taking the land to the Native Land Court. As the Turanga Tribunal found, Wi Pere and other leaders hated the court and the ‘utter disempowerment’ that it stood for, but they had to participate: ‘They knew the Court was there and had to be engaged with. To turn one’s back on it risked losing jealously guarded rights to a competitor willing to file a claim. The Court was an evil but, for the time being anyway, an unavoidable evil.’²⁰³

Tuhoe opposition was even more ‘resounding’ than that of Turanga iwi, but Tuhoe were ‘equally trapped’.²⁰⁴ We have no concrete information about how much land was thought to be contained within the Tuhoe and Whakatohea offer of Te Wera, or how much of that land they actually intended to sell. Nor is there evidence of immediate opposition from other Tuhoe chiefs. It should be remembered that the Tuhoe collective will had been set aside just the year before, when Waimana and Waiohau had been taken through the court. Leading the offer of Te Wera in 1879 was the Waimana chief Rakuraku, with Tamaikoha joining him in accepting an advance payment. For the moment, it seemed that the will of these border chiefs had prevailed within Tuhoe. On 19 September, the Government paid £100 to these chiefs, as well as to Hira Te Popo of Whakatohea, Rakuraku’s brother Mihaera, Netana Rangiihu, and 19 others.²⁰⁵ At the beginning of the month, the Crown had also advanced £200 to Wi Pere (of the £1,000 he had requested). For the Turanga chiefs, the Government planned to pay a further £300 in advances. But the Tuhoe chiefs were told that they would get no more money until the land had been surveyed and brought before the court. Wi Pere would also get nothing above £500 until he had obtained court titles for Te Houpapapa.²⁰⁶ At this time, the Government was no longer spreading its tamana (advances) so widely, although still using them essentially as down payments for a court hearing as well as an eventual purchase. The system itself was abolished by the end of 1879 but its effects lingered. Where pre-title negotiations were under way, they were allowed to continue.

The fact that Crown agents were negotiating simultaneously with different groups for virtually the same land was soon exposed. Tuhoe and Whakatohea

202. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2 (doc A77), pp 4, 9; Kathryn Rose, summary of ‘Te Aitanga-a-Mahaki and Tahora 2: Extracts from Reports Written by Kathryn Rose for Te Aitanga-a-Mahaki Claims Committee’, 2004 (doc 112), p 1

203. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 424 (counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 11)

204. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 11

205. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 71

206. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 4; Binney, ‘Encircled Lands, Part 2’ (doc A15), p 71

leaders came straight to Gisborne to object to any survey of their lands as part of Te Houapapa, while Ngati Kahungunu protested as well.²⁰⁷ In his evidence for the Crown, Brent Parker accepted that these two purchase attempts resulted in a rush of rival applications for surveys and hearings.²⁰⁸ Groups had to protect their interests from each other (and from anyone who might accept Crown purchase offers or apply to have overlapping interests surveyed). This was a classic feature of the Native Land Court system. It had to be used because it was the only means of legal protection vis-à-vis the Crown and other tribes. In this case, however, the Government realised that it had provoked vociferous opposition from all the tribes in a large region. The head of land purchasing, Richard Gill, defended the Government's actions as necessary to get things started across as wide an area as possible, without having to arrange and survey smaller slices, leaving it for the court to decide the 'tribal awards' later.²⁰⁹

At first, Gill decided to back off from the purchases. The payment of advances was suspended and the local agents were advised that the Government would not try to start surveys.²¹⁰ 'Do not,' he instructed Porter, 'force on any more work than is absolutely necessary.'²¹¹ In October 1881, Porter sent in a new offer to sell Te Houapapa, and in December of that year the Government gazetted the block as under negotiation for purchase. This provoked a fresh application to survey Te Wera from Rakuraku. Preece persuaded Te Waru Tamatea, the upper Wairoa leader who had been exiled to Waiotaha in the eastern Bay of Plenty, to drop his objections to the purchase. Gill met with Rakuraku in early 1882 and obtained his agreement that two men – Paora Haupa and Aporo Matahuaka – should oversee the survey. Gill then went to Gisborne in March 1882 to see if he could obtain agreement to proceed with Te Houapapa.²¹²

Professor Binney commented that 'The right to initiate the survey had become the subject of competition. Rakuraku's application was intended to obstruct Wi Pere, as the latter acknowledged.'²¹³ Gill thought it was pointless to conduct a separate survey of Te Wera, which was actually included in Te Houapapa, but Wi Pere told him in March 1882 that nothing could be surveyed yet – 'the boundaries will be disputed by Te Uriwera and the survey stopped.'²¹⁴ Gill tried to insist that the survey of Te Houapapa go ahead, despite their objections, but left the meeting when the Turanga leaders could not agree. At the same time, also hanging over everyone's heads, there had been an application to survey Waimaha (which overlapped with Tuhoe's 'Te Wera' and Wi Pere's 'Te Houapapa') from Te Waru's people in exile at Opotiki: 'The right to survey Te Wera and Te Houapapa had become locked into

207. Ibid, p 4; pp 71–72

208. Parker, 'Tahora No 2' (doc 17), pp 5–6

209. Boston and Oliver, 'Tahora' (doc A22), p 17

210. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 5; Binney, 'Encircled Lands, Part 2' (doc A15), p 72

211. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 5

212. Boston and Oliver, 'Tahora' (doc A22), pp 18–19

213. Binney, 'Encircled Lands, Part 2' (doc A15), p 74

214. Ibid, p 73

a terrible contest of mana, on which neither Wi Pere nor Rakuraku nor Te Waru could obtain agreement.²¹⁵

One of the features of this kind of competition, where groups had to file applications to the court as the only way to protect their interests, was that it often had a domino effect and brought in new tribes and new lands. The Crown's proclamation of Te Houpapa as under negotiation in 1881 had a major impact on Ngati Kahungunu of Wairoa. Not only did they protest against any survey of their interests without their consent, they also responded with an application of their own to survey the Waipaoa block. In Cathy Marr's view, this move – spearheaded by the Reverend Tamihana Huata and Hapimana Tunupaura at a hui in 1882 – was the direct result of the 1881 proclamation, and of the various applications in which others appeared to claim their interests in Te Papuni.²¹⁶ Yet this move in its turn created pressure on other groups. A rival application for Waipaoa was filed by other Ngati Kahungunu hapu a month later.²¹⁷ At the same time, Huata and Tunupaura knew that they were bringing in the Waikareiti lands without the agreement of those who lived in that western part of the block. In 1883, Preece noted Huata's view that both Waipaoa and Waikareiti should be surveyed under the one application, and then divided later by the court if necessary.²¹⁸ The Waikaremoana/Waikareiti community affected by this proposed survey did not get involved by filing an application in their turn. Why not? In Tama Nikora's view, the history of the four southern blocks had had a profound impact on how far these people were able to defend their position in Waipaoa.²¹⁹ We note here that they stayed away from any and all involvement with the court over their Waikareiti lands for the next seven years.

The evidence of Cathy Marr, and also of Michael Belgrave and Grant Young, commented in detail on the factors that brought about the Waipaoa application. Essentially, they saw it as a combination of 'push' and 'pull'. While the court system offered opportunities on the one hand, there was no choice but to use it on the other – and with an extra push to put in a claim before the Crown transacted with others. Belgrave and Young cautioned against taking too negative a view of those who did make applications to the court. In the first place, there was an insurmountable pressure, in that the Native Land Court was the only way to secure a legal title for protection from other tribal claims. In Ms Marr's view, this was an especially powerful pressure in border regions such as Waipaoa and Tahora, where the court system was particularly damaging to the traditional (though not always peaceful) accommodation of a variety of overlapping interests. Also, the Kahungunu chiefs

215. Binney, 'Encircled Lands, Part 2' (doc A15), p 74

216. Cathy Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Century' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A52), p 231

217. *Ibid*, p 232

218. Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), p 13

219. Tama Nikora, 'Waikaremoana' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H25), pp 51–73

saw an advantage in being claimants rather than counter-claimants, and in controlling exactly which lands were surveyed and where boundaries were located. Ms Marr compared this approach to that of Tuhoe, and of the Ruapani who were aligned with Tuhoe, who resisted the court rather than trying to use it, and who lost interests later as a result. Ultimately, however, Belgrave, Deason, and Young agreed with Marr that the filing of the first application for Waipaoa was the result of the Crown's attempts to purchase land in neighbouring Tahora, and the court applications from other tribes that that had generated.²²⁰

The Ngati Kahungunu application in October 1882 for a survey of Waipaoa was accepted immediately by the Government. In the meantime, other Tuhoe leaders had finally intervened in the three-way contest between Rakuraku, Wi Pere, and Te Waru over the Tahora lands. Kereru Te Pukenui informed Porter that 'he had banned all surveying within his borders up to Maungapohatu.'²²¹ Porter reported this prohibition to the Native Department. In June 1882, Rakuraku said that he was still willing to have Te Wera surveyed, but that 'te urewera' were objecting so it could not be done.²²² Tama Nikora commented:

Rakuraku appeared to pursue the survey of Te Wera because he feared that Wi Pere might seize control of the land if he did not. Nonetheless, the senior chiefs of Tuhoe such as Te Wakaunua and Kereru Te Pukenui still objected to surveying either Te Wera or Te Houpapapa.²²³

In the evidence of Professor Binney, an impasse existed by June 1882. The Urewera leadership would not allow the surveying of Te Wera to be carried out by others, whether from Turanga or from Wairoa. At the same time, however, Tuhoe themselves did not want it surveyed from their own side, despite Rakuraku's initiative.²²⁴ In these circumstances, Wi Pere later claimed that an agreement was negotiated between Te Urewera and Turanga leaders, not to let the survey happen until the Government had reformed the native land laws.²²⁵ He told the court in 1889 that 'In 1882 it was arranged between us & Urewera if survey took place we should arrange particulars of survey. We came to an arrangement that until new laws passed it should remain unsurveyed.'²²⁶

Professor Binney was sceptical about the negotiation of such an agreement in 1882. She noted that it did not prevent a further Turanga application to survey Te

220. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 226–233; Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: An Overview Report of Issues Relating to Ngati Kahungunu' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A122), pp 7–10

221. Binney, 'Encircled Lands, Part 2' (doc A15), p 74

222. Ibid; Rakuraku to Te Kira (Gibbs), 19 June 1882; Bush to Gill, file note, 19 June 1882 (Brent Parker, comp, supporting papers to 'Tahora No 2', various dates (doc L7(a)), pp 86–87)

223. Nikora, 'Waikaremoana' (doc H25), p 52

224. Binney, 'Encircled Lands, Part 2' (doc A15), p 74

225. Ibid, pp 74–75; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18

226. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18

Houpapa in 1883.²²⁷ The new purchase agent at Gisborne, John Brooking, claimed that this application arose from a meeting of all parties interested in the block. Boston and Oliver doubt this assessment, and Ms Rose's evidence is that this new application was led by Te Whanau a Kai rangatira Pimia Aata and Peka Kerekere. Wi Pere does not seem to have been involved.²²⁸ In any case, the new Te Houpapa request brought an immediate and strong protest from Ngati Kahungunu, and the Government decided not to try to proceed with a survey.²²⁹

From 1883 to 1888, neither the Government nor the tribal leaders took any further action over the many intersecting blocks that had been claimed in the Tahora lands, apart from a brief flurry of activity in 1885. Whakatohea applied for a survey of Te Wera, Te Tahora, and Te Kaharoa in that year. The chiefs and a significant number of others signed the application for hapu including Ngati Rua, Ngai Tama, Ngati Ira, Te Upokorehe, Ngati Patu, and Ngati Ngahere. In response, Tuhoe chiefs applied for a hearing of Te Kaharoa, which appears to have been described as land in the northern part of the Tahora block. This claim was registered but it could not be heard for lack of a survey.²³⁰ The Tuhoe chiefs seem to have been satisfied, as they had placed their claim on record but did not want a survey or court title.

The Government, on the other hand, took no action at all over the Tahora lands. According to Assistant Surveyor-General Stephenson Percy Smith, its long-term policy was to wait until the tribes had come to an agreement before trying to start a survey.²³¹ While the Government waited, its advances constituted – in the words of Professor Binney – a permanent lien on the land.²³² Focusing on the period from 1879 to 1883, Rose and Binney agreed that the Crown had put pressure on Te Urewera and Turanga leaders to get these lands surveyed and into the court.²³³ Focusing on the longer period from 1879 to 1888, Parker concluded rather that the Crown was not pushing at all to take its advances and purchases forward. For him, the significance of these events was that all the various tribes had tried to take land in Tahora to the Native Land Court, long before Baker's survey.²³⁴

In the meantime, the survey of Waipaoa had taken place between 1883 and 1885. There had been some delays. The surveyor accused Ngati Kahungunu of obstruction. The chiefs responded that they had objected to his trying to survey the Crown's claim (the Matakuhia block) first, when its size could not possibly be

227. Binney, 'Encircled Lands, Part 2' (doc A15), p 75

228. Boston and Oliver, 'Tahora' (doc A22), p 22; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 6–7

229. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 7. This decision was also taken because there was no surveyor available, but the primary reason was the (by then) years' worth of opposition to surveying this land from all quarters.

230. Parker, 'Tahora No 2' (doc L7), pp 5–6

231. Binney, 'Encircled Lands, Part 2' (doc A15), p 79

232. *Ibid*, p 71

233. *Ibid*, pp 71–78; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 4–8

234. Parker, 'Tahora No 2' (doc L7), pp 6, 18

known until the survey was completed (and its cost known).²³⁵ After the completion of the survey in 1885, there was no pressure to bring this land before the court. The Crown was not trying to buy it, and there was no private interest in it. While the Crown wanted to cut out its survey block (Matakuhia), it was content to wait while interest accumulated on the survey debt, increasing the amount of land that it could claim later. As will be recalled, Ngati Kahungunu leaders had applied for this survey in October 1882, in response to the Government's gazetting of its intention to purchase overlapping lands (and on the basis of court applications from other tribes). As Marr noted, the October initiative came from inland hapu, and it resulted in a rival Ngati Kahungunu application for hearing in November 1882. This second application was withdrawn in 1884 (for reasons unknown). This meant that there were no extant applications for hearing. The Waikaremoana/Waikareiti people had not put in a claim, the November 1882 claim had been withdrawn, and the original application had only been for a survey, not for a hearing. The leaders of all groups seem to have been content to leave matters in this state for the next few years, since the Crown made no move to advance its purchase of land in Te Papuni district. It was not until 1888 that fresh court action over Tahora triggered new applications for Waipaoa.²³⁶ We will return to this development below.

10.5.3.2.2 THE 'SECRET SURVEY' OF TAHORA 2

In the mid- to late 1880s, the Government was interested in pursuing its purchase of Te Wera and Te Houpapa, but could not see a way forward. In 1887, Charles Alma Baker began a secret survey of both of these purchase areas (and of the wider, 213,000-acre region eventually called Tahora 2). We need to consider the circumstances of this survey in some detail, as it was a matter of great grievance to the claimants in our inquiry, and the subject of many specific allegations of Treaty breach. Baker himself saw the survey as intimately connected with the Government's desire to carry its purchases forward and get the land into court. By 1887, he had already embroiled the Government in strife over the Oamaru block, which was on the eastern border of Tahora 2. Baker had received approval to survey 15,000 acres for a set fee in 1885. He had, however, in the course of the survey managed to expand it first to 75,000 acres, and then to 100,000 acres, at a vastly greater price. This was done in the face of significant Maori opposition. Was Baker punished for this? On the contrary, the Government decided to advance him half his costs in May 1887, and to have the land brought quickly into the court so that the full cost of the survey could be recovered.²³⁷ T W Lewis, the Under-Secretary

235. Stevens, 'Waipaoa' (doc A51), pp 10–15. As we shall see in section 10.8, the chiefs had signed a (later disputed) agreement that survey costs would be paid in land. The name attached to the forfeited land was Matakuhia.

236. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 229–241

237. Binney, 'Encircled Lands, Part 2' (doc A15), pp 69–70, 77–78

for the Native Department, urged his Minister that this would be a ‘good bargain for the Govt.’²³⁸ These lessons from Oamaru were applied directly to Tahora 2.

Baker first tried to get Government approval for a survey of the Tahora lands in January 1887. He asked Percy Smith, the Assistant Surveyor-General, whether: ‘the adjoining block “Te Wera” which is under negotiation for purchase, can be done at the same time, it would of course be a saving of expense if both were done together. Te Wera is very uncertain as to area.’²³⁹

Baker was influenced by the point that the Government had wanted to purchase this land but had been unable to get it surveyed.²⁴⁰ He said so himself, but with the added gloss that the Native Land Purchase Department²⁴¹ had secretly given him the go ahead: ‘He says he was lead [sic] to believe that Govt would approve of the survey being completed, by one of the officers of the Land Purchase Dept. in Wellington, if it could be done without any Native difficulty, on account of the Govt advances on Te Wera.’²⁴² Percy Smith, however, was adamant that he had given a very different steer when Baker tried to get approval a second time in November 1887:

[Baker] proposed to do the Tahora or Wera Block at the same time [as finishing Oamaru] in the interests of the Opotiki claimants. I told him he should not attempt this as there were difficulties . . . and that until he had the proper statutory authority, he could not obtain any security for his work. He went away to finish Oamaru, and the next thing I hear is that he has finished the Tahora survey as well . . .²⁴³

The key point is that Baker’s experience with Oamaru had turned out well, because the Government – as he knew – wanted to get that land into court. Ultimately, the same was to prove true for Tahora 2. All the same, counsel for Te Whanau a Kai agreed with the Crown’s submission that it was not responsible for Baker having conducted a secret survey.²⁴⁴

The facts of the ‘secret survey’ can be recited briefly. Apart from Baker’s own approaches to the Government in January and November 1887, there had been a telegram requesting it in April 1887 from Tauha Nikora. This young man had originally applied for the Oamaru survey as well. He was joined in this new application by his sister Maria, who was Baker’s de facto wife. The third applicant was

238. Lewis to Native Minister, 27 May 1887 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 77)

239. Percy Smith to Surveyor-General, 17 January 1887 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 77)

240. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 70

241. In 1879, the land purchasing branch of the Native Department was made a separate department, called the Native Land Purchase Department. Its under-secretary was Richard Gill. The Native Department, however, remained the primary influence on Government policy, with T W Lewis as its under-secretary. In 1885, Native Minister Ballance brought the land purchasing operations back into the Native Department.

242. Percy Smith to Surveyor-General, 22 February 1888 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 79)

243. Ibid

244. Counsel for Te Whanau a Kai, submissions by way of reply, July 2005 (doc N27), p 9

called Te Hautakuru, and these young people claimed on behalf of a Whakatohea hapu, Ngati Patu.²⁴⁵ Professor Binney suggested that the request was clearly the work of Baker, with the young people his 'instruments in the whole affair'.²⁴⁶ Be that as it may, the Government did not grant permission for the survey, although, as we have seen, Baker later claimed to have had a secret nod from land purchase officials. While supposedly completing the survey of Oamaru (which was part of the eastern boundary of Tahora 2), Baker proceeded to survey the western boundary line of Tahora. From the evidence of Brent Parker, all that is known about the survey is that 10 observations and measurements were made, starting in December 1887 and finishing in March 1888. There is no definite evidence as to whether any lines were actually cut, although Baker himself said later that he had not completed the work.²⁴⁷

Even before Baker had started his secret survey, word had got out about his intentions, leading to protests from the east coast. The Minister of Lands assured James Carroll in December 1887 that a surveyor was 'in the locality', but it was to complete a survey of Oamaru.²⁴⁸ In February 1888, while the survey was under way, Hetaraka Te Wakaunua and Numia Kereru wrote to the Native Minister: 'This is to inform you of a "ruuri tahae" (secret survey) which has been made through our land at Maungapohatu. The person who is doing it is Baker. We object to it, stop it. Do you therefore let us know the person who applied for it, the persons or tribe.'²⁴⁹

Although 'ruuri tahae' was translated as 'secret survey', we note that it literally means a 'thieving' or 'stealing' survey. As we shall see, this was a prophetic description of Baker's work. By the time the Native Minister replied to this letter, the survey was already a fait accompli. A plan existed, and Baker was in communication with both the Native Department and Percy Smith, trying to get it certified. In March, the Surveyor-General, McKerrow, concerned that the Native Minister had misled Wi Pere and others in his belief that no survey was going on, decided that the whole matter had to be put in the hands of the Native Department:

We cannot acknowledge Mr Alma Baker's survey until we have the authority of the Native Dept. His undertaking the survey, notwithstanding your [Smith's] warning to the contrary, seems a very irregular proceeding, and has led the Dept to put words in the Native Minister's mouth, which, to Wi Pere must appear false.²⁵⁰

From this point onwards, the key influence on policy was T W Lewis, the Under-Secretary for the Native Department. On 7 April, he advised his Minister that the

245. Binney, 'Encircled Lands, Part 2' (doc A15), pp 77–78

246. *Ibid*, p 78

247. Counsel for Te Whanau a Kai, closing submissions, 30 May 2005 (doc N5), p 12; Parker, 'Tahora No 2' (doc L7), pp 9–10, 16, 18. Baker told Lewis in April 1888 that the survey was not finished, and that some lines still needed to be cut.

248. Binney, 'Encircled Lands, Part 2' (doc A15), p 78

249. Hetaraka Te Wakaunua and Numia Kereru to Native Minister, 24 February 1888 (Binney, 'Encircled Lands, Part 2' (doc A15), p 69)

250. Surveyor-General, 16 March 1888 (Binney, 'Encircled Lands, Part 2' (doc A15), p 80)

'only way I see out of the difficulty is for Mr Baker to apply "de novo" – go on the ground & repeat his survey'.²⁵¹ He had already told Baker to offer this solution to Percy Smith and, if Smith agreed, then Lewis thought that Baker's survey should ('in justice to the native claimants at Opotiki') be approved.²⁵² Mitchelson, however, rejected this advice at first. He minuted: 'Mr Baker had no right to undertake the survey without first obtaining permission to do so and as He was warned by the Survey Department. He did the work at his own risk and must now take the consequences'.²⁵³

Nonetheless, the Minister agreed to Lewis' solution later in the month. When he did so, on 25 April 1888, Mitchelson added an extra proviso. Baker had first to obtain the consent of all interested Maori in writing, after which the survey could receive official authorisation 'upon the understanding that the lines are gone over again and the survey properly completed'.²⁵⁴

In June 1888, the *Kahiti* advertised a hearing of Tauha Nikora's claim for Tahora 2.²⁵⁵ Also advertised for hearing was the old 1885 Tuhoë claim for Te Kaharoa, which was understood to be part of the same lands.²⁵⁶ In response, James Carroll forwarded a Turanga protest to the Native Department. Then, at the August hearing of these two claims, Judge Wilson sent a telegram to the Native Department:

The natives here say that under these names an immense country has been secretly surveyed by a Mr Baker at the instance of a young Opotiki native named Tauwha Nikora and I fear of his friends [ie Baker's friends] . . . this is Uriwera Country to a great extent & Uriwera natives here are excited at alleged interference with the lands they claim. At the urgent request of the Uriwera I have settled this matter so far as this session at Opotiki is concerned by dismissing these cases for want of a plan.²⁵⁷

It appeared that Baker had still not obtained the consent of anyone other than his original supporters. Even while the hearing was under way, however, a new application had been received from Tauha Nikora for approval to survey Tahora 2. Judge Wilson discovered this on 9 August. He sent a second telegram, noting the absurdity of applying for authorisation of a survey that had already been completed. In his view, Baker had broken the law and should receive a strong censure from the Government – perhaps the cancellation of his certification as a surveyor, a step which would have prevented Baker from resubmitting his Tahora survey at a later date.²⁵⁸ Counsel for Te Aitanga a Mahaki pointed to the judge's view that

251. Lewis to Native Minister, 7 April 1888 (Binney, 'Encircled Lands, Part 2' (doc A15), p 79)

252. Parker, 'Tahora No 2' (doc L7), p 12

253. Mitchelson, minute, 7 April 1888 (Binney, 'Encircled Lands, Part 2' (doc A15), p 69)

254. Parker, 'Tahora No 2' (doc L7), pp 12–13

255. Binney, 'Encircled Lands, Part 2' (doc A15), pp 80–81

256. Parker, 'Tahora No 2' (doc L7), pp 18, 21

257. Wilson to Lewis, telegram, 8 August 1888 (Binney, 'Encircled Lands, Part 2' (doc A15), p 81)

258. Binney, 'Encircled Lands, Part 2' (doc A15), p 81; Parker, 'Tahora No 2' (doc L7), p 14; Opotiki Native Land Court, minute book 3, 9 August 1888, fol 247

Sections 79 and 80 of the Native Land Court Act 1886

79. Plan not to be used by Court unless 'approved'—The Court shall not, except on application of the Governor as aforesaid, receive in evidence or use or accept any plan of land the subject of any proceeding or order, unless such plan shall be certified by the Surveyor-General, or some officer authorized by him for the purpose, to be 'approved'.

80. By Surveyor-General. His approval may be refused—The Surveyor-General, or other such officer as aforesaid may refuse to certify a plan to be 'approved' if—

- (a) Such plan, and any survey on which it is based, be not the work of a surveyor who holds a certificate of competency from the Surveyor-General;
- (b) If such surveyor before entering upon such survey had not the authority of the Surveyor-General in writing for making such a survey.

this kind of punishment was the only possible deterrent (and therefore the only protection for Maori).²⁵⁹ The judge stated in open court:

The punishment for the surveyor I cannot define, perhaps the cancellation of his license. This is the protection that the law gives to the natives. Surveys of this nature might be made in any part of New Zealand if permitted and spurious claims be set up thereas to the great anxiety and annoyance of the owners of the land. These transactions cannot be made undetected. Blocks belonging to important tribes may be interfered with in this manner by any younger man ~~like Tauha~~ & I will see that the surveyor's conduct does not pass unnoticed . . . This survey has been made and the consent applied for [afterwards]. An infraction of the law has been taken place. The land in question belongs to several tribes and no single man ~~could~~ ought to have made the application for the survey. Section 80 subsection B of the law has been disregarded. [Deletions in original.]²⁶⁰

In the above quotation, certain words were crossed out in the Opotiki minute book. As we see it, the replacement of 'no single man could have made the application for the survey' with 'no single man ought to have made the application for the survey' is very telling about the state of the law.

259. Counsel for Te Aitanga a Mahaki, submissions by way of reply (doc N22), pp 7–8; see also Boston and Oliver, 'Tahora' (doc A22), pp 40–41

260. Opotiki Native Land Court, minute book 3, 9 August 1888, fol 247

Nikora's August application was the second step in the process by which the survey was approved. The first step had been back in April 1888 when, instead of leaving Baker to take the consequences as initially planned, the Minister had accepted Lewis' advice and instructed the surveyor to obtain consent and go over his lines again. Now, a fresh application for a survey had been filed in August. Again, Lewis' advice was crucial.

In response to the new application, the Assistant Surveyor-General, Percy Smith, sent a memorandum to McKerrow. In it, he noted that there had been applications for hearing from Ngati Ira, Ngati Patu, and Te Upokorehe, and also 'a letter from the Whakatohea & Urewera saying they wish the map to be authorised'. A telegram to the opposite effect had come to him from Rakuraku and others, also purporting to be on behalf of 'the Whakatohea & Urewera'. His conclusion: 'there is a good deal of division amongst the people'. Smith then noted that the 'East Coast people' also had not (and would not have) supported the application. He told his superior: 'Perhaps the Native Department would advise, under these conflicting Circumstances.'²⁶¹

According to Crown counsel, based on Parker's analysis of this memorandum in particular, there was sufficient evidence of consent to justify authorising the survey. The Crown 'acknowledge[d] that the decision to authorise was made in the face of considerable opposition.'²⁶² But a 'balancing exercise' was carried out: 'What can be said is that the government balanced the level of consent against the level of dissent, concluding that there was sufficient consent to authorise the survey.'²⁶³ Claimant counsel, on the other hand, submitted that evidence of opposition to the survey was 'universal', based in part on the many protests received before this application (and during the August hearing at the very time that it was received), and also long after the application was authorised.²⁶⁴

On Smith's advice, the matter was referred to the Native Department. In Professor Binney's evidence, what was uppermost in officials' minds was to get access to the land.²⁶⁵ This is supported in the documents supplied by Mr Parker.²⁶⁶ On 18 August, Lewis tackled the question of whether Baker should be punished. In doing so, he probably had in mind the Surveyor-General's discretion to reject a plan if the surveyor was not certified. Lewis asked Mitchelson if he wanted to act on Judge Wilson's suggestion of punishing Baker (by revoking his certification). The under-secretary advised that Baker had already been 'called to account for his unauthorised survey & has offered an explanation – I do not think it necessary

261. Percy Smith to Surveyor-General, [18] August 1888 (Parker, supporting papers to 'Tahora No 2 Block' (doc L7(a)), p 233)

262. Crown counsel, closing submissions (doc N20), topics 8–12, p 49

263. *Ibid.*, pp 58–59

264. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 15–17; counsel for Te Aitanga a Mahaki, submissions by way of reply (doc N22), pp 5–6; see also Binney, 'Encircled Lands, Part 2' (doc A15), p 88

265. Binney, 'Encircled Lands, Part 2' (doc A15), p 83

266. Parker, supporting papers to 'Tahora No 2 Block' (doc L7(a))

The Role of Native District Committees in Dealing with the Tahora 2 Survey Application

In 1883, the Government had surrendered to intense Maori pressure and created a system of district committees, designed in theory to provide for Maori input into court decisions. (In reality, as the Native Land Laws commission found in 1891, the committee system was a 'hollow shell' and a 'mockery'.¹) During the hearing of Tahora survey costs in 1889, the court's assessor, Nikorima Poutotara, said that he had 'form[ed] an opinion that this Survey was undertaken without reference to Native committee. I also take into consideration that the Gov decided matters should be referred to the Native committee.' Baker replied that he was 'informed in Native Office that the surveys were referred to Native committees as merely a matter of form'.²

Tahora 2 was a large region in which tribal districts (and therefore district committees) intersected. As we discussed in chapter 8, Tuhoe were not properly represented on a district committee, and had tried to get the Government to recognise their own committee in 1888 without success. The evidence as to whether the August application was referred to any of the relevant committees is mixed. It appears from an 1889 petition, and from what was said in Court, that Baker may have tried (and failed) to get the Opotiki district committee to approve his application in August 1888.³ The evidence is inconclusive. In any case, any decision from the committee was not binding on the Crown. This lack of true Maori power and representation in decision-making was a fatal weakness in the native land laws.

1. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 340

2. Opotiki Native Land Court, minute book 6, 12 April 1889, fols 10–11

3. Tiaki Paniwhi and others to Native Minister, 28 January 1889 (Brent Parker, comp, supporting papers to 'Tahora No 2', various dates (doc L7(a)), pp 213–214)

to proceed further in the direction of censure or punishment for his offence.^{3,267} Mitchelson minuted this as 'Seen'.

Then, on 20 August, Lewis wrote to the Native Minister:

Mr Baker's unauthorised survey of Tahora has very much complicated matters. Had the work not been done I should have recommended that the Survey be authorised & the land brought before Court in the ordinary way. As it is I think it would be

267. Lewis to Native Minister, 18 August 1888 (Parker, supporting papers to 'Tahora No 2 Block' (doc L7(a)), p 246)

desirable to consult Mr Carroll with a view to the removal of the obstruction of the EC natives. *It would of course be very desirable to have the title to this large block determined.* [Emphasis added.]²⁶⁸

Mitchelson minuted 'Accordingly' on this memorandum. On 27 August, Lewis told the chief judge that the unauthorised survey was a 'difficulty . . . to get rid of'.²⁶⁹ Four days later, on 31 August, he gave his most crucial piece of advice to the Minister: 'I think the best way of dealing with this matter is for Mr Smith to authorise the Survey'.²⁷⁰ Mitchelson agreed, and the Surveyor-General was notified. On 4 September, once 'clearance' had come from the Native Department, the Surveyor-General formally authorised Baker to survey Tahora 2.²⁷¹

This was a crucial decision. We agree with the submission of counsel for Te Whanau a Kai that 'a number of highly-placed government officials colluded to pull off what might be called a "swifty" towards the end of 1888 in an effort to drape a cloak of legality over Baker's survey'.²⁷² The September authorisation of the survey was the first key step in draping this cloak of legality over it.

What needs to be noted, however, is that the Government knew the terms of its April instructions to Baker had not been fulfilled. In August 1888, the Minister requested that the survey be authorised, but that his original terms still be insisted upon. The full text of Lewis' advice, which the Minister minuted as 'approved', was: 'I think the best way of dealing with this matter will be for Mr Smith to authorise the Survey in terms of your memo of the 25th April last on SG 7189/370 & that Mr Carroll is informed so that he can notify the East Coast natives who are interested.'²⁷³ The Minister's April 'memo', to which Lewis referred, had stated:

Mr Baker to be informed that the authority can only be given upon his receiving from the natives their consent and forwarding the same to the Assistant Surveyor General and if such is in proper form, authority can be given upon the understanding that the lines are gone over again and the survey properly completed.²⁷⁴

As Mr Parker noted, the likeliest explanation of the three-month gap between the authorisation (4 September) and the certification of the already-existing plan (26 November) was that time was allowed for Baker to fulfil these conditions.²⁷⁵

268. Lewis to Native Minister, 20 August 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 234)

269. Binney, 'Encircled Lands, Part 2' (doc A15), p 83

270. Lewis to Native Minister, 31 August 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 229)

271. Binney, 'Encircled Lands, Part 2' (doc A15), p 84

272. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 21

273. Lewis to Native Minister, 31 August 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 229)

274. Mitchelson, minute, 25 April 1888, on Baker to Smith, 18 April 1888 (Parker, 'Tahora No 2' (doc L7), pp 12–13)

275. Parker, 'Tahora No 2' (doc L7), pp 16–17

Mitchelson appears to have stuck by his conditions. On 1 December, in response to the advertising of Tahora 2 for hearing, James Carroll sent an urgent telegram to Mitchelson: 'did you give authority to Baker's survey – you promised not until matters were cleared up.'²⁷⁶ The Minister replied on 3 December:

The authority for the Survey of Tahora No 2 was approved by me on condition that Mr Baker received from the Natives their consent and forwarded the same to Assistant Surveyor General. That Lines should be gone over again and Survey properly completed. This was communicated to you in Wellington.²⁷⁷

Eight days before the Minister sent this response, however, the Surveyor-General had certified Baker's plan for Tahora 2 on 26 November 1888. Under the Native Land Court Act 1886, this meant that the case could now proceed to court, and that the owners determined by the court would have to pay for the survey.

In Mr Parker's evidence, there is no way of knowing whether Baker met the second of the Minister's stipulations – that the lines should be 'gone over again.'²⁷⁸ Counsel for Te Whanau a Kai pointed out that Baker's official work book for Tahora ended in March 1888. It was unlikely, in counsel's view, that Baker would have done anything extra – or, indeed, could have done so without being driven off the land.²⁷⁹ This point cannot be determined conclusively.

There is overwhelming evidence that Mitchelson's first requirement – that Maori should consent – had not been met. As well as protests before the scheduled hearing (which had been set down for December), the hearing itself was dominated by objections to the survey. On the opening day, 'speaker after speaker challenged the legitimacy of the survey.'²⁸⁰ A petition objecting to it was read out, carrying 528 signatures on behalf of hapu from Te Urewera, Turanga, and Ngati Kahungunu. All the leading chiefs of the many different hapu whose land had been forced into court agreed that the survey should never have taken place and that the hearing should not proceed. The hearing was adjourned (to allow Turanga people the opportunity to attend), and the leaders of all the main tribal groups took advantage of this hiatus to send more petitions, objecting to the survey and the title investigation.²⁸¹

Professor Binney commented: 'The evidence of universal opposition from senior tribal leaders to this hearing was overwhelming, if the minister chose to listen. But he did not.'²⁸² Under section 16 of the Native Land Court Act 1886, the Governor had the power to stop the court at any stage of its process (on the advice

276. Carroll to Native Minister, 1 December 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 224)

277. Mitchelson to Carroll, 3 December 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 223)

278. Parker, 'Tahora No 2' (doc L7), pp 16–17

279. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 24

280. Binney, 'Encircled Lands, Part 2' (doc A15), p 87

281. *Ibid*, pp 87–88

282. *Ibid*, pp 88–89

The Governor's Power to Stop the Court

Section 16 of the Native Land Court Act 1886 reads:

16. Governor may stay proceedings by notice—It shall be lawful for the Governor before the commencement or at any stage of a proceeding under this Act, by notice in writing or by telegram to the Chief Judge or a presiding Judge, to declare that such proceeding shall not be proceeded with; and upon the receipt of such notice the jurisdiction of the Court in respect of such proceeding shall cease.

Any such notice may be revoked by the Governor by writing, and thereon the jurisdiction of the Court shall revive.

No restrictions were placed on the Governor's exercise of this power.

of his Ministers). The Native Minister could have intervened if he chose. We note that Mitchelson had failed to ensure that his own condition of Maori consent was met before the survey was certified, he had ignored the court's strongly expressed view that Baker should be punished, and now he failed to intervene and prevent the hearing when statutory power existed to do so. It was a serious catalogue of failures.

When the hearing resumed in February 1889, Rakuraku said: 'We are at a loss to understand how in reference to application of two or three persons as against the voice of a large body of people, the Court can't take into consideration the application of the people.'²⁸³ Rakuraku added: 'it is our fear in the event of our wishes not being complied with some disturbance of a serious nature might arise.'²⁸⁴

The court had done its best and was now resigned:

if a wrong has been done it has not been done by us, and they must seek their remedy elsewhere. We can confine ourselves to our own duties only. If a Surveyed plan is produced the law requires us to proceed with case and give decision. Outside that we should go outside our province to comment upon.²⁸⁵

As we see it, the court would only have discretion not to proceed if the claimants withdrew their claim – something which Tauha Nikora and his co-applicants refused to do.²⁸⁶ Thus, given the presence of a certified plan, the title investigation

283. Opotiki Native Land Court, minute book 4, 6 February 1889, fol 247 (Boston and Oliver, 'Tahora' (doc A22), p 47)

284. Ibid

285. Opotiki Native Land Court, minute book 6, 12 April 1889, fol 9 (Binney, 'Encircled Lands, Part 2' (doc A15), p 97)

286. Parker, 'Tahora No 2' (doc L7), pp 25–26

had to proceed. The key factors which forced the hearing upon all these unwilling tribes were the secret survey, the Government's conditional agreement to the survey in April 1888, the Surveyor-General's authorisation of the survey in August 1888, his certification of the plan in November of that year, and the Minister's failure to ensure that his conditions were met or take appropriate action when they were not.

Could the Surveyor-General have exercised his discretion not to certify the plan? Section 80 of the Native Land Court Act 1886 permitted the Surveyor-General to reject plans in two circumstances: the surveyor did not have a certificate of competency; or the surveyor 'before entering upon such survey had not the authority of the Surveyor-General in writing for making such a survey'.²⁸⁷ We agree with counsel for Te Whanau a Kai that the Surveyor-General could have refused to certify the plan under section 80, but did not do so because the Government had a strong desire to see the land brought before the court.²⁸⁸ Further, because authorisation had been given retrospectively in September, on conditions that had still not been met by November, it is our view that there was a positive duty on the Surveyor-General to have withheld his certification. We also agree with counsel for Te Aitanga a Mahaki that the Native Minister, having imposed conditions, ought to have inquired as to whether they had been met.²⁸⁹ Indeed, no inquiry was necessary to demonstrate that consent had not been obtained. While the Crown submitted that it was not necessary to get everyone's consent, this was not the condition laid down at the time, and it is difficult to see that anyone's agreement had been obtained, other than that of the individuals from Ngati Patu who had requested the survey in the first place. Underlying all its actions, the Government's ultimate goal was to see the hearing take place. As TW Lewis observed in August 1888, endorsed by the Native Minister: 'It would of course be very desirable to have the title to this large block determined.'²⁹⁰ For this reason, the survey was approved against almost universal opposition.

10.5.3.2.3 TAHORA 2 AND WAIPAEOA COME BEFORE THE COURT

In February 1889, the substantive hearing of claims to Tahora 2 took place in the Native Land Court. The claimants were Tauha Nikora, Te Hautakuru, and others claiming to speak for Ngati Patu, a hapu of Whakatohea. There were counter-claims from all the major tribal groups in the region. The claimants were found to have no interests in the block at all. The counter-claimants, having failed in their united attempt to prevent the land from being heard, had no choice but to accept the title investigation and its creation of lists of owners with individual, transferable interests. Wi Pere told the court that in 1882, the Tuhoe and Turanga chiefs 'came to an arrangement that until new laws passed it should remain unsurveyed.

287. Native Land Court Act 1886, s80

288. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 24–26

289. Counsel for Te Aitanga a Mahaki, submissions by way of reply (doc N22), pp 6, 12

290. Lewis to Native Minister, 20 August 1888 (Parker, supporting papers to 'Tahora No 2' (doc L7(a)), p 234)

Was the Survey Illegal? Did the Surveyor-General Act Outside the Law?

Counsel for Te Whanau a Kai and counsel for the Crown agreed that Baker had not broken the law, and that the Surveyor-General had the legal authority to certify the plan. The Native Land Court Act 1886 discouraged unauthorised surveys but it did not make them illegal. The Crown submitted that there had been protections to ensure bona fide surveys before 1886, but that these had been repealed. Under section 80 of the 1886 Act, the Surveyor-General had the discretion to either certify or not certify the plan. He had two instances in which he could refuse his certification, but he was not required to withhold it in either instance. Crown counsel and counsel for Te Whanau a Kai agreed on these points.¹

Nonetheless, counsel for Te Whanau a Kai considered that the Surveyor-General (and the Native Minister and his officials) acted improperly. The September authorisation of the survey was 'essentially an attempt to circumvent the legislation by removing the grounds for exercise of the Surveyor-General's discretion'. It was not technically retrospective, because Baker had to go over the lines again – it was an authorisation to redo, not do, the survey – but this was a pretence: 'In exercising his discretion [in November] the Assistant Surveyor General was able to say, or pretend rather, that Baker had received permission to carry out his survey.' Everyone knew when Baker had really done the survey, and vociferous opposition to it was clear to the Government. To treat Baker's survey as an authorised one was 'a travesty of the law'. Although nothing illegal had been done, there was an 'improper exercise of a statutory discretion at the point of certification of the plan.'²

We accept claimant counsel's submissions on these points.

1. Counsel for Te Whanau a Kai, closing submissions, 30 May 2005 (doc N5), pp21–27; Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, pp60–61

2. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp25–26

The result of this survey has been that those hopes have been entirely frustrated as to our being able to hold this land.²⁹¹ Even so, as we shall see in the next section, the tribal leaders attempted to protect this large region by making it inalienable and putting it into a trust.

The Crown suggested that – given the number of times people had tried to bring this land into court in the early 1880s – it was only a matter of time before it ended up there anyway.²⁹² We agree. The integration of the Crown's purchasing machine with the native land laws was designed to bring about just such a

291. Opotiki Native Land Court, minute book 5, 12 April 1889, fol342; see also Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p18

292. Crown counsel, closing submissions (doc N20), topics 8–12, p59

result. We do not, however, accept the Crown's submission that the competition over Tahora 2 demonstrated the need for the Native Land Court as a forum to sort it out.²⁹³ The evidence before us is that the tribal leaders in this huge block negotiated an out-of-court arrangement of their respective interests in 1889. Knowing that the land had to be separated into discrete blocks, each with a list of owners, the chiefs did this work outside the court. Professor Binney considered this an important achievement, given the immediate tensions over Te Kooti's abortive visit to Gisborne, and the longer-term rivalry over these lands.²⁹⁴ In our view, this was one of many proofs that Maori did not in fact need the court to settle these matters, yet they were trapped into accepting its individualised title.

One area did remain in dispute. Hetaraka Te Wakaunua challenged the Ngati Kahungunu claim to parts of Te Papuni (Tahora 2F). In doing so, there is evidence that he went against a collective decision by Tuhoe leaders to cooperate with Wi Pere.²⁹⁵ This decision seems to have been brought about in part by Te Kooti, who told the Tuhoe chiefs: 'don't have anything to do with these things, let Wi Pere have the conduct of them.'²⁹⁶ This was later resented by some Tuhoe leaders, who disputed the court's award of all of Tahora 2F to Ngati Kahungunu. In any case, the Tuhoe involvement in the other aspects of the Tahora 2 hearing was led by Tamaikoha, who was not a follower of Te Kooti.

Thus, the 213,000-acre Tahora 2 block was dragged into court in 1889, on the application of individuals who not only did not represent their own hapu, but who were found to have no interests in the land. But the effects of this event were not limited to Tahora. Cathy Marr suggested that the gazetting of Tahora for hearing in 1888 resulted in new applications to hear Waipaoa.²⁹⁷ It will be recalled that the original 1882 applications for Waipaoa had been provoked by Crown purchase efforts and court applications affecting Ngati Kahungunu claims in Te Papuni. But by 1885, when the survey of Waipaoa was completed, both the purchases and the applications had stalled. Things had been quiet since 1883. In that circumstance, although they now had a survey plan, the Ngati Kahungunu leaders kept Waipaoa out of the court.

This situation changed when Tahora 2 was advertised for hearing three years later. On 12 November 1888, Hapimana Tunupaura and Tamihana Huata objected to the hearing of lands claimed by them – Te Wera, Papuni, Waimaha, and Waipaoa – in this hearing.²⁹⁸ Thus, thinking that Waipaoa was caught up in Nikora's claim, they filed an application for a hearing of Waipaoa in December 1888 (to be based on their own map). Two other applications for Waipaoa were filed in the same month. The first was from Wiremu Nuhaka, who had filed the Ngati Kahungunu

293. Ibid, p 56

294. Binney, 'Encircled Lands, Part 2' (doc A15), pp 89–90

295. Ibid

296. Urewera Commission, minute book 5, 3 May 1901, fol 326 (Cecilia Edwards, 'The Urewera District Native Reserve Act 1896, Part 2: Title Determination under the Act, 1896–1913' (commissioned research report, Wellington: Crown Law Office, 2004) (doc D7), p 116)

297. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), p 240

298. Binney, 'Encircled Lands, Part 2' (doc A15), p 86

counter-claim back in 1882, and there was a new claim by Meretene Te Rongo.²⁹⁹ In January 1889, the Crown also applied to have its interests in Waipaoa (Matakuhia) awarded to it.³⁰⁰

Ngati Ruapani claimed in our inquiry that they were not a party to these applications, and that they were dragged unwillingly into court as a result of them.³⁰¹ Tuhoe claimed the same, and that they had had no notice of the hearing, so that only one of their representatives was actually present, resulting in the defeat of their case. It is clear that Tuhoe and Ngati Ruapani had no part in the 1882 application for survey, which led to the production of a plan by 1885. As we noted earlier, Huata recognised the existence of other interests when he told Preece that the Waikareiti lands might need to be divided from Waipaoa by the court, although he still wanted it all surveyed under one (his) survey. In 1889, Tunupaura explained what had happened when the survey reached Waikaremoana. He said that Winitana, Hori Wharerangi, and Wi Hautaruke and other chiefs had not objected to the survey, nor did they obstruct it. Wi Hautaruke, in his evidence for Tuhoe, replied that both he and Hori Wharerangi had in fact objected to the survey. One Ngati Ruapani leader, Hapi Tukahura, had cooperated and conducted the survey of the western part of the block. According to Hautaruke, this was because he got paid to do so. Ms Marr notes that the survey was not physically obstructed by the Waikaremoana chiefs.³⁰² During this period, in part because of the Te Whitu Tekau policies, and in part because of the words of Te Kooti, neither Ruapani nor Tuhoe filed a claim for Waipaoa.

While the same was also true of Tahora, a delegation of Tuhoe (led by Tamaikoha) did turn up in court to fight the Tahora case. Why did the same not happen in Waipaoa?

In part, the answer was that some Waikaremoana people had made a prior arrangement with Ngati Kahungunu. Robert Wiri drew our attention to a 1946 appellate court case, in which Ngati Ruapani described the 1889 ownership lists for Waipaoa as ‘ex parte’; that is, done by one side in the absence of the other.³⁰³ At some point between Hapi Tukahura’s involvement in the survey and the court’s sitting, a key segment of Ngati Ruapani allied themselves with Ngati Kahungunu and trusted Huata and Tunupaura to include them in the ownership of Waipaoa. It was thus left to the ‘loyalist’ chiefs to conduct the case in court.

Evidence about the out-of-court arrangements emerged during the hearings. As Tama Nikora and Cathy Marr explained, there had been a hui of Ngati Kahungunu

299. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), p 240

300. Stevens, ‘Waipaoa’ (doc A51), pp16, 21; Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), pp 240–241

301. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions, 30 May 2005 (doc N13), pp 26–27; counsel for Ngati Ruapani (Wai 144), closing submissions, 3 June 2005 (doc N19), app A, paras 97–108

302. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), p 236

303. Robert Wiri, ‘Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities, and the Determination of Mana in the Waikaremoana District’ (MA thesis, University of Auckland, 1994) (doc A35), pp 232, 236, 238

on the block, where they decided which hapu names would be put into the title. Tunupaura told the court:

In connection with my putting the whole land through the Court we had a meeting at my place. We ascertained there were 8 hapus entitled to the land. They were N'Hinganga, N'Tewahanga, N'Tapuwaē, N'Hinetu, N'Mihi, N'Poroara, N'Hika, N'Ruapani. We decided at our meeting that they were entitled to the land. There are many hapus interested in the land but we amalgamated them and gave them in under these names.³⁰⁴

This was an alliance of upper Wairoa and Waikaremoana hapu, which rejected the claims of other Kahungunu hapu (and any wider tribal claim).³⁰⁵ Hapimana Tunupaura denied that one purpose of this alliance was 'ousting the Ureweras', but another Kahungunu witness said that the hui had decided, urged by Tunupaura, to ally with their Turanga relations to set up a combined case for Waipaoa, Te Wera, and Tahora, opposing the claims of 'the Uriwera, Ngaitai and Whakatohea to those blocks'.³⁰⁶ Ngati Kahungunu's historians suggested that the actual alliance in Waipaoa was with Ngati Ruapani, 'apparently for the purpose of excluding Tuhoe'.³⁰⁷ The evidence at the 1946 appellate court case confirmed that Ngati Ruapani had stayed away from the court: 'We made our arrangements with Hapimana and we did not attend'.³⁰⁸ One Ruapani leader, Hapi Tukuhaura, did attend. His evidence, in conjunction with that of the Kahungunu witnesses, defeated the case of the sole Tuhoe witness, Wi Hautaruke. (Both sides claimed to speak for and represent the absent Ruapani people.³⁰⁹)

Rangi Mataamua explained that Wi Hautaruke was a man of authority within the Waikaremoana community. He was considered to represent many Tuhoe hapu, to be an 'ambassador' for the tribe, and to have been its representative in the court.³¹⁰ But Hautaruke was not the senior Waikaremoana chief; that was Te Makarini Tamarau. So why was Hautaruke the only Tuhoe leader present? According to Numia Kereru's evidence later in the Urewera commission, Tuhoe were not present because they had not been notified of the hearing. They would not have attended in great numbers anyway, given Te Kooti's injunction against the court.³¹¹ But, as Tutakangahau pointed out, too much was at stake to stay away

304. Native Land Court minute book, 14 February 1890, fols 23–24 (Grant Young and Michael Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A129), pp 72–73)

305. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 74; Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 243–247

306. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), p 232

307. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 64

308. Gisborne Appellate Native Land Court, minute book 27, 16 May 1946, fol 40; see also fols 24–25

309. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 247–256

310. Rangi Mataamua, brief of evidence, 2004 (doc H21), pp 3–6

311. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 241, 248

from the court altogether.³¹² Given the attendance of Tuhoe leaders in sufficient strength at Tahora 2 and the four southern block reserve hearings, we accept that this is the likeliest explanation for why they were (in contrast) absent from the Waipaoa hearing. This was not the first or the last failure of the notification procedures in our inquiry district. At the same time, we accept that Ngati Ruapani had not sought a survey or hearing of Waipaoa, and stayed away from the court deliberately.³¹³ We note, however, that they had – at some point before the hearing – come to an arrangement with the Ngati Kahungunu chiefs to include them in the title for the western part of the block.

In sum, Ngati Kahungunu leaders, fearing for their interests in Waipaoa after the advertisement of Tahora 2, put in a fresh application for hearing at the end of 1888. This application was a representative one, filed on behalf of upper Wairoa and Waikaremoana groups. It forced everyone else into court. Counter-claims from other Kahungunu groups were filed, but Ngati Ruapani and Tuhoe did not put in rival applications for Waipaoa. As a result of the Kahungunu application, these groups had no choice but to defend their interests in court or lose them. At some point before the 1889 hearing, Tunupaura forged an alliance with some of the Ngati Ruapani of Waikaremoana, resulting in their staying away from court and leaving matters to Tunupaura to arrange on their behalf. Other Ruapani and Tuhoe, who were not a party to this arrangement, failed to turn up to defend their rights – probably because they had not received notification of the hearing. As a result, those who were not a part of Tunupaura's arrangements were shut out of the title. In the evidence of the Ngati Kahungunu historians, this was a deliberate alliance to exclude Tuhoe. The Crown has conceded that unwilling groups were forced into court, to avoid the risk of losing everything. Both Waipaoa and Tahora 2 are very clear examples of this system at work. Tuhoe (and Ngati Ruapani aligned with Tuhoe) did lose out in Waipaoa, because they were not present. What needs to be remembered, too, is that the Ngati Kahungunu leaders themselves were reluctant to put Waipaoa through the court. Despite having had a survey plan since 1885, they did not file an application for hearing until they felt they had to in the face of rival claims in Tahora 2.

10.5.4 Treaty analysis and findings

In all cases in the Urewera rim blocks, title investigations were initiated by Maori.³¹⁴ According to claimant counsel, this did not represent freedom of choice. Rather, Maori were either pushed or pulled into making applications, often by factors beyond their control. This included the ability of unmandated individuals to make applications. There was also the need to get in first before neighbours (who would then control the survey), or before the Crown initiated a lease or purchase

312. Edwards, 'Urewera District Native Reserve Act 1896, Part 2' (doc D7), pp 116–117

313. They, of course, had no need to know the time and place of hearing, since they did not plan to attend.

314. Technically, the Crown had the power at times to initiate title investigation for blocks where it had acquired interests, but it did not use this power in Te Urewera.

with other groups. Poverty, debt, and the need to start using the land in the colonial economy could also force it into court, as in the case of Ngati Manawa. Unless settlers like Swindley were prepared to live with an informal lease, then there was no choice but to use the court, and to accept its individualised titles. The only other choice was not to use the land. Such a choice was preferred by Tuhoe in many instances, but Crown dealings (especially leases) pulled land into court in the border areas. This sometimes happened on the application (or with the agreement) of Tuhoe hapu, regardless of the collective policies of Te Whitu Tekau. The Crown accepted that unwilling groups were often forced into court, but argued that title investigations were almost always initiated by representative leaders of hapu with valid claims. The Crown, we were told, had an obligation to free minorities from a collective veto, and to uphold the right of hapu to bring their lands into court.

Only half of the land in the rim blocks was brought into court by tribal leaders acting on behalf of at least one group with a valid claim. In the cases of Waimana and Tahora 2, land was brought into the court process by individuals who probably did not represent their own hapu, and were found not to be owners in the land. This represented 41 per cent of the land in the rim blocks. Also, Kuhawaea and Tuararangaia were brought into court on the application of young chiefs who did not have the support of the groups on whose behalf they made their applications. (Counsel for Wai 36 Tuhoe suggested that the title investigation of Ruatoki was also an example, because it was initiated by Ngati Awa, who were found not to be owners.³¹⁵ We do not accept this submission. Applications from other tribes did influence the decision of some Tuhoe leaders to make their own application for Ruatoki, but we do not consider that they were the main factor in this decision.) Thus, the native land legislation allowed 254,806 acres to be brought before the court on the basis of applications from young chiefly individuals who either had no valid claim to the land or did not represent an agreed position on the part of their tribal groups. This was almost half of the land in the rim blocks, and was therefore a very serious failing on the part of the Crown's native land laws.

Even where claims were filed by representative chiefs, this did not mean that the system was fair for other groups with rights in the land under claim. The rim blocks constituted border areas where customary rights overlapped. But the native land laws allowed a single hapu or group to file a claim. Unwilling groups were forced into court to avoid losing their lands in Waimana, Kuhawaea, Heruiwi 4, Whirinaki, Tuararangaia, Ruatoki,³¹⁶ Waipaoa, and Tahora 2 (some 422,058 acres or 78 per cent of the rim blocks). We accept, on the other hand, that there was an element of agreement among all parties in Heruiwi 1–3, Waiohau, and Matahina that these lands must come before the court, once one party in those lands had initiated a survey.

315. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p12

316. Our inclusion of Ruatoki here refers not to the applications by other tribes, which did not bring about the hearing, but to the forced participation of Tuhoe hapu as a result of applications by other Tuhoe hapu.

In the case of Ngati Whare, their boycott of the court resulted in their exclusion from all titles, apart from a few individuals who were put on the lists. This could not have happened if the native land laws had continued to provide for preliminary inquiries outside the court, instead of limiting matters to the evidence (or voluntary agreements) in court. Tuhoe, Ngati Haka Patuheuheu, and Ngati Rangitahi, despite their opposition to the court on principle, did make claims or counter-claims and turned up to defend them when necessary. In our view, these tribes' rejection of the court ought to have been honoured by the Crown, and an alternative process negotiated with them. They should not have been put in a position of having to accept the court or lose their lands. Turning up, of course, did not guarantee appropriate recognition of customary rights in these fraught border lands. But Ngati Whare certainly paid a high price for their principles.

Crown leases – and refusal to pay rents until the land was brought into court – were a factor in pulling Heruiwi 1–3 and Matahina into the court. Other Crown pre-title dealings, including payment of advances, purchase negotiations, or proclamations that land was under negotiation, were also factors in Matahina, Kuhawaea, Tahora 2, and Waipaoa. As we see it, the Crown's pre-title dealings were the key factor in Heruiwi 1–3 and Matahina (19 per cent of the rim blocks), and also important in these other blocks (a total of 70 per cent of the area in the rim blocks). There was a noticeable slowing of court activity in Te Urewera in the mid- to late 1880s when the Government stopped its pre-title dealings. Private leases were important in bringing Kuhawaea and Waiohau before the court, but otherwise were not a significant factor in this inquiry district.³¹⁷

On top of the impact of this widespread Crown tactic, the impact of particular omissions on the part of the Crown had a dire effect on some groups. These included the failure of notification procedures in Kuhawaea and Waipaoa, which resulted in Tuhoe missing out on attending those hearings (and losing customary lands in consequence). We shall see below (section 10.6) whether the Crown's provision for rehearings was an adequate remedy in these cases.

We note also the particular circumstances in which Tahora 2 finally came before the court. Despite the fact that the particulars of Baker's unauthorised survey became well known, despite the land court's censure of his proceedings, and despite the Minister's setting of conditions for the authorisation of the survey, which should have protected all claimant groups, ultimately they were not protected at all. The Minister failed to ensure his own conditions were met – and his own department succeeded in ensuring that the land went to the court, as it had long sought. Although, as Crown counsel observed, this only affected one block and was not a systemic issue, we note that it affected nearly 40 per cent of the land in the rim blocks, and was thus a very significant exception.

As we saw in section 10.2, the Crown imposed the Native Land Court on the peoples of Te Urewera without consulting them or obtaining their consent. Since Te Whitu Tekau had made its opposition to the court clear, the Government

317. We do not include Waimana here because Swindley's private lease had no role in drawing the land into court.

was on notice that groups which claimed customary rights in all the rim blocks actively objected to the court. Nonetheless, the court was able to sit and decide titles to half a million acres of land, because the law either deprived Maori of choices or severely constrained them. This was inconsistent with the Treaty, which guaranteed the tino rangatiratanga of Maori communities over their land. Some were pulled into the court: it was the only vehicle by which they could use their lands in the new economy, however much they might have objected to it in principle. Others were pushed: applications by non-mandated individuals, or by one group of rights-holders among many, forced unwilling tribes into the court. The Crown's native land laws compelled these groups to participate. When they did not – or were absent for other reasons, such as a failure of notification – they lost their rights. Further, the Crown's system of pre-title dealings helped drag land into the court, against the wishes of groups of customary owners. This was the case for some 70 per cent of the land in the rim blocks. For Heruiwi 1–3 and Matahina, it was the primary factor.

The imposition and operation of a land title system with no choices – or no choice but one, rejected in principle but inescapable in practice – was in breach of the Treaty. We find the Crown in breach of the principles of active protection and autonomy, and of the plain meaning of article 2, for setting up a system that compelled Maori to participate against their wishes, and took their land from them if they did not. We reject utterly the Crown's argument that it had a duty to free individuals from the decisions of the collective. This kind of revolutionary change to customary ownership – which, after all, consisted of rights derived from Maori law and protected by the Treaty – was one that only Maori could make, through their own deliberations in their own institutions.

We also find the Crown in breach of its Treaty duty to act with scrupulous honesty and fairness, by manipulating its pre-title dealings to force land into the court, again against the wishes of many of its owners.

Finally, it was the Crown's wish to see Tahora 2 processed through the court that led to the Government's approval of the secret survey. The Native Minister refused to stop the court in the face of universal Maori pleas before and at the 1889 hearings. The Minister's condition, that Maori agree to the survey before it could be confirmed, was dispensed with in order to get title decided and alienation under way. We find the Crown in breach of its Treaty duties actively to protect Maori interests, to recognise Maori authority over their lands, and to act with the utmost honesty and good faith, in its actions over the Tahora 2 survey and the resultant court hearings.

The immediate prejudice was threefold:

- ▶ First, the very advantage touted by settler proponents of the court was prejudicial: anyone who wanted to use their land in the economy, or who had to make a claim in court to avoid losing their rights, ended up with a title consisting of a list of individual owners (see section 10.2). As we shall see in the following sections, this form of title was crucial in facilitating the transfer of land from Maori to the Crown, against the wishes of tribal communities and their leaders.

- ▶ Secondly, those Maori who either took the risk of not appearing, or who failed to appear because they were not notified, lost any rights they had in the land under claim.
- ▶ Thirdly, decisions about customary entitlements were removed from community control; from the point of title investigation onwards, all future decisions (as to succession, the rights of those who had left the district, and other matters regarding the management of titles) would be made by the court, not by the hapu. We will address these points further, and consider the longer-term prejudice, in section 10.10.

10.6 WAS THE CROWN MADE AWARE OF COURT DECISIONS THAT WERE ALLEGED TO HAVE RESULTED IN SIGNIFICANT INJUSTICE AND DID IT PROVIDE APPROPRIATE REMEDIES ?

SUMMARY ANSWER: The court investigated and awarded titles in Te Urewera rim blocks from 1878 to 1894. The Crown was made aware that all of these title decisions were alleged to have resulted in significant injustice. In all cases, there were either applications for rehearing or petitions to Parliament. There were also complaints made directly to Ministers or officials. In our view, the volume of complaints is a symptom of the fact that the Native Land Court was the wrong body to decide titles in the rim blocks. Neither the court nor its form of title was capable of dealing with the complex, overlapping customary rights in these contested border lands. The Crown maintained, however, that it provided an adequate remedy by investigating complaints and referring them to judicial bodies for resolution. The outcome was usually that Parliament or the chief judge either dismissed complaints or sent applicants back to the Native Land Court for rehearing. Sending aggrieved Maori back to the court simply resulted in a rerun of the same defective process. Neither the chief judge nor the court was adequately equipped to deal with these matters. The Crown ought to have empowered Maori to decide their own titles, as they requested. Nonetheless, having set up the Native Land Court, the Crown could have provided a better body to investigate and determine whether grievances about the court's decisions were well founded, such as the first Urewera commission.

The Crown's acts and omissions were in breach of Treaty principles. The claimants in our inquiry have been left with a lasting grievance, because, as they see it, the Native Land Court wrongly deprived them of ancestral lands. In reaching these findings, we do not offer a view on whether individual court decisions fairly reflected customary rights.

10.6.1 Introduction

In the previous section, we discussed the manner in which the rim blocks came before the court for title investigation in the nineteenth century. We turn now to consider grievances arising from the court's awards at those hearings. Essentially, the claim is that the Native Land Court was the wrong body to decide customary entitlements, and the form of title that it could award was incapable of fairly

reflecting customary arrangements. The result was that its decisions deprived people of their ancestral land. Many claimant witnesses complained of particular court decisions, still viewed today with anger and distress.

These claims pose a dilemma for the Tribunal. Legal orthodoxy holds that the Native Land Court is not the Crown or an agent of the Crown, and its decisions are not the decisions of the Crown. At the beginning of this section, we set out the arguments about this issue, as well as the approach and findings of previous Tribunals. We then consider the remedies provided by the Crown in the nineteenth century, when faced with complaints about the decisions of the court. These included the right to apply for a rehearing, the right to petition Parliament, and the actions taken in response to successful petitions. On this question, the Crown did not make any concessions. Its view was that it had done everything necessary and appropriate to correct injustices arising from court decisions.

We begin our discussion with an outline of the essential differences between the Crown and claimants.

10.6.2 Essence of the difference between the parties

At a general level, the claimants argued that the Native Land Court was the wrong body to decide their customary entitlements, whether at initial title investigation or on appeal. Relying on the findings of the Tribunal in previous reports, they maintained that the court was ill-equipped to decide complex questions of the customary law of another society. Titles needed to be determined within that society. In particular, the claimants (and also Ngati Awa) argued that the rim blocks in Te Urewera were border areas of such significant tribal overlap that all the worst features of the court system were exacerbated. The Crown's remedies were of no real help: in most cases, applications for rehearing were declined, and the court's decisions were barely altered if a rehearing (by the same court) took place; and there were almost no concrete remedies as a result of petitions to Parliament. The Crown should have been aware – given so much dissatisfaction – that there was a systemic problem with the court in Te Urewera.³¹⁸

In response, the Crown argued that the Native Land Court was capable of giving effect to out-of-court arrangements, and fully competent to decide title in the rim blocks. It accepted that there was a high degree of overlap, and that this probably explained why almost all of the court's decisions were appealed. Nonetheless, the Crown maintained that in providing judicial processes to deal with appeals or petitions – namely, a rehearing by the Native Land Court or a special commission of inquiry – it had done all that was required of it to provide a remedy for potential injustices arising from the court's title investigations. Also, the Crown maintained that the form of title granted by the court was necessary for participation in the colonial economy, and that the claimants agreed to sacrifice some of

318. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 62, 68–72, 78–81, 88, 96–99 (these generic submissions were adopted by most claimants); counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 37–39; counsel for Ngati Awa, closing submissions, 3 June 2005 (doc N15) pp 9, 21; counsel for Ngati Hineuru, closing submissions (doc N18), pp 23–24

the complexity of their tenure when they decided to apply to the court for a title usable in that economy.³¹⁹ (In this part of their submissions, Crown counsel took no account of their previous admission that unwilling groups were forced to participate in the court (see section 10.5.2).)

In terms of particulars, the parties debated some issues which we have found it unnecessary to determine. Much of the difference between the Crown and claimants focused on the performance of individual judges (and whether they were biased), and the content of particular title decisions. We do not make findings on these matters. We set out our reasons for this in the next section (section 10.6.3), and also the parties' arguments on the propriety of our re-examining the individual decisions of the court.

10.6.3 Tribunal analysis

10.6.3.1 *The claims*

For some claimants in our inquiry, their most serious grievance about the Native Land Court system was its title decisions, which they believe awarded their ancestral land to others. This was a heartfelt grievance for many of the tangata whenua witnesses who appeared before us. Speaking of Matahina, for example, Alec Ranui of Ngati Haka Patuheuheu told us:

Na te mea, ahakoa i tukuna he tonu mai i a Patuheuheu Ngati Haka, i tautohetia a Matahina e o matau tipuna Mehaka Tokopounamu raua ko Wi Patene Tarahana, kare te kooti whenua i aro ake. Ka hoatu ka whakawhiwhia te nuinga o Matahina kia Ngati Awa ka toe mai ko nga maramara noaiho kia Patuheuheu Ngati Haka. Ka nui te takariri o matau tipuna ki te kooti whenua mo tenei tahae whenua na te mea ko matau te mana whenua te mana tangata i runga i a Matahina.

Even though Patuheuheu Ngati Haka sent our claims, our ancestors Mehaka Tokopounamu and Wi Patene Tarahanga sent their claims for Matahina [to the court], the Native Land Court did not take any notice. They gave instead, awarded the bulk of Matahina to Ngati Awa, – and the morsels were given to us, to Patuheuheu Ngati Haka. Our ancestors were clearly agitated with the Native Land Court for this theft of land because we asserted mana over Matahina.³²⁰

We heard similar evidence about Matahina and other blocks from many witnesses. We summarise the claims as follows:

- ▶ Ngai Tamaterangi claimed that their customary rights as a tribal entity were not recognised by the Native Land Court in the Waipaoa and Tahora 2 blocks, but that individuals whom they consider as members of their group were included in the titles.³²¹
- ▶ Ngati Haka Patuheuheu argued that the Native Land Court system was incapable of doing justice to overlapping customary rights of different kinds and

319. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 17–20, 37–39, 87–95

320. Ranui, brief of evidence (doc C14(a)), pp 6, 17

321. Counsel for Ngai Tamaterangi, closing submissions, 30 May 2005 (doc N2), pp 4, 53–57

I WANT to know why only some descendents of Tamaterangi received shares in the Tahora and Waipaoa blocks.'

Katarina Kawana¹

1. Katarina Kawana, brief of evidence, 29 November 2004 (doc 129), para 34

extent, and claimed in particular that court decisions had been unjust to them in respect of Tuararangaia and Matahina. Ngati Haka Patuheuheu also claimed that individuals were wrongly left out of some of the title lists.³²²

- ▶ Wai 36 Tuhoe claimed that, due to failures of notification, judicial bias, or undue Crown influence on the proceedings, the court failed to award them their fair and proper share of Waiohau, Matahina, Kuhawaea, Tahora 2F, and Waipaoa.³²³
- ▶ Ngati Whare alleged that their interests were wrongly overlooked in Heruiwi 1–3, Kuhawaea, Whirinaki, and Heruiwi 4, because the court was not required to follow a more inquisitorial process.³²⁴
- ▶ Ngati Ruapani argued that some of their number who lived at Waikaremoana were wrongly left out of the ownership list for Waipaoa.³²⁵
- ▶ Ngati Rangitihī claimed that they were 'stripped of their traditional interest' in Matahina by the court, and that the small piece of land awarded to them on rehearing was an inadequate recognition of their customary rights.³²⁶
- ▶ Ngati Hineuru argued that their share of Heruiwi 4(4A) did not recognise the full extent of their customary interests because the court was the wrong institution to be deciding such matters, and that they should also have been awarded land in 4F.³²⁷

In closing their case, Ngati Rangitihī stated that for them, our inquiry was not just about the actions of the Crown, but was 'also about the recognition of the extent of their mana and the continuing defence of their traditional rohe.'³²⁸ Ngati Awa kept a watching brief in our inquiry, making submissions in defence of Native Land Court awards of land to them in the nineteenth century. Ngati Manawa and Wai 621 Ngati Kahungunu also defended the decisions of the court on their own

322. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 62–72, 78–81, 88–104

323. Counsel for Wai 36 Tuhoe, closing submissions, pt c, schedule of primary findings and recommendations sought, 2005 (doc N8(b)), pp 2–4

324. Counsel for Ngati Whare, closing submissions (doc N16), pp 44–55

325. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, para 108

326. Counsel for Ngati Rangitihī, closing submissions, 1 May 2005 (doc N17), pp 11–15

327. Counsel for Ngati Hineuru, closing submissions (doc N18), pp 22–24

328. Counsel for Ngati Rangitihī, closing submissions (doc N17), p 2

terms. We need to consider, therefore, whether we have jurisdiction to consider the decisions of the Native Land Court at all, and whether we are being asked to act as a virtual court of appeal from its decisions, rather than to make findings as to whether or not the Crown has breached the Treaty.

10.6.3.2 Can the Waitangi Tribunal consider decisions of the Native Land Court?

The question of whether the Tribunal can consider decisions of the Native Land Court has been settled decisively by the Rekohu Tribunal. In that inquiry, the Tribunal found that the Native Land Court was not ‘the Crown’, nor was it an agent of the Crown, within the meaning of the Treaty of Waitangi Act 1975.³²⁹ We agree.

In determining whether the Tribunal could investigate the court’s decisions, however, the Rekohu Tribunal relied on the view of Justice Heron that it could not avoid looking at the results of the court’s actions in respect of Treaty grievances. Ultimately, the Tribunal found that the key point for its jurisdiction came after the court’s decision. If, in the Tribunal’s view, the court’s decisions were unjust and inconsistent with Treaty principles, then it had to consider whether or not any omission of the Crown to intervene was in breach of the Treaty.³³⁰ The Waitangi Tribunal ‘may properly give consideration to whether the Native Land Court has acted inconsistently with Treaty principles and, if it so finds, to determine whether the Crown omitted to take appropriate action to remedy the situation to the extent such action was practicable.’³³¹

In agreeing with this finding, the Te Tau Ihu Tribunal noted: ‘In doing so, we do not question or impugn the legality of the court’s decisions. Those decisions stand unless altered by a duly empowered court or by legislative action. The Waitangi Tribunal is not an appellate court.’³³²

The Te Tau Ihu Tribunal considered the appropriateness of Crown intervention in the decisions of a court, in terms of legal and Treaty principles, and in terms of how Governments viewed it at the time. As that Tribunal noted, the fundamental principle at stake was that Maori should have been empowered to decide their own land titles.³³³ As we discussed earlier in this chapter (section 10.2), that was also the finding of the Tribunal in *Rekohu, Turanga Tangata Turanga Whenua*, and *He Maunga Rongo: Report on Central North Island Claims*.

The Central North Island Tribunal and Te Tau Ihu Tribunal both quoted Native Minister Donald McLean in 1872:

They [Maori] were themselves the best judges of questions of dispute existing among them. No English lawyer or Judge could so fully understand those questions as the Natives themselves, and they believed that they could arrive at an adjustment of the differences connected with the land in their own Council or Committee, very much

329. Waitangi Tribunal, memorandum, 5 October 1994 (Wai 64 R01, paper 2.67), pp 11, 18–21

330. *Ibid*, pp 18–21

331. *Ibid*, p 22

332. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780

333. *Ibid*, p 779

better than it would be possible for Europeans to do. He [McLean] hoped honorable members would accord to the Native race this amount of local self-government which they desired. He believed it would result in much good, and whatever Government might be in existence would find that such Committees, with Presidents at their head, would be a very great assistance in maintaining the peace of the country.³³⁴

As the Te Tau Ihu Tribunal explained, it was thus conceived at the time that 'fairer, more just decisions could be arrived at by Maori bodies interpreting and applying their own customary law'.³³⁵ The imposition of the Native Land Court to make these decisions instead was a fundamental breach of the Treaty. In the Tribunal's view, it inevitably resulted in 'court-created entitlements which distorted or mistook custom'.³³⁶ The Turanga Tribunal agreed that, in some cases, the Tribunal ought to consider whether particular decisions were 'unsafe' in that respect, justifying a Crown intervention at the time.³³⁷

This basic problem with the court posed a dilemma in terms of another fundamental principle, that the courts should be independent of the executive. Government action to change the findings of a court is a serious matter, and is usually 'confined to changing legal principles rather than particular decisions'.³³⁸ From time to time, however, the nineteenth-century Parliament passed legislation ordering that individual titles or whole classes of titles be put back to the Native Land Court for reinvestigation.³³⁹ The Governments of the day received many petitions and protests about decisions of the court. Rather than fixing the systemic problem, their response was to investigate the complaints in a parliamentary select committee and then refer individual cases back to the court (or sometimes to a commission of inquiry). The Native Affairs Committee noted, in respect of a petition before it in 1887 to 1888:

If the discontent of the Natives left out [of the title] is to be weighed (without a legal rehearing) there is no title in the country worth the paper it is written on. That there has been a great deal of injustice and miscarriage of justice with regard to Court titles seems to be beyond dispute but the evil would be multiplied many fold if the Government set itself to override the law and to indirectly or directly review titles.³⁴⁰

Thus, the Government's policy (and practice) was to send each individual case for reinvestigation, if persuaded that an injustice had occurred.³⁴¹ It is this policy

334. Donald McLean, 22 October 1872, NZPD, vol 13, p 895 (Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 190); see also Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 779–780

335. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780

336. *Ibid*

337. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 661–662

338. Waitangi Tribunal, *Rekohu*, p 147

339. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 781

340. Native Affairs Committee of Parliament, undated minute [1887–1888] (Waitangi Tribunal, *Hauraki Report*, vol 2, pp 754–755)

341. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 781–783

that we, in turn, are required to examine against the principles of the Treaty in terms of how it operated in Te Urewera. The Rekohu and Te Tau Ihu Tribunals agreed that, although it did nothing to fix the underlying problem that affected all cases, it did give scope for particular injustices to be corrected.³⁴² One problem with the approach, as we shall see, is that it restricted the Crown's Treaty obligation of active protection to intervening in particular decisions which had come to its attention, whether directly by Maori complaint or indirectly from the reports of officials.³⁴³

10.6.3.3 Should this Tribunal consider court decisions affecting claimants in our inquiry?

If the Tribunal has jurisdiction to evaluate court decisions and subsequent Crown actions, the question becomes: should we do so in the circumstances of our particular inquiry? Here, we note that practice has varied. The Rekohu Tribunal, the Turanga Tribunal, and the Te Tau Ihu Tribunal all accepted the necessity, in certain circumstances, of evaluating the Native Land Court's capacity to arrive at decisions on customary entitlements, some of its particular decisions, and then the subsequent protests and Crown actions about those decisions. The Hauraki Tribunal, on the other hand, preferred not to comment on the findings of the court in particular cases.³⁴⁴

10.6.3.3.1 THE PARTIES' ARGUMENTS

In our inquiry, the Crown noted that all the cases in the rim blocks were contested and all decisions appealed. In counsel's view, this was unusual, reflecting the nature of these blocks as border districts. The Crown made no submission as to whether or not we should evaluate particular court decisions – rather, it assumed that we would do so. Counsel submitted that the court was an appropriate body to decide contested titles, and that there was a system in place to correct any 'irregularities' of process or substance in the court's decisions. This system consisted of the ability to apply for a rehearing, the investigation as to whether a rehearing should be granted, and the rehearsings themselves. The Crown noted that the great majority of applications for rehearing were turned down in Te Urewera. Counsel suggested that we must not take this as a pattern, but should investigate the decisions on a case-by-case basis. Also, the Crown argued that the claimants' right to petition Parliament provided a further check on unsafe court decisions. For any grievances not brought to its attention, however, it could not be held responsible.³⁴⁵

The claimants argued that we should consider particular decisions as to whether an injustice had taken place, and then in terms of whether the Crown provided an appropriate remedy. Ngati Awa took the opposite position. We consider their

342. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p781; Waitangi Tribunal, *Rekohu*, p147

343. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp781–783

344. Waitangi Tribunal, *Hauraki Report*, vol 2, pp781–782

345. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 17–20, 37–39, 87–95

submissions in some detail here, as they were closer to agreement than appeared at first sight.

We received submissions on the issue as a matter of principle from counsel for Wai 36 Tuhoe and from counsel for Ngati Haka Patuheuheu. Counsel for Wai 36 Tuhoe concentrated on the role of the Crown in particular Native Land Court decisions. He began by recommending the approach of the Turanga Tribunal:

The Tribunal has been cautious about reviewing the merits of the rulings of the Native Land Court in relation to interests as between Maori. However, in the *Turanga Report* the Tribunal did review the merits of the Court's rulings on the basis that '... in some instances the Tribunal can properly be called upon to consider whether the Crown responded appropriately to a decision of the Native Land Court, and to judge that response in terms of the principles of the Treaty of Waitangi. We accept also that the threshold to be met before intervention can be justified so long after the actual hearing should be a high one. A useful standard would be whether the decision of the Court when viewed against the evidence which was or should have been before it was so demonstrably unsafe (in meaning or right) as to have justified the intervention of the Crown at the time.'³⁴⁶

In addition, argued counsel, the Tribunal can properly review court decisions where the Crown's actions directly or indirectly influenced the outcome. The Crown was obliged to intervene and correct faulty decisions that were arrived at by its own undue influence on the process.³⁴⁷ It was not an 'impartial spectator of Court applications.'³⁴⁸ In Tuhoe's view, the Waipaoa decision was unduly influenced by the prior history of the four southern blocks (see chapter 7).³⁴⁹ In the case of Matahina, there was an 'obviously close relationship between Rangitukehu [of Ngati Awa] and the Crown and its officers.'³⁵⁰ The claimants suggested too that Judge Mair was biased because he had fought against Tuhoe. Most importantly, the pre-title leasing arrangements were leading towards sale (and a particular award of ownership).³⁵¹

Counsel for Wai 36 Tuhoe suggested that there was a second instance in which the Crown should have intervened, regardless of how safe or unsafe any particular decisions might have seemed. This was the situation where the whole framework of decision-making was so obviously faulty that all decisions were (in some way or other) contrary to custom. The Crown should have intervened in that instance, regardless of whether or not specific complaints were made.³⁵² Tuhoe argued that

346. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 37. The quotation from *Turanga Tangata Turanga Whenua* is at pages 661 to 662 of that report.

347. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 37–39

348. *Ibid*, p 38

349. *Ibid*

350. *Ibid*

351. *Ibid*, pp 38–39

352. *Ibid*, pp 37–39

the contested lands of the rim blocks, where so many tribal interests met and intersected, were an obvious example. If there had to be a court at all, then the court at least needed to be able to recognise and award a 'legal equivalent' to customary interests that differed from 'outright fee simple interests'.³⁵³ The inability of the court system to do this meant that its decisions were inevitably distorted. The Crown, they argued, 'should have ensured that the Court system operated fairly to arrive at an outcome that reflected custom'.³⁵⁴

Counsel for Ngati Haka Patuheuheu provided generic submissions on behalf of all claimants. He too suggested that the kind of title that the court could award was crucial to the problem. It 'crystallised many usufructory rights and/or overlapping interests in a single and absolute interest holder'.³⁵⁵ These 'Crown-derived titles did not provide for the subtle and complex interests in land that existed under tikanga Maori'.³⁵⁶ Customary owners were fixed in time by the memorial of ownership, rather than determined from time to time as in tikanga. Also, the frozen snapshot of individual interests often missed out individuals or whanau. This was alleged to have occurred, for example, in the titles for Tuararangaia, Waimana, Kuhawaea, Heruiwi 1–3, and Ruatoki. In particular, counsel pointed to the example of Tuararangaia 2, which, he argued, was awarded to Ngati Pukeko because they had a history of canoe-building from resources in the area. Under the Native Land Court system, a group that exercised some (relatively minor) rights to resources could either end up missing out altogether, or could end up with an absolute title to land.³⁵⁷ The native land laws 'created "winners and losers" when the customary system provided for all'.³⁵⁸

The most disputed block in our inquiry was Matahina. In the submission of claimant counsel, it was 'a further example of how the range of overlapping or shared rights could not be recognised adequately by the Crown-derived titles'.³⁵⁹ Judge Brookfield appears to have believed that the counter-claimants possessed some interests, but felt compelled to award the entire area to the group he considered to be dominant – Ngati Awa. But at rehearing, the court did recognise Ngati Haka Patuheuheu and Ngati Rangitihi as having had a customary claim based on occupation.³⁶⁰ The decisions of 1881 and 1884 show that 'the Judges saw different grounds and custom for customary rights to land':

It is submitted that in a block where there were numerous overlapping claimants and the lands were contested the Court did not have a mechanism, nor the type of title at its disposal to recognise such overlapping interests. It is submitted that the

353. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 39

354. *Ibid*

355. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 62

356. *Ibid*, p 68

357. *Ibid*, pp 69–70

358. *Ibid*, p 70

359. *Ibid*, p 71

360. *Ibid*

decisions in 1881 and 1884 reflect the inability of the Court to properly reflect the overlapping interests in Matahina.³⁶¹

Ngati Awa's watching brief allowed them to put their point of view about any claim that they perceived as challenging their interests, their traditions, and the reputations of their rangatira.³⁶² Ngati Awa were also concerned about any claim that tried to 'redraw the boundaries set down by the Native Land Court and the awards made to Ngati Awa':

It almost seemed as if a fresh hearing of the title investigations was sought by some claimants along with amended awards for the blocks.

Counsel submits that this would not be an appropriate role for the Tribunal and there are substantial difficulties associated with such a role.³⁶³

Counsel for Ngati Awa observed that the court heard these cases some 120 years ago. Information available today is less than (or different to) that available to the Native Land Court at the time.³⁶⁴ He relied on the *Ngati Awa Settlement Cross-Claims Report*, which found that,

Irrespective of what further hearings there are of evidence relating to these lands, it is likely that it will always be very difficult, from the distance of approximately 120 years, to unravel what happened in the various Native Land Court hearings, and what (if any) different awards ought to have been made.³⁶⁵

Nonetheless, Ngati Awa agreed with some of the key points made by the claimants in our inquiry:

That is not to say that the Native Land Court was an appropriate institution. Clearly, it was a flawed institution that wreaked havoc on the participants. Therefore, Counsel accepts that it is within the Tribunal's jurisdiction to make broad findings that the Crown failed to ensure that the Court adequately recognised the customary interests of claimant groups or enabled the Court to deal with overlapping interests. Counsel's main point is this level of inquiry does not require a complete and full examination of the Native Land Court cases or precise findings on boundaries and acreages.

More importantly, it can be done without discrediting or challenging the claims of Ngati Awa either before the Native Land Court or the Waitangi Tribunal.

If that submission was accepted then there would be little need for any detailed submissions on the particular cases before the Tribunal.³⁶⁶

361. Ibid, pp 71–72

362. Counsel for Ngati Awa, closing submissions (doc N15), p 8

363. Ibid

364. Ibid

365. Waitangi Tribunal, *Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 78 (counsel for Ngati Awa, closing submissions (doc N15), p 8)

366. Counsel for Ngati Awa, closing submissions (doc N15), p 9

In particular, Ngati Awa agreed with the main point put forward by counsel for Ngati Haka Patuheuheu about Matahina:

This Tribunal taking an objective view might find that all the iwi can claim some form of interest in Matahina and that the interests overlap. The Tribunal might also comment on the inability of the Native Land Court system to deal with shared or overlapping interests. Related to this might be a finding that because of that inflexibility, the customary interests in the block were not adequately recognised or provided for.³⁶⁷

We are encouraged by this point of broad agreement. Counsel for Ngati Awa disputed many of the specific criticisms made by claimant witnesses about the Matahina hearings and judgments.³⁶⁸ But this concession, in our view, is very much to the point. It is in accord with the submissions of Tuhoe and others that the court was incapable of making fair decisions in the particular circumstances of the Urewera rim blocks.

The Crown, however, did not agree with these submissions. It did accept that there was a significant degree of overlapping customary rights in the rim blocks. Counsel did not, however, accept that the kind of title awarded by the court was inappropriate in that situation. The new titles were not supposed to replicate customary tenure, but to deal with new ownership and management issues in the post-1840 world.³⁶⁹ They were intended to make 'fixed and certain that which was fluid multilayered and complex.'³⁷⁰ Even so, the Crown argued that collective ownership was still provided, albeit without any form of collective control or management.³⁷¹ 'The Crown,' we were told, 'can be criticised for a failure over time to fully appreciate the significance of community and kinship to Maori society and how this is critically linked to land,'³⁷² but it was very difficult to create mechanisms to both reflect this and enable participation in the colonial economy: 'Although it may have been possible for the new forms of title to have made provision for an overlay of residual rights from the customary system, they would have impacted significantly on the ability to deal in those lands.'³⁷³

Thus, the Crown denied that its form of title was inevitably going to cause problems in the circumstances of the rim blocks. Also, it denied any undue influence on court decisions (as claimed by Tuhoe). Hearings took place in open court with direct examination of witnesses. Mechanisms to ensure safety in title determination included clear application processes, authorised surveys, notification procedures, preliminary inquiries, and competent judges and assessors. In particular, the Crown denied that there is any evidence of bias among the judges. Also,

367. Counsel for Ngati Awa, closing submissions (doc N15), p 21

368. *Ibid*, pp 13–22

369. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3–4, 10, 17–20

370. *Ibid*, p 18

371. *Ibid*, p 17

372. *Ibid*, p 19

373. *Ibid*, p 20

the facilitative approach of the court (encouraging Maori to agree where possible, instead of imposing a decision) led to appropriate title judgements. If there were any mistakes, either in process or in the substance of decisions, the system provided a remedy in the form of rehearings and petitions to Parliament. In the Crown’s view, these remedies worked well in Te Urewera.³⁷⁴

10.6.3.3.2 THIS TRIBUNAL’S APPROACH

The claimants argued that there were three interlocking factors to consider:

- ▶ the kind of title that the court could award (which influenced the nature and content of its decisions);
- ▶ the question of whether the title adjudication system was so patently unsuited to the circumstances of the rim blocks that all the court’s decisions must have been flawed; and
- ▶ the particular influences on – and flaws in – each individual decision of the court.

First, we consider the question of whether the new titles had to simplify customary ownership so that land could be leased, sold, or made security for loans. We accept that security of title was required for dealings in the new economy (see section 10.2). Lessees, buyers, and lenders needed to know that they were acquiring a reliable title from the right people. The Crown argued that new forms of title could have made ‘provision for an overlay of residual rights from the customary system’, but that this ‘would have impacted significantly on the ability to deal in those lands.’³⁷⁵ It will become clear in the next section (section 10.7) that the title actually created by the native land laws was vested in a list of individuals, and that settlers or the Crown had to deal with each one of them in seeking to acquire land. As we shall see in section 10.10, borrowing was virtually impossible on what became perceived as an unsafe ‘multiple’ title. The Turanga Tribunal found that these new titles did not facilitate Maori participation in the colonial economy in any meaningful way.³⁷⁶ What was required – as the Crown has conceded – was some form of community title or corporate management mechanism, that would have provided security of dealing on the one hand, and genuine Maori decision-making and choices on the other.

Such a mechanism could have encompassed any number of overlapping or layered rights, according to the people’s preferences. We accept that economic dealings required a regular and reliable interface between Maori and settlers. Tribal committees, representing groups with overlapping, layered rights, could have provided such an interface. Claimant counsel pointed out that corporate titles would have better mirrored customary rights while still enabling Maori and settlers to deal in the economy.³⁷⁷ We agree. As we saw in chapter 9, with the Urewera District Native Reserve, and as we shall see in chapter 12, with the East Coast trusts, what

374. Ibid, pp 4, 37–39, 87–95

375. Ibid, p 20

376. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 439–446, 527–537

377. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 8

was necessary was for the Crown to negotiate an appropriate form of collective title with tribes. It would be up to Maori to determine what kind of rights (and in what degree) would be recognised and represented in their decision-making bodies. This was what the Treaty guaranteed to them (see section 10.2).

Secondly, we note a general agreement on the part of all parties that we should examine the remedies provided by the Crown in the event of a challenge to the court's decisions. Not all of those contested decisions related to the court's ability to decide customary title. Some applications for rehearing concerned failures of notification (Kuhawaea) or survey liens (Tahora 2 and Matahina D – see section 10.8). We further note the agreement between Ngati Awa and the claimants in our inquiry that the court was particularly ill-equipped to reach appropriate decisions in border areas such as the rim blocks. Ngati Awa accepted that the Matahina decisions can be fairly criticised because 'customary interests in the block were not adequately recognised or provided for', as a result of the court's inability to deal properly with shared or overlapping rights.³⁷⁸ While the Crown does not accept this point, it argued that we should examine each block on a 'case by case basis' to determine whether the outcome of rehearings and petitions had been fair. Claimant counsel submitted that we should also consider the evidence for a systemic problem, and whether a systemic solution (rather than intervention in particular cases) was appropriate.

We do not see the necessity to examine the evidence before the court in each case, nor to determine whether, in our view, an appropriate decision was reached for particular blocks. All of the court's decisions were the subject of either rehearing applications or petitions to Parliament (sometimes both). In our view, the evidence is clear that the Native Land Court was not the appropriate body to investigate and decide customary title in these contested border lands. The Crown's fundamental point was that its remedy for potential injustices was to refer them to 'judicial bodies for resolution.'³⁷⁹ In almost all cases, this judicial body was the Native Land Court. It follows that if the Native Land Court was the wrong body to make the initial decision, it was also the wrong body to correct injustices arising from those decisions. This includes both the court's power to grant absolute and final titles on rehearing, and the chief judge's power to decide whether or not a rehearing was justified in the first place.

We turn next to consider in detail the remedies provided by the Crown, in the event of Maori dissatisfaction with the decisions of the Native Land Court.

10.6.3.4 The remedies provided by the Crown

The Crown and claimant positions may be reduced to two fundamental points: the Crown argued that by referring complaints to judicial bodies, whether as ordinary rehearings or as a result of petitions, it took the appropriate action; and the claimants argued that this remedy fell woefully short of the Crown's Treaty obligations,

378. Counsel for Ngati Awa, closing submissions (doc N15), p 21

379. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 95

because using the Native Land Court simply perpetuated the flaws of earlier decisions, while other bodies provided no concrete remedies.

10.6.3.4.1 REHEARINGS

As Crown counsel pointed out, aggrieved Maori had a right to apply for a rehearing.³⁸⁰ For the blocks dealt with in 1878, the decision whether to grant a rehearing was made by the Governor in council.³⁸¹ Tuhoe leaders (and the original Te Upokorehe applicants) sought a rehearing of Waimana, which was granted. The tribal award was not changed, but the list of owners was increased from 12 to 66, as arranged by Tamaikoha out of court.³⁸² Tuhoe do not quarrel with this decision. A rehearing was also sought for Waiohau 2 (which had been awarded to Ngati Pukeko). The Government refused Tuhoe's applications, on the advice of the judge who heard the case (Judge Halse) via the chief judge.³⁸³

From 1880, the chief judge made the decision as to whether a rehearing should be granted.³⁸⁴ In 1882, he turned down Tuhoe's applications for a rehearing of Kuhawaea, on the advice of Judges Puckey and O'Brien, without hearing the applicants. This was later found to have been illegal.³⁸⁵ In the same year, the chief judge rejected applications for a rehearing of Matahina, but one was granted later by special legislation (see below).³⁸⁶ In 1885, Chief Judge Macdonald also turned down Ngati Haka Patuheuheu's application for a rehearing of the partition of Waiohau 1 (see chapter 11). This, too, was done without hearing the applicants, and was later found to have been unlawful.³⁸⁷

From 1888, the chief judge was required to decide rehearing applications in open court, with the concurrence of an assessor.³⁸⁸ Under this revised system, applications were heard for the rehearing of Tahora 2, Waipaoa, Heruiwi 4, Whirinaki, and Tuararangaia. Most of these applications were dismissed. Rehearings were granted for Whirinaki (which ended with virtually the same result as the original hearing), and for some of the applicants in Tahora 2, and for one applicant in Waipaoa. In the course of this process, ownership lists were adjusted to include additional individuals. The tribal claims for rehearing were either rejected by the chief judge or, as in the case of Ngai Tamaterangi's claim for inclusion in Tahora 2, failed at the

380. Ibid, pp 88, 92–95

381. Native Land Act 1873, s 58

382. Sissons, 'Waimana Kaaku' (doc A24), pp 40–51

383. Arapere, 'Waiohau' (doc A26), pp 34–37; Paul, supporting papers to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(f)), pp 22–46

384. Native Land Court Act 1880, s 47

385. Bright, 'The Alienation of Kuhawaea' (doc A62), pp 51–52, 59; Judge Puckey, 25 November 1882 (Nicola Bright, comp, supporting papers to 'The Alienation of Kuhawaea', various dates (doc A62(a)), p C13)

386. Cleaver, 'Matahina' (doc A63), pp 47, 50

387. Robert Hayes, 'A Report on Certain Aspects of the History of the Waiohau Block' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L15), pp 13–14

388. Native Land Court Act 1886 Amendment Act 1888, s 24

Te Upokorehe

OUR people spent some time on the Waimana lands. I believe we were awarded some interests through the Native Land Court. As I said before we consider we have interests there through Ngati Raumoana, but would never say we could tell Tuhoe what to do there. We just support our Tuhoe whanaunga at Waimana.

'Hohepa Kereopa told me that the word Waimanakaaku was started when Ngati Raumoana moved. They kept moving their kai and things in their pits so they built the shed over a pit and buried it over a pit hence they called that the kaaku. Koina nga korero, nga Hohepa enei korero.

'When I think of Upokorehe living in Waimana I think it was out of whanaungatanga. We relate through all those peoples, Te Whakatane and through to Tamakaimoana. These days, I'm satisfied if Upokorehe, keep their affairs regarding Te Moana o Tairongo to the Ohiwa side of the confiscation line, that way we're not treading on one another's toes . . .

'Anyway I only want the Tribunal to be aware that we have claims. I know this Urewera Tribunal is not going to look into them. We just want the Tribunal to be aware of Upokorehe when it looks at Te Moana-a-Tairongo and the Ohiwa region including the Waimana and Tahora block lands. We are cautious that the Tribunal should not overlook us when it does this work for the Urewera Inquiry as we are tangata whenua in Ohiwa and we have customary interests in the region.'

Charles Aramoana¹

1. Charles Aramoana, brief of evidence, 14 January 2005 (doc J46), pp 11, 13

rehearing. No rehearings were granted for Heruiwi 4 and Tuararangaia.³⁸⁹ (Ngati Manawa do not quarrel with the outcome of the Whirinaki rehearing.³⁹⁰)

In 1894, the Liberal Government created a Native Appellate Court, with a guaranteed right of appeal from the Native Land Court. The new court consisted of the chief judge, who would appoint two judges to hear appeals, drawn from a pool of Native Land Court judges also appointed to the appellate court. The new court could sit with an assessor, but the assessor's concurrence was not required in its decisions.³⁹¹ Ruatoki appeals were heard by this new appellate court but, as we

389. Boston and Oliver, 'Tahora' (doc A22), pp 88–121; Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 60–64, 72–75; Tulloch, 'Heruiwi 1–4' (doc A1), pp 63–66; Clementine Fraser, 'Tuhoe and the Native Land Court, 1866–1896' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A103), pp 123–124; Tulloch, 'Whirinaki' (doc A9), pp 30–32

390. Counsel for Ngati Manawa, closing submissions (doc N12)

391. Native Land Court Act 1894, ss 79–95. We note too that the assessor's concurrence was no longer required in the Native Land Court.

LET us talk about Kuhawaea. Under pressure from the Crown, Ngati Manawa and Patuheuheu Ngati Haka came to some agreements – that we would not cross claim on Kuhawaea. And that Ngati Manawa would include Patuheuheu Ngati Haka into Kuhawaea. In the end only two members of Patuheuheu Ngati Haka were registered on the list of land owners. This was one aspect of the Native Land Court and its divide and rule tactic which irked us. The majority of Patuheuheu Ngati Haka were excluded from the lands of Kuhawaea.

'That's one big issue – if you didn't go to Court you lost your lands.

'Secondly, even if only a few people turned up at Court – the Court awarded the land to a handful of people. This is shocking!'

Alec Ranui¹

1. Alec Ranui, brief of evidence, 14 March 2004 (doc C14(a)), p 18

shall see in chapter 13, Ruatoki titles were cancelled in 1900 and reinvestigated by the Urewera commission.

According to Crown counsel, all applications were decided appropriately on their merits, with the exception of those dismissed illegally by the chief judge in the 1880s.³⁹² As will be evident from the preceding account, there was much dissatisfaction with the court's decisions, some of it resulting in applications for rehearing. The majority of applications for rehearing were dismissed, either by the chief judge (from 1880 onwards) or on his advice (in the case of Waiohau in 1878). While ownership lists were revised for Waimana, Tahora 2, and Waipaoa, no tribal awards were changed as a result of rehearings.

10.6.3.4.2 PETITIONS

As the Crown noted, petitions were investigated by the Native Affairs Committee. Successful petitions were usually investigated further by the Government, and then referred to a judicial body 'for resolution.'³⁹³ Apart from the fraudulent partition of Waiohau 1 (see chapter 11), Urewera petitions about the decisions of the court were concentrated in the 1890s.

10.6.3.4.2.1 Heruiwi 1–3

Some Ngati Manawa owners of Heruiwi 1–3 petitioned that they had been wrongly left off the ownership list. Gilbert Mair had pencilled them in after the hearing, but this had had no legal effect. Ultimately, the Government decided that a mistake had been made, but that there was no remedy because the land had been sold

392. Crown counsel, closing submissions (doc N20), topics 8–12, p 95

393. Ibid, pp 94–95

(to it).³⁹⁴ In our view, the Crown – having just purchased Heruiwi 2–3 – had land available for a remedy.

10.6.3.4.2.2 Kuhawaea

Ngati Haka Patuheuheu petitioned about Kuhawaea, and their claim to have missed out because they were not notified of the hearing. Chief Judge Davy advised the Native Affairs Committee that his predecessor had dismissed their rehearing applications illegally, and the matter was referred to the Urewera commission for inquiry.³⁹⁵ In the Crown's submission, this was in itself an adequate remedy, and all that was required of it in the circumstances.³⁹⁶ The commission heard the petition in 1899, considering both the court minutes from the original hearing, and fresh evidence from Ngati Manawa, Ngati Haka Patuheuheu, Ngati Hape, and Tuhoe. Unfortunately, the historians in our inquiry were not able to locate the commission's report.³⁹⁷ The Crown argued that there was no evidence as to whether any compensation ever resulted, but this was contradicted by its own witness, Cecilia Edwards, who confirmed that no compensation was ever paid to the claimants.³⁹⁸

In the submission of Wai 36 Tuhoe, the only remedy that the Urewera commission could have made of its own accord was to have compensated Ngati Haka Patuheuheu with an increased share of land in the Urewera District Native Reserve, but that would have been 'robbing from "Pita" to pay "Paora"'.³⁹⁹ According to Cecilia Edwards, this may well have been the reason for giving Ngati Haka Patuheuheu a bigger share than they might otherwise have got in the Hikurangi-Horomanga block.⁴⁰⁰ The tribe raised Kuhawaea with the Government again in 1908. Carroll seems to have forgotten the 1898 decision to put this grievance before the commission. He responded that the matter should 'stand over', unless or until steps were taken to 'rectify errors in respect of Urewera lands', in which case the Kuhawaea claim could be made the subject of inquiry. According to Edwards, no further action was ever taken.⁴⁰¹

10.6.3.4.2.3 Tahora 2

After the failure of their claim at the rehearing, Ngai Tamaterangi sent a petition to Parliament in 1890. Rewai Rangimataeo headed the petition, supported by 165

394. Counsel for Ngati Manawa, closing submissions (doc N12), p 54; Tulloch, Heruiwi 1–4 (doc A1), pp 37–39

395. Bright, 'Kuhawaea' (doc A62), pp 59–60

396. Crown counsel, closing submissions (doc N20), topics 8–12, p 95

397. Bright, 'The Alienation of Kuhawaea' (doc A62), p 60; Edwards, 'The Urewera District Native Reserve Act 1896, Part 2' (doc D7), p 73. Edwards suggested that the commission might not have written an actual report, but rather arranged for Ngati Haka Patuheuheu to have a greater share of UDNR land than they were customarily entitled to.

398. Crown counsel, closing submissions (doc N20), topics 8–12, p 95; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 33

399. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 17

400. Edwards, 'The Urewera District Native Reserve Act 1896, Part 2' (doc D7), pp 69, 72–73

401. *Ibid*, p 72; Cecilia Edwards, under cross-examination by counsel for Ngati Haka Patuheuheu, Taneatua School, Taneatua, 3 March 2005 (transcript 4.14, pp 210–211)

**Counsel for Ngati Haka Patuheuheu Cross-examines Cecilia Edwards
about the Crown's Remedy for Kuhawaea**

Williams: I suppose the issue for me, though, is that the Crown still didn't provide any remedy to this issue.

Edwards: That's right. That's right.

Williams: Despite knowing that it was a matter that had, well, the application had been illegally dismissed.

Edwards: That's right. The remedy, if you like, was a soft remedy which was to provide for a process of somebody to look into the matter and there was no hard result.¹

1. Cecilia Edwards, under cross-examination by counsel for Ngati Haka Patuheuheu, Taneatua School, Taneatua, 3 March 2005 (transcript 4.14, p 210)

others. The successful Ngati Kahungunu claimants, headed by Tamihana Huata (with 203 others), sent a counter-petition denying that there was any need to reopen the Tahora 2 title, which had already been heard twice. The Native Affairs Committee made no recommendation on either petition.⁴⁰² As far as we know, that was the end of official protest about the titles to Tahora 2, although complaints were made to the Urewera commission later in the 1890s.

In addition to these petitions, the Tuhoe leader Tamaikoha sent one in 1903, complaining about the partition of Tahora 2A. Tuhoe and Te Upokorehe had sent a representative (John Balneavis) to the Validation Court in 1896 to look after their interests. According to Tamaikoha's petition, Balneavis had partitioned Tahora 2A so as to obtain all the best land for a small minority of the owners. On the advice of the chief judge, Parliament cancelled the partition in 1906, ordering a rehearing by the Native Land Court. As a result of this hearing in 1907, the objectionable partition was not renewed and the whole of 2A3 was vested in the 1896 non-sellers.⁴⁰³ This remedy satisfied the owners, except that on survey the block was found to be a lot smaller than it was supposed to have been. The Crown's awards (2A1 and 2A2) were not adjusted downwards to compensate.⁴⁰⁴

10.6.3.4.2.4 Waipaoa

In 1894, Hapimana Tunupaura (and 52 supporters) petitioned Parliament, asking for the return of land in Waipaoa. This was presumably the 100 acres awarded to

402. 'No 264, 1890 – Rewai Rangimataeo and 165 others', AJHR, 1891, I-3, p 10; 'No 300, 1890 – Petition of Tamihana Huata and 203 Others', AJHR, 1891, I-3, p 14

403. Boston and Oliver, 'Tahora' (doc A22), pp 166–167

404. *Ibid.*, pp 164, 169–171

the Crown in Waipaoa 1, on which Ngati Kahungunu claimed to have homes and an urupa. The chief judge had dismissed their application for a rehearing of this claim. The Native Affairs Committee recommended this petition for favourable consideration by the Government, but – from the evidence available to us – no action was taken at the time.⁴⁰⁵

10.6.3.4.2.5 Ruatoki

In 1898, there were three petitions to Parliament about Ruatoki. Mehaka Tokopouamu and Numia Kereru sent petitions seeking to revisit the title and ownership lists, while Te Mahurehure hapu wanted the partitions cancelled. These petitions (and the whole question of the Ruatoki title) were referred by Parliament to the Urewera commission.⁴⁰⁶ We will consider substantive questions relating to Ruatoki in chapter 13, where we address the Urewera commissions and their outcomes. Here, we note the different treatment of Ruatoki in the 1890s: the automatic hearing of all appeals, and the reference of subsequent complaints to a body of tribal and Government commissioners for further inquiry and settlement. This was very different from the treatment of the other rim blocks, as we have seen. In our view, this was the least that could have been accorded all complaints about the title decisions of the Native Land Court in Te Urewera.

10.6.3.4.3 THE SPECIAL CASE OF MATAHINA

In 1883, special legislation was passed to order a rehearing of the title to Matahina. In 1881, the Native Land Court dismissed the claims of Ngati Haka Patuheuheu, Ngati Hamua, Ngati Rangitihī, and Ngati Hinewai (a hapu of Rangitihī), and awarded sole title to Ngati Awa. Tuhoe and Ngati Manawa had withdrawn their claims early in the proceedings, after checking the boundaries of the block. Ngati Haka Patuheuheu applied for a rehearing but their application was dismissed by the chief judge in 1882.⁴⁰⁷ Ngati Rangitihī sent a petition to the Native Minister two weeks after the initial hearing, but this was not treated as an application for rehearing.⁴⁰⁸

After their rebuff by the chief judge, Ngati Haka Patuheuheu negotiated an agreement with Ngati Awa with regard to the contested part of the block south of the Waikowhewhe Stream. In the meantime, the assessor had informed the chief judge that he had made a mistake when inspecting the land, having inspected land at Pokohu but not Matahina.⁴⁰⁹ This is an example of a rehearing brought about not by an application or a petition but on the advice of officials that the Government should intervene. While rare, it did happen. The Native Department reached the view that ‘injustice has been done to some natives shut out of the block.’⁴¹⁰ The

405. ‘Petition of Hapimana Tunupaura and 52 Others’, AJHR, 1894, I-3, p 4

406. Steven Oliver, ‘Ruatoki Block Report’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), p 83

407. Cleaver, ‘Matahina’ (doc A63), p 47

408. David Potter, brief of evidence, 26 March 2004 (doc C41), pp 39–40, 53

409. Cleaver, ‘Matahina’ (doc A63), pp 49–50

410. Lewis to Gill, 20 September 1882 (Cleaver, ‘Matahina’ (doc A63), p 49)

Premier decided that the Government could not finalise its purchase negotiations with Ngati Awa until this matter was rectified. When Ngati Haka Patuheuheu wrote to the Government, advising that they had sorted out their claim to land south of Waikowhewhe with Ngati Awa, and no longer wanted a rehearing, the Government decided to proceed anyway. As a result, the Special Powers and Contracts Act of 1883 authorised the Native Land Court to rehear Matahina.⁴¹¹ Despite the Government's view that injustice had been done, the legislation specified that rehearings were necessary because of procedural flaws, 'having no relation to the several titles on the merits'.⁴¹²

We have no detailed evidence on the 1882 agreement between Ngati Awa and Ngati Haka Patuheuheu, other than the latter's view at the time (expressed to the Government) that it had satisfied their claim.⁴¹³ Professor Mead did not refer to it in his evidence for Ngati Awa.⁴¹⁴ Nonetheless, the rehearing permitted the Ngati Rangitihī claim to also be reconsidered, which otherwise would have remained unheard.

At the rehearing, the court, composed of two judges, reached a different conclusion and granted 2,000 acres to Ngati Haka Patuheuheu, 1,500 acres to Ngati Hamua, and 1,000 acres to Ngati Rangitihī. The claimants endorsed the view of Philip Cleaver, which was that these awards were so small as to actually constitute a decision against them, despite the change of the court's award in principle.⁴¹⁵ Nonetheless, this is the only example from Te Urewera in which a rehearing changed tribal awards in any significant degree. The law did not provide for any appeal from this rehearing decision. As far as we are aware, the claimants did not try to petition Parliament about the outcome. It has, as witnesses from Ngati Rangitihī and Ngati Haka Patuheuheu told us, remained a serious grievance for them, passed down from generation to generation.⁴¹⁶

10.6.3.5 The Urewera commission: an alternative model for investigation and remedy?

As we saw in chapter 9, the Liberal Government agreed to an alternative to the Native Land Court process for the Urewera heartland, which was set aside as the Urewera District Native Reserve in 1896. Instead of using the court, title to land in the reserve would be determined by a commission. The majority of commissioners (five) would be Tuhoe chiefs, assisted by two senior Government officials. As we will discover in chapter 13, this commission was close to the people, it sat on their own lands, and it was extremely well attended. As a result, claims were debated and contested vigorously, with a wealth of evidence uncovered and recorded. Two

411. Cleaver, 'Matahina' (doc A63), pp 49–51

412. Special Powers and Contracts Act 1883, s 4 (Cleaver, 'Matahina' (doc A63), p 50)

413. Cleaver, 'Matahina' (doc A63), p 50; Robert Marunui Iki Pouwhare, brief of evidence, 14 March 2004 (doc C15), pp 35–36

414. Hirini Moko Mead, brief of evidence, no date (doc L23)

415. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 71–72

416. See, for example, Pouwhare, brief of evidence (doc C15), pp 35–37; Potter, brief of evidence (doc C41), pp 40–44; Nikora, brief of evidence for third hearing (doc C31), pp 8–11.

of the rim blocks, Kuhawaea and Ruatoki, were referred to the commission for it to inquire into petitions and grievances, and – in the case of Ruatoki – to reinvestigate and settle the titles. As part of its deliberations, the commission discovered many grievances and issues about the titles of the other rim blocks. Ngati Whare, for example, raised the claims to non-Urewera District Native Reserve lands that they had not presented to the Native Land Court.⁴¹⁷ It seems to us that the Urewera commission was a unique opportunity for the Crown to have provided a regional investigation of Maori dissatisfaction with the decisions of the Native Land Court in the rim blocks, with a view to remedying any injustices that had occurred.

Was the Crown aware of such dissatisfaction? The answer to this question is ‘yes’. As we have seen in this section, every court decision had been contested by applications for rehearing and/or petitions to Parliament. By 1894, when the appellate court was established, it must have seemed clear to the Crown that court decisions in the rim blocks had been particularly contested. Yet few of these applications or petitions had been granted. Maori leaders expressed their discontent to the Government as opportunity arose, although, as we saw in chapter 8, contact between Tuhoe and officials was fairly limited in the 1880s, before the Governor’s visit in 1891. By the late 1890s, contact was more regular and sometimes intense. In 1898, for example, an Urewera delegation to the Premier pressed the case of Kuhawaea on him (among other matters).⁴¹⁸

Even Ngati Whare, who had refused to attend the court or seek rehearings, made their unhappiness known when possible. In 1894, during the Premier’s first ever visit to Te Whaiti, the titles of Whirinaki and Heruiwi were raised with him. Unfortunately, the exact complaint was not recorded in the minutes, but Seddon responded:

As to the investigation of title to the Whirinaki and Herewera [Heruiwi] blocks, the Government have no power over the law. When once a decision is arrived at, the Government have no power over rehearings, and cannot interfere, unless there has been absolute fraud. The Supreme Court is the only tribunal that can interfere. But it would be well if you were to reduce to writing the matters complained of, and send the particulars down to me, so that I may make inquiries as to how the affair stands.⁴¹⁹

John Hutton and Klaus Neumann suggested that Ngati Whare may have raised these blocks privately with Carroll. Both blocks were well past the legal time limit for rehearing applications.⁴²⁰ In any case, Seddon’s reply was somewhat disingenuous, since the Government frequently ordered inquiries or rehearings for blocks

417. Counsel for Ngati Whare, closing submissions (doc N16), pp 51–52

418. Edwards, ‘The Urewera District Native Reserve Act 1896, Part 2’ (doc D7), p 65

419. ‘Pakeha and Maori: A Narrative of the Premier’s Trip through the Native Districts of the North Island’, March 1894, AJHR, 1895, G-1, p 73 (John Hutton and Klaus Neumann, ‘Ngati Whare and the Crown, 1880–1999’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), p 102)

420. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 101–102

when fraud was not an issue. The Supreme Court, on the other hand, was not a remedy for Maori aggrieved by Native Land Court title decisions. Hutton and Neumann observed that there was no further action from Seddon.⁴²¹

As we noted in the case of Matahina, the Government could take action when its officials were convinced that injustice had resulted from court decisions, even in the absence of applications or petitions. In our view, the Urewera commission was a prime opportunity for the investigation of Kuhawaea and Ruatoki to have been put on a broader footing. Evidence of Maori complaints about titles, such as the Tahora 2 decisions, came up in the commission even when it was not looking for them.⁴²² Had the commission been tasked with a regional inquiry to ensure that justice had been done in the rim blocks, it would clearly have been able to find answers. As Carroll noted, when referring Kuhawaea to the commission, it had to deal with 'all the adjoining lands' and so could 'easily make remarks acquainted with the facts and position of affairs'.⁴²³ We note, of course, that the tribal composition of the first commission was not necessarily suitable for such a task. Membership of the commission – or of a commission entrusted with this task – would have had to have represented all the tribes interested in the rim blocks, with Government commissioners to advise and assist.

One of the Government's interests was to ensure the validity of its title for the land that it had acquired from Maori since title determination.⁴²⁴ Reopening Kuhawaea or Ruatoki was no threat to it in that respect, whereas it had much to lose if incorrect decisions had been made in the blocks in which it had made significant purchases. On the other hand, the private sale of Kuhawaea put much of the land beyond the reach of an effective remedy. In both cases, Crown (formerly Maori) land or financial compensation were available options for remedies.

10.6.4 Treaty analysis and findings

A profound wrong has been done to the peoples of Te Urewera. They ought to have been provided with a form of community title more reflective of customary arrangements. Also, as we noted in section 10.2, Maori ought to have decided their own land entitlements. This was fundamental to the Treaty. It has been the finding of the Tribunal in other inquiries, and we saw the force of it in our own. The Crown argued that by providing a judicial process, either in the form of rehearings or as a result of petitions, it had satisfied its obligations to correct injustices brought to its attention. We disagree. To refer complaints arising from the Native Land Court back to that court was simply to perpetuate and entrench the wrong. We agree with the Rekohu and Te Tau Ihu Tribunals that the court was not the

421. *Ibid*, p 102

422. See, for example, Edwards, 'The Urewera District Native Reserve Act, Part 2' (doc D7), pp 116–117; Belgrave and Young, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 63–64.

423. J Carroll, minute, 10 October 1898 (Bright, supporting papers to 'The Alienation of Kuhawaea' (doc A62(a)), p B5)

424. See, for example, Cleaver, 'Matahina' (doc A63), pp 49–51; Tulloch, 'Heruiwi 1–4' (doc A1), pp 38–39.

correct body to decide customary titles, and that it necessarily produced decisions that distorted or mistook custom (see section 10.2). The claimants in our inquiry have been left with enduring grievances.

We repeat again the submissions of Ngati Awa with respect of Matahina, which pointed the way:

This Tribunal taking an objective view might find that all the iwi can claim some form of interest in Matahina and that the interests overlap. The Tribunal might also comment on the inability of the Native Land Court system to deal with shared or overlapping interests. Related to this might be a finding that because of that inflexibility, the customary interests in the block were not adequately recognised or provided for.⁴²⁵

In the case of Matahina, a rehearing was ordered by Parliament as a result of the Government's discovery that the assessor may have made a procedural error, and its conviction that injustice had been done to those left out of the title. Although Ngati Haka Patuheuheu and Ngati Rangitihi were not satisfied with the outcome, the rehearing exhausted their legal and political options. Parliament was hardly likely to intervene a second time to order another rehearing. What this highlights is that the Government's chosen remedy was to send contested titles back to the very court – with its inherent flaws – that had made the decisions in the first place. The claimants and Ngati Awa agreed that the court was simply incapable of dealing with the overlapping interests in border areas, and that its form of title was particularly ill-suited to such cases. This was true for all the rim blocks in Te Urewera.

10.6.4.1 *Did petitions provide an alternative or back-up remedy?*

As with rehearing applications, most of the petitions to Parliament were not granted. In the case of Heruiwi 1–3, it was decided that the land had been sold anyway, and there was no remedy for the petitioners. Since the land had been sold to the Crown, we consider that a remedy could still have been found, especially since it had only just purchased Heruiwi 2–3. For Kuhawaea, no effective remedy was provided in the form of actual compensation. Petitions about the title to Tahora 2 were not granted. For the partition of Tahora 2A3, however, Parliament did provide an effective remedy. Petitions for the return of land awarded to the Crown in Waipaoa 1, especially in respect of an urupa, did not have had any positive outcome at the time. Petitions about Ruatoki were referred to the Urewera commission (see chapter 13).

Petitions, therefore, did provide some scope for remedial action. As we see it, only one actually succeeded in providing any concrete remedy – the Tuhoe petition about the partition of Tahora 2A3.

In most cases, however, the claimants in our inquiry did not petition Parliament. Nor, sometimes, did they apply for a rehearing. In part, the costs may

425. Counsel for Ngati Awa, closing submissions (doc N15), p 21

have dissuaded them. By the time Waipaoa was heard, for example, Tuhoe had already been turned down twice for applications based on failure to notify them of a hearing. It may not have seemed worth the cost of trying a third time. Others, such as Ngati Whare, made informal approaches to the Government, rather than official petitions. As we have seen, this strategy had no greater success.

In sum, the right to apply for a rehearing was an illusory remedy. Most applications were turned down. For those that were granted, rehearings involved essentially the same court and kind of title that were, in our view, particularly inappropriate for the overlapping claims in the rim blocks. Alternative inquiry processes, such as the Urewera commission, could have been used instead. The commission itself, or a more representative variant of it, was well placed to carry out a regional inquiry in the 1890s, and to uncover injustices in the title decisions that had preceded it. Such an inquiry would have enabled the Crown to remedy any injustices while it still owned the majority of land it had just acquired from Maori in the rim blocks. That an inquiry was held for Kuhawaea and Ruatoki shows the potential available in this respect, although the outcome for Kuhawaea was disappointing. Petitions provided an uncertain avenue of relief for those who made them, but most did not.

We find that the Crown provided a system of title investigation (and of titles) that was in breach of the Treaty. Having set up such a system, the Crown then failed to provide Maori with adequate remedies when the Native Land Court – as it must inevitably do – reached decisions that were unacceptable to one or more parties in the overlapping claims to the rim blocks. The right to apply for a rehearing was ineffective on two grounds: most applications were dismissed; and those that were granted could only be heard in the same inappropriate system that had decided the titles in the first place. Further, the right to petition Parliament resulted in a real remedy in only one case (the partition of Tahora 2A).

The Treaty principle of redress, which has been discussed by the Tribunal in many reports, required the Crown to provide fair and effective redress for well-founded grievances, so as to restore the honour and integrity of the Crown, and the mana and status of Maori. As the Te Tau Ihu Tribunal found, past remedies provided by the Crown must be measured according to this Treaty principle.⁴²⁶ We find the Crown in breach of this Treaty principle of redress, as well as the principles of autonomy and active protection, for these various acts and omissions. We find too that these Treaty breaches were avoidable in the circumstances of the time. The Crown could have empowered Maori to decide their own titles, as they requested. It could also have remedied well-founded grievances after inquiry by a body such as the first Urewera commission. Although we have decided not to comment on particular title decisions, we are certain that all claimants in our inquiry were prejudiced as a result of these Treaty breaches. We will outline aspects of that prejudice in section 10.10.

426. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp5–6

10.7 WHAT WERE THE CROWN'S PURCHASE POLICIES AND PRACTICES IN TE UREWERA?

SUMMARY ANSWER: Between 1881 and 1930, the Crown purchased almost 60 per cent of the rim block land that had been awarded to the claimants in our inquiry. Most of this land was acquired in the 1890s. The unfair and coercive nature of the Crown purchase machine was observed by the Stout–Ngata commission in 1907:

Theoretically the Crown does not buy unless the owners are willing to sell. But the experience of half a century shows—(1) that in the absence of competition produced by restrictive legislation, and in the face of encumbrances due to litigation and survey costs, circumstances are created which practically compel the Maori to sell at any price; (2) that the individualisation of titles to the extent of ascertaining and defining the share of each individual owner in a tribal block owned by a large number gives to each owner the right of bargaining with the Crown and selling his interest; it gives scope to secret dealing, and renders practically impossible concerted action on the part of a tribe or hapu in the consideration of the fairness or otherwise of the price offered, or in the consideration of the advisability of parting at all with the tribal lands.⁴²⁷

We agree. The Crown's deliberate exploitation of its monopoly powers, of the hardship and debts of Maori individuals, and of the empowerment of the individual over the community, made it virtually impossible for hapu to negotiate price, reserves, or the decision to sell in the first place. Individuals were picked off one by one. Prices were unfairly low. In all the lands purchased by the Crown, a reserve for sellers was set aside in only one block. In such circumstances, it is not possible to speak of willing sellers or meaningful consent. As the Native Land Laws commission observed in 1891, 'The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people . . . The strength which lies in union was taken from them.'⁴²⁸ The Crown claimed in our inquiry that – in spite of the system it had set up – it had conducted its nineteenth-century purchases with groups and their leaders. This was not in fact so in almost all instances.

There were brief signs of hope between 1899 and 1905, when Crown purchasing was abolished and Maori were given the opportunity to vest their land in (partly representative) Maori land councils for leasing only. Carroll's reforms were soon swept away, however, and Crown purchasing resumed in Te Urewera from 1909. The Crown's twentieth-century purchase policies and practices were along much the same lines as in the nineteenth century, and were just as unfair and coercive. While theoretically re-empowering owners to make group decisions, the Native

427. 'Native Lands and Native Land Tenure (General Report on Lands Already Dealt with and Covered by Interim Reports', 11 July 1907 (Bruce Stirling, 'Te Urewera Valuation Issues' (commissioned research report, Taneatua: Tuhoe-Waikaremoana Maori Trust Board, 2005) (doc L17), pp 28–29)

428. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)

Land Act 1909 actually set the quorum for meetings of assembled owners so low as to enable tiny minorities to make the decision to alienate ancestral land. Those who were absent from a single meeting (usually the great majority) could have their land sold without their consent. No follow-up meeting or other process was required to obtain their views or consent. Worse, in 1913 the Reform Government restored the Crown's power to purchase individual interests, for occasions when it could not convince even small minorities of owners to sell. At the same time, the Crown had resurrected its nineteenth-century powers to exclude private competition. There was some improvement in price with the setting of Government valuation as a minimum in 1905, although the Crown still had to resort to purchasing individual interests when meetings of owners would not sell at its prices (or at any price).

The Crown's purchase policies and practices were in serious breach of the Treaty, to the significant prejudice of the claimants in our inquiry.

10.7.1 Introduction

From 1840 to 1862, the Treaty of Waitangi provided that Maori could alienate or retain their land as they wished, but if they chose to alienate, they could do so only to the Crown. In 1862, the Crown waived its right of pre-emption and provided for the direct purchase or lease of Maori land by settlers. After the debacle of the Waitara purchase, which had led to war in Taranaki, the Crown's system of buying land was discredited and it largely withdrew from the land market. In 1869, however, Donald McLean (chief land purchase commissioner under the old system) became Native Minister. Under his superintendence, the Crown resumed purchasing land. Maori then had a choice: enter into a relationship with settlers (or speculators) and sell or lease privately; or deal with the Crown. It became one of the great questions of the day, whether colonisation worked fastest and best under Crown or private buying. From the 1870s onwards, the Crown legislated to give itself a series of advantages in the market, over both private buyers/lessees and Maori owners. Also, as we saw in section 10.2, the Native Land Court and its titles were designed to facilitate (sometimes almost compel) the transfer of land out of Maori ownership. A Crown purchase machine was created that ground its way through Maori opposition and obtained some 65 per cent of the land in the rim blocks by 1930.⁴²⁹ Private buyers, on the other hand, acquired only some 16 per cent. In this section, we consider claims that the Crown's purchase policies and practices were in breach of the principles of the Treaty of Waitangi.

10.7.2 Essence of the difference between the parties

The claimants argued that the Crown's purchase of land in the rim blocks was in breach of the Treaty. In their view, its purchase policies created a set of interlocking features that stacked the deck against Maori resistance to sales, and their

429. The Crown acquired 59 per cent of the land awarded to our claimants by direct purchase, and a further 5.4 per cent by takings in satisfaction of survey costs. We discuss survey costs in section 10.8.

The Claim about the Structural Unfairness of the Crown Purchase System

Counsel for Ngati Manawa submitted:

it may be useful to reduce the Crown purchasing system to its core essentials so that its structural unfairness becomes plain. Supposing I wish to purchase a house, but that the transaction has the following aspects:

- a. I, the Crown, have unlimited resources, and the would-be seller, Ngati Manawa, though fond of its house, is desperately poor, indeed starving.
- b. The seller is not allowed to sell the house to anyone but me,
- c. While I am making up my mind about whether I want the house or not, or how much I feel like paying for it, which can be for as many years as I like (decades, sometimes), the owners are not allowed to mortgage or lease their house or give it away to anyone else (if they dare to do so that is a criminal offence).
- d. I get to say what the house is worth, and there is no way this can be challenged.
- e. If the house is owned by four people as tenants in common, the two who do not sell will have to pay some of the costs of subdivision, and if they don't or can't they will be made to hand over some of their portion to me.
- f. If the house is owned by four people, and three of them decide not to sell, I can still buy the interest of the person who will sell, and force the rest to meet some of the costs of cutting out the portion of the seller.
- g. If I have bought one of the shares and am trying to buy the rest from the others I can take out injunctions stopping the remaining owners from cutting down trees (even for their own use) and if they do so I can force them to pay some of the profits to me.

All the above are standard aspects of the Crown purchasing system as it operated in its settled classic form from around 1880–1920. It was in my submission a deeply unfair and one-sided system.¹

1. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 40

preference for leasing (or for not dealing in their lands at all). The main features of the Crown purchase machine in the nineteenth century were:

- ▶ *Exclusion of the private sector:* From 1871 onwards, the Crown had a variety of mechanisms to exclude private competition. The most important of these were its monopoly powers under the Government Native Land Purchases Act 1877, the Native Land Purchase Act 1892, and the Native Land Act 1909. In addition, full pre-emption was reimposed on the country from 1894 to 1909.

In the claimants’ view, these monopoly powers made it virtually impossible for Maori to resist selling land, and at the Crown’s low prices.⁴³⁰

- ▶ *Pre-title dealings*: The claimants, especially Ngati Manawa, argued that the Crown used leases and advances to gain a foothold in the land, and then used them to overcome opposition to sales. As a result of Maori resistance to permanent alienation, the Crown had to accept leases, but it did so solely to gain ‘leverage as a purchaser’.⁴³¹ It had no intention of farming the land or subletting it to settlers. Instead, it used its refusal to pay rents to force Maori – who were not allowed to deal with anyone else – to eventually sell the Crown the freehold.⁴³² At the same time, advances (whether for purchase or lease) were used to break down the opposition of cash-starved communities to dealing in their lands.⁴³³
- ▶ *Undivided share buying*: According to the claimants, the standard Crown purchase practice was to buy the undivided interests that its own native land laws had created, and then seek a partition from the Native Land Court when it had reached the limit of individuals prepared to sell. Non-sellers, even prominent rangatira, could do little to prevent this piecemeal acquisition of shares. This was especially so because of the poverty that drove individuals to sell their paper shares, which were otherwise of little practical use to them, in order to meet short-term consumption needs. Maori poverty combined with Crown monopolies and the kind of title created by the court to virtually compel sales, outside the control or even the scrutiny of the tribal community and its leaders.⁴³⁴
- ▶ *The costs of obtaining title*: An integral part of the system, in the claimants’ view, was the costs of obtaining title, more particularly the costs of surveys. These contributed to the pressures on Maori to sell land.⁴³⁵ We will address this issue in a section 10.8.

In the twentieth century, the Crown purchasing system was temporarily suspended from 1900 to 1905, and then reintroduced in full force in 1909. Ngati Kahungunu and Ngati Ruapani raised an issue particular to this period. The Maori Land Settlement Act of 1905 allowed the Native Minister to vest land compulsorily in boards for leasing. According to the claimants, this happened in the case of Waipaoa 5, yet ultimately failed to prevent its sale.⁴³⁶

430. Counsel for Ngati Manawa, closing submissions (doc N12), pp 41–46

431. *Ibid*, p 20

432. *Ibid*, pp 20–21, 50–51

433. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 112; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 95–96; counsel for Ngati Rangitahi, closing submissions (doc N17), pp 22–24

434. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 45–46; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 52

435. Counsel for Ngati Manawa, closing submissions (doc N12), pp 46–47

436. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 65–67; counsel for Ngai Tamaterangi, closing submissions (doc N2), p 54; counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 31–34; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, paras 132(m), 137–139

From 1909 to 1913, the Crown had to buy land from a meeting of assembled owners. It could still impose a monopoly to prevent any private competition, including leasing. In the claimants' view, the quorum set by legislation for such meetings was so low as to create a travesty of group decision-making.⁴³⁷ Even so, the Crown was still unable to get owners to agree to sales, especially at its low prices. The law was amended in 1913 to permit the Crown to buy individual interests again. In the claimants' submission, this enabled the Crown to circumvent even the minimal community controls reinstated in 1909. Economic circumstances were such that targeted individuals had little choice but to sell, and to sell at the Crown's prices.⁴³⁸

On the overall question of prices, the claimants argued that the Crown – by exploiting the interlocking features outlined above – was able to take away the power of the owners to negotiate in any meaningful sense. As a result, it was able to impose low prices on them. The claimants accepted that it is difficult to be sure what a fair price might have been. There are indications from prices paid by the Crown for similar land (or the same land later), and from the amounts offered by private parties, that the Crown's prices were too low. In the claimants' view, this reinforces general evidence that monopolies were widely believed at the time to drive prices down. Also, they pointed to the evidence of Dr Donald Loveridge that prices almost doubled in the years after 1905, once Government valuation was made the compulsory basis for a minimum price. In Loveridge's view, this showed that prices were too low in the preceding decades. For the 1890s, by contrast, there were no safeguards in the legislation to require a fair or independent valuation as part of setting prices for Maori land.⁴³⁹

The Crown focused its closing submission on the claimants' nineteenth-century issues. In essence, the Crown denied most of the key claimant allegations, and argued that the others had been greatly exaggerated.

As its starting point, the Crown pointed out that its purchase of land was provided for in the Treaty – not all land alienations will be breaches. Maori had positive as well as negative reasons to sell land, including the raising of money for farming. The Government had an obligation to act in good faith, fairly, reasonably and honourably: 'Conducting transparent negotiations with proper rights holders is in line with this duty.'⁴⁴⁰ The Crown submitted that, by and large, Crown purchase practice met this standard in the Urewera rim blocks. Claimant historians, in the Crown's view, have exaggerated the extent to which its agents dealt with individuals at the expense of the community.⁴⁴¹ The evidence 'repeatedly refers to negotiations with hapu and Chiefs and various public meetings being held to discuss alienation issues.'⁴⁴² Individual signatures were obtained, but it was 'generally

437. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

438. Counsel for Ngati Manawa, closing submissions (doc N12), pp 47–48

439. Ibid, pp 34–38; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 11, 31; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70–71

440. Crown counsel, closing submissions (doc N20), topics 8–12, p 68

441. Ibid, pp 6, 68

442. Ibid, p 68

(although not always)' as a result of agreements reached with hapu or chiefs.⁴⁴³ Crown counsel did make one important concession: 'It does however seem that dealings with individuals rather than groups became more common in the 1890s, the period of time when the majority of Urewera purchasing occurred.'⁴⁴⁴ Even so, counsel pointed out that Richard Seddon (like earlier Native Ministers) preferred group dealings in the 1890s.⁴⁴⁵

The Crown accepted that it had given itself extraordinary powers in respect of buying individual interests, which it often denied to private parties. 'At this time,' we were told, 'it was considered reasonable to expect that the Crown and its agents would be scrupulous in the exercise of these powers. The Crown's performance in the exercise of these powers needs to be examined on a case-by-case basis.'⁴⁴⁶

In terms of leases and pre-title dealings, the Crown argued that their importance has also been exaggerated. They were only relevant to Crown purchases in two of the 11 blocks: Heruiwi 1-3 and Matahina.⁴⁴⁷ In other blocks, the Crown abandoned pre-title dealings 'where they were not welcome.'⁴⁴⁸ In the Crown's view, it usually dealt with willing sellers who had full powers of negotiation. There was evidence of Maori successfully rejecting its purchase attempts (as in Kuhawaea). It does not appear to have tried to interfere if private persons wanted to lease or buy land.⁴⁴⁹ The Crown noted that its refusal to pay rents could be a source of 'annoyance', but argued that it was necessary to ensure that the correct owners were identified by the court first.⁴⁵⁰ In the case of Heruiwi 1-3, the Crown admitted that its refusal to pay rent after title determination was an appropriate 'matter for Tribunal inquiry.'⁴⁵¹

In terms of its monopoly powers, the Crown argued that they were a legitimate attempt to 'protect its negotiations from private interference.'⁴⁵² As with other 'extraordinary' powers, the Crown's duty was to ensure that its agents acted with scrupulous fairness.⁴⁵³ The question, however, of whether the Crown 'abused its monopoly powers of purchase' is not a significant issue for the rim blocks. The Crown only purchased a 'few blocks' under such powers, and there is insufficient evidence to show whether the monopoly powers 'had any material impact on the purchase price paid'. Also, there was strong evidence that negotiations over price 'were considered and robust.'⁴⁵⁴ Maori sometimes rejected offers or negotiated price increases.⁴⁵⁵

443. Ibid, p 6

444. Ibid

445. Ibid, p 66

446. Ibid, p 6

447. Ibid, pp 6, 66-70

448. Ibid, p 6

449. Ibid, pp 6, 68-72

450. Ibid, pp 73-74

451. Ibid, p 70

452. Ibid, p 74

453. Ibid, p 65

454. Ibid, p 6

455. Ibid, pp 6, 67-68

The Crown accepted in theory that a monopoly could lower prices when Maori ‘wanted to sell or had no choice but to sell’:

However, for this issue to be answered comprehensively, a systematic study would be required of those blocks where the Crown invoked its power to exclude competition and blocks sold privately in the same period (evidence in Heruiwi is that the Crown paid more than the maximum it had intended to). Even then, care must be taken to ensure that those factors that go towards influencing the sale price (eg quality of land, location of block, period of purchase) are comparable, no evidence on the record does this.⁴⁵⁶

In terms of twentieth-century issues, the Crown did not make any closing submissions on the compulsory vesting of Waipaoa 5, the 1909 land purchase system, the 1913 amendments to it, or any of the purchases that took place from 1909 to 1930. In its opening submissions, the Crown denied that any Te Urewera land was compulsorily vested in a board under the 1905 Act, but did not otherwise address these issues.⁴⁵⁷ In its statement of response to the particularised claims, the Crown either denied most of the specific allegations or reserved its position on them.⁴⁵⁸ In response to claims about the sale of Heruiwi 4C by a small minority of owners, counsel noted: ‘The Crown accepts that a question arises as to the adequacy of the safeguards for the majority of owners against the actions of a minority of owners under its regime governing meetings of assembled owners under the 1909 Act.’⁴⁵⁹

10.7.3 Tribunal analysis

10.7.3.1 *Pre-title dealings*

As we have seen in section 10.5, the Crown’s pre-title dealings were important in bringing a number of blocks into the Native Land Court. They were less successful, however, in ultimately securing the alienation of land in those blocks. The Crown argued that the importance of its pre-title dealings has been overstated.⁴⁶⁰ We agree. Only in Heruiwi 1–3 and Matahina did significant sales occur as a result of those pre-title dealings. We discuss Heruiwi 1–3 in this section. We do not, however, consider the Crown’s purchase of land in Matahina in any detail. The use of pre-title dealings to get Matahina into the court has already been discussed, and was of relevance to the claimants in our inquiry. The method by which the Crown purchased land from Ngati Awa after title was decided, however, is not a matter for this Tribunal.

456. Crown counsel, closing submissions (doc N20), topics 8–12, p75

457. Crown counsel, opening submissions, February 2005 (paper 2.780), p15; see also Crown counsel, opening submissions, 11 April 2005 (paper 2.819)

458. We note that many issues for the period 1909–30 were not raised in the particularised claims. It was only after the hearing of evidence, when their full import was revealed, that some matters became the subject of claimant closing submissions. The Crown’s statement of response, therefore, is not entirely helpful in deriving the Crown’s position on matters not covered in its closing submissions.

459. Crown counsel, final statement of response, 11 June 2003 (paper 1.3.2, SOC 2), p A138

460. Crown counsel, closing submissions (doc N20), topics 8–12, p70

Blocks outside the Ambit of this Report

Due to the Ngati Awa Claims Settlement Act 2005, the Tribunal is not considering post-title Crown actions in relation to the following rim blocks:

Matahina A1–A6	74,200 acres	Awarded to Ngati Awa
Matahina B	1,500 acres	Awarded to Ngati Hamua
Tuararangaia 2	1,000 acres	Awarded to Ngati Pukeko
Tuararangaia 3 and Warahoe	4,156 acres	Awarded to Ngati Hamua
Waiohau 2	1,100 acres	Awarded to Ngati Pukeko

We note that, while those Ngati Hamua and Warahoe who are affiliated to Ngati Whare and to Tuhoë participated in this inquiry, no claims were made about Matahina B or Tuararangaia 3.

Also, Whakatohea were not claimants in this inquiry. As a result, we make no specific findings about them in relation to Tahora 2B (60,806 acres), which was awarded to Ngati Ira and Whakatohea in 1889.

10.7.3.1.1 HERUIWI 1–3

As we discussed above, the Native Land Court was suspended in the Rangitaiki Valley from 1873 to 1877. One reason was the conflict among Te Arawa over use of the court, and the extent of opposition to it operating. Another reason, however, was the Government's desire to exclude private competition for land, since only the Crown was allowed to purchase land before title investigation. (While some settlers were still willing to risk transactions, especially informal leases, the suspension of the court discouraged others.) The Crown's exclusion of a private market became an enduring theme in Te Urewera rim blocks, as we shall see below. Even with some of its private competitors dissuaded, Government purchase agents found it very hard to get agreement to land sales. A policy was developed of entering leases instead. As counsel for Ngati Manawa submitted, these were not genuine leases. There was no intention of farming the land, or of subletting so that it could be developed by settlers. Nor, as it turns out, was there a genuine intention to pay rent. The sole purpose of the lease was to establish a foothold in the land, and tie it up, without returns to its owners, until they were forced to sell.⁴⁶¹

In its submissions, the Crown argued that its leases were not 'one-way-roads'.⁴⁶² They did not always result in sales. Counsel conceded, however, that in the two instances where the Crown was able to complete lease agreements – Heruiwi 1–3

461. Counsel for Ngati Manawa, closing submissions (doc N12), pp 20–21, 50–52

462. Crown counsel, closing submissions (doc N20), topics 8–12, p 70

and Matahina – the leases were in fact turned into sales.⁴⁶³ As Te Arawa rangatira Te Rangikaheke observed, a Government lease was nothing more than bait on a hook. The hook was the eventual purchase of the land.⁴⁶⁴ This was Government policy. The colonial secretary told Parliament in 1874:

it was not always possible to get the freehold of Native land . . . [but] in practice, the cession of freehold generally followed the leasing of the land [and] the leases were being taken as a preliminary to the expected acquisition of the freehold. . . . It was the business of the Government to carry out the wishes of Parliament by acquiring an estate from the Natives in the North Island, and he thought it was best to obtain that estate. It was perfectly well known that, in dealing with Native land, the first step was the lease, and that obtained, the freehold inevitably followed in time.⁴⁶⁵

How did this work in practice in Heruiwi 1–3?

Ngati Manawa were in a difficult position when they returned to war-ravaged lands in the early 1870s. They were already in debt to benefactors such as Gilbert Mair, and they struggled to grow or buy enough food in the 1870s and 1880s. Relying on the evidence of McBurney, Armstrong, and Tulloch, claimant counsel emphasised the number of times tribal leaders or officials reported the tribe's dire situation to the Government in these decades.⁴⁶⁶

The Ngati Manawa strategy, in the absence of capital to develop their lands, was to use them in the colonial economy while retaining ownership. Leasing seemed the ideal solution, and it was favoured over sales by all the claimants in our inquiry. With the Native Land Court suspended, however, the main potential tenant was the Crown. At first, Ngati Manawa offered to lease land on what officials thought were 'absurdly high terms'.⁴⁶⁷ In the monopoly era of the 1870s, these terms were soon knocked down. In 1874, Mitchell and Davis⁴⁶⁸ advanced £100 of rent for Heruiwi, and then finalised a lease with 47 signatories in February 1875. Another advance of £50 was made the day after the lease was signed. This was clearly, as the Crown suggested, a negotiation with chiefs on behalf of their community. The terms were: £100 per annum for the first decade; £150 per annum for the second decade; and £200 per annum for the third decade.⁴⁶⁹ The lease included a clause that the owners were not allowed to sell or in any other way deal with their land for 30 years: 'This illustrates what strange kinds of "leases" these transactions were: it is unusual for a supposed tenant to dictate in a lease that the

463. Crown counsel, closing submissions (doc N20), topics 8–12, pp 69–70

464. Armstrong, summary of 'Ika Whenua and the Crown' (doc F8), p 5

465. Daniel Pollen, 24 July 1874, NZPD, vol 16, p 209 (Tulloch, 'Heruiwi 1–4' (doc A1), p 23)

466. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 28–30

467. Tulloch, 'Heruiwi 1–4' (doc A1), p 23

468. Henry Mitchell and Charles Davis were Crown land purchase agents operating in the Rangitaiki and neighbouring districts. Together with Captain JA Wilson, later a Native Land Court judge, they were responsible for attempting to lease or purchase land for the Crown on the western side of Te Urewera in the 1870s.

469. Tulloch, 'Heruiwi 1–4' (doc A1), pp 23–24

landlord is forbidden from alienating the leased land or taking a mortgage over it.⁴⁷⁰ Unlike similar leases, however, this one did not include the stipulation that the Crown would not pay rent until the court decided title. Even so, the schedule of specific dates for payment was crossed out.⁴⁷¹

Apart from one more advance of £10, the Crown paid no rent between the signing of the lease in 1875 and the investigation of title in 1878. The court was allowed to hear Rangitaiki lands by this time, but in March 1878 the Crown renewed its monopoly over Heruiwi by proclaiming it as under negotiation for purchase. If the owners wanted a return on their land, they could only get it from the Crown. But the Government continued refusing to pay rent after the court decided title. Mitchell made some small payments in 1878 and 1879, but otherwise pointed out to his superiors that the rent was due. Despite requests from both Mitchell and Ngati Manawa, the Government took the view that survey costs and previous advances exceeded what was owing in back rents. Mitchell disagreed. By February 1881, the Government owed £353 on the lease. Ngati Manawa and Ngati Hineuru threatened to repudiate the lease in 1881, but by this time the Government was already negotiating to buy the land.⁴⁷²

In March 1881, Richard Gill informed the Native Minister that the owners of Heruiwi were anxious to sell it to the Crown. In April, the owners advised that they would re-enter the land if the rent was not paid, and a group of senior leaders (including Harehare Atarea) informed the Minister of their opposition to any sale.⁴⁷³ By May, Gill admitted that the owners 'have no desire to sell the block and prefer the rent being regularly paid'. Instead, the 'offer to sell was brought about by myself [Gill]', because the Government wanted to recoup the rent advances by turning the lease into a purchase, and then put settlers on the land.⁴⁷⁴ Having extorted an offer to sell for £4,000, Gill advised that the Crown should pay £2,500 – but sweetening the deal by also paying back rents.⁴⁷⁵

In May, Gill offered the Minister three options: carry out the lease and pay rent; abandon the lease and remove the monopoly proclamation; or buy the land (and pay back rent). Even though he knew from Gill and Harehare Atarea that Ngati Manawa and Ngati Hineuru did not want to sell this land, and preferred that the Government honour its lease, the Minister accepted Gill's advice to turn the lease into a purchase.⁴⁷⁶

In June, Gill reported that 'the natives are unanimous as to sale.'⁴⁷⁷ This was untrue. Rawiri Parakiri and some of his people had agreed to the sale (at £3,000),

470. Counsel for Ngati Manawa, closing submissions (doc N12), p 51

471. Tulloch, 'Heruiwi 1-4' (doc A1), p 24

472. *Ibid*, pp 24, 28-31

473. *Ibid*, pp 30-31

474. Gill to Native Minister, 9 May 1881 (Paula Berghan, 'Block Research Narratives of the Urewera, 1870-1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), p 567)

475. Tulloch, 'Heruiwi 1-4' (doc A1), p 31

476. *Ibid*

477. *Ibid*, p 32



Unknown (A.T.L. 1/017971-G)

Gilbert Mair. In the 1881 purchase of the Heruiwi lands, Mair acted as an agent for the Government. The transaction exemplified the Crown's oft-employed strategy of excluding private buyers by proclamation to ensure its own purchase monopoly and engaging in pre-title dealings to pull Maori land into the Native Land Court: leasing the land and refusing to pay rent for six years because title had not been decided. The Heruiwi owners collectively would still not agree to sell (much preferring to lease), but Mair was able to buy up a majority of individual shares after the block had been brought to the Native Land Court in 1878.

but Mair noted that 'Harehare refused to sell saying that he would put up ripekas [crosses] all over the land and in 2 years all the Europeans will vanish into thin air.'⁴⁷⁸ Later in the same month, private purchasers offered £2,000 more than the Government was prepared to pay, but the law prevented the owners from considering this offer.⁴⁷⁹

The owners of Heruiwi were faced with little or no choice. Their land was tied up under lease and a proclamation that prevented them from considering the much higher offer from private buyers. Their tenant, the Crown, was refusing to pay the rent and insisting on them selling the land to it. Even so, the owners would not – as a group – agree to the sale. In this circumstance, Mair advised the Government that he could get a majority of signatures by purchasing undivided individual shares, and then applying to the court for a partition. In this way, he thought he could get around most of the opposition, although there would still be a small core of non-sellers.⁴⁸⁰ Gill agreed, instructing: 'Buy so many interests as you can.'⁴⁸¹ As part of the negotiations, there were to be no more advances to 'the Ngatimanawa for food' after the purchase was concluded.⁴⁸² We accept, however,

478. Tulloch, 'Heruiwi 1-4' (doc A1), p 32

479. Ibid

480. Ibid

481. Gill to Mair, 20 June 1881 (Tulloch, 'Heruiwi 1-4' (doc A1), p 32); Berghan, 'Block Research Narratives' (doc A86), p 568

482. Tulloch, 'Heruiwi 1-4' (doc A1), p 32

that the Crown did not count its rent advances as part of the purchase price.⁴⁸³ It was only the unpaid rents that were used to make the price appear higher.

On 29 June, even before Mair had collected any signatures, the Native Minister exercised his power to apply to the court for the Crown's interests to be excised. In September, the owners also applied for a partition, and it was this application that the court heard in December 1881. Mair produced a deed with the signatures of 48 of the 56 owners. The Crown had paid out £2,142 to the 48 sellers: $\frac{1}{56}$ each of £2,500.⁴⁸⁴ The additional sum of £500 (classified by the Government as overdue rent) does not appear to have been paid. On 2 July 1881, before purchasing individual interests, Mair made a single payment of £174 2s 8d. This was probably paid to non-sellers as well as sellers, since Mair's diary shows that Harehare Atarea was present.⁴⁸⁵ As we shall see in section 10.8, the Crown seems to have deducted survey costs and advances from the £600 rent actually due, and £174 was the sum that was left. The Government had originally planned to sweeten the deal with an extra £500; but only paid £174 of it. The court awarded the Crown 20,910 acres (Heruiwi 1). The eight non-sellers did not turn up at the hearing, but Mair explained that he had negotiated with tribal leaders that the non-sellers would get two separate pieces of land (Heruiwi 2–3). The court took the word of Mair and the sellers to this effect.⁴⁸⁶

10.7.3.1.2 OTHER PRE-TITLE DEALINGS

The sale of Heruiwi 1–3 exhibited all the hallmarks of the system complained of by the claimants. A lease agreement, in combination with a Government monopoly, was used to virtually compel the owners to sell to the Crown. An ongoing refusal to pay the rent for six years (from 1875 to 1881) was a key part of the Government's strategy. In the knowledge that the majority of owners did not want to sell this land, the Government resorted to purchasing individual shares, subverting tribal decision-making and the authority of rangatira as the representatives of the community. The owners were forced to accept the Crown's price, despite a higher offer from private buyers, and their own demand for a higher price at the beginning of negotiations. Purchasing from individuals took away any collective bargaining power. Payment of back rents was used to make the price look better, ignoring the fact that the Crown was legally obliged to pay its rent.

The Crown pointed out, however, that its other lease negotiations in Te Urewera were less successful. As we have said, Matahina was locked into a Crown lease, and then part of it was awarded to the Crown in 1884 in satisfaction for survey costs and advances. The claimants in our inquiry, Ngati Rangitihī (Matahina D) and Ngati Haka Patuheuheu (Matahina C and C1), were not part of this purchase. Their small Matahina blocks were mostly acquired later by the Crown to satisfy survey

483. Ibid

484. Crown counsel, closing submissions (doc N20), topics 8–12, pp 68–69; Berghan, 'Block Research Narratives' doc A86, pp 566–569

485. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 294

486. Tulloch, 'Heruiwi 1–4' (doc A1), p 33; Berghan, 'Block Research Narratives' (doc A86), p 569

charges secured by liens (as we shall see in section 10.8). In this case, however, the Crown was wrong to say that its rent advances were not turned into purchase advances.⁴⁸⁷ When Ngati Haka Patuheuheu received money on Matahina/Pokohu in the 1870s, this was advances against rent owing on the lease. In 1884, however, those payments were treated as advances for purchase. Mair recommended that the tribe be allowed to refund the money, as otherwise it would entitle the Crown to half of their small piece of Matahina. The Government agreed, and Ngati Haka Patuheuheu had to pay back their share of the rent advances as if they had been a downpayment for purchase.⁴⁸⁸

Other than Matahina and Heruiwi, the Crown was not able to complete any pre-title lease or purchase negotiations. Advances were made on Kuhawaea, Ruatoki, and Tahora 2. In the case of Ruatoki, most of the £50 advance was collected up by Tuhoe leaders and returned to the Government.⁴⁸⁹ Wilson gave up on this block – and also on Waimana, where the Government had a secret arrangement with the lessee's business partner to get land later.⁴⁹⁰ As Crown counsel observed, the Government was sometimes willing to bow out where non-speculators had made arrangements with Maori.⁴⁹¹ It was usually the case that bona fide settlers who wanted to start farming would accept informal leases, despite Government monopoly proclamations. This was the case in Kuhawaea and Waiohau, although it took a long time for the Government to finally agree to give up its proclamation over Kuhawaea. The lessee paid back the Government advances. As we have seen in section 10.5, the Crown's decision to withdraw from Kuhawaea was the main factor in allowing the survey (and court hearing) to proceed, over the wishes of the great majority of owners. In the case of Waiohau, Ngati Haka Patuheuheu had some discussions with Wilson about a Government lease in 1874, but that was as far as it went. No advances were paid, and the chiefs entered into private leases instead.⁴⁹²

The Crown suggested that these blocks show it was only prepared to deal with willing sellers. When Maori refused to lease or sell, it graciously withdrew.⁴⁹³ In our view, it shows rather that the Crown was only able to buy land where it had managed to obtain a lease and thus a stranglehold over a block. Even then, it had to resort to individual purchases to get Heruiwi 1. In this respect, the court titles (with their lists of individual owners) proved fatal to Maori ability to hold on to their land, and to insist on leases rather than sales. This was also the case in Waimana and Kuhawaea, where lessees immediately started buying individual interests, as soon as title was granted. The lessees had little choice, as there was nothing to

487. Crown counsel, closing submissions (doc N20), topics 8–12, pp 69, 74

488. Rose, 'A People Dispossessed' (doc A119), pp 93, 122

489. Oliver, 'Ruatoki' (doc A6), p 48

490. McLean to Wilson, 24 December 1873 (Binney, supporting papers to 'Encircled Lands, Part 1' (doc A12(a)), p 42)

491. Crown counsel, closing submissions (doc N20), topics 8–12, pp 66–72

492. Rose, 'A People Dispossessed' (doc A119), pp 67–70, 92

493. Crown counsel, closing submissions (doc N20), topics 8–12, p 72

The Alienation of Matahina

In 1884, the Crown obtained 8,500 acres of Matahina A for survey costs and in satisfaction of its pre-title advances. In the 1880s, another 6,000 acres of Matahina A1 was alienated to pay for a second survey (of the subdivisions), and 19,000 acres was sold to private parties, with the court partitioning this land in 1891. Most of the remaining Ngati Awa land (the A blocks) was sold to private purchasers in the 1920s. There were further small sales in the 1960s, and part of the remaining land ended up in the Tarawera Forest scheme.

In 1907, the Crown took 513 acres of Matahina B for survey costs. Another 587 acres was sold to a private forestry company in the 1930s. A further 166 acres was sold in the 1960s.

In 1907, the Crown took 667 acres from Matahina C and C1 for survey costs (see section 10.8). In the 1930s, the remaining land was included in the Ruatoki development scheme but it was not developed. This land was eventually amalgamated, part was swapped with other Matahina land, and the new block (called Matahina F) was vested in the Tuhoe-Waikaremoana Maori Trust Board in the 1980s and leased for forestry.

In 1907, the Crown took 920 acres of Matahina D for survey costs, leaving only 80 acres for the Ngati Rangitahi owners (see section 10.8). The remaining land became part of the Tarawera Forest deal in the 1960s (a joint venture in exotic forestry, involving the Crown, Tasman Pulp and Paper, and thousands of owners of Maori land).

About one per cent of Matahina remained in Maori ownership by the 1990s, before the return of Crown forest lands to Ngati Awa as part of their Treaty settlement.¹

1. See Philip Cleaver, 'Matahina Block' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc A63); Philip Cleaver, summary of 'Matahina Block' and response to questions in the statement of issues, 20 February 2004 (doc C8), p 19.

stop a competitor from buying up interests.⁴⁹⁴ The court titles effectively circumvented the tino rangatiratanga of hapu communities. The Government could still choose to deal with tribal leaders at public hui. But if, as in the case of Heruiwi 1, it decided not to do so, then the court titles enabled it to get the land from individuals. Poverty was the driver – individuals found themselves with little choice,

494. See, for example, the pressure that Jemima Shera's purchasing of interests must have placed on Swindley from the very beginning: Sissons, 'Waimana Kaaku' (doc A24), pp 40–43, 50, 52–54, 58–59.

selling for low prices that sustained whanau for a while, but could not (by their very nature) contribute to community development of the land.⁴⁹⁵

On the eastern side of our inquiry district, there were pre-title dealings in Waipaoa and Tahora 2. For Waipaoa, these dealings consisted of an arrangement to pay for the survey with a block of land called Matakuhia. We will deal with that arrangement in section 10.8. In the case of Tahora 2, Government negotiations to purchase Te Wera and Te Houpapapa were stymied from 1879 to 1889. Although advances were paid to Tuhoe and Whakatohea (£100) and to Turanga leaders (£200), this occurred towards the end of the Government's system of pre-title dealings. In the very year that these advances were paid, the Native Minister decided to put an end to the practice. As we shall explain shortly, in the early 1880s, the Government withdrew from live negotiations that were based on such advances, in cases where the land was of no great value, or the purchase was not worth pursuing. As we saw in section 10.5, the Native Land Purchase Department continued to push pre-title negotiations in Tahora 2 until 1882. From then on, the Government played a waiting game – it would not move until the tribes could agree on surveying the land (see section 10.5.3 above).

By the time Tahora 2 was finally heard by the court, it came under the Liberal Government purchase policies of the 1890s. The advances were irrelevant by then as a means of leveraging a purchase, although the Crown still insisted on getting land for its £200 advance to Wi Pere for the Turanga hapu.⁴⁹⁶ The Tuhoe-Whakatohea advance, however, was allowed to lapse.⁴⁹⁷

Thus, we agree with the Crown that the significance of pre-title dealings has been exaggerated in terms of actual land alienation. In our view, these dealings were more important for drawing land into the court (see section 10.5). Where the Crown managed to complete lease negotiations, however, this proved critical to later purchase. This was the case for Heruiwi 1.

10.7.3.2 Purchases under Liberal Government policies, 1890–1909

In 1879, the Native Minister decided to abolish the system of pre-title dealings. Advances and leases had proved useful in getting a foothold in many blocks, but payments had been scattered across vast territories over several years, without always resulting in completed purchases. Nor had the Crown's agents in the 1870s been motivated by specific settlement strategies. Their goal was to secure as much land as possible, over as wide an area as possible. In the early 1880s, the Government retrenched. It abandoned some negotiations, as too difficult or pointless to pursue (while insisting that advances be repaid in land or money). Energies

495. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 28–30; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, para 143; Brian Murton, 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H12), pp 227–236

496. Boston and Oliver, 'Tahora' (doc A22), p 137

497. *Ibid.* At first, the Crown intended to recover this advance in 1891 to 1892, but eventually the matter lapsed (with no explanation).

were refocused on land of immediate economic value for settlement.⁴⁹⁸ As we have seen, the primary example of this in Te Urewera was the reluctant abandonment of Kuhawaea in 1882.

At the same time, a new strategy was developed – of which we saw an early example in Heruiwi 1 – confining negotiations to the purchase of individual interests after title was decided by the court. If Maori could keep their land out of the court, then the Government would not try to buy it. As soon as court titles were obtained, however, purchase agents moved in – as we shall see in the case of land put through the court in Te Urewera from 1889 onwards. The bulk of the Crown's purchases in the rim blocks took place in the 1890s, under this system.

It was not, however, the only option available to the Government. There had been a hiatus in the mid-1880s, when John Ballance experimented with a system of block committees which could vote to put their 'surplus' land in the hands of a commissioner to auction for lease or purchase. Maori did not take up this option, mainly because they had wanted the commissioner to act in conjunction with their tribal committees, rather than having full and sole power over the land. Even so, Maori protested vehemently when Ballance's Act was scrapped and free trade was reintroduced in the late 1880s, along with a resumption of Crown purchasing.⁴⁹⁹ The Liberals too experimented with boards, auctions, and leasing from time to time, as Maori opposition to sales matched the Government's intense efforts to buy land in the 1890s. We shall return to some of these alternatives in the following sections.

The poverty that had driven land dealings in Te Urewera in the previous decades remained a factor in the 1890s. As Binney and Murton explained, individuals were vulnerable to a range of pressures. Without capital for development, they were living a precarious existence, growing crops on marginal lands and surviving on income from seasonal work (outside Te Urewera). Traditional resources were either out of reach – at Ohiwa – or in decline. As a result, the effects of natural disasters, such as floods or crop failures, were more exaggerated than earlier in the century.⁵⁰⁰ Life was harsh, 'tempered only by the fact that this was their ancestral land.'⁵⁰¹

This was the situation in Te Urewera when the Liberals came to power in 1889. Their policy was to buy as much Maori land for settlement as possible. Leasing made it on to the agenda from time to time, when Maori opposition forced it there, but always at the price of Maori giving up control of their land to Crown agents to lease. The Liberals' preference was to settle small farmers on good land, but – as with most nineteenth-century governments – they were prepared to purchase anything and everything, and sort out the settlement side later. Maori collectives

498. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 556–558, 607–613

499. *Ibid*, vol 1, pp 347–356, 366: Ballance's Act referred to here was the Native Lands Administration Act 1886.

500. Binney, 'Encircled Lands, Part 2' (doc A15), pp 34–35; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 218–236, 249–308

501. Binney, 'Encircled Lands, Part 2' (doc A15), p 35

(tribal and pan-tribal) who opposed this agenda were considered hostile. Even the Liberals, however, were not necessarily convinced that the Urewera interior was suitable for close settlement. They wanted its supposed gold and minerals, its timber, and ultimately (if they could get it) land for larger-scale pastoral farming.

The Liberals' aggressive purchase programme netted 2.7 million acres of Maori land between 1891 and 1900.⁵⁰² Their unprecedented success in such a short time evoked a huge groundswell of Maori opposition. This centred on the Kingitanga and the nationwide Kotahitanga movement, which sought Maori self-government, abolition of the Native Land Court, Maori committees to decide their own titles and manage their own lands, and – as an absolute minimum – an end to Crown purchase of Maori land.

At first, the Liberals were prepared to rely on the usual method of creating a monopoly – proclaiming land as under negotiation for purchase, and then renewing the proclamation from time to time so as to maintain a state of siege for the Maori owners.⁵⁰³ Then, in 1893, they passed experimental legislation involving a return to some of Ballance's ideas from the mid-1880s. A majority of owners could choose to sell their land to the Queen, hand it over to the Queen to be leased, or hand it over to a board to be auctioned for sale or lease. This Act (the Native Land Purchase and Acquisition Act 1893) envisaged independent valuations of land and an end to individual dealings, but it never came into force.⁵⁰⁴ Instead, most Liberal purchases from 1894 to 1899 took place under the Native Land Court Act 1894, which reimposed Crown pre-emption on the whole country. Under this Act, Maori could either sell their individual interests to the Crown, or they could hand the land over to a board to lease or sell it on their behalf. Also, for the first time since 1886, the Government provided for a legal entity that could represent the owners of blocks as a collective. Owners were allowed to vote to incorporate themselves, but not in cases where the Crown had acquired a 'right or interest' in their land.⁵⁰⁵ For Te Urewera, this ruled out many of the rim blocks because the Crown had commenced purchases or acquired survey liens.

In our inquiry, the claimants were particularly critical of the Crown's failure to provide for collective authority in its court titles. Tama Nikora, for example, told us:

In my view customary tenure was changed as a result of the Native Land Court determining title as individuals were given absolute interests and there was no provision for 'corporate governance.' Prior to the Native Land Court Tuhoe did operate by corporate governance through traditional leadership structures. All the evidence

502. Tulloch, 'Heruiwi 1-4' (doc A1), p 85

503. The Government Native Land Purchases Act 1877 was repealed in 1892. Its monopoly provision was replaced by section 16 of the Native Land Purchases Act 1892.

504. Cecilia Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation' (commissioned research report, Wellington: Crown Law Office, 2004) (doc D7(a)), pp 81-90

505. Native Land Court Act 1894, ss 117-134

that I have seen indicates that Tuhoe did not want any change and that Tuhoe had observed from a distance the adverse impacts of that change on other iwi. Hence the strong stance taken by Te Whitu Tekau.⁵⁰⁶

The Crown accepted that it had not provided a corporate mechanism for managing Maori land, as would have been appropriate, but argued that it finally did so in 1894.⁵⁰⁷ As we have noted, however, this option could not be taken up in Te Urewera rim blocks, where the Crown had acquired (or soon acquired) interests or rights.

The Turanga Tribunal found that Maori communities would not have willingly divested themselves of almost all their assets for almost no return (see section 10.2).⁵⁰⁸ One explanation for how this happened was the purchase of individual interests. As Kathryn Rose argued, this was a known and deliberate technique to overcome the resistance of communities and tribal leaders to land sales.⁵⁰⁹ She noted the strategy as described by W J Wheeler, a purchase officer involved in buying Tahora 2:

The owners . . . *must be dealt with individually*, as the majority of them, if assembled in public meeting, would be filled with righteous indignation, of the thought of parting with their birthright for a mess of pottage; but within 24 hours, the same persons would gladly sell, if they could do so unobserved by their fellows. [Emphasis in original.]⁵¹⁰

As we shall see, this was a common strategy in Te Urewera in the 1890s, and it struck at the core of Maori communities' and leaders' ability to prevent sale of ancestral land for immediate consumption needs. It was roundly condemned by the claimants. Colin (Pake) Te Pou pointed out: 'When the Maori customs were robust, an individual person could never sell it [the land].'⁵¹¹ Counsel for Ngati Haka Patuheuheu, based on what he saw as the consequence of the individual titles created from 1873 onwards, submitted: 'Such individual interests could be picked off by Crown purchase agents and private interests, despite, and irrespective of, any tribal or chiefly decision or right of veto.'⁵¹²

We note too that this process fell far short of standards articulated to Tuhoe, Ngati Manawa, and Ngati Whare by the Liberal Premier, Richard Seddon. Crown counsel submitted: 'In the 1890s, Seddon also insisted that the Crown deal with groups.'⁵¹³ As we saw in the previous chapter, the Premier visited Te Urewera in

506. Nikora, brief of evidence for third hearing week (doc c31), p 18

507. Crown counsel, closing submissions (doc N20), topics 8–12, p 13

508. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 510–511

509. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 23–26, 33–37

510. Wheeler to Sheridan, June 1896 (Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 34)

511. Colin (Pake) Te Pou, brief of evidence, 26 March 2004 (doc c32(a)), p 12

512. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 67

513. Crown counsel, closing submissions (doc N20), topics 8–12, p 66

1894, trying (among other things) to persuade Maori of the benefits of disposing of land under his 1893 Act. We discussed that visit (and Seddon's messages) in more detail in chapter 9. Here, we note that he promised that committees of owners, or the majority of the owners themselves, would make deliberate decisions as to whether their lands were surplus. If so, then the majority of owners would decide if the land should be leased or sold. The Premier emphasised the option of leasing, but also suggested that the Government could invest purchase moneys on behalf of sellers if they wanted a long-term benefit from permanent alienation. Whether leasing or selling, however, the choice was to be a deliberate one made by the community. In either case, the Government itself did not want to take their lands from them.⁵¹⁴ Then, in 1895, Seddon agreed to special arrangements in the heart of Te Urewera, to meet the wishes of Te Urewera leaders: local committees and a central, tribal committee would manage their lands. Only the tribal committee had the power to sell land in the Urewera District Native Reserve. At this very time (1894–95), Government agents working in the rim blocks were buying up individual interests in Heruiwi 4, Whirinaki, and Tahora 2, and were about to do so in Waipaoa and Heruiwi 2–3.

Further, the Government had been warned against individual purchasing by its own royal commission on the native land laws, which had reported to it back in 1891. The commissioners found that the Native Land Acts had 'drifted from bad to worse', and that private (often secret) individual purchasing had replaced the 'old public and tribal method of purchase':

All the power of the natural leaders of the Maori people was undermined . . . An easy entrance into the title of every block could be found for some paltry bribe [advance]. The charmed circle once broken, the European gradually pushed the Maori out and took possession. Sometimes the means used were fair; sometimes they were not. The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people . . . The strength which lies in union was taken from them.⁵¹⁵

The Liberals' purchase of individual interests netted massive amounts of land in the North Island in the 1890s (including the majority of the land purchased by the Crown in the Urewera rim blocks). Maori opposition was so strong and united nationally by the end of the decade that the Crown finally agreed to stop purchasing land in 1899, in the face of massive Maori discontent. This self-denying policy lasted from 1899 to 1905, when the Crown resumed purchasing. In the meantime, after reaching a negotiated agreement with the Kotahitanga parliament, the Liberal Government passed legislation in 1900 designed to put the settlement of New Zealand on a new footing. Maori could now choose to vest their land in

514. See, for example, 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp 54–56, 82.

515. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)

district Maori land councils, which would have a Maori majority (partly elected). The councils would have the power to lease (but not sell) the land. For five years, this policy (called 'taihoa' or 'by and by') was tested.⁵¹⁶ Would Maori vest enough land in the councils, and would settlers be willing to take it up on lease?

In 1905, with Kotahitanga disbanded and Maori apparently reluctant to use the councils on a large scale, the Liberals began the dismantling of the 1900 system. In the view of the Central North Island Tribunal, the system had been a promising one that was not given a fair trial. Instead, the Government removed the elected component and turned the councils into boards, with a Pakeha majority.⁵¹⁷ Also, the Native Minister was given power to vest land compulsorily in the boards, but only for the purposes of leasing. This new compulsory system was trialled in two districts.⁵¹⁸ The Tairāwhiti district included part of our inquiry district, and the Waipāoa 5 block was vested compulsorily for leasing in 1906 (as we shall see in more detail below). Outside of the two districts specified in the 1905 Act, Crown purchases resumed. In 1909, towards the end of the Liberal era, the native land legislation (and purchasing system) was overhauled and a new Native Land Act passed. We shall discuss that Act and its consequences for Te Urewera in the next section.

10.7.3.2.1 HERUIWI 4 – THE EXCEPTION TO THE RULE ?

Heruiwi 4 (some 75,000 acres) was awarded to Ngāti Manawa, with small sections for Ngāti Hineuru (4A), Ngāti Kahungunu (4E), and Tuhoē (4C). Even as the title orders were being made out, it was clear that Ngāti Manawa intended to sell some of their land. The court noted, with respect to 4G, 4H, and 4I: 'Mehaka hands in a list of owners for a portion of the main block which is not to have any restrictions as N' Manawa has been put to great expense in the surveys of Heruiwi and Whirinaki blocks.'⁵¹⁹ In February 1891, soon after the lists were settled, tribal leaders offered to sell 4G, 4H, and 4I (just over 40,000 acres) to the Crown. The land had been set aside to pay for survey costs and other expenses. At first, the Government was interested because a mistake was made – it thought that the more valuable 4A and 4B, next to the Crown's land in Heruiwi 1, were being offered. When Harehara Atarea renewed the tribe's offer in late 1891, the Government lost interest when it realised that the land was not very valuable for settlement. Even so, the Government was prepared to buy the land if it could be done quickly and for a minimal price. The majority of owners agreed to a lower price, and signed a deed in February 1892. Others signed in March and April of that year.⁵²⁰

Thus, the first major alienation of land in Te Urewera under the Liberals was carried out by tribal leaders on behalf of the community, with deeds signed by the

516. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 665–666, 671–675

517. *Ibid*, pp 675–682

518. Stevens, 'Waipāoa' (doc A51), p 42

519. Whakatane Native Land Court, minute book 3, 1 December 1890, fol 240 (Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(l)), vol 12, p 3925)

520. Tulloch, 'Heruiwi 1–4' (doc A1), pp 71–75

majority as a group. This seemed promising, even though it happened that way in part because the Crown did not want the land very much, and the community had to pay its debts. (Payments, however, were made to individuals, not the community through its leaders.⁵²¹)

In the same year, Ngati Manawa offered to sell 4D to the Crown. In this case, signatures appear to have been collected individually over a couple of months, with 11 of the 14 grantees agreeing to sell. But this block too was sold after an offer from tribal leaders (Harehare Atarea in particular). By October, all remaining resistance had been overcome by individual negotiations, and the sale was completed. As part of this sale, one of the grantees, Toha Rahurahu, was paid a price much higher than his share was worth, on condition that he withdraw his application for a rehearing of 4E.⁵²² In 1893, after the resolution of applications for rehearing, the Crown also purchased the neighbouring 4E from Ngati Kahungunu. We have no information as to whether group discussions preceded the purchase, but the transaction was clearly made piecemeal with individuals. The first signature was obtained in 1892, from Toha Rahurahu when he agreed to withdraw his application for rehearing, before the Crown had begun the process of getting other signatures.⁵²³ It was still chasing the signatures of five of the 13 owners later in 1893.⁵²⁴ We know too that payments were made individually.⁵²⁵

By 1893, the majority of Heruiwi 4 had been sold, much of it on the basis of group decisions to do so. In that year, however, there were also offers to sell land in two of the most valuable parts of Heruiwi, where the communities were living and trying to sustain themselves by cropping. These parts (4B and 4F) had had restrictions placed on the titles, because tribal leaders wanted to prevent their sale. In 1893, Harehare Atarea sought to sell 6,000 acres of this land to the Crown. This decision cannot have been taken lightly.⁵²⁶ By this time, Ngati Manawa had sold the great bulk of their 'magnificent heritage' to the Crown at – as Gilbert Mair put it – the Crown's 'own price.'⁵²⁷ They had acquired no lasting benefits. In 1893, their economic situation had been rendered desperate (again) by flooding and crop failures. Harehare Atarea told the Native Minister: 'What is the use of the land if the owners die of starvation?'⁵²⁸

In this instance, however, a tribal offer to sell was converted into the purchase of individual interests, so that the Government could acquire much more than the owners (as a collective) wanted to sell. Atarea had offered 6,000 acres. He wanted

521. Tulloch, 'Heruiwi 1-4' (doc A1), p 74

522. *Ibid*, pp 75-76

523. Berghan, 'Block Research Narratives' (doc A86), p 579

524. Kelly to Sheridan, 7 March 1893 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(m)), vol 13, p 4217)

525. Tulloch, 'Heruiwi 1-4' (doc A1), p 76. Witnesses for Ngati Kahungunu, including Niania (doc 138), Belgrave and Young (doc A129), and Belgrave, Young, and Deason (doc A122), do not mention this block.

526. Tulloch, 'Heruiwi 1-4' (doc A1), pp 77-78

527. Mair to Bird, 20 December 1922 (McBurney, 'Ngati Manawa and the Crown' (doc C12), p 464)

528. Harehare Atarea to Native Minister, 18 January 1893 (Tulloch, 'Heruiwi 1-4' (doc A1), p 78)

to partition the land, setting aside this area and putting in a minimum number of owners so as to allow a quick and ready sale. This plan was abandoned when the Government agreed to the sale, and Atarea expected to sell limited pieces of 4B and 4F without partitioning. Instead, the Crown purchased individual shares over a two-year period, obtaining 16,000 acres.⁵²⁹

The purchase of individual interests was also a feature in the Crown's acquisition of Heruiwi 4A, which had been awarded to Ngati Hineuru. Along with 4B, this was the most valuable part of the block, and it was a major site of tribal residence and cropping. There was no offer to sell this land. Rather, the Crown – which wanted the land for homesteads for settlers on its neighbouring Heruiwi 1 – began purchasing individual interests in 1895, and partitioned its interests out in 1899. By this time, the Crown had acquired 3,724 of the 5,880-acre block, which was supposed to have been inalienable and which its community did not want to sell.⁵³⁰

Thus, Ngati Manawa and other owners sought to sell some of Heruiwi 4 in the early 1890s, in order to pay for survey costs and other debts. These early transactions were made as a result of offers by tribal leaders, and seem to have involved a majority decision to sign deeds. In 1893, however, the Crown began to buy individual interests way beyond what the owners had offered to sell (in 4B and 4F). Two years later, in 1895, the Government began to buy individual interests in land that it wanted (4A), even where there had been no offer to sell. This was a worrying trend, also reflected in other Urewera rim blocks.

10.7.3.2.2 TAHORA 2, WHIRINAKI, AND HERUIWI 2–3 – PURCHASING OF INDIVIDUAL INTERESTS PREDOMINATES

In 1889, Wi Pere explained to the Native Land Court that Urewera and Turanga leaders had agreed to keep Tahora 2 out of the court until the native land laws were reformed. Their efforts were defeated, however, making it (as he said) almost impossible for them to hold onto the land.⁵³¹ It was in this circumstance that an agreement was apparently reached between all the major tribal groups in Tahora 2 to convey this enormous block to Rees and Pere on behalf of the New Zealand Native Land Settlement Company. The full history of the company, and the need for such a vehicle to circumvent the individualisation of the native land laws, has been described by the Turanga Tribunal.⁵³² Here, we note that the Crown's historian, Michael Macky, doubted the existence of an 1889 agreement, since it was never produced in court.⁵³³ On the face of it, such an alignment of tribes was unlikely. Nonetheless, leaders from Te Urewera, Wairoa, Turanga, and Opotiki had already reached an agreement to divide this land into separate parcels for the court in 1889. That agreement was helped by the fact that Wi Pere was a leader within Ngati Kahungunu as well as Te Aitanga a Mahaki and Te Whanau a Kai.

529. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–79

530. Ibid, pp 84–85

531. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18

532. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–494, 539–585

533. Michael Macky, 'Report in Respect of Tahora and the East Coast Trust' (commissioned research report, Wellington: Crown Law Office, 2005) (doc 18), pp 6–7

Experiments in ‘Recollectivising’: Trusts, Companies, and the Validation Court

Tahora 2, a large area of land in which the interests of Urewera, Wairoa, Opotiki, and Turanga tribes overlapped, became caught up in the efforts of East Coast Maori leaders to restore corporate title and control over land that had been individualised by the Native Land Court. These efforts were led by Wi Pere, a tribal leader of Te Whanau a Kai, Te Aitanga a Mahaki, and Rongowhakaata, who also had links with Ngati Kahungunu. Pere forged an alliance with colonial lawyer and politician WL Rees. Together, they first tried to put land into a series of trusts (called the Rees–Pere trusts), but they could not get the Government to pass empowering legislation, and the courts ruled that Maori land could not be placed in trust under the current native land laws. In 1881, Pere and Rees tried an alternative: a joint-stock company. Land was transferred from the Rees–Pere trusts to the New Zealand Native Land Settlement Company. Like the trusts, its goal was to restore Maori community control of land alienation (this time in partnership with Auckland businessmen), enabling strategic sales for the benefit of both settlers and Maori.

The Turanga Tribunal, which considered the history of the company in some

Tuhoe cooperation appears to have been secured by Te Kooti, who had instructed their leaders to leave matters to Wi Pere to arrange.⁵³⁴ While the evidence is not entirely conclusive, we think it likely that there was a second agreement involving Pere and the New Zealand Native Land Settlement Company.

This very agreement may have inspired the early and determined purchasing efforts of Crown agents.⁵³⁵ As we noted above, purchase agents in the 1890s used the picking off of individual interests (often in secret) to get around the opposition of tribal leaders. Wi Pere, in particular, tried very hard to prevent individuals from selling. The Government instructed its agents that Pere should not be recognised ‘beyond his own individual interest.’⁵³⁶ This reflected a very deliberate refusal to recognise the customary role and authority of rangatira.

At first, tribal leaders had offered the Crown a piece of land in the middle of the block (about 20,000 acres) to satisfy the survey lien. There were rumours that they might be willing to sell a lot more in order to get development capital. But in June 1893 the Native Minister, determined to impose a lower price than was on offer, instructed his officials to begin buying individual interests.⁵³⁷ A monopoly was

534. For the role of Te Kooti, see Tutakangahau’s evidence to the Urewera commission in 1901, set out in Edwards, ‘The Urewera District Native Reserve Act 1896, Part 2’ (doc D7), p116.

535. Boston and Oliver, ‘Tahora’ (doc A22), p123

536. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p23

537. Ibid, pp21–28

detail, found that it failed because of its high debts, some poor business decisions, and lack of Government support. In 1888, the Bank of New Zealand forced the company into liquidation, the year before the Maori owners of Tahora 2 supposedly conveyed their land to it. After a mortgagee sale in 1891, the company's surviving lands were vested in new trustees (Wi Pere and James Carroll). The Carroll-Pere trust staggered on until 1902, when the Government intervened to save the land from further mortgagee sales (see chapter 12).

In the meantime, the Government had set up a Validation Court in 1893, the purpose of which was to validate bona fide agreements between Maori and settlers, where these were impeded by supposedly minor or technical violations of the native land laws. In 1895, Pere and Rees tried to use this court to put a stop to the Crown's purchase of individual interests in Tahora. In 1896, as we shall see, the court vested some surviving sections of Tahora 2 in the Carroll-Pere Trust. We will consider these matters further in section 10.9 below, and in chapter 12, which deals with claims about these lands after they were placed in trust.¹

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–494, 539–585

proclaimed over the block in early 1894 (rendered unnecessary later that year, when pre-emption was restored nationwide).⁵³⁸ Tribal leaders and community sanctions were powerless to stop individuals from selling.⁵³⁹ Indeed, the Government made some efforts to subvert community leaders, and pay them to get others to sell. The only definite evidence of this, though, is among Whakatohea.⁵⁴⁰

As noted, Wi Pere led resistance to the sale of individual interests. The Minister instructed that other Maori should be reminded that Pere had accepted an advance back in 1879, and that that advance should be recovered in land. Pere, working closely with Rees, tried to impose some kind of coordinated control on the alienation of interests, and in particular tried to negotiate for reserves, but the Government refused to deal with them. By 1895, with the Crown having acquired a large interest, unknown in scope and location, Rees and Pere tried to put a stop to the purchasing altogether by applying to the Validation Court for recognition of the 1889 trust deed.⁵⁴¹ As part of that application, they sought information from the Crown as to what interests it had purchased. The Gisborne purchase agent, Wheeler, refused to supply any information:

538. 'Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty', 9 February 1894, *New Zealand Gazette*, 1894, no 12, p 266

539. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 21–28

540. Boston and Oliver, 'Tahora' (doc A22), p 126

541. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 23–28

1st. because *many who had sold have only done so on obtaining from me a distinct promise that neither Wi Pere or any other Native should be made acquainted with their sales*, and 2nd. because I understand that information is wanted to bring Tahora into the Validation Court and stop Government purchases until such time as Government agrees to the terms prepared by Wi Pere; who is working solely in the interests of the Natives. [Emphasis in original.]⁵⁴²

We note the Crown's recognition of Pere's motive in working to protect Maori interests, and that this was considered reason enough not to work with him. This underlines the inherent conflict in the Crown's role as both a purchaser of Maori land and a protector of Maori interests.

In 1895, the Crown countered the Rees–Pere application to the Validation Court with its own application to the Native Land Court to have its interests defined and partitioned. When the court sat to hear the Crown's application in April 1896, the Government had acquired individual interests amounting to 124,403 acres (plus 1,000 acres in satisfaction of Pere's advance, and 6,291 acres for Charles Alma Baker's survey lien). From 1896, most of the unsold Maori land in Tahora 2 was (relatively) safe in the Carroll–Pere trust, and the Government concentrated on surveying its newly acquired lands.⁵⁴³ Outside the trust, however, the land of Tuhoe and Te Upokorehe (the surviving parts of 2A) and of Ngati Ira (2B) was still vulnerable to the purchase of individual interests. Crown agents continued to buy up shares after the definition of the Crown's portions in 1896. Because it was already under way before the Crown's moratorium on new purchases in 1899 (see below), the collection of signatures in 2A continued from 1896 until 1901. The court awarded the Crown 638 acres (Tahora 2A2) in recognition of these further purchases.⁵⁴⁴

Similarly to Tahora 2, all purchases in Whirinaki were conducted on the basis of acquiring individual interests. In 1895, the Crown took over the survey liens for Whirinaki 1 and 2, and began its purchasing campaign. Tribal leaders had tried to protect the land by getting the court to make it inalienable. As we shall discuss in more detail in section 10.9, the Crown simply ignored the restrictions on alienation and purchased it anyway. By the end of the year, the Government had acquired two-thirds of Whirinaki (17,039 acres by purchase, 4,439 acres by survey lien).⁵⁴⁵

542. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 26

543. Boston and Oliver, 'Tahora' (doc A22), pp 122–163

544. See the departmental returns (year ending 31 March) of land purchased by the Crown: AJHR, 1897, G-3, p 11 (380 acres); AJHR, 1898, G-3, p 12 (50 acres); AJHR, 1900, G-3, p 11 (92 acres); AJHR, 1901, G-3, p 7 (146 acres). There is a discrepancy between the 668 acres claimed to have been purchased by the Crown, and the 638 acres awarded by the court in 1907. Boston and Oliver were aware that this land was said to have been purchased by the Crown, but could provide no further information: see Boston and Oliver, 'Tahora' (doc A22), p 167. The Crown also purchased 1,614 acres of Tahora 2B from Ngati Ira, over the period 1896 to 1898.

545. Tulloch, 'Whirinaki' (doc A9), pp 37–41

Unknown (Puke Ariki, PHO2014-0025)



Patrick Sheridan. Sheridan, who had served in both the Taranaki and the Waikato campaigns, was appointed chief land purchase officer in 1890. In 1895, the Crown began its purchase campaign in the Whirinaki block. The whole of the block had been made inalienable, but the Crown simply ignored the restrictions, though it was aware of them. It bought up individual interests and acquired two-thirds of the block, with only 400 acres reserved for the Ngati Manawa sellers.

As in Tahora 2, tribal leaders were unable to place any brakes or controls on the selling. The Native Minister, James Carroll, did agree to set aside a 400-acre reserve, containing kainga and cultivations. Harehare Atarea went to Wellington and asked for this reserve to be increased to 1,000 acres. Patrick Sheridan, who was the official in charge of the Crown's purchase operations at this time, replied that it was up to Ngati Manawa how many shares were sold – if they wanted to keep 1,000 acres, they could do so. This reply was disingenuous at best, given the way the land purchasing machine operated.⁵⁴⁶ Sheridan instructed Richard Gill, the purchase agent on the ground, to give Ngati Manawa 'every facility for making what reserves they desire . . . as long as they do not pick the eyes out of the block.'⁵⁴⁷ The result was that only the original 400 acres was reserved. Otherwise, about one-third of the block was retained by a minority of the original owners when the Crown partitioned out its interests. The Crown did not attempt to purchase more of Whirinaki before the end of the century (although it did get more land from the fresh surveys that were needed).⁵⁴⁸

Towards the end of the decade, the Crown also purchased Heruiwi 2–3, the small remnants which had been preserved from the partitioning of the Crown's share of the original Heruiwi block (Heruiwi 1) back in 1882. The Government began by informing the owners of survey costs long overdue, and then proceeded

546. Ibid, p 43

547. Sheridan to Gill, 17 November 1895 (Tulloch, 'Whirinaki' (doc A9), p 43)

548. Tulloch, 'Whirinaki' (doc A9), pp 43–46

to purchase the eight individual interests over a two-year period. By 1897, when the Crown sought an award from the Native Land Court, nothing of the original Heruiwi 1–3 block remained in Maori ownership.⁵⁴⁹

10.7.3.2.3 WAIPAOA – THE FINAL PUSH

The Waipaoa block was heard by the Native Land Court in 1889. According to Cathy Marr, the Government began to consider its purchase from that point onwards. This was delayed, however, by applications for rehearing, and then by the lack of any certainty as to the boundaries of Waipaoa 3–10, which had been awarded to Ngati Kahungunu and Ngati Ruapani but not surveyed.⁵⁵⁰ The Government was interested in these ‘back country’ blocks, even though they were not very attractive for settlement. This was partly because of interest in Lake Waikareiti and its surrounds for scenery preservation, and partly because this area was considered a crucial foothold in opening up Te Urewera.⁵⁵¹ Despite the creation of the Urewera District Native Reserve in 1896, the Government’s purchase officials were still dedicated (as Wilson had been in the 1870s) to opening the district for settlement. These sentiments were shared – and in some ways led – by Percy Smith, who by then was Surveyor-General.⁵⁵²

In 1896 to 1897, the Government made a decision to proceed with purchasing, on the basis that the internal boundaries could be computed with ‘sufficient accuracy’ for a deed plan, and that they would be rendered obsolete anyway by the Crown’s purchase of the entire block.⁵⁵³ In opening his negotiations, W Wheeler noted that he had received offers to sell from some owners, a point confirmed by Sheridan. To some extent, therefore, the purchase was initiated by both the Crown and at least some of the owners.⁵⁵⁴ There were, however, no group negotiations, no opportunity to negotiate a price or extent of purchase, and no opportunity to make reserves or specify the location of interests. Instead, individual signatures were collected from 1898 to 1903. This appears to have been a slow process, conducted in some secrecy.⁵⁵⁵ Counsel for Wai 621 Ngati Kahungunu described it as ‘predatory’.⁵⁵⁶

Opposition to the purchase was led by Wi Pere, as had been the case in Tahora 2. In 1899, Pere protested to the Government that the purchasing was being done in secret (Sheridan had denied that it was even going on). He also claimed that the purchase was proceeding in defiance of the wishes of the chiefs, and of an agreement between Maori leaders and Premier Richard Seddon.⁵⁵⁷ We do not have

549. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 81–83

550. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), pp 266–268

551. Stevens, ‘Waipaoa’ (doc A51), pp 3–4, 36

552. *Ibid*, p 36

553. *Ibid*, pp 31–33

554. *Ibid*, pp 32, 34

555. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), pp 268–269

556. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 65

557. Stevens, ‘Waipaoa’ (doc A51), pp 35–37

detailed evidence on the agreement raised by Pere. We note that the Government did agree to stop purchasing Maori land nationally in 1899. It appears to us that the continued collection of signatures was in defiance of the Native Land Laws Amendment Act of that year. Section 3 of the Act provided that Maori land would not be alienated to the Crown from the commencement of the Act, except where a written agreement had already been made – in that case, the purchase ‘may be completed in so far only as is necessary for the adjustment of boundaries and partition of the respective interests of the Crown and Native owners’. As we see it, the only action that the Crown could take was to apply for a partition of its interests. This was in keeping with the Premier’s undertaking to Maori leaders.

The 1899 Act was due to expire at the end of the next session of Parliament.⁵⁵⁸ By then, it had been replaced by the Maori Land Administration Act of 1900. The new Act allowed Crown purchases ‘in progress’ at the time of its passage to be completed.⁵⁵⁹ This was broader than the 1899 Act, and allowed the Government to continue collecting signatures for Waipaoa (as well as Tahora 2A). By 1903, the Crown was ready to partition its interests. It had purchased the undivided shares of 350 owners, although it had still not acquired a majority of the land left after the taking of 5,822 acres for the original survey costs. The deeds had recorded the whole block as ‘sold’, but the Crown gave up trying to complete the purchase of outstanding interests in 1903.⁵⁶⁰ We have no evidence as to why this decision was made.

In February 1903, the Crown applied to the Native Land Court for an award of its interests. Further, the Minister had asked the court to ‘abolish [the previous] partitions and cut out Crown’s interest in one block.’⁵⁶¹ It appears from the minutes of the hearing that the Government brought this proposal to the court and presented the Maori owners with it then and there. We have no information of how many (or which) owners were present. The Crown’s lawyer asked for ‘a little time for them to consider it’. This was followed by out-of-court discussions, and then the hearing resumed on the same day.⁵⁶²

At first, it appeared that the Crown’s proposal was changed as a result of these discussions, to concentrate its interests in two blocks, one on the eastern side and one in the west. But this was not the case. The Crown had changed its mind sometime between filing the original application and turning up at the hearing. A Government surveyor had already prepared a description of the boundaries of the two blocks that the Crown wanted.⁵⁶³

A single non-seller testified that he approved ‘on behalf of the people to the partition as now proposed.’⁵⁶⁴ Although the minutes are not clear, this appears to

558. Native Land Laws Amendment Act 1899, s 5

559. Maori Land Administration Act 1900, s 34

560. Stevens, ‘Waipaoa’ (doc A51), pp 37–39

561. Wairoa Native Land Court, minute book 12, 7 February 1903, fol 83

562. *Ibid*

563. *Ibid*, fols 83–84

564. *Ibid*, fol 83

be Arani Kunaiti of Ngati Kahungunu.⁵⁶⁵ The Kunaiti whanau had major interests in Waipaoa.⁵⁶⁶ When there were no objections, the court approved the Crown's proposal, annulled the old subdivisions, and created three blocks.⁵⁶⁷ Two (Waipaoa 3 and 4) were awarded to the Crown (13,990 acres). The other block, Waipaoa 5 (19,490 acres), was retained by the non-sellers. By means of its original acquisition of land for survey costs (Waipaoa 1–2) and its purchase of individual interests, the Crown had now obtained about half of the original Waipaoa block.⁵⁶⁸

In our inquiry, Ngati Ruapani were critical of this process.⁵⁶⁹ Waipaoa 4, awarded to the Crown, was in the west of the block. It not only took in a taonga, Lake Waikareiti (already partly in Waipaoa 2), but it also included all the land in which Ngati Ruapani had customary interests. Although not all Ngati Ruapani had sold, they thus lost their land and were put with all the other non-sellers into a block in which they had no customary associations.⁵⁷⁰

In Cathy Marr's view, the partitioning of Waipaoa had favoured the Crown's interests at the expense of the claimants'. The Government had been able to purchase only by a secret process of buying scattered individual interests, with no certainty as to where they were located or whether they would be useful for settlement. Then, in the process of partitioning, all the Crown's shares were consolidated into two complete blocks (contiguous to its earlier awards), and non-sellers were 'lumped together' in a single part of the old block. This arrangement ignored their original agreements as to where (in Waipaoa 3–10) their hapu interests had been located.⁵⁷¹ The process of uncontrolled selling had been converted into controlled partitioning, reorganising, and reallocating the land with a view to saving the Crown from the consequences of blind buying. Of course, this would not have been necessary if the Government had been able to achieve its original goal of buying all interests in Waipaoa. It also might have been avoided if the owners of Waipaoa had been able to afford to survey their old subdivisions.

We have no information on what the owners' view of this was at the 1903 hearing. It may be that they agreed to it, as the simplest way of separating Crown and non-seller interests in the eight blocks. Also, consolidated interests may have seemed more useful than partitioning each of the eight blocks with the Crown. There were no objections, but it is not possible to say how many owners were present, or whether Kunaiti spoke for all non-sellers. It was unlikely that he spoke for Ngati Ruapani. Regardless, we accept that Ngati Ruapani non-sellers were not well served by this arrangement. The loss of Lake Waikareiti in particular was a heavy

565. Wairoa Native Land Court, minute book 12, 7 February 1903, fol 83

566. Richard Niania, brief of evidence, 22 November 2004 (doc 138), pp 40–41

567. Wairoa Native Land Court, minute book 12, 7 February 1903, fols 83–84

568. Stevens, 'Waipaoa' (doc A51), pp 38–40

569. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 30–31, 33–34

570. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), pp 270–271

571. *Ibid*, pp 268–271

Block	Acres	Block	Acres
Heruiwi 2-3	3,484	Heruiwi 4E	3,143
Heruiwi 4A	3,657	Tahora 2	124,403
Heruiwi 4D	6,200	Waipaoa	13,990
Heruiwi 4B, 4F	16,000	Whirinaki	17,309

Table 10.7: Crown Purchase of Individual Interests in Te Urewera in the 1890s

Sources: For Heruiwi 2-3, 4A, 4B, 4D, 4E, and 4F, see Tracy Tulloch, 'Heruiwi 1-4' (commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc A1); for Tahora 2, see Peter Boston and Steven Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22); for Whirinaki, see Tracy Tulloch, 'Whirinaki' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A9); and for Waipaoa, see Emma Stevens, 'Report on the History of the Waipaoa Block, 1882-1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51).

blow. Also, whether or not Kunaiti spoke for all the Ngati Kahungunu owners, Richard Niania explained that they too have concerns about how non-sellers lost rights and customary associations with their land in this way.⁵⁷² It is simply not possible for us to say how far there had been any free and informed consent to the scheme.

10.7.3.2.4 OUTCOMES OF THE LIBERALS' PURCHASE PROGRAMME

When the Crown stopped purchasing in Waipaoa in 1903, it brought the Liberals' nineteenth-century programme of purchasing individual interests to an end. We pause here to review its outcomes. In sum, by 1893 the Crown had moved to purchasing such interests in the remnants of Heruiwi 4. In the same year, it began buying undivided shares in the Tahora 2 blocks, and in 1895 it started the same process in Whirinaki and Heruiwi 2-3. In 1898, it started buying individual interests in Waipaoa, which it pursued until 1903. As a result of these purchases of undivided shares from individuals, the Crown acquired 187,916 acres.⁵⁷³ It had also bought 40,672 acres of Heruiwi 4 on the basis of an early purchase conducted with tribal leaders and a majority of the owners. Thus, the Crown had purchased a total of 228,588 acres by 1903.

If we take into account that we are not including Matahina A and B, Waiohau 2, Tahora 2B and 2B1, Tuararangaia 2 and 3, and Ruatoki in our calculations, then – in the 1890s – the Crown had purchased almost half of the land awarded to our claimants. It had acquired further land for survey costs (see section 10.8).

572. Niania, brief of evidence (doc 138), p 39

573. We do not include the purchase of individual interests in Tuararangaia 3 in this calculation because that land was purchased from hapu connected to Ngati Awa (whose claims have been settled).

10.7.3.2.5 WAIPAOA – FROM INDIVIDUAL PURCHASING TO COMPULSORY VESTING

From 1903 (the end of the Waipaoa purchase) to 1905, the Crown was not allowed to buy any more Maori land in Te Urewera. This self-denying rule had been introduced in 1899, but it was gradually weakened from 1905, until full Crown purchasing was restored in 1909. In the meantime, however, Waipaoa 5 became caught up in the experimental arrangements instituted by the Liberals, to try to progress settlement by means of leasing. As the Central North Island Tribunal has found, the Native Minister, James Carroll, was determined to preserve sufficient Maori land for the development and wellbeing of his people. In 1905, in a desperate attempt to stave off renewed purchasing, he agreed to the compulsory vesting of land in boards for the purpose of leasing (not selling) it. Compulsion was considered necessary because Maori had not vested enough land in the 1900 councils of their own free will.⁵⁷⁴

This arrangement was part of a package enacted in the Maori Land Settlement Act 1905. The district land councils of 1900 (with elected Maori representatives and a Maori majority) were abolished. They were replaced by boards appointed by the Crown, with a Pakeha majority. In two districts, Tairāwhiti and Te Taitokerau, the Crown would not purchase any land before 1908. In the meantime, the Native Minister would have the power to take Maori land in those districts compulsorily, if he considered that it was not 'required or suitable' for occupation by its owners, and vest it in the board. The board was entrusted with administering the land in the best interests of its owners. It could create reserves for their use and occupation, for papakainga, urupa, fisheries, birding, or timber. Having decided whether or not to reserve any of the land, the board then had the task of classifying its quality and dividing it up into allotments for leasing. The usual process was a public auction of the leases, but first the board could set aside allotments to lease to the owners themselves. The board was not allowed to sell the land.⁵⁷⁵

In 1906, Waipaoa 5 was taken compulsorily by the Native Minister and vested in the Tairāwhiti District Maori Land Board. We have no evidence as to how or why the Minister made this decision. The owners had no legal right to be consulted, and their agreement was not required. It emerged later, however, that Wi Pere had done some kind of deal with Carroll. As part of taking the land compulsorily, the Minister agreed that 8,000 acres of it would be reserved for the owners.⁵⁷⁶ Did the Minister have the legal power to make or enforce this deal? From our reading of the 1905 Act, it seems that the only thing the Minister could have done to enforce this arrangement, at least in terms of law, was to have negotiated the location of the 8,000 acres with the owners and then left it in their possession. He did not

574. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 676–679

575. Maori Land Settlement Act 1905, ss 2–3, 8–9, 20(3); see also Stevens, 'Waipaoa' (doc A51), pp 45–46

576. Stevens, 'Waipaoa' (doc A51), pp 47–49; Porter to Fisher, 5 October 1907, 11 December 1907, MA 1906/1137, Archives New Zealand, Wellington

The Return of Thomas William Porter

Unknown (ATL PACOLL-2236)



In chapter 5, we last saw Thomas William Porter accompanying and advising the Ngati Porou forces in the hunt across Te Urewera for Te Kooti. In the 1870s, Porter commanded the East Coast Militia and acted as a Government purchase agent, credited with acquiring one million acres for the Crown. In 1879, as we saw earlier in this chapter, he negotiated the unsuccessful purchase of Te Houpapa with Turanga leaders, and tried to ease this purchase through to completion in the early 1880s. Porter became a major in 1885, and he was also mayor of Gisborne for a period in the 1880s. In 1889, he commanded the force sent to prevent Te Kooti from reaching Gisborne, which (as we saw) impinged on the negotiations between iwi over Tahora 2 in that year. In 1890, Porter became a lieutenant-colonel. In 1901 to 1902, he commanded New Zealand forces in the South Africa War. He also commanded the Ninth Contingent in 1902 and was appointed a full colonel. After further military commands, Porter was appointed president of the Tairāwhiti District Māori Land Council in 1905. He continued as president when the council was reconstituted as a board. In this capacity, he was in charge of the abortive leasing of Waipaoa 5, and approached the Government about whether there had been a condition on the vesting of that land, as to reserving 8,000 acres to be farmed by its owners. Porter

left the land board in 1908 and took no further part in affairs of relevance to this report, other than to write a biography of Major Rapata Wahawaha, and to contribute to the historical research of James Cowan on the New Zealand Wars. During the First World War, Porter commanded New Zealand's National Reserve. He died in 1920.¹

1. JAB Crawford, 'Thomas William Porter', *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <http://www.dnzb.govt.nz>, last modified 22 June 2007

have the power to require the board to reserve it.⁵⁷⁷ (He could, of course, have asked the board to do so, but this did not happen.)

The *Poverty Bay Herald* predicted that Maori who had 'long been suspicious of the operations of native land settlement' would have 'full confidence that they will be fairly and justly treated under the new law'.⁵⁷⁸ The board cut up the block into sections for leasing, reserving 2,000 acres for the owners on the eastern side. It was not until after the sections had been advertised that the board found out about the arrangement between Carroll and Pere to reserve 8,000 acres. This occurred because Arani Kunaiti and 'several others have been trying to co-operate with Europeans in working the 8,000 acres'.⁵⁷⁹ The board's president, Colonel Porter, referred the question to the Native Department, and also pointed out that the board's 2,000-acre reserve did not really provide for the 'Urewera'. He asked the department whether it was thought necessary to reserve land for them (which, in this context, meant Ngati Ruapani). The department replied that it was not, so the existing reserve arrangement of 2,000 acres was retained.⁵⁸⁰ If the Minister understood himself to have agreed to an 8,000-acre reserve, he took no action to fulfil the agreement.

As we noted above, the board was supposed to consider leasing to the owners first, before proceeding with a more general auction.⁵⁸¹ There were six sections to be leased. Some of the Ngati Kahungunu owners (backed by Wi Pere) wanted to lease three of them, but they did not want to pay rent. As a result of disputes between the board and Ngati Kahungunu segments of the owners about this, none of the land was leased and the proposed auctions did not take place.⁵⁸²

The land remained in limbo from 1907 to 1909, vested in the board but not able to be leased. In 1909, the law was changed to allow the Crown to buy land that had

577. Maori Land Settlement Act 1905, s8

578. *Poverty Bay Herald*, 15 October 1906 (Stevens, 'Waipaoa' (doc A51), p 47)

579. Porter to Fisher, 11 December 1907, MA 1906/1137, Archives New Zealand, Wellington

580. Stevens, 'Waipaoa' (doc A51), pp 48–50

581. Maori Land Settlement Act 1905, s8(g)

582. Stevens, 'Waipaoa' (doc A51), pp 49–50

been compulsorily vested under the 1905 Act. We shall consider that change, and the sale that followed, in the next section.

10.7.3.3 *Crown purchasing in Te Urewera rim blocks, 1909–30*

A new system of Crown purchasing was established by the Liberal Government in 1909. The Native Land Act of that year was a major overhaul of the land legislation and policies of the preceding decades. It established a system which endured (with amendments) until 1953. The major political architects of the Act were the Native Minister, James Carroll, and the member for Eastern Maori, Apirana Ngata, who had just presided with Sir Robert Stout over a huge stocktake of Maori land. The main legal architect of the Act was John Salmond, the future Solicitor-General. Together, they created a sophisticated machine for the alienation of Maori land in the twentieth century.

The Central North Island Tribunal has discussed the 1909 legislation in some detail. We refer readers to that discussion.⁵⁸³ Here, we summarise the main features of relevance to Crown purchasing in Te Urewera. First, there was an end to Carroll's version of 'taihoa', with its focus on large-scale leasing. Full powers to purchase Maori land were restored to the Crown and private settlers. Leasing was still provided for if Maori owners were able to insist on it. But the 1905 boards were there to stay, with expanded powers to monitor, facilitate, and give legal effect to the alienation of Maori land. Secondly, the practice of purchasing undivided individual interests was abolished.⁵⁸⁴ Purchasers (including the Crown) had to approach the local land board and ask it to summon a meeting of the owners.⁵⁸⁵ These meetings, Carroll told Parliament, were designed to restore community decision-making. They were 'practically a resuscitation of the old runanga system, under which from time immemorial the Maori communities conducted their business.'⁵⁸⁶ The Crown would be bound by the decision of the majority (in value) at the meeting. It did not, however, have to go ahead with the purchase if the terms were not favourable to it. The only exception to this process was in the case of land owned by 10 or fewer owners. The Crown could buy such land directly from individuals.⁵⁸⁷ Although the rim blocks included some very small partitions in Waimana and Waiohau by this period, with 10 or fewer owners, we know of only one Crown purchase of this kind before 1930.⁵⁸⁸

We pause here to discuss some of the criticisms of the meeting of assembled owners system, as it was the key tool for alienating Maori land in this period. In

583. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 682–692

584. Native Land Act 1909, s 370

585. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686

586. Carroll, NZPD, vol 148, p 1102 (Tulloch, 'Heruiwi 1–4' (doc A1), p 122)

587. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686; Native Land Act 1909, pts 13, 18, 19

588. The Crown's purchase of individual shares in Waipaoa 5C, which had nine owners, is the only example of which we are aware. The Crown had purchased the interests of seven of the nine owners by 1928. See MA-MLP 1 1910/129, Archives New Zealand, Wellington (Stevens, 'Waipaoa' (doc A51), app 1, p 6).

her evidence on Heruiwi 4, Tracy Tulloch has assembled a range of views on the matter. Citing Professor Alan Ward, Tulloch suggested that Carroll's intention was to return to 'runanga' a 'collective control over their own lands' and to give 'rangatiranga a legal recognition.'⁵⁸⁹ Professor Richard Boast, however, pointed out that this supposed collective was 'not any of the natural units of Maori society but the accidental and artificial one of block owners.'⁵⁹⁰ Thus, if wider tribal groups and their leaders were to have a say, it would have to be outside the meetings' system.

Perhaps the most telling criticism, however, was that the legislation did not ensure that meetings were truly representative even of the block owners. The quorum was set at only five owners. Given that many blocks had hundreds of owners, this was a risibly low standard. Counsel for Wai 36 Tuhoe was critical of this provision of the Act.⁵⁹¹ Professor Ward, on the basis of a nationwide study, concluded that it 'commonly meant that the owner group as a whole was not consulted'. Creating the institution of owners' meetings could have gone part way to fulfilling the Treaty, but in fact it 'bypassed the need for a full consensus of the owners (or even a clear majority of the owners) and ignored or overrode the wishes of owners not present at crucial meetings.'⁵⁹²

The Central North Island Tribunal found it hard to reconcile this provision with Carroll's stated intention to reconstitute groups of owners as runanga. 'If it was not simply cynical,' the Tribunal observed, 'the choice of such a minimal quorum must reflect a lack of confidence among both judges and parliamentarians about the extent to which Maori would participate in the new system of administration and alienation.'⁵⁹³ The Hauraki Tribunal found the provision to be 'manipulative,' intended to allow minorities to alienate land without the involvement or sometimes the knowledge of most owners.⁵⁹⁴ The Tribunal's interpretation was informed by the significance of the 1905 Act in its inquiry district. Under that Act, which reintroduced Crown purchase in some districts, the Crown could compulsorily buy the interests of non-selling minorities.⁵⁹⁵ This seems to have been a key stepping stone to the low quorum set for meetings of owners in 1909. We will test the applicability of these views to the way the system operated in our inquiry district.

Getting a quorum of Maori owners has always been a problem for institutions set up in the twentieth century, as John Ruru of Te Aitanga a Mahaki told us.⁵⁹⁶ But the decision to alienate land permanently was so important that the

589. Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, p 389 (Tulloch, 'Heruiwi 1-4' (doc A1), p 104)

590. P Spiller, J Finn, and R Boast, *A New Zealand Legal History* (Wellington: Brooker's Ltd, 1995), p 161 (Tulloch, 'Heruiwi 1-4' (doc A1), p 104)

591. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

592. Ward, *National Overview*, vol 2, p 390 (Tulloch, 'Heruiwi 1-4' (doc A1), p 105)

593. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 688. The Native Land Court judges were mentioned here because they had been heavily consulted in the framing of the new law.

594. Waitangi Tribunal, *Hauraki Report*, vol 2, p 897

595. *Ibid*, pp 853-854

596. John Ruru, brief of evidence, no date (doc 147), p 4

threshold should have been a high one. In that sense, we can compare the 1909 Act to the standard set by Ballance's legislation back in 1886. The Native Land Administration Act of that year had required that block committees be elected by a majority of owners. Similarly, although it was honoured mostly in the breach, much nineteenth-century legislation had required partitions and alienations to have the assent of the majority. The consequences of setting a much lower standard in 1909 will become clear later in this section.

The 1909 legislation was amended by the Reform Government in 1913. Despite its low quorum requirements, too many meetings of owners were rejecting the Crown's offers to buy their land. As claimant counsel submitted, T W Fisher (head of the Native Department) became increasingly frustrated by this. In 1913, he urged the Government to exempt itself from the process: 'It is further desirable, in the larger blocks, where a number of owners are concerned, and a motion to sell has been defeated by a not fully representational meeting, that provision should exist for the Crown to acquire individual interests.'⁵⁹⁷ We are at a loss to understand why the solution to non-representational meetings would be purchasing from individuals.

Nonetheless, the Native Minister, William Herries, agreed with this recommendation. In the Native Land Amendment Act 1913, the Crown's power to buy undivided individual interests was restored. It was not, however, confined to the situations described by Fisher, but rather operated across the board. The Government could still buy from a meeting of owners (which was easiest in the first instance) but, if the meeting rejected its offer, then it could proceed with 'piecemeal acquisition of undivided shares.'⁵⁹⁸ According to Ms Tulloch, this strategy was deliberately applied in our inquiry district. In 1921, an official commented about Te Urewera: 'The Natives were keenly averse to selling and it was impossible to purchase by assembled owner meetings, and therefore individual purchase had to be adopted.'⁵⁹⁹ This was a frank admission of the Crown's willingness to bypass the protection of community authority insofar as this was represented by the meetings of assembled owners. Tulloch called this the Crown's 'divide and buy' tactic.⁶⁰⁰

In the submission of counsel for Ngati Manawa, it was common for Crown offers to be rejected at meetings, because the price was too low or because the owners 'did not want to sell at any price.'⁶⁰¹ The Crown would then proceed to buy individual interests, eventually acquiring enough to justify a partition. Although

597. T W Fisher, 'Native Land Courts and Maori Land Boards: (Report from the Under-secretary, Native Affairs, on the Working of the) for the Year Ending 31st March, 1913', 18 May 1913, AJHR, 1913, G-9, p 2 (counsel for Ngati Manawa, closing submissions (doc N12), p 47); see also Tulloch, 'Whirinaki' (doc A9), p 98

598. Counsel for Ngati Manawa, closing submissions (doc N12), p 48

599. Memorandum to Native Minister, 23 March 1921 (Tulloch, 'Heruiwi 1-4' (doc A1), p 122). This official was referring to purchases in the UDNR as well: see Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), p 157.

600. Tulloch, 'Heruiwi 1-4' (doc A1), p 122

601. Counsel for Ngati Manawa, closing submissions (doc N12), p 48

the community collectively turned down the Crown's offer, 'targeted individuals would of course sell due to personal economic circumstances which in the case of Ngati Manawa in the late 1920s can be assumed to have been somewhat dire'.⁶⁰² We will test these submissions in this section.

The Reform Government also changed the composition of Maori land boards in 1913. The nominated Maori members were removed, and the board simply became the Native Land Court judge and registrar in any particular district. At the same time, board scrutiny was no longer required for Crown purchases, in cases where the Government decided to bypass the meeting of owners' provision and buy from individuals.⁶⁰³ Elaborate machinery was created for the Crown to lease Maori land, and (unlike in the 1870s) sublease it to settlers for development. Technically, therefore, leasing to the Crown was a viable option for Maori owners who wanted to retain their ancestral land.⁶⁰⁴ We note, however, that the Crown made no offers to lease land in Te Urewera between 1909 and 1930.

Fundamentally, these were the basics of the Crown purchasing system from 1913 to 1930. Private parties still had to buy or lease through meetings of owners and the board, which was supposed to check the adequacy of price or rents, validity of deeds, and the amount of land left to each individual owner. The Crown, on the other hand, could circumvent this system whenever it chose. It could also, as before, establish a monopoly to shut out prospective purchasers or lessees. Under the 1909 Act, the Crown could prohibit private dealings for one year, with the option of extending that for six more months.⁶⁰⁵ The Reform Government extended this power in 1913, to allow two-year prohibitions. This meant that the prohibition had to be renewed after two years (extended to three years in 1916), not that the monopoly had to end after two years.⁶⁰⁶

10.7.3.3.1 THE 1909 SYSTEM IN OPERATION – WAIPA OA 5

By 1909, much of the land in the rim blocks had been sold to the Crown or private buyers. There were few large pieces left to attract the attention of Government officials. (In case they missed any, the 1913 Act required the Native Land Court to report any land to the Government that it believed was not being used.⁶⁰⁷) The largest remaining concentration of Maori land, outside the East Coast Trust, was Waipaoa 5, which had been vested in the Tairāwhiti District Maori Land Board but had still not been leased by 1910.

From 1905 to 1908, land taken compulsorily for leasing under the 1905 Act could not be sold. This was changed, however, in the Native Land Act 1909. The board was still not allowed to sell such land, nor was the Crown allowed to buy it from

602. Counsel for Ngati Manawa, closing submissions (doc N12), p 48

603. Tulloch, 'Whirinaki' (doc A9), p 98

604. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 687

605. *Ibid*, p 686

606. Native Land Amendment Act 1913, s 111; Native Land Amendment and Native Land Claims Adjustment Act 1916, s 8

607. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 687

the board.⁶⁰⁸ Nor could the owners get it back.⁶⁰⁹ Section 368, however, allowed the Crown to buy it from a meeting of assembled owners.⁶¹⁰ Alternatively, section 346 allowed the assembled owners to pass a resolution empowering the board to sell half of it by public auction.⁶¹¹ Soon after this law change, the Waipaoa 5 owners wrote to the Native Minister, pointing out that leasing had not occurred and they were not able to get any benefit from their land. Some of the owners, therefore, wanted to sell their interests (10,000 acres). The Wairoa owners, however, did not want to sell. Thus, about 9,000 acres would need to be reserved for them.⁶¹²

In response to an approach from this group of owners, the board debated the matter and decided to offer the whole block to the Crown (without reserving any). In compliance with the Act, however, the board could not sell this land to the Government. Rather, the Government had to make an offer and ask the board to call a meeting of owners. The board asked the Native Department to make an offer, and the department agreed. On 25 October, Carroll offered to buy the whole block at Government valuation.⁶¹³

The board convened a meeting of owners on 16 November 1910. The meeting was attended by 55 owners, which was well in excess of the minimum number of five, although still far short of the full number of owners (at least 342).⁶¹⁴ There was some tension between Ngati Kahungunu and Ngati Ruapani at this meeting. It will be remembered that Ngati Ruapani had already lost all their ancestral land when they were relocated to Waipaoa 5. With the land tied up in the board and no one seeming to want to lease it, they (and some Ngati Kahungunu) were anxious to get a return on it by the only option left them. Arani Kunaiti proposed limiting the sale to 11,000 acres, but he was outvoted at the meeting by 52 votes to three.⁶¹⁵

608. Native Land Act 1909, section 291 (the board is allowed to sell other land but not this land), and section 366 (the Crown is allowed to buy other land from the board but not this land).

609. The only provision for returning this land under the 1909 Act was a stipulation that this would happen in 1957, if it was still unleased by then: Native Land Act 1909, ss 286, 290. The Reform Government, however, provided for land taken under the 1905 Act to be revested in its owners by Order in Council (Native Land Amendment Act 1913, s96). This amendment was introduced after the sale of Waipaoa 5B to the Crown.

610. Native Land Act 1909, s368

611. *Ibid*, s346. This section empowered a meeting of assembled owners to authorise the board to treat this land (which came under part xv of the Act) as if it came under part xiv, under which the board was supposed to divide the land in two – half for leasing, and half for sale by public auction.

612. Berghan, 'Block Research Narratives' (doc A86), pp 718–720

613. Stevens, 'Waipaoa' (doc A51), p 51

614. Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), vol 18, pp 6203, 6216–6218. We use the phrase 'at least' because our calculation of the total number of owners is often based on the original title orders, and does not take into account expansion as a result of successions. Usually, successions were in arrears. When Bowler purchased individual interests in Heruiwi 4A2B in the 1920s, which had 124 owners when it was created in 1915, he had to organise 40 successions so that he could purchase interests from live owners.

615. President, Tairāwhiti District Māori Land Board, to Under-Secretary, Native Department, 23 November 1910 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), p 6216); Stevens, 'Waipaoa' (doc A51), pp 51–52

The board, in confirming the resolution to sell, noted that this was a 'large majority'.⁶¹⁶ It took no account of the fact that 84 per cent of owners had not attended the meeting (as, indeed, it was not required to do). We note, however, that the intention to reserve about 8,000 acres of this land was a long-standing one. It had been part of Wi Pere's arrangement with Carroll in 1906. The owners had tried to get farming started on that land while it was in the hands of the board. Then, the 1910 approach to the Crown conceded that the non-sellers wanted to keep about 9,000 acres. This was still the case at the meeting of owners, where Kunaiti proposed to retain 8,000 acres. But because the sellers dominated this particular meeting (with 16 per cent of owners present), the desire of many Ngati Kahungunu owners to retain a substantial share of their ancestral land was defeated.

Also, the only dissentients whose interests would be looked after were those who had been at the meeting. Thus, the board recommended cutting out sections for Arani Kunaiti and Tangi Whareraupo, who dissented from the sale.⁶¹⁷ Seventy-two names were put into the title for Kunaiti's section (5A). The 1909 Act required those who voted against a resolution to sign a memorial of dissent at the meeting.⁶¹⁸ In 1913, the Reform Government specified what this meant: that any owner who had not dissented in writing within three days of the meeting was 'deemed to have consented'.⁶¹⁹ In 1915, this three-day period was extended to a week.⁶²⁰ What this most likely meant in practice was that only those who were present at meetings and dissented in writing could get their interests cut out by the Native Land Court. In this way, the Government tried to prevent owners who, for whatever reason, did not attend the meeting from overturning its decision later.

In 1913, the board (which by then consisted of the local land court judge and registrar) was given powers of partition. In 1910, however, the Waipaoa 5 sale had to wait until the dissentients' interests were partitioned out by the court. In the meantime, the stark reality behind the sale had emerged. The sellers were living in what the board described as 'very straitened circumstances' and were desperate for the purchase money.⁶²¹ When the Government refused to advance any of it, the president actually did so himself, in the belief that their situation was urgent. In September 1911, the court awarded 16,785 acres to the Crown and 2,705 acres to the two non-sellers. There was a further delay, however, because the non-sellers appealed this decision (believing their shares entitled them to more land). The sellers made repeated approaches to the Government for their money in 1912, which they were 'very anxious to have', while the appeal process dragged on.⁶²² Storekeepers, too, wrote to the Crown, because Maori were drawing supplies on

616. Stevens, 'Waipaoa' (doc A51), p 52

617. *Ibid*, pp 52–54

618. Native Land Act 1909, ss 344–345

619. Native Land Amendment Act 1913, s 100(2)

620. Native Land Amendment and Native Land Claims Adjustment Act 1915, s 4

621. Stevens, 'Waipaoa' (doc A51), pp 52–53

622. *Ibid*, pp 53–55

credit against this delayed payment. The Government responded that the sellers had received one advance (to help them survive a 'trying winter') but would get no more until the title was sorted out.⁶²³ It is difficult to avoid the conclusion that the owners had to sell this land to eat.

By 1913, the titles had been resolved and the Government was ready to start surveying the land for settlement. At this point, however, a second meeting of owners was required. This was because the original offer had been to buy the land at Government valuation (£1 per acre) but a fresh valuation had dropped to 13s 1d per acre. Knowing that the sellers were desperate, the Government ignored the board's protests and played hardball with the owners: they could either accept the new price or the Government might back out of the purchase. The board called a meeting of owners on 20 May 1913. We have no information on how many owners attended this meeting. The meeting resolved to sell to the Crown at the much lower price (£11,000, down from £16,785), while communicating the sellers' great disappointment to the Government.⁶²⁴ Although we do not know the proportion of owners attending, this does not appear to us to have been the act of willing sellers.

By means of this new mechanism, the Crown had thus obtained the great bulk of Waipaoa 5.

10.7.3.3.2 THE 1909 SYSTEM IN OPERATION – HERUIWI 4

By the early 1910s, the Government's purchase efforts were focused on the large, unsold territory of the Urewera District Native Reserve. In the rim blocks, the great majority of Heruiwi 4 had already been sold, but the Tuhoe section – Heruiwi 4C – had survived the 1890s intact. With Tuhoe under severe pressure and beginning to agree to sales in the reserve, a group of Heruiwi 4C owners approached the board about selling this land. On 1 September 1911, the board convened a meeting which resolved to sell to the Crown for 12s 6d an acre.⁶²⁵ Between December 1911 and February 1913, the owners wrote to the Government at least five times, urging it to buy this land. This initiative appears to have been led by Waaka Paraone of Ruatoki, who said that he represented about 60 owners, and that they had no choice but to sell because of their 'trials'. Also, the land was 'outside the boundary line of Tuhoe' (meaning the Urewera District Native Reserve).⁶²⁶ The offers to sell, therefore, were coming from a group representing about 40 per cent of the owners. Ms Tulloch interpreted their 'trials' to mean the economic deprivation of Tuhoe at that time. Even so, a second meeting of owners in 1913 refused to sell at the Crown's price, which was five shillings an acre. This meeting was attended by 25 out of 152 owners.⁶²⁷

623. Ibid, pp 54–58

624. Ibid, pp 58–60

625. Berghan, supporting papers to 'Block Research Narratives' (doc A86(m)), p 4363

626. Tulloch, 'Heruiwi 1–4' (doc A1), p 101

627. Ibid, pp 102–103

The owners held out until 1915, and then they informed the board that they would have to accept the Government's price. A third meeting of owners was called on 8 April 1916. Only 11 owners (7 per cent) were present. They all voted to accept the Crown's offer.⁶²⁸ Counsel for Wai 36 Tuhoe condemned the 1909 Act for allowing such a low proportion of the owners to make a decision binding on all the rest.⁶²⁹

A year after the Crown's purchase of 4C, it attempted to buy 4A2B. Heruiwi 4A had been awarded to Ngati Hineuru. The 1,740-acre 4A2B was the only piece left after the Liberals' purchases. The Crown owned all the land around it and wanted to secure this last bit as well. At first, the board called two meetings in February 1917 but could not get a quorum.⁶³⁰ Finally, in July, the Crown's offer to buy the land at Government valuation was rejected by a quorate meeting (six present out of at least 124), but the meeting made a counter-offer to sell at a special valuation. The original valuation had dated back to 1914, and was increased by a new valuation carried out in 1917. Even so, a fresh meeting of owners in 1919 (five present) still thought the offer too low, and resolved not to sell. In this instance, the Government seems to have rejected its option of buying individual interests, and decided to go for the easier option of simply calling meeting after meeting. A second meeting in August 1919 did not reach the quorum of five owners, and nor did a third meeting in December of that year. Finally, in March 1920, another meeting was called and managed to get a quorum. Again, the Crown's offer of eight shillings an acre was rejected. The owners made a counter-offer of £3 an acre.⁶³¹

At this point, the Government decided to stop calling meetings and opted for purchasing individual interests. It did increase the price (to 10 shillings an acre). For the next 12 years, WH Bowler carried out the frustrating process of trying to buy interests from scattered owners, and organising court succession orders so that he could buy from living owners. By 1933, the Crown had shares worth 841 acres (just under half the block). The slow progress partly reflected the fact that this small piece of land was not of overwhelming importance to officials. The purchase stalled in 1933, because the Government had run out of funds to buy more interests. The Crown did not give up, however, and partition its interests. Over the next 10 years, the Crown acquired a few more acres (and the majority of shares).⁶³² The Crown's interests were not finally resolved until the 1960s (see chapter 18 on timber issues).

10.7.3.3.3 THE 1909 SYSTEM IN OPERATION – TAHORA 2

Most of the land in Tahora 2 had been purchased by the Crown in the 1890s, or ended up vested in the East Coast Trust (see chapter 12). The Tuhoe and

628. Tulloch, 'Heruiwi 1-4' (doc A1), p102

629. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

630. Berghan, supporting papers to 'Block Research Narratives' (doc A86(m)), p 4334; Tulloch, 'Heruiwi 1-4' (doc A1), p105

631. Tulloch, 'Heruiwi 1-4' (doc A1), pp105-106

632. *Ibid*, pp106-112

Whakatohea subdivisions remained largely outside the trust.⁶³³ In Tahora 2A, which had been awarded to Te Upokorehe and Tuhoe, most of the land was sold to the Crown in the 1890s. The block that survived was called 2A3, containing 8,226 acres.⁶³⁴ In September 1910, the Crown proposed that 2A3, as well as what was left of the neighbouring Tuhoe blocks, 2AE and 2AD, be vested in the Waiariki District Maori Land Board and then sold to it by the board. A meeting of owners was called for November 1910 to vote on this proposal but could not reach agreement. No resolution was passed. The Crown waited while the land was surveyed (which took years), until competition from a consortium of Auckland businessmen led to a renewed Crown offer in 1914. To protect its monopoly, the Government used its powers to proclaim Tahora 2A3 as under negotiation, making any private offers illegal. Also, the Crown planned to use its new powers under the 1913 Act if the meeting rejected its offer. The Government instructed the Urewera purchase agent, Bowler, to attend the meeting and start collecting signatures. The first 1914 meeting failed because there was no quorum. The board tried again on 20 November, when the meeting rejected the Crown's offer.⁶³⁵

As soon as this meeting was over, Bowler began purchasing individual interests. From 1915 to 1921, a fresh prohibition on private dealings was placed on the land each year. Under that monopoly, Bowler slowly bought up individual signatures, ignoring protest from Maori who did not want this land to be sold. The Government's view was that the objectors could simply cut out their individual interests as non-sellers, when it decided that it had purchased enough to warrant a partition. By 1921, the Crown had acquired shares worth 5,446 acres, but a decision was made not to subdivide the land but to leave it in limbo until the Crown's interests were defined in the Urewera Consolidation Scheme (see chapter 15). In the meantime, a 'special effort' was made to buy more interests, but without netting more than a few hundred acres. In 1922, the Crown partitioned its share of Tahora 2A3. As Boston and Oliver noted, this process disempowered owners, who could only derive any economic benefit from their unlocated shares by selling them to the Crown under monopoly conditions.⁶³⁶

In 1910, the Government had wanted to buy all the remaining Tuhoe interests in Tahora 2. As well as 2A3 (shared with Te Upokorehe), these were 2AD2 (3,276 acres) and two surviving sections of 2AE. In November 1910, a meeting of owners resolved to accept the Crown's offer of 9s 6d per acre for 2AD2. The number of owners present at the meeting was not recorded, although it must have met the minimum requirement (five of the 267 owners). The sale was not confirmed by

633. Tuhoe owned 2AD, 2AE, and 2G. Of these sections, only 2G2 was put into the East Coast Trust. Tuhoe also shared ownership of 2A with Te Upokorehe. Section 2B was owned by Ngati Ira and Whakatohea. None of this land ended up in the trust. The remnants of the sections awarded to Ngati Kahungunu (2F) and to Te Whanau a Kai, Ngati Rua, Ngati Maru, and Ngati Hine (2C) were vested in the trust. We discuss the fate of land in the trust in chapter 12.

634. Originally, this block was thought to have contained 11,343 acres. This was reduced drastically when the land was surveyed (and the Crown's awards in 2A1 and 2A2 were not reduced).

635. Boston and Oliver, 'Tahora' (doc A22), pp 172–174

636. *Ibid*, pp 174–178, 194

the board, however, because there were doubts about the Government valuation. A new valuation found the land to be worth an extra three shillings an acre. The Government approached the board, asking if it needed to call another meeting for a new resolution to sell at this price. In the meantime, however, the owners had had better offers from private buyers. The board, charged with protecting the interests of the owners, offered to confirm the original resolution to sell to the Crown if the Government would match the new prices. The Native Department decided to withdraw from negotiations. It soon emerged, however, that the 1910 meeting had not represented the wishes of all the owners. When the land was sold to Dillicar in 1912 (by a meeting of just 12 owners), many of the Tuhoe owners soon protested that they had not wanted to sell 2A D2. Boston and Oliver concluded that some of the protest was about the urgently needed money, and delays in paying it.⁶³⁷ Be that as it may, the meeting of owners system was clearly an unsafe way of determining the collective will of the owners.

10.7.3.3.4 THE 1909 SYSTEM IN OPERATION – WHIRINAKI

Around one-third of the Whirinaki block survived in Maori ownership into the 1900s. In 1911, the Crown tried to buy the small Whirinaki 1(2) section (330 acres), the only flat land left in the north-west of Whirinaki, where the owners were living and cultivating. The meeting of owners rejected the Crown's offer. We do not know what proportion of owners attended the meeting, which was held in nearby Murupara. At this time, well before the 1913 amendment, the Crown had no choice but to accept the meeting's verdict. Tulloch noted that the Government made no further attempts to buy this land.⁶³⁸

In the same year, the Government made an offer for Whirinaki 1(4B1), a block of 3,283 acres. This block was sandwiched between Crown lands that became State forests, and the Government wanted it for forestry. In this case, the offer arose because of an approach from WH Bird, on behalf of the owners. He told Ngata that the rugged, timbered 4B blocks should be sold to raise capital for farm development elsewhere. At the assembled owners' meeting, however, the Crown's offer was rejected. We do not have the exact number present, but there were only 24 owners in this block (with a total of 132 shares). Those who wanted to sell represented 59 shares. Again, because this was before the 1913 amendment, the Crown could not pursue individual interests. The Government advised the owners to partition the block so that Bird and his people could sell their share. They took up this option. The court partitioned the block in 1913, awarding 1,533 acres (section 1(4B1A)) to those who wanted to sell, and a B block to the non-sellers (1,749 acres).⁶³⁹

637. Boston and Oliver, 'Tahora' (doc A22), pp 196–205

638. Tulloch, 'Whirinaki' (doc A9), p 57

639. Ibid

The Crown Gives Up on Some Blocks

In some cases, the Crown did not pursue purchases after its offer failed at a meeting of assembled owners:

- ▶ *Matahina D*: Having acquired most of Matahina D by survey costs, the Government sought to buy D2 in 1910 at 10 shillings an acre. The meeting at Te Teko was not able to get a quorum of five owners. The Crown did not pursue this purchase further.¹
- ▶ *Tahora 2AD2, 2AE1(2)*: When the Crown failed to obtain these blocks in 1910, it did not stand in the way of private purchasers in 1911 (who obtained both blocks when the Waiariki District Maori Land Board approved resolutions to sell).²
- ▶ *Waiohau 1A11, 1A12, 1A13*: Meetings of owners at Whakatane in 1916 could not get a quorum of five owners. The Government decided not to pursue these blocks because they were considered worthless for settlement.³
- ▶ *Whirinaki 1(2), 1(4B2)*: When meetings of owners rejected the Crown's offer for section 1(2) in 1911, and for 1(4B2) in 1915, it did not pursue these blocks further at that time (see above).

1. Philip Cleaver, 'Matahina Block' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc A63), pp 86–87

2. Peter Boston and Steven Oliver, 'Tahora 2' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 198–205, 212–215; 'Notice of Meeting of Owners under Part xviii of the Native Land Act, 1909', 19 October 1910, *New Zealand Gazette*, 1910, no 95, p 3853

3. Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(q)), vol 17, pp 6090–6093

The Crown tried again in 1914, this time making an offer to the 11 owners of 4B1A. In the meantime, some owners had continued to press the Government because they needed capital for farm development. Five owners (32 out of 62 shares) attended the meeting and accepted the Crown's offer unanimously.⁶⁴⁰ At the same time, the Government was also determined to get the non-sellers' section (4B1B). In 1914, it issued a prohibition to prevent any private dealings in the land. Then, it asked the board to call a meeting in 1915 for both the 4B1B block and the 4B2 block (3,656 acres). When the 4B2 block was created in 1902, it had 41 owners. Eight were present at the 1915 meeting and voted to reject the Crown's offer. The Government had proposed to pay three shillings an acre, and the owners asked for 100 shillings an acre instead. The 4B1B owners also rejected the Crown's offer.

640. These figures have been rounded. The actual figures are: 31 7/9 shares out of 61 2/3 shares.

This meeting was attended by four owners (out of 14), as well as a trustee for a fifth owner, and a yet-to-be-appointed successor to another. These owners asked for 20 shillings an acre, in response to the Government's offer of four shillings.⁶⁴¹

Even though there were only relatively small numbers of owners in these blocks, the Government decided not to pursue individual interests. By 1923, some of the resolute non-sellers of 4B1B told the board that they were 'now anxious to sell'.⁶⁴² A second meeting of owners was called in October 1923, but it again rejected the Crown's price (which was the same as it had been in 1915). The Government refused to buy at the owners' much higher price, but forestry officials were very interested in this land and encouraged the calling of a third meeting of assembled owners in 1925. This time, all the owners attended the meeting, which was held at Murupara. The Crown raised its offer to 7s 6d, which it had good reason to think the owners would accept, but the meeting again voted against the Crown's price. The meeting informed the Government that it could have their land for £1 an acre.⁶⁴³

The forestry service advised that the land was not wanted immediately – it would be many years before the timber could be made profitable. The Crown (unlike the owners) could afford to wait. The Government therefore decided once again to embark on the slow process of buying individual shares, insisting on the rejected price of 7s 6d. At first, the owners stood firm, but by 1927 some individuals had begun to sell. Two years later, in 1929, the Crown had acquired the interests of 10 owners (50 of the 70.5 shares). The remaining individual owners were adamant that they would not sell their shares. Instead of partitioning, the Government decided to wait them out while the timber was still unusable. Eventually, the Government resumed individual purchasing in the 1960s.⁶⁴⁴

10.7.3.3.5 EXCEPTIONS TO THE RULE – THE CROWN BUYS INDIVIDUAL INTERESTS WITHOUT CALLING A MEETING FIRST

In two cases, the Crown purchased individual shares without trying a meeting of owners first. It will be recalled that Waipaoa 5 was vested in the Tairāwhiti District Māori Land Board and that the Crown had purchased the great bulk of it in 1910–13 (Waipaoa 5B). The dissentients at the meeting had had their interests partitioned as Waipaoa 5A (2,624 acres) and 5C (81 acres). Ngāti Kahungunu owners, led by Arani Kunaiti, were known to be very opposed to selling this land. It is telling that in such circumstances, the Crown did not bother trying to call meetings of owners. Instead, it proceeded straight to the purchase of individual interests. In 1915, three of the 72 owners of 5A offered to sell their interests to the Crown. They held 59 out of 2,489 shares. In response, the Government authorised the purchase of individual shares in 5A (and later in 5C as well). The largest shareholders, the

641. Tulloch, 'Whirinaki' (doc A9), pp 56, 58–60; Berghan, supporting papers to 'Block Research Narratives' (doc 86(r)), pp 6454–6455

642. Registrar, Waiariki District Māori Land Board, to under-secretary, Native Department, 2 June 1923 (Tulloch, 'Whirinaki' (doc A9), p 60)

643. Tulloch, 'Whirinaki' (doc A9), pp 60–61

644. *Ibid.*, pp 61–64

Kunaiti whanau and Tangi Whareraupo, held out against the purchase agent, so the Crown had only acquired 575 acres of 5A by 1918.⁶⁴⁵

In October 1916, the board called a meeting of 5A owners to consider three lease proposals. The first involved revesting the land in its owners for leasing to a neighbouring settler. This was rejected by 26 owners (in an 'almost unanimous' vote) because they wanted to farm the land themselves. The second proposal was for a lease to one of their own, which was defeated by 366 shares to 200, with 12 owners voting. The third proposal was for a lease to three other owners so that they could farm the land, which was carried by the same margin. The lease, however, seems to have fallen over.⁶⁴⁶ This was because the Governor in council issued a prohibition order for Waipaoa 5A on 16 October 1916.⁶⁴⁷ The Government had got wind by telegram of the owners' intention, which would have interfered with its purchase efforts.⁶⁴⁸ As a result of the prohibition, the board could not confirm the lease.

Having stymied the leasing proposals, the Crown continued with its attempts to buy this land. Officials noted that it would be 'useless to have meetings of assembled owners called'.⁶⁴⁹ They knew that the owners wanted to farm, not sell. The purchase agent confirmed that the non-sellers controlled the majority vote, and a meeting should not be called. Worse was to follow. In order to prevent any competition from leasing, the Crown continued to use its powers to prohibit private alienations for the next few years. We find this an extraordinary move on the part of the Crown in the circumstances. Even though the land had been compulsorily vested in the board for the very purpose of leasing, the board was forbidden from carrying out its task. In 1924, however, the board tried to break the deadlock, proposing to the Crown that it should be allowed to lease the block.⁶⁵⁰

By this time, the Government had acquired almost half of 5A (1,277 acres out of 2,624) and the majority of 5C (56.5 acres out of 81). But it was reluctant to partition yet for fear of driving up the price of remaining shares. In 1925, the owners petitioned Parliament, noting that they had a meeting house, four houses, and two urupa on this land, yet it was lying idle because of the purchase agent's activities, and the prohibition on leasing. They asked for the land to be revested in them so that 'the tribe could work it as a communal farm'.⁶⁵¹ The board, on the other

645. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), pp 17–19; Berghan, 'Block Research Narratives' (doc A86), pp 723–729

646. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 19; Berghan, 'Block Research Narratives' (doc A86), pp 724–727; Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6168–6169, 6172, 6175

647. 'Prohibiting All Private Alienation of Certain Native Land', 16 October 1916, *New Zealand Gazette*, 1916, no 120, p 3301

648. Herries to Nolan, 13 October 1916 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), p 6181)

649. Under-Secretary to Goffe, 31 October 1916 (Berghan, 'Block Research Narratives' (doc A86), p 725)

650. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 19; Berghan, 'Block Research Narratives' (doc A86), pp 725–729

651. Tahi Rapata and others to Coates, 29 April 1925 (Berghan, 'Block Research Narratives' (doc A86), pp 730–731)

hand, wanted to lease to a European: 'If the Te Reinga Natives occupy the land, it is only reasonable to assume that the Te Reinga blackberry will accompany them and their stock.'⁶⁵²

The board proceeded with a lease to a settler (presumably the Crown's prohibition had expired), and the owners appealed to the Native Minister: 'This is our land, and not the Board's,' they told the Minister.⁶⁵³ Even with such an appeal before it, however, the Government refused their request to intervene and permitted the lease, which did not need the owners' approval. Then, in 1927, the Crown partitioned part of its share of 5A (613 acres) for a scenic reserve. It remained co-owners with Maori in the new 5A2.⁶⁵⁴ The claimants were not able to clarify for us the ultimate fate of 5A2 and 5C, although we know that the Crown had purchased the majority of 5C by then.⁶⁵⁵

The Crown's actions in respect of this block were reprehensible. It is true that the legislation empowered it to act as it did. In 1909, the power to alienate land vested compulsorily in the board under the 1905 Act was introduced. It was confined to a meeting of assembled owners. Then, in 1913, the Crown was given power to buy individual interests in any land, including vested lands.⁶⁵⁶ That it was still obstructing the owners' wishes in 1925 – when there was growing official understanding of the importance of assisting Maori owners to farm their lands – suggests a myopic determination to carry through its policy in respect of this block. That policy had never been guided by the interests of the owners. In our view, the Crown clearly abused this power to buy interests in Waipaoa 5A and 5C, in the knowledge that the owners wanted to farm this land, and did not want to sell it. The Crown persisted in the face of their collective opposition, knowing that it was 'useless' to even try getting agreement from a meeting of the owners.

The other block purchased without use of the meetings of owners system was Tahora 2AE3(2). This block of 1,012 acres had been awarded to 11 owners in 1896. The decision to purchase individual interests seems to have been one of convenience. Bowler was already buying up shares in Tahora 2A3, so he was given permission to do the same in 2AE3(2) in 1921. Without any collective bargaining power, owners had no choice but to sell (or not) at the Government's price. Also, the individual purchasing was supported by a prohibition against any other alienations, which was renewed as needed. In two months, Bowler obtained 5³/₅ of the

652. Registrar to Under-Secretary, 30 April 1925 (Berghan, 'Block Research Narratives' (doc A86), p731)

653. Taohe Robert and others to Coates, 15 July 1925 (Berghan, 'Block Research Narratives' (doc A86), p732). We note that this name was given variously as Taahi, Taohe, and Tahi.

654. Berghan, 'Block Research Narratives' (doc A86), p732; Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p20

655. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p20; Niania, brief of evidence (doc 138), p43. Paula Berghan's block narrative ends in 1928: see Berghan, 'Block Research Narratives' (doc A86), p732.

656. Native Land Amendment Act 1913, s109

Other Meetings of Assembled Owners

By our calculation, there were at least 50 meetings of owners called for the rim blocks between 1909 and 1930. Nine meetings were called for Matahina A blocks, three for Waiohau 2, two for Matahina B2, two for Tuararangaia 2B, and one for Tuararangaia 3B2. We are not inquiring into the particular history of these blocks after their award of title, so we have not considered these meetings.

For the remaining blocks, there were seven meetings called for the purpose of voting on sales or leases to private buyers. We have discussed some of them where relevant to Crown offers. All but two of these meetings took place between 1911 and 1916. We will consider them further in section 10.9.

11 shares. Further progress was delayed while successions were decided. By 1922, the Crown had acquired a majority of shares (622/45), totalling 596 acres.⁶⁵⁷

Over the next six years, the purchase agent collected most of the outstanding signatures while the prohibition orders remained in constant effect. In 1928, the last few interests were owned by people who simply could not be found. The prohibition order was renewed from 1930 to 1933, because the Government was anxious to join this land with neighbouring blocks and get it settled. By 1933, after 12 years of hunting, there were two outstanding non-sellers, and succession orders for two other owners who had died in the interim. The Crown finally gave up in 1934 and partitioned the block, getting all of it except for five acres. (It obtained the final five acres in 1936.⁶⁵⁸)

10.7.3.3.6 THE 1909 SYSTEM IN OPERATION – A SUMMARY

By 1930, the Crown had acquired additional land in Waipaoa 5, Heruiwi 4, Tahora 2, and Whirinaki 1 by means of the meetings of assembled owners system, supplemented by individual purchasing where necessary. The presence of only a minority of owners on the day allowed the sales of Waipaoa 5 and Heruiwi 4C, despite evidence of substantial dissent from the decision among the owners of Waipaoa 5. It cannot be denied that some owners were ready (even desperate) to sell this land. For most, there was no other way to get any return from it. But given the Government's stated intention of returning to the collective decision-making of runanga, the meeting of assembled owners system was far from satisfactory. In only one case (Whirinaki 1(4B1A)) were all the owners clearly willing sellers. They wanted to sell this piece of land to raise capital for farming.

657. Boston and Oliver, 'Tahora' (doc A22), pp 216–218

658. Ibid, pp 218–223

The power afforded the Crown in the 1913 Act to buy individual interests – reviving its powers under earlier Acts – was used selectively in those blocks whose owners refused to sell their land. We agree with the Central North Island Tribunal, which stated:

We consider that the negative impacts of purchasing undivided shares were well known to Parliament in 1913, and that Herries' explanation for the resumption of this policy [that private purchasers had too many advantages over the Crown] cannot stand as a justification for it. It was only a few years since Seddon had stated that when the number of Maori people was set alongside the amount of Maori land remaining, it would be 'manifest injustice to take more land from them under the old system. If that system were continued . . . we would have claims for land on behalf of landless Natives'. And in the Legislative Council in 1911, Dr Findlay was critical of those who declared that the solution of the land problem was to individualise native title so that each person could sell their title, ending up landless.⁶⁵⁹

The Crown used this power in the case of Heruiwi 4A2B, Tahora 2A3, and Whirinaki 1(4B1B); this was its method for overcoming the repeated refusal of the owners to sell their land. We accept the submission of claimant counsel that 'Nothing illustrates more clearly the Crown's willingness to circumvent and undermine community attempts to control the land alienation process.'⁶⁶⁰

We have shown that the Crown tried to buy Heruiwi 4A2B at seven meetings from 1917 to 1920. There was no quorum at four of these meetings. At two, a tiny minority of owners refused the Crown's offer. We do not know how many people were present at the final, decisive meeting, but it seems clear that if the majority of owners had wanted to accept the Crown's offer, they had had plenty of opportunities to do so. In the case of Tahora 2A3, the Crown tried three meetings from 1910 to 1914. The first meeting could not agree, the second meeting could not get a quorum, and the third meeting rejected the Crown's offer. (Again, we do not know how many owners were present at the decisive meeting.) For Whirinaki 1(4B1B), the Crown knew from the 1911 meeting and the 1913 land court partition that it was dealing with the people who had not wanted to sell. At three meetings, held over a decade from 1915 to 1925, the owners' position changed – they were ready to sell, but not at the Government's price. All the owners were present at the final meeting, which rejected the Crown's price for the third time. (By the 1960s, when individual purchasing again resumed in Whirinaki, Henry Bird observed that the owners were still clinging to their last pieces because they had lost almost all their ancestral land.⁶⁶¹)

659. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 689

660. Counsel for Ngati Manawa, closing submissions (doc N12), p 48

661. Tulloch, 'Whirinaki' (doc A9), p 73

In all three blocks, the Crown's pursuit of individual interests was at prices rejected by meetings of owners, and it took place over a long period of time.⁶⁶² In Tahora 2A3, officials made private competition illegal and purchased shares for eight years, after which they finally sought a partition. But in the cases of Heruiwi 4A2B and Whirinaki 1(4B1B), the Government did not in fact give up and seek to divide its interests from the non-sellers' when it finally ran out of sellers in the 1930s. Instead, there was a long hiatus from the 1940s to the 1950s, after which the Crown resumed purchasing individual interests. In the meantime, nobody could use the land.

The details of the Crown's determined actions to buy these blocks do not make comfortable reading. In the case of Waipaoa 5A and 5C, and of Tahora 2AE3(2), the Crown did not even bother with trying to get agreement from a meeting of owners first. This was clearly a strategy to circumvent the known opposition of Ngati Kahungunu to selling their land in Waipaoa 5. In Tahora 2AE3(2), it was more a matter of convenience. A long process of attrition ensued, before the Crown finally purchased all 11 shares in this block over a 15-year period.

10.7.3.3.7 THE SPECIAL CASE OF TUARARANGAIA – TUHOE GIFT LAND TO THE CROWN

In 1891, the Native Land Court divided Tuararangaia between Tuhoe (whose block was called Tuararangaia 1), Ngati Pukeko (Tuararangaia 2), and Ngati Hamua and Warahoe (Tuararangaia 3). The Tuhoe section, Tuararangaia 1, had survived the 1890s intact. In 1907, the Government took a quarter of the block for survey costs. Then, in 1910, the Native Minister applied to the court for the owners of the remainder to form an incorporation. This step was taken on the recommendation of the Stout–Ngata commission.⁶⁶³ Erueti Pene appeared for the owners at the hearing and said that they had agreed to incorporating.⁶⁶⁴ We note that this was the first incorporation created in the Urewera rim blocks since the provision was enacted in 1894.

A meeting of assembled owners was called to elect a management committee. The committee included some Tuhoe and Ngati Haka Patuheuheu leaders of the day: Erueti Biddle, Miki Te Wakaunua, Te Ranui, Mika Rangitaiki, Akuhata Te Kaha, Natana, and Te Purewa. In 1912, this committee offered about 40 per cent of the block (1,000 acres) to the Crown as an endowment for Maori colleges, in order to obtain higher education for their people. The other 60 per cent was proposed

662. The Crown did increase its price slightly for Heruiwi 4A2B, but this still fell far short of what the owners had said they wanted at their meeting, and on the basis of which they had rejected the Crown's offer.

663. Robert Stout and Apirana Ngata, 'Native Lands and Native-Land Tenure: Interim Report of Native Land Commission on Native Lands in the County of Whakatane', 23 March 1908, AJHR, 1908, G-1C, pp 4-5

664. Clayworth, 'Tuararangaia' (doc A3), p97

What About the Trees and the Money?

The Crown's milling of the timber on the education endowment land was a significant grievance for the claimants.¹ Tama Nikora, in his evidence at our Waiohau hearing in 2004, told us:

In August 1912 at Tuarau, Ruatoki, the Tuhoe owners resolved to cede 1000 acres of Tuarangaia 1B to the Crown for a college to be established for the children of Tuhoe, Ngati Awa and Te Arawa in the Ohiwa region. The Maori version of the resolution is clear in its stipulation of the purpose of ceding of the land – my translation is to be preferred. The school was never built although the trees on the land were milled by the Crown. In 1971 Tuhoe submitted to the Honourable Duncan MacIntyre, Minister of Maori Affairs, while visiting Tuhoe at Mataatua, Ruatahuna, that the land should be returned. The land was eventually returned and is now committed to forestry. The Crown has never accounted to the Tuarangaia 1B owners for its ownership of the land for 55 years in breach of the gifting and the money it pocketed from milling the timber.²

1. Colin (Pake) Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 13

2. Tama Nikora, brief of evidence for third hearing week, 18 March 2004 (doc C31), p 16

for development as dairy farms, although there was no capital to do so.⁶⁶⁵ The 1909 Act allowed the committees of incorporations to sell or lease land, but there was no specific provision for them to make gifts of it.⁶⁶⁶ In any event, the Government felt it necessary to call a meeting of assembled owners to confirm the proposed gift. We have no information on how many attended this meeting at Ruatoki in 1912, but we do know that Tuhoe chiefs led the discussion and supported the proposal, hoping for a college to be established at Ohiwa. The resolution passed and was confirmed by the Waiariki District Maori Land Board.⁶⁶⁷

In 1914, the management committee offered the rest of the block to the Crown as a donation to the war effort. As we shall see in chapter 14, Tuhoe chiefs were positioning themselves as against Rua Kenana in terms of supporting the war, and allying with the Crown. Numia Kereru was one of two chiefs who proposed this gift to the committee, which voted unanimously to make the offer. In addition to the committee's offer, 39 Tuhoe leaders signed a letter to the Prime Minister in support of it. While the Government had felt that it could accept land as an

665. Clayworth, 'Tuarangaia' (doc A3), pp 98–102

666. Native Land Act 1909, ss 327–337. See also parts 13, 18, and 19 for other relevant sections.

667. Clayworth, 'Tuarangaia' (doc A3), pp 99–102; Nikora, brief of evidence for third hearing week (doc C31), p 16

In his evidence for the Crown, Brent Parker found that no use of the endowment land was made until the late 1940s, when milling became profitable in conjunction with neighbouring Crown land. In 1951, Tuhoë asked for the land to be returned to them as farms for returned servicemen. The Government replied that the land was unsuitable for farming, and was being milled for the Education Department, which would use the money for Maori schools and colleges. The Forest Service, however, deducted 10 per cent from the timber money in payment for its services, and also a sum for appraising the timber. After deductions, only £8,212 was paid to the Education Department.³ The Crown concedes that there is no evidence that it was used for Maori education.⁴ The evidence of Parker and the claimants was in agreement that no Maori college was established at Ohiwa. The land was returned to Tuhoë in 1972.

In a chapter 21, we consider the basis upon which the Crown held this land, and the disposition of the proceeds of sale of the trees.

3. Brent Parker, 'Report of Brent Parker in Relation to Tuararangaia 1B Education Endowment' (commissioned research report, Wellington: Crown Law Office, 2005) (doc M15)

4. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p35

educational endowment, this time it decided that it had no legal power to accept Maori land to help pay for the war.⁶⁶⁸ Tuhoë, it was noted, were 'well endowed with land but have no money, in fact [they are] practically penniless.'⁶⁶⁹ The Government decided that it would have to buy the land, and have Tuhoë donate the money to the War Fund.⁶⁷⁰ In 1915, it provided specifically for such situations in the Native Land Amendment and Native Land Claims Adjustment Act, empowering meetings of owners to donate money from purchases 'for patriotic purposes', and empowering the boards to effect these donations.⁶⁷¹

A meeting of owners was called at the end of 1914 to discuss the Government's proposal. There were 719 owners in this 1B block. The meeting was attended by 25 of them, with 16 proxies. The Native Land Court judge (and board president) believed that this was a 'well attended' meeting.⁶⁷² The owners resolved (by 54 shares to one) to sell the land to the Crown, and donate the proceeds. The single dissenter was, however, an important one – Te Oti Tutakangahau, whose family

668. Clayworth, 'Tuararangaia' (doc A3), pp104–105

669. Powhare (working for the Waiariki District Maori Land Board) to Massey, telegram, 5 September 1914 (Clayworth, 'Tuararangaia' (doc A3), p104)

670. Clayworth, 'Tuararangaia' (doc A3), p105

671. Native Land Amendment and Native Land Claims Adjustment Act 1915, s5

672. Clayworth, 'Tuararangaia' (doc A3), p105

supported Rua. The reasons for and against this decision were political. As Judge Browne commented, it was highly unlikely that Tutakangahau would actually take his share of the money if it was kept out for him.⁶⁷³

Thus, Tuhoe gifted all that was left of Tuararangaia 1 to the Crown in 1912 and 1914. Peter Clayworth observed that the tribe was cash-poor, and owned this rough land that was not very valuable for farming. They had no permanent kainga on it, using it mainly for hunting. In this situation, Tuhoe offered gifts to the Government in the hope of improving and solidifying their relationship, establishing reciprocity, and getting college-level education for the tribe.⁶⁷⁴ At the same time, Clayworth questions whether such a small number out of 719 owners was ‘a fair representation of the wishes of the owners.’⁶⁷⁵ There was nothing to show that these people, with legal rights acquired under the native land laws, had assented to the gifts. Tama Nikora also took this view, noting that the decision was taken by 5.7 per cent of the owners, holding 6.4 per cent of the shares.⁶⁷⁶ He commented: ‘I have struggled to understand the decision to give away this land when Tuhoe was fighting to retain land in the UDNR.’⁶⁷⁷

We accept the point that the Crown, having created legal interests for land-owners, did not protect those interests by ensuring the owners assented to the gifts. The meeting of owners provision, with its quorum set so low, was virtually useless for that purpose. On the other hand, the owners had set up an incorporation. The gifts were the work of its committee, and clearly had support from the wider tribe and some of its leaders. This was, in our view, an example of the tribe, rather than the Crown, using the meetings of owners system for its own purposes, and exercising tino rangatiratanga despite having no legal rights to this land. It is the only example of this that we can point to in the rim blocks for this period.

In 1951, Takarua Tamarau sought the return of this wartime gift for the purpose of settling Tuhoe returned servicemen on it.⁶⁷⁸ The Minister of Maori Affairs, Ernest Corbett, looked into it and found that the Education Department was in the process of milling its 1,000 acres. Corbett turned down Tuhoe’s request, replying:

The suggestion that the land be used for the settlement of Maori ex-servicemen is not a new one, but the reports available to me indicate that the land is in any case not suitable for farming. Certainly its inaccessibility and general condition make it unlikely to be considered for development at the present time.⁶⁷⁹

673. Clayworth, ‘Tuararangaia’ (doc A3), pp 105–106

674. *Ibid*, p 107

675. *Ibid*, p 106

676. Nikora, brief of evidence for third hearing week (doc C31), p 17

677. *Ibid*, p 16

678. Brent Parker, ‘Report of Brent Parker in relation to Tuararangaia 1B Education Endowment’ (commissioned research report, Wellington: Crown Law Office, 2005) (doc M15), p 4; Corbett to Under-Secretary, Maori Affairs, 16 April 1951 (Brent Parker, comp, supporting papers to ‘Tuararangaia 1B Education Endowment’, various dates (doc M15(a)), p 8)

679. Corbett to Takarua Tamarau (draft) 25 May 1951 (Parker, supporting papers to ‘Tuararangaia 1B Education Endowment’ (doc M15(a)), p 9)

This cannot have been the reciprocity anticipated by Tuhoe when they made their gift. By this time, the land was evidently usable for forestry purposes, if not for farming.

10.7.3.4 Prices and valuation under a Government monopoly

In this inquiry, the Crown argued that the question of whether it 'abused its monopoly powers of purchase' is not a significant issue for the rim blocks. The Crown only purchased a 'few blocks' under such powers.⁶⁸⁰ Crown counsel accepted in theory that a monopoly could negatively affect prices, but argued that there is not enough evidence to show if its monopoly powers 'had any material impact on the purchase price paid'.⁶⁸¹ It would seem not, given the evidence of strong bargaining by Maori.⁶⁸² The claimants, on the other hand, were adamant that the Crown's monopoly powers had been a dominant force in its purchase of their land in the rim blocks. As part of that force, Maori had had little choice but to sell, and no choice but to sell at the Crown's price. There was no independent vetting of prices, no safeguards to ensure that Maori got a fair price, and, above all, no market to establish a value for the land. The Crown, we were told, kept prices low by excluding private competition; this was in no one's interest but its own.⁶⁸³

10.7.3.4.1 HOW OFTEN DID THE CROWN USE ITS MONOPOLY POWERS TO EXCLUDE COMPETITION ?

The first issue we need to address is how extensively the Crown used monopoly powers to exclude private competition. In the submission of Crown counsel, it was 'only a few blocks' and therefore of little importance. We test that submission in this section.

In the nineteenth century, Te Urewera was first affected by monopoly powers in two ways. First, the Crown gave itself legislative power to exclude private dealings in any land wanted for gold mining, special settlements, or railways.⁶⁸⁴ This was extended in 1874 to include land under Crown lease, so that the Government could protect its ability to turn the lease into a purchase. The Immigration and Public Works Act was quite specific on this point.⁶⁸⁵ Secondly, the Government had used the leases themselves to exclude competition. As we noted earlier, the Heruiwi 1–3 and Matahina leases included provisions that the landlords were not allowed to sell the land or make any kind of transaction with anyone other than their tenant, the Crown. This provision meant that the first Crown purchases of relevance in our inquiry – Matahina and Heruiwi 1–3 – were conducted under a monopoly.

680. Crown counsel, closing submissions (doc N20), topics 8–12, p 6

681. *Ibid*, pp 6, 75

682. *Ibid*, p 6

683. Counsel for Ngati Manawa, closing submissions (doc N12), pp 34–37, 41–45; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 71

684. Immigration and Public Works Act Amendment Act 1871, s 42

685. Immigration and Public Works Act 1874, s 3

Government Monopoly Powers over Maori Land

The Government's power to establish a monopoly over Maori land was created by legislation. We summarise the relevant provisions:

1871

Immigration and Public Works Act Amendment Act 1871: In order to acquire land for gold mining, special settlements, or railways, the Governor can put a notice in the *Gazette* that such land is under negotiation. It then becomes unlawful for any private person to deal in that land (section 42).

1874

Immigration and Public Works Act 1874: All private dealings are prohibited in any land leased by the Crown from Maori, 'until the Governor has exercised his option to purchase the lands' or the lease expires. The Governor has to put a notice of all such land in the *Gazette* (section 3).

1877

Government Native Land Purchases Act 1877: Where the Crown has paid any money or opened any negotiations for the purchase of Maori land, it is not lawful for anyone else to have dealings in it. The Governor has to notify such lands in the *Gazette*, as well as any withdrawal from negotiations (sections 2 and 3). District land registrars are to ensure that a caveat is recorded for all such lands, and that no deeds affecting such lands are registered under the Land Transfer Act (sections 4 and 5). (This Act was in force from 1877 to 1892.)

1892

Native Land Purchases Act 1892: The Governor can put a notice in the *Gazette* that the Crown is in negotiation for any Maori land in the North Island, making it unlawful for private parties to buy or acquire any kind of right in that land until the notice is withdrawn by the Governor. Notices expire within two years (section 16). Registrars are to put caveats against all such lands, and to refuse to register any deeds affecting them (section 17). When the notice takes effect, the Crown may evict anyone from the land except its owners, or a person who obtained a lawful interest before the land was proclaimed (section 18).

1894

Native Land Court Act 1894: Full Crown pre-emption is restored over Maori land, except where bona fide leases or purchases were under way or in negotiation at the time the Act was passed (sections 117 and 118).

1909

Native Land Act 1909: The power of Maori owners to sell or lease their land to private parties is restored (for the first time since 1894) (parts 13, 17, and 18). Where any Crown negotiation for Maori land is contemplated or underway, the Governor can issue an Order in Council prohibiting private dealings for up to one year. The prohibition can be extended for six months (section 363). For the first time, as well as making any private transactions void, the legislation prescribes a penalty: offenders can be imprisoned for three months or fined £200 (sections 364 and 365).

1913

Native Land Amendment Act 1913: Prohibitions can be extended for 12 months (instead of six months). Successive prohibitions should not be longer than two years each (section 111).

1916

Native Land Amendment and Native Land Claims Adjustment Act 1916: Prohibitions can be extended for two years (instead of 12 months). Successive prohibitions should not be longer than three years each (section 8).

1917–30

The power to prohibit private dealings was not removed or further amended between 1917 and 1930.

We make no further reference to Matahina, but we note that in 1878 the Crown proclaimed Heruiwi under the Government Native Land Purchases Act 1877.⁶⁸⁶ As claimant counsel submitted, this Act represented a broadening of the Crown’s powers from those conferred by the Immigration and Public Works Acts. Under the new Act, the Government could proclaim a monopoly over any land on which it had paid money or entered negotiations.⁶⁸⁷ Heruiwi 1–3 remained under proclamation until the Crown completed its purchase in 1881.⁶⁸⁸

The next significant Crown purchases took place under the Liberals in the 1890s. They revamped the Crown’s monopoly powers, repealing the 1877 Act and passing a new Native Land Purchases Act in 1892. Its monopoly powers were virtually identical to those conferred by the 1877 Act, but this was revised again in 1894. In that year, the Liberals restored full Crown pre-emption. Most of the Liberal land

686. Tulloch, ‘Heruiwi 1–4’ (doc A1), p 24

687. Counsel for Ngati Manawa, closing submissions (doc N12), p 42

688. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 24, 31, 40

purchasing in Te Urewera was conducted under the 1894 Act, including Heruiwi 2–3, Waipaoa, and Whirinaki. Most of the Tahora 2 purchasing was also under this Act, as was the final buying up of interests in Heruiwi 4.

The Native Land Court Act came into force on 23 October 1894. By that time, purchasing had been going on in Tahora 2 for about a year, and in Heruiwi 4 for three years. Claimant counsel put to us that these lands were purchased under a virtual monopoly, even so.⁶⁸⁹ As we shall see in section 10.9, restrictions were placed on the alienation of almost all the Tahora 2 blocks, and on Heruiwi 4A, 4B, 4C, and 4F. These restrictions were imposed at the request of Maori leaders to make their land inalienable. Instead, as claimant counsel submitted, they worked in practice to exclude private purchasers but not the Crown.⁶⁹⁰ This was a particularly bitter outcome of the supposed ‘protection’ mechanisms. Before the nationwide reimposition of pre-emption, the Crown purchased all the unrestricted parts of Heruiwi 4, and also began buying interests in the restricted 4B and 4F. Its purchase of shares in 4A (also restricted) took place later in the decade, under the 1894 Act.⁶⁹¹

Purchasing in Tahora 2 began about a year before pre-emption was restored and continued in 1895. The Crown’s interests were partitioned in 1896. Ms Rose argued that the Crown prohibited private negotiations for Tahora 2 in late 1893, using its powers under the 1892 Act.⁶⁹² The earliest *Gazette* notice that we have been able to locate took effect on 9 February 1894.⁶⁹³ This means that the Crown had reimposed pre-emption on Tahora 2 eight months before it did so nationally. As claimant counsel noted, almost all the Tahora 2 blocks were supposed to be inalienable, which had the effect of excluding any private competition even before the February 1894 proclamation.⁶⁹⁴

We conclude that the Liberals’ nineteenth-century purchases in Te Urewera were all conducted under monopolies of one form or another, except for some 50,000 acres of Heruiwi 4. Their biggest twentieth-century purchase – Waipaoa 5B – also took place under a monopoly. This was because the Crown had given itself exclusive power to buy vested land under the 1909 Act. This was not, however, a total monopoly situation, as Waipaoa 5 could still have been leased to private parties by the board. The Crown, however, took steps to prevent such leasing when it later moved to acquire the non-sellers’ land (Waipaoa 5A).

Crown purchases under the 1909 Act were not always carried out in monopoly conditions. From the evidence available to us, the Crown only used its special powers for blocks which it cared enough about to purchase individual interests. In the case of Tahora 2A3, the Crown prohibited private dealings before the meeting

689. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 31–32, 35

690. *Ibid*

691. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 71–81, 84–85, 90

692. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 24

693. ‘Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty’, 9 February 1894, *New Zealand Gazette*, 1894, no 12, p 266

694. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 31–32, 35

of owners, to exclude competition from an Auckland syndicate, and then kept the prohibition on the block while it bought up individual shares.⁶⁹⁵ With nearby Tahora 2AΕ3(2), the Crown purchased individual interests without a meeting first, making private dealings illegal for 15 years while it did so.⁶⁹⁶ Similarly, it bought up interests in Waipaoa 5A without a meeting, putting a prohibition on the land to prevent the board from leasing it.⁶⁹⁷ Whirinaki 1(4B1B) was also proclaimed while the Crown tried to purchase it at meetings of owners, although the prohibition had lapsed by the time the Government started buying individual interests.⁶⁹⁸ There was no prohibition, however, over Heruiwi 4A2B or Waipaoa 5C. In the case of Waipaoa 5C, the 81-acre block was thought too small and steep to be of any interest other than as a scenic reserve, so no prohibition was considered necessary.⁶⁹⁹

Thus, all land purchased by the Crown in the rim blocks in the nineteenth century was acquired under a monopoly, with the exception of parts of Heruiwi 4. Some land was also purchased under monopoly conditions in the twentieth century. In the latter case, monopolies were a tool to help buy individual interests, especially after a meeting of owners had rejected the Crown's offer. We do not accept, therefore, the Crown's submission that its monopoly powers only affected a 'few blocks,' and were not a significant factor in the rim blocks.⁷⁰⁰

The formal justification for these powers, of course, was not that the Crown could get an advantage against Maori in its negotiations. The usual explanation was that bona fide settlers needed to be protected from speculators, who might otherwise outbid the Crown, lock up the land, and then get most of the profit from cutting it up and reselling it to genuine farmers.⁷⁰¹ There were other ways of providing for this without giving the Crown sole powers to buy Maori land. One suggestion, often advanced in the nineteenth century, was for Maori land to be sold or leased at public auction.⁷⁰² We will return to this proposal below. A second option, used in the legislation from time to time, was to limit the amount of land that any one individual or company could accumulate.⁷⁰³

Another question was whether the Crown would have faced much competition if it had not imposed a monopoly in Te Urewera. There was interest from settlers in the Rangitaiki lands in the 1870s and 1880s, and also in lands close to settled areas such as the Waimana and Galatea estates in the late nineteenth and early

695. Boston and Oliver, 'Tahora' (doc A22), pp 172–175, 177–178

696. *Ibid.*, p 216

697. 'Prohibiting all Private Alienation of certain Native Land', 16 October 1916, *New Zealand Gazette*, 1916, no 120, p 3301. This prohibition was extended or renewed from 1917 to 1924, as per the following volumes of the *New Zealand Gazette*: 1917, no 150, p 3788; 1919, no 125, p 3198; 1920, no 81, p 2686; 1921, no 32, p 788; 1922, no 91, p 3171; 1923, no 83, p 2896; 1924, no 35, p 1289.

698. Tulloch, 'Whirinaki' (doc A9), pp 59–62

699. Berghan, 'Block Research Narratives' (doc A86), p 726

700. Crown counsel, closing submissions (doc N20), topics 8–12, p 6

701. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 289–290; vol 2, pp 465, 556–557, 571, 576–580, 600–603, 689, 705

702. Waitangi Tribunal, *Hauraki Report*, vol 2, p 749

703. See, for example, part 12 of the Native Land Act 1909.

twentieth centuries. Mostly, however, there was not a lot of private interest in the more remote, rugged, forested areas of Te Urewera, such as Heruiwi 4, Whirinaki, and Tahora 2 in the period before pre-emption was reimposed nationally. As we have seen, the timber resources of parts of the rim blocks could not be profitably exploited until much later in the twentieth century. The real impetus for buying land was a public one, not a private one. The settler Parliament was determined to obtain land for 'settlement' under the Liberal and Reform Governments, regardless of how suitable that land actually was for farming by those who had been promised readily accessible land.

Against this point, we note that Maori did not necessarily know whether settlers might be interested in leasing or buying their lands, and were not allowed to find out while prohibited from dealing with private parties. The 'market' could not be tested for much of the period under review. Instead, there were rumours that this consortium or that farmer was interested in paying a much higher price. Prohibitions, especially when extended for year after year after year, contributed to a climate where people felt they had few or no choices. This was so, even if there were not really many settlers wanting to lease their lands. We think, therefore, that the monopoly powers were important but their importance should not be overstated for Te Urewera.

10.7.3.4.2 WAS THERE ROBUST BARGAINING ?

The Crown conceded that its monopoly could have reduced prices in theory but not necessarily in practice, so we need to assess whether its powers did in fact make it harder for Maori to get a fair price. According to the Crown, evidence of Maori bargaining, and of the Crown increasing prices as a result, shows that monopolies did not leave Maori powerless. The claimants, on the other hand, argued that the extent to which the Crown privileged itself in negotiations did take away most of the owners' ability to bargain, to make free and willing choices, and to obtain a fair price.

As we discussed above, Heruiwi 1 was purchased in 1881 as the culmination of a long period in which the land was tied up in a lease, with the Crown refusing to pay the rent. The process by which the Government decided its price, and the degree to which Maori could bargain in that process, is instructive.

The initial price was influenced by a local agent, Gilbert Mair, who gave his view of what the owners wanted. No process was undertaken to value the land, or to consult the owners directly – who, as it turned out, did not want to sell. The department's first thinking was that up to £3,000 should be paid, and that rent should not be included. This maximum dropped by £1,000 soon after, and then the department began to supplement its offer by including rent money that it owed to the owners anyway. At first, the owners (who still did not want to sell) insisted on £4,000. They were later offered £500 more than this by private buyers, but that offer could not be taken up because of the monopoly. One section of owners gave in and was willing to take a lower price of £3,000. But the Native Minister approved a price of £2,500 (plus rents owed), and then the price was set. To get around continued resistance, individual interests were purchased at the

Crown's price.⁷⁰⁴ It was later asserted in the Native Land Court that "The sale was arranged before the whole of the Tribe and the sum offered and named by Captain Mair accepted."⁷⁰⁵ This was simply untrue.

There was not much genuine bargaining involved in any of this. The Crown set its own price, for its own reasons, and prevented any collective bargaining by buying up individual interests. As the 1891 commission observed, more generally: "The strength which lies in union was taken from them."⁷⁰⁶

This proved to be the pattern in our inquiry district for the rest of the nineteenth century. The only exception to it was the early purchases in Heruiwi 4. In 1891, Ngati Manawa wanted to sell much of the interior lands, 4G, 4H, and 4I (some 40,000 acres). As their main reason for doing so was to meet survey and other costs, we will discuss the bargaining over this land in section 10.8. Here, we note simply that this sale was very different from that of Heruiwi 1. There was an informal valuation from the Surveyor-General, a negotiation between the Government and the owners, and agreement on a compromise price between the two parties.⁷⁰⁷

The purchase of 4D (1892) and 4E (1893) followed a different pattern. Again, 4D was offered for sale by Ngati Manawa leaders, who asked for 2s 6d per acre. As far as we can tell, there was no effort to appraise the worth or utility of this land. The Government simply accepted the offer, but reduced the price to 2s 3d. Owners were not given an opportunity to bargain. Individual signatures were purchased over two months in 1892. This process of private buying allowed the Government to pay one owner £15 for his share, when it was only worth £2 1s 2d. This was to induce him to withdraw his application for the rehearing of 4E, which he duly did. When 4E was purchased the following year, the Government paid the same price (2s 3d per acre). We have no information on whether there were any group negotiations at the beginning, but we do know that individual shares were purchased. One owner tried to hold out for a higher price but eventually accepted the Government's money.⁷⁰⁸

The difficult economic circumstances of the individual owners were just as important as any monopoly in facilitating Government acquisition of land at whatever price it set. In 1893, Harehare Atarea offered the Crown 6,000 acres of Heruiwi 4B and 4F (some of Ngati Manawa's best land). Flooding and crop damage had made the tribe desperate. The Minister set the price at three shillings an acre. We have no information on how this amount was determined. The owners agreed to accept that price for the 6,000 acres, but the Government's individual purchasing actually netted 10,000 acres more at the same price, something that had never been negotiated or agreed.⁷⁰⁹

704. Tulloch, 'Heruiwi 1-4' (doc A1), pp 30-33

705. Opotiki Native Land Court, minute book 2, 13 December 1881, fols 155-156 (Tulloch, 'Heruiwi 1-4' (doc A1), p 34)

706. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)

707. Tulloch, 'Heruiwi 1-4' (doc A1), pp 71-73, 88

708. *Ibid*, pp 75-76

709. *Ibid*, pp 77-79

From 1895 to 1899, the Government also bought most of Heruiwi 4A, and the non-sellers' share of Heruiwi 1–3. In the case of Heruiwi 2–3, the Government asked the Surveyor-General's opinion on its value. Smith replied that the land was of no great importance, except to get rid of the prospect of Maori neighbours for settlers of Heruiwi 1. He suggested 1s 6d for Heruiwi 2, and two shillings or 2s 6d for Heruiwi 3. The Government rounded this to a single offer of two shillings per acre for both blocks. The owners had already accepted a £100 advance from a private purchaser, but this transaction had not been completed. The legislation allowed for existing private purchases to be completed within a set time, but the owners agreed to pay back the £100 if the Government paid them £400. Two years' of purchasing individual signatures followed, at the end of which the Government had acquired the whole of the land for £373 8s. Heruiwi 4A was some of the most valuable land in the block, but we have no information as to how the Government decided its price. We do know that it took three years to buy up individual shares. In that circumstance, collective bargaining over price was simply not possible.⁷¹⁰

Thus, the later purchases in Heruiwi 4 were marked by some group initiatives at the beginning, but prices were set by the Government and imposed by means of individual purchasing, without allowing Maori collective power to bargain (or even to agree or disagree collectively to a price).

This was also the pattern for other Liberal purchases in Te Urewera in the 1890s. Back in 1879, when the Government was trying to buy land in Tahora 2, T W Porter negotiated with Turanga leaders on the basis of four shillings an acre. In the west, however, negotiations with Rakuraku and Hira Te Popo had proceeded on an estimated value of 2s 6d to 3 shillings per acre. In 1893, the Government negotiated with individuals for two shillings an acre.⁷¹¹ As we discussed above, there were no negotiations with tribal leaders in 1893, or any attempt to reach agreement on a price in advance of individual purchasing. Kathryn Rose observed that this was a deliberate tactic to impose prices that the owners would not accept 'as a body'.⁷¹² Bruce Stirling commented:

Thus, land that was considered to be worth four shillings or three shillings per acre in 1879 was deemed to be worth just two shillings per acre in 1893. This reflects the reality that prices were based less on value and more on the minimum price the Crown could impose; its ability to push the price down, rather than land's value, was what changed in the intervening years.⁷¹³

At first, as we shall see in more detail in section 10.8, tribal leaders had sought to sell enough land to the Government to clear the survey debts, offering it at five shillings an acre. Percy Smith's opinion was sought, and he advised that the land was mountainous and inaccessible. The value would increase when road access

710. Tulloch, 'Heruiwi 1–4' (doc A1), pp 81–85, 88

711. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 71–72

712. Rose, 'Te Aitanga a Mahaki and Tahora 2' (doc A77), p 35

713. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 72

was provided, but until then he thought it only worth two shillings per acre. The owners faced a threat of compulsory sale to pay the survey lien, and so they lowered their offer (for that land only) to three shillings. But this was not a negotiation, and the Crown did not deal further with tribal leaders. Rather, it imposed Smith's price of two shillings an acre through individual purchasing.⁷¹⁴

The acquisition of individual interests in Whirinaki began in 1895. The Government's price was three shillings an acre. We have no information on how this was calculated. There were no group negotiations for Whirinaki, and no opportunity to bargain over the price. Individuals could accept the Crown's price or not sell their interest – that was the only choice open to them.⁷¹⁵ The same was true of Waipaoa. In that case, Percy Smith was consulted and suggested a price of three shillings an acre. Back in 1890, when Ngati Kahungunu leaders had been arguing over the survey lien, they insisted that their land was worth five shillings per acre. There was no opportunity, however, for them to bargain with the Government over price. Individual interests were purchased from 1898 to 1903, without any group negotiations or any collective agreement to the price.⁷¹⁶

Things might have improved for owners from 1909 with the introduction of a new process: group decision-making through meetings of assembled owners. At the same time, the Crown had to offer Government valuation as its minimum price. But, as we have already seen, the Government was not always willing to negotiate with groups despite its emphasis on the benefits of the new system. Then, in 1913, it abandoned even the semblance of consultation with the owners collectively. Under amending legislation, it had the power to buy individual interests, either after or instead of a meeting of owners (it still had to pay Government valuation as a minimum price). The results were as follows.

In one instance, the Crown's offer was immediately accepted (Whirinaki 1(4B1A)) by a meeting of owners. This followed an earlier meeting of owners for the parent block, and the partitioning of the interests of those who wanted to sell.⁷¹⁷ The only other example of an immediate acceptance of the Crown's offer was Tahora 2AD2. In that case, however, the price was based on an out-of-date valuation, and the Crown bowed out when a private buyer offered more.⁷¹⁸ In two cases (Whirinaki 1(2) and 1(4B2)), the Crown accepted the decision of a meeting of owners to reject its offer, without pursuing it further.⁷¹⁹

In one instance (Heruiwi 4C), the Crown waited for five years until a third meeting of owners finally agreed to its price.⁷²⁰ In a second case (Waipaoa 5B), the Crown clearly imposed its price on a meeting of owners. It will be recalled that the Crown dropped its price two years after making an agreement, from £16,785 to

714. Boston and Oliver, 'Tahora' (doc A22), pp 124–127

715. Tulloch, 'Whirinaki' (doc A9), pp 38–41, 48–52

716. Stevens, 'Waipaoa' (doc A51), pp 29, 32–38

717. Tulloch, 'Whirinaki' (doc A9), pp 57–59

718. Boston and Oliver, 'Tahora' (doc A22), pp 198–201

719. Tulloch, 'Whirinaki' (doc A9), pp 57–60

720. Tulloch, 'Heruiwi 1–4' (doc A1), pp 101–105; Berghan, supporting papers to 'Block Research Narratives' (doc A86(m)), p 4363

£11,000, based on a more recent valuation. Technically, the Crown could do this because its offer had been to buy at Government valuation. Both the board and the owners had no choice but to accept this, because the Government threatened to withdraw from the purchase, and the owners were desperate (see above). They had taken on debt and had no choice but to sell. This appears to us *prima facie* to be both a breach of contract and economic duress.

In three instances, the Crown resorted to individual purchasing when meetings of owners rejected its offers:

- ▶ *Heruiwi 4A2B*: At the first meeting, in 1917, the owners called for a special valuation. The Crown increased its offer as a result of that valuation, but its new price was rejected at meetings in 1919 and 1920. At the final meeting, the Crown offered eight shillings an acre and the owners refused to sell at less than £3. The Government then purchased individual interests, increasing the price slightly to 10s an acre. Individual owners had to sell (or not) at the Crown's price.⁷²¹
- ▶ *Tahora 2A3*: A meeting of owners rejected the Crown's offer in 1914, so the Government used its power to buy up individual interests at the rejected price.⁷²²
- ▶ *Whirinaki 1(4B1B)*: Meetings of owners rejected the Crown's offers in 1915 and 1923. All owners were present at a third meeting in 1925, which rejected an offer of 7s 6d, demanding £1 instead. The Crown then purchased individual interests at the rejected price.⁷²³

In three other cases, Waipaoa 5A and 5C, and Tahora 2AE3(2), there was no opportunity to negotiate a price at all, because the Crown proceeded straight to purchasing individual interests at its own price, without calling a meeting of owners (see above).

We conclude that, in most instances when the Crown proceeded with a purchase under the 1909 system, Maori owners were not able to negotiate a price for their land. Their negotiating positions were either worn down by time and desperation (Waipaoa 5B and Heruiwi 4C), or subverted by individual purchasing (Whirinaki 1(4B1B), Heruiwi 4A2B, Waipaoa 5A, Waipaoa 5C, Tahora 2A3, and Tahora 2AE3(2)).

Overall, from 1881 to 1930, we see little evidence of the 'robust' negotiations claimed by the Crown. In almost all cases, the only choice was to sell at the Crown's price or not at all. In most cases, prices were not negotiated with a group or leaders in advance of a purchase, but were imposed on individuals. This happened, too, in instances where negotiations started at the collective level, but the owners refused to sell (or refused to sell at the Crown's price). The Crown submitted that in most blocks, purchases took place as a result of agreements reached 'with tribal groupings or Chiefs, with individual signatures also required'. Counsel added: 'Terms,

721. Tulloch, 'Heruiwi 1-4' (doc A1), pp 105-112

722. Boston and Oliver, 'Tahora' (doc A22), pp 174-175

723. Tulloch, 'Whirinaki' (doc A9), pp 58-64

including price, were negotiated not imposed.⁷²⁴ In our view, the evidence demonstrates that the opposite was often the case.

In light of the evidence, we think that the hardship experienced by Maori in the absence of capital to develop their lands, and the subversion of tino rangatiratanga by dealing with individuals, were the key drivers of sales at the Crown's prices. Monopoly powers played a part, by preventing Maori from seeking a better price or testing the market value of their lands.

10.7.3.4.3 DID THE CROWN ITSELF SET FAIR PRICES BEFORE 1909, DESPITE EXCLUDING MARKET COMPETITION ?

According to Robert Hayes, the Crown gave itself 'extraordinary' powers that it did not allow private parties, including the power to purchase individual interests and to prohibit any other dealings. In his view, this was explicable by the need for central promotion of settlement and development, but he also commented:

one may reasonably expect that the Crown and its agents would be scrupulous in the exercise of these powers. The code pertaining to private dealings required that the transaction, at least from 1870, not be contrary to equity and good conscience. In short, the transaction had to be fair, including the consideration paid.⁷²⁵

We turn now to the question of whether, having removed the checks of market competition, the Government itself acted to ensure that its prices were fair, and not simply the lowest that it could impose. In doing so, we note that the owners' asking price was not intrinsically 'right'. It represented what they hoped to get for the land. But there was an inherent conflict of interest if the purchaser had the one-sided power to decide the value of the land and to set the price.⁷²⁶ This was, said counsel for Ngati Manawa, 'an enviable position for any purchaser of real property to be in (I wish I had been allowed to value my own house before I paid for it)'.⁷²⁷

As we have seen, there was little or no opportunity to bargain in many cases in Te Urewera. That being so, the Crown's obligation was to ensure that it did not abuse its power to dictate prices.

In the Crown's submission, we lack sufficient evidence to determine what would have been a fair price for each piece of land, and so the question of whether prices were fair is simply unanswerable. This is a circular argument: there was no 'market' so there was no basis of comparison for the prices paid by the Crown, but it was precisely because the Crown had banished any market that it could set its own prices. Counsel submitted:

724. Crown counsel, closing submissions (doc N20), topics 8–12, p 68

725. Hayes, 'Evidence on the Native Land Legislation' (doc A125), pp 164–165; Crown counsel, closing submissions (doc N20), topics 8–12, p 65

726. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 32

727. Counsel for Ngati Manawa, closing submissions (doc N12), p 34

The Crown accepts that in theory a monopoly in the nature of the Crown excluding private competition could negatively affect the price Maori could command for their land where they wanted to sell or had no choice but to sell. However, for this issue to be answered comprehensively, a systematic study would be required of those blocks where the Crown invoked its power to exclude competition and blocks sold privately in the same period (evidence in Heruiwi is that that the Crown paid more than the maximum it had intended to). Even then, care must be taken to ensure that those factors that go towards influencing the sale price (eg quality of land, location of block, period of purchase) are comparable, no evidence on the record does this.⁷²⁸

In his reply submission, counsel for Ngati Manawa pointed out that it was too late to decry the lack of research after the end of hearings, and that the Tribunal must try to answer the question from the evidence available to it.⁷²⁹

The claimants made four points in support of their case. Counsel argued first that we can rely on evidence that Crown monopolies were widely known at the time to drive down prices. This includes, for example, the investigations and reports of the Rees–Carroll commission in 1891 and of the Stout–Ngata commission in 1907.⁷³⁰ The Central North Island Tribunal pointed out that the need to pay Maori a fair price for their land was a major theme in parliamentary debates and politicians’ speeches of the time. There were many contemporary criticisms of Government monopolies in that respect.⁷³¹ ‘We have no right,’ Sir Robert Stout told Parliament in 1894, ‘to seize their land at a price less than they can get for it in the open market from other people.’⁷³²

In 1891, James Carroll (of the Native Land Laws commission) gave a minority report to Parliament, objecting to the reimposition of pre-emption on the whole country. He discussed its operation before 1862, arguing that it enabled the Government to secure Maori land for ‘the more favoured subjects of Her Gracious Majesty’ at ludicrously low prices.⁷³³ This had also been the case wherever it had been used since: ‘Evidence adduced before the Commission proved conclusively that, where the Government interposed with its pre-emptive right, as was the case in the King-country, the Natives could not obtain a fair price for their land.’⁷³⁴

In Carroll’s view, this was ‘simply confiscation’. Maori had ‘but one market’ and had to sell at the Crown’s prices or not at all. The unfairly low prices made

728. Crown counsel, closing submissions (doc N20), topics 8–12, p 75

729. Counsel for Ngati Manawa, submissions by way of reply, 8 July 2005 (doc N26), pp 3–4

730. Counsel for Ngati Manawa, closing submissions (doc N12), pp 35–36; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–34; counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 3–4

731. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 435–436; 581; see also Stirling, ‘Te Urewera Valuation Issues’ (doc L17), p 27

732. Robert Stout, 28 September 1894, NZPD, vol 86, p 388 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 436)

733. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–33

734. James Carroll, ‘Note by Mr Carroll’ (counsel for Te Whanau a Kai, closing submissions (doc N5), p 33)

it impossible for Maori to accumulate enough capital to develop their remaining lands, which was the whole point of selling land in the first place.⁷³⁵

The commission's majority report advocated full pre-emption in terms of purchasing, although it argued that Maori should still be able to lease their lands to settlers through a board. In the commission's opinion, pre-emption was the only way to get out of the mess that decades of private dealings had created, and to ensure justice to both Maori and settlers. Again, speculation was an important theme: the 'public as a whole' should benefit from opening Maori land, and not just a 'small class'. But the commission did not address the issue of monopoly or price – it presumed that the Crown would deal justly with Maori.⁷³⁶

As we have seen, the Government did not accept Carroll's minority report on this point, and pre-emption was reintroduced nationally in 1894. Some 15 years later, the Stout–Ngata commission commented on the outcome:

While restricting private alienation, Parliament had reserved the right of the Crown to purchase 'on such terms as might be agreed upon between the Crown and the owners.' This was the fiction. In practice the Crown bought on its own terms; it had no competition to fear; the owners had no standard of comparison in their midst, such as the rents of land under lease or profits from farming might have afforded; they had been reduced by cost of litigation and surveys, by the lack of any other source of revenue, to accept any price at all for their lands. The price paid was a recognition of the aboriginal rights, and a necessary step in the extinction of those rights, but the Government kept steadily in view the welfare of the colony. The price was, in our opinion, below the value. It was the best possible bargain for the State. It was in accordance with the will of Parliament, and it opened up a vast territory to the land-seekers. The Executive, no doubt, conceived it was furthering the interests of general settlement, even if it rated too low the rights of the Maori owners and its responsibility in safeguarding their interests.⁷³⁷

While these observations were made about the King Country, they show the accuracy of Carroll's predictions. Claimant counsel suggested that they applied equally in Te Urewera.⁷³⁸ Mr Stirling pointed to the commission's general report for 1907, in which it observed that Maori across the North Island had not been willing sellers for the previous half-century. A key component of a system which 'practically compel[s] the Maori to sell at any price' was the Government's monopoly powers.⁷³⁹

735. James Carroll, 'Note by Mr Carroll', AJHR, 1891, G-1, pp xxviii-xxix

736. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', 23 May 1891, AJHR, 1891, G-1, pp xix-xxi

737. Robert Stout and Apirana Ngata, 'Native Lands in the Rohe-Potae (King Country) District (an interim report)', 4 July 1907, AJHR, 1907, G-1B, p 4

738. Counsel for Ngati Manawa, closing submissions (doc N12), p 36

739. Robert Stout and Apirana Ngata, 'Native Lands and Native Land Tenure (General Report on Lands Already Dealt With and Covered by Interim Reports)', 11 July 1907 (Stirling, 'Te Urewera Valuation Issues' (doc L17), p 28)

The Crown accepted that there had been contemporary criticism of its monopoly prices. Counsel noted that there was a school of thought that Maori would only obtain ‘full value’ for their lands if all dealings were under the direct superintendence of the Crown. Under this way of thinking, the Crown should always ensure a fair outcome for Maori (full value for their lands) and for poorer settlers, who otherwise would be shut out by wealthier capitalists.⁷⁴⁰ The main mechanism proposed in practical terms was for Maori land to be sold or leased for the highest price it could get at public auction.⁷⁴¹ Ballance had provided for this in 1886, and the Liberals tried it too in 1893. It was also a dominant idea in the Acts of 1900 and 1905. But the problem for Maori with this way of dealing in lands was always the strings attached: usually, that they give up all control of their land to non-representative boards, and often that their land be dealt with compulsorily in this way. It was the element of compulsion that effectively killed the 1893 Act. As Seddon later noted, compulsion was not actually needed.⁷⁴² Purchase of individual interests proved a less obvious but more insidious strategy.

Auctions may have been a fairer way of determining a market value for Maori land, but they were not adopted in our inquiry district (except for the attempt to auction leases of Waipaoa 5). The Crown, on the other hand, pointed out that it did not always go for the lowest possible price.⁷⁴³ We accept this point. In the case of some Heruiwi blocks, the Government paid more than the lowest price that had been suggested. Also, under the 1909 system, the Crown sometimes increased its prices – occasionally because Government valuations (which set minimum prices) had gone up in the interim, or because there was simply no prospect of getting a sale through at the original price. In one notable case (Waipaoa 5B), it reduced its price, even though Government valuation was supposed to set a minimum, not a maximum, price.

The second point in support of the claimants’ case was the change in prices after 1905. Counsel emphasised the evidence of the Crown’s historian, Dr Loveridge, that prices almost doubled after Government valuation was introduced as a minimum price in that year. In Loveridge’s view, this was evidence that prices had been too low in the decades before 1905, rather than evidence of a sudden rise in values.⁷⁴⁴ The Central North Island Tribunal considered it was hard to quibble with such an obvious conclusion – as do we.⁷⁴⁵

740. Crown counsel, closing submissions (doc N20), topics 8–12, p 8

741. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 686–687, 711, 713, 726, 749, 784, 843, 857

742. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 585

743. Crown counsel, closing submissions (doc N20), topics 8–12, pp 67, 75

744. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 11; counsel for Ngati Manawa, closing submissions (doc N12), p 36; Donald Loveridge, under cross-examination by counsel for Ngati Manawa and Crown counsel, Taneatua School, Taneatua, 13 April 2005 (transcript 4.16(a), pp 289–291, 316–317); see also Donald Loveridge, ‘The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910: A Preliminary Survey’, 2004 (Wai 1200 ROI, doc A77), p 71. The Crown filed the summary for this report (doc L6) in our inquiry, but did not file the report itself. This report was, however, relied on by the parties.

745. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 582

The Compulsory Element of the 1893 Act

In 1893, Parliament enacted the Native Land Purchase and Acquisition Act, which supplemented (but did not replace) the Native Land Purchases Act 1892. The new Act offered an alternative system to individual purchasing. If the Government wanted to acquire certain land in a proclaimed district (section 4), it could ask a native land purchase board to report on the character of the land, its suitability for settlement, the desirability of acquiring it, and its value (section 6). Maori were to be represented on the board by their member of Parliament and a Maori commissioner, to be appointed by the chief judge of the Native Land Court from a list of candidates supplied by the Maori members of Parliament (section 3). Having obtained the board's report, the element of compulsion kicked in. The Government could require the owners to choose either to sell the land to the Queen or to have it leased by a land board as if it were Crown land (sections 7 to 12). If the land was still in customary title, the Governor could direct the Native Land Court to decide titles (section 13). The only limits were that the Governor was not allowed to acquire pa, kainga, or cultivations, and he had to ensure that the owners had sufficient other land for their 'maintenance' (sections 14 and 15).

If the owners did not want to sell or lease, then two-thirds (or 'so many of them as may be deemed to satisfactorily represent the whole') could petition the board for their land not to come under the Act (section 26). From the wording of section 26, we take it that the Government intended to agree to such petitions, so long as they represented the authentic wishes of the owners. This, however, was never tested because no districts were proclaimed under the Act. Alternatively, a minority of dissentients could get their interests partitioned out from any sale or lease (section 32). If land was withdrawn from the Act, then the owners could sell or lease as they chose – but only if they first tried to do so by public auction (section 26).

Although this Act was never brought into force, it was Premier Seddon's main platform for telling Tuhoe, Ngati Whare, and Ngati Ruapani in 1894 that majorities of owners would be empowered to make deliberate decisions about their land (see chapter 9).

An associated issue was the question of how the Crown actually determined its prices before Government valuation became the norm. What mechanisms did it use? As we have discussed above, the Government often relied on the estimates of its local land purchase agents, or – in the 1890s – on an estimate from the Surveyor-General. Counsel for Wai 36 Tuhoe pointed to the existence of a fairer mechanism in the Native Land Purchase and Acquisition Act 1893.⁷⁴⁶ When this

746. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70–71

Bill was introduced, the Government explained that it would give Maori owners 'every opportunity of seeing that their lands are properly and fairly valued before they are called upon in any way to deal with them.'⁷⁴⁷ Carroll supported the new system, as he told Parliament, 'so that it cannot be said that the Government are getting land out of the Natives for little or nothing.'⁷⁴⁸

This 1893 system involved appointing a purchasing board, on which Maori would be represented. Land would be valued by 'three indifferent persons, one to be appointed by the board, one by the Native owners', and a third to be chosen by both.⁷⁴⁹ If the owner and the board could not agree on the third valuer, one would be appointed by a Supreme Court judge. The value fixed by the majority of these three people (if they were not unanimous) would be binding on the Crown, and also form the standard for ensuring that prices at auction were fair.⁷⁵⁰

The 1893 Act was never used, because its powers of compulsion were not needed. This meant that its system of appointing independent valuers, with owner input, was also never used. The claimants argued that this part of the Act at least would have been much fairer than the system used in Te Urewera in the 1890s.⁷⁵¹

Although we have no evidence for some blocks, the usual practice for the Liberals was to consult Percy Smith, the Surveyor-General. He advised on the price to be set for Heruiwi 4G, 4H, and 4I, Heruiwi 2-3, Tahora 2, and Waipaoa. Smith's informal opinion was thus as technical as it got. Bruce Stirling, in his evidence for the claimants, was very critical of this process:

During his many years of surveying work Smith had varying degrees of familiarity with most districts throughout the North Island. However, his appraisals of value were not based on a current inspection of the land; being more typically based on his memories of the area in question or his assessment of surveyors' reports. More importantly, they were coloured by his own prejudices towards the retention by Maori of their land. Sometimes his recommended rates were adopted, and sometimes they were not, but in any case such estimates certainly could not be equated to a valuation, as that term came to be defined in the late nineteenth century.⁷⁵²

Also, Stirling and Boast criticised the process for refusing to take prospective values into account. If the land was wanted for farming, or if there was little prospect of early logging, then valuable timber was simply ignored. This was an important feature in many of the rim blocks, yet 1890s price estimates were set largely without

747. J McKenzie, 31 August 1893, NZPD, vol 81, p 514 (Edwards, 'The Urewera District Native Reserve Act 1896, Part 1' (doc D7(a)), p 84). McKenzie was the Minister of Lands.

748. J Carroll, 31 August 1893, NZPD, vol 81, p 536 (Edwards, 'The Urewera District Native Reserve Act 1896, Part 1' (doc D7(a)), p 86)

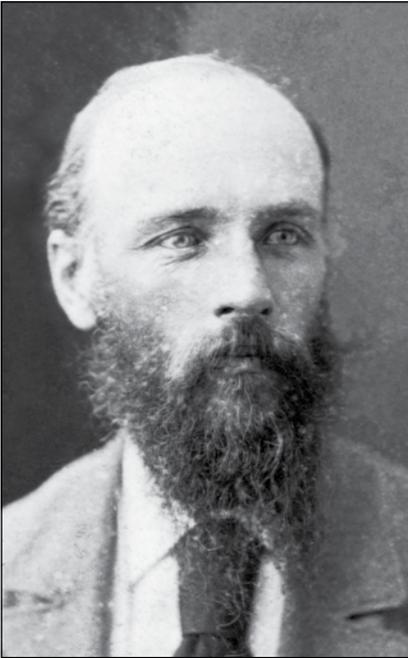
749. Native Land Purchase and Acquisition Act 1893, s 6(1)

750. *Ibid*, ss 6(1), 7, 17

751. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70-71; see also Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 70-71

752. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 71

Hemus and Hanna (ATL, PA2-1467)



Surveyor-General Stephenson Percy Smith. Brought up in Taranaki, Smith began working as a cadet in the Provincial Survey Department in 1855. He became the Assistant Surveyor-General in 1881 and the Surveyor-General in 1889. Like Government purchase officials, he was dedicated to opening Te Urewera for settlement, focusing during the 1890s on the ‘rim’ blocks. In early 1895, Smith told Te Urewera communities that the Crown was going to undertake a trigonometrical survey of the district, both for mapping purposes and to assist the title work of the Native Land Court. Many Tuhoe believed that the survey was in fact an official land court block survey, and they obstructed surveyors at Ruatoki.

taking the value of timber into account as a commercial resource.⁷⁵³ We have seen that, in the case of Tahora 2, Smith admitted that the land would be worth more when roads were built. The Crown could maximise its own value by waiting until after purchase to build roads or railways. It was also in a position to simply wait until infrastructure developed around its acquisitions.⁷⁵⁴

For the claimants, the key point was that until 1905, there were no safeguards in the legislation, no independent valuations, and no requirements for such to set a minimum price. There ought to have been ‘an independent valuing system which took the special problems relating to Maori freehold land into account.’⁷⁵⁵ This is not to suggest that Government valuations, even though they led to a significant price rise, were without flaws.⁷⁵⁶ In this chapter, we do not address the question of valuation for the post-1905 period. We leave that to our later discussion of the Urewera District Native Reserve, where it was a primary issue (see chapter 15). Here, we agree with the claimants that the 1893 Act showed an awareness of the

753. Ibid, pp 26, 56–61; Richard Boast, ‘The Crown and Te Urewera in the 20th Century: A Study of Government Policy’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A109), p 9

754. Counsel for Ngati Manawa, closing submissions (doc N12), p 37

755. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31

756. Counsel for Ngati Manawa, closing submissions (doc N12), pp 36–37; Stirling, ‘Te Urewera Valuation Issues’ (doc L17), pp 29–53

Purchasing at Government Valuation, 1909–30

In his evidence for the claimants, Bruce Stirling highlighted some disturbing issues about Government valuation in the period from 1905 to 1921. First, the Valuer General uncovered in 1911 what appears to have been a systematic, nationwide undervaluing of Maori land. Secondly, although the Valuer General tried to correct this situation, his own policy of holding down Government values in the face of a price boom (from the First World War to the early 1920s) exacerbated it instead.¹ This would not have been such a problem in the rim blocks if the Government had used its valuations as a minimum price. Instead, they were almost always taken as the maximum that the Crown would pay. Sometimes a special valuation was carried out, and the Government occasionally increased its price in the face of opposition at meetings of owners. But, as we have seen, the Crown also had the options of waiting out opposition over a number of years (as in Heruwiwi 4C), or purchasing individual interests at prices rejected by meetings of owners. Since the latter option took place over a long period (sometimes decades), this meant that the original valuation was soon out of date, even if it had been fair in the first place. These are all matters of concern for the Crown's purchases of land in Te Urewera rim blocks under the 1909 system, even though Government valuation did at least raise the prices being offered by the Crown.

1. Bruce Stirling, 'Te Urewera Valuation Issues' (commissioned research report, Taneatua: Tuhoë-Waikaremoana Maori Trust Board, 2005) (doc L17), pp 29–53

need for fair, independent valuations, and that – although known – this need was not acted upon in the 1890s. Thus, no system of independent valuations was in place when there was considerable buying in the rim blocks.

The third point made by the claimants was that it is possible to test some prices in an 'indicative way'.⁷⁵⁷ As Bruce Stirling showed in his evidence, we can compare the Crown's prices with each other, to establish at least some indication of what it was prepared to pay for similar (or the same) land in different circumstances or at different times.⁷⁵⁸ We note the caution from Professor Murton, that we need to take into account the possibility of the under-valuing of lands used for comparison. At first sight, he argued, Urewera prices were 'not much below those at which the Crown bought much better quality land around Gisborne in the 1890s'.⁷⁵⁹ Yet, Turanga lands were also under-valued, as was noted in Crown evidence for that

757. Counsel for Ngati Manawa, closing submissions (doc N12), p 37

758. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 70–92

759. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 225

inquiry.⁷⁶⁰ We can also compare the Crown's price to offers from private parties, where those are known. Although we lack comprehensive evidence – indeed, such evidence might not exist – what there is supports the general picture that nineteenth-century monopoly prices were too low.

Mr Stirling's discussion of the price set for Tahora 2 in the 1890s (two shillings an acre) pointed to higher prices offered in 1879 (three shillings and four shillings an acre), and the much higher value given the land in the Validation Court in 1900 and 1901. There, it was valued for mortgage purposes at 10 shillings an acre in 1900, and as high as 19 shillings an acre in 1901. (The Crown was still purchasing in Tahora 2A for two shillings an acre at this time.⁷⁶¹) Similarly rugged land at Mangatu was worth about £1 an acre in 1900. Mr Stirling's calculations were based on rentals equating to 5 per cent of the value of the land.⁷⁶²

After compulsory valuations were introduced in 1905, Tahora 2A3 was valued at between 12s 6d and £1 per acre in 1910, and Tahora 2AD2 was valued at 12s 6d an acre in 1911. A private buyer was willing to pay £1 2s 6d for 2AD2 in that year.⁷⁶³ As we have discussed, Dr Loveridge referred in his evidence to a doubling of prices after Government valuation became a compulsory minimum price in 1905. The value of Tahora 2, however, was from six to 10 times what the Crown had paid for it from 1893 to 1901. It is difficult to escape the conclusion that Tahora 2 had been significantly undervalued.

Similar evidence was provided for other blocks. In the case of Waipaoa, for example, the Crown was purchasing interests at three shillings an acre in 1903. Government valuation put the price of the unsold half of Waipaoa (Waipaoa 5) at £1 an acre in 1910.⁷⁶⁴ This dropped to just over 13 shillings in 1913, but the value of Waipaoa 5A was given as £1 an acre in 1915, and just under that in 1917.⁷⁶⁵ Thus, land valued at three shillings an acre in 1903 was fairly consistently valued at £1 an acre from 1910 to 1917. The value of Waipaoa 5 had increased almost six times from what the Crown had paid for the rest of the block. The original purchase price was clearly too low. And that is without taking into account that the Crown acquired Lake Waikareiti without any special payment, despite its value as a food resource and cultural treasure to local Maori.⁷⁶⁶ As counsel for Nga Rauru o Nga Potiki reminded us, commercial values are not the only ones that matter. Land has value that cannot be expressed in dollar terms. To see it purely from the perspective of the 'market' is to hide 'what a great deal of people regard as intrinsically valuable, important, and creative.'⁷⁶⁷

760. *Ibid*

761. 'Lands Purchased and Leased from Natives in North Island, AJHR, 1901, G-3, p 7

762. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 71–74

763. Boston and Oliver, 'Tahora' (doc A22), pp 172–174, 198–200

764. Stevens, 'Waipaoa' (doc A51), pp 34, 59

765. Berghan, 'Block Research Narratives' (doc A86), pp 722–724, 727; Stevens, 'Waipaoa' (doc A51), pp 58–60

766. Many claimants spoke of the physical and cultural riches of Lake Waikareiti. See, for example, Rangimarie Pere, brief of evidence, 18 October 2004 (doc H41(a)), pp 11–13.

767. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 21

In terms of private offers in the nineteenth century, we note that there were none that we know of for the land purchased by the Crown, except in the case of Heruiwi 1. In that instance, a private consortium offered £2,000 more than the Crown. As we have seen, private buyers were interested in Waimana, Waiohau, and Kuhawaea. For the less accessible, forested parts of the rim blocks, there does not appear to have been any private interest in the 1890s. That may be, of course, because the land was either restricted from alienation, or under Crown pre-emption – in other words, there was no opportunity for a private market to develop. In other districts, however, there were often private offers (or rumours of them) even after the Crown had imposed a monopoly. This probably reflects the point that forestry was really a twentieth-century opportunity for these lands – its potential seemed distant in the 1890s. There was, however, more private interest in these blocks by the 1910s and 1920s.

The fourth point in support of the claimants' case was that the kind of 'market' that existed for Maori land, and the kind of prices that it could command, was dictated by the native land laws. The price was controlled by the kind of title that could be obtained, and what could be done with that title. If Maori land had been commodified differently, so that purchasers had to buy a different kind of title, prices would also have been different.⁷⁶⁸ As Professor Boast put it:

The Crown *created* a particular commodity, that is undivided shares in Maori land, which it then itself bought. Had the property rights of the Urewera people been commodified in some other way, they might have had a very different value, or may not have been as freely alienable; as it was, however, customary tenure was commodified in a manner which made it highly and very readily alienable by individuals to the Crown at low prices, and – in the case of UDNR blocks at least – where the Crown was the only legal buyer in any event.

The question is thus not 'did the Crown pay a fair market price'? The issue is, rather, was it fair and appropriate that the property interests of Tuhoe and the other tribes were commodified in the particular way they were. Was this commodification disadvantageous to them and advantageous to the Crown in terms of setting prices? [Emphasis in original.]⁷⁶⁹

This was closely tied to questions of political power (who made the law), and to how Professor Murton measured the 'economic capability' of Maori at this time; the lawmakers empowered individuals, giving them a title that they could do little with save sell – and sell to the Crown at its own price. Then, having individualised title and title negotiations, the Crown blamed individual failings for poverty.⁷⁷⁰

We note first that there was the expensive business of Maori getting a saleable title in the first place, which made it harder for them to hold out against even low

768. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp 7–11

769. *Ibid*, pp 10–11

770. Counsel for Ngati Manawa, closing submissions (doc N12), pp 83–85; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 40–86

offers. We discuss this in section 10.8. Secondly, the law created a title that could be sold by individuals outside the control of the community of owners. This title was cheaper to buy than if a purchaser had to negotiate a price with a group and its leaders.⁷⁷¹

In 1907, the Stout–Ngata commission explained how these two things came together with Maori poverty and Crown monopolies to ensure low prices:

Theoretically the Crown does not buy unless the owners are willing to sell. But the experience of half a century shows—(1) that in the absence of competition produced by restrictive legislation, and in the face of encumbrances due to litigation and survey costs, circumstances are created which practically compel the Maori to sell at any price; (2) that the individualisation of titles to the extent of ascertaining and defining the share of each individual owner in a tribal block owned by a large number gives to each owner the right of bargaining with the Crown and selling his interest; it gives scope to secret dealing, and renders practically impossible concerted action on the part of a tribe or hapu in the consideration of the fairness or otherwise of the price offered, or in the consideration of the advisability of parting at all with the tribal lands.⁷⁷²

Thus, in the commission’s view, the monopoly was only one part of the equation. Maori were driven to accept the Crown’s low prices by the costs they had incurred in obtaining their titles, and because the law did not let them negotiate as a group. The evidence in our inquiry confirms what was obvious to commissioners Stout and Ngata a hundred years ago.

Given:

- ▶ the many contemporary observations that the Crown’s prices were too low,
- ▶ the structural factors that facilitated lower prices,
- ▶ the jump in prices after Government valuation became compulsory, and
- ▶ the indicative evidence that particular prices were too low,

we conclude that the claimants were not paid a fair price for their land in the rim blocks from 1881 to 1903.

10.7.4 Treaty analysis and findings

There can be no doubt, after considering the evidence recited in this section, that the Crown’s purchase policies and practices were unfair and coercive. As such, they were in breach of the plain meaning of article 2 of the Treaty, and of its principles. We cannot but echo the findings of the Native Land Laws commission in 1891, and of the Stout–Ngata commission in 1907, that the purchase of tribal lands from individuals was particularly coercive in both principle and practice.

As we saw in section 10.2, the Crown’s destruction of the authority of Maori communities was deliberate. It disempowered Maori, who were denied the right

771. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), pp 7–11

772. Stout and Ngata, ‘Native Lands and Native Land Tenure (General Report . . .)’, 11 July 1907 (Stirling, ‘Te Urewera Valuation Issues’ (doc L17), pp 28–29)

to negotiate prices, reserves, or even the decision to sell at all, through their customary leaders and by community consensus. If there is one theme running through the history of the Urewera rim blocks, from 1881 to 1930, it is this practice of dealing with what the 1891 commission called ‘helpless’ individuals. The deck was stacked against them. The Crown behaved in a predatory manner, exploiting their poverty, their debts, and the fact that almost the only thing they could do with their individual paper interest was to sell it. We saw in many instances that when the tribal community preferred to lease or to make small, strategic sales, the Crown bypassed the community’s wishes by picking off individual interests one by one. This was a flagrant breach of the tino rangatiratanga protected and guaranteed by the Treaty. We state without reservation that the system set up by the Crown coerced Maori to sell their lands to it, and at unfairly low prices. This was in breach of the principle of active protection.

The components of the Crown’s purchase machine were (individually and collectively) in breach of the Treaty. We note, in particular:

- ▶ the Crown’s dealing with individuals to bypass and defeat community opposition to sales (seen at its most flagrant in Heruiwi 1–3, Heruiwi 4, and Tahora 2, and in response to failed resolutions at meetings of assembled owners);
- ▶ the Crown’s use of monopoly powers to exclude private competition (including settlers who might have leased the land), to take away Maori choices (save to sell to the Crown), and to keep prices unfairly low;
- ▶ the Crown’s use of leases to exclude private competition and to acquire a foothold for purchasing, without any genuine intention to lease and sublet the land, and its refusal to pay rent so as to extort a purchase;
- ▶ the Crown’s payment of unfairly low prices, and its refusal to make reserves for sellers;
- ▶ the extremely low quorum requirement for meetings of assembled owners, so as to disenfranchise the majority of owners and obtain their land without consent;
- ▶ the 1913 amendment to bypass meetings of assembled owners altogether;
- ▶ the Crown’s exploitation of Maori poverty, including the expense of surveying land and taking it through the court, to acquire as many interests as it could (see also section 10.8); and
- ▶ the Crown’s determination to purchase any and all Maori land, regardless of Maori interests or whether it was really needed for settlement, leading even to the purchase of the Waipaoa lands vested compulsorily in a Maori land board for leasing only.

This purchase machine, with its interlocking policies and practices, coerced Maori to part with their land, in a manner utterly inconsistent with the Treaty of Waitangi. The prejudice suffered by the claimants was serious. They lost almost two-thirds of their land in the rim blocks by means of this system. While it is clear that some of this land would have been sold anyway, under a more fair and Treaty-consistent system, the outcomes ought to have been very different. Maori were poor before they sold to the Crown, and they were still poor afterwards. We will explain the prejudice in more detail below in section 10.10.

In addition, we make specific findings about the Crown's actions in respect of the Waipaoa block. In seeking (and obtaining) the re-partition of Waipaoa 3–10, with the result that it obtained all of the land in which Ngati Ruapani had customary interests, without their clear and considered consent, the Crown breached its Treaty duty actively to protect their lands and interests. In legislating for the compulsory vesting of land, and in so vesting Waipaoa 5 without the consent of its owners, the Crown breached the plain meaning of article 2 of the Treaty, and its duty to consult and obtain the free, willing, and informed consent of Maori to the alienation of their land. In then providing for land acquired compulsorily for leasing (with sale specifically prohibited) to be sold, the Crown breached its duty actively to protect the land and interests of Ngati Ruapani and Ngati Kahungunu. By failing to respect the repeated requests for reservation of some 8,000 to 9,000 acres of Waipaoa 5, the Crown denied the known wishes of Ngati Kahungunu owners to retain their land, and breached its Treaty duty actively to protect their lands and interests. In exploiting the poverty and desperation of the Ngati Ruapani and Ngati Kahungunu sellers of Waipaoa 5B, and virtually compelling them to accept a lower price than first offered, the Crown breached its Treaty duty to act with scrupulous fairness.

Then, in prohibiting leasing of land vested compulsorily for that purpose, so as to pursue its purchase of individual interests in Waipaoa 5A, the Crown acted in bad faith towards the Ngati Kahungunu owners, and failed actively to protect their land and interests. Also, the Crown refused to call a meeting of assembled owners, knowing that they preferred to farm their land and not sell it, using instead its power under the 1913 Act to pick off individual interests over a number of years. This was a deliberate subversion of the tino rangatiratanga of the Ngati Kahungunu owners of Waipaoa 5A and 5C.

This is an appalling record, in which the Crown abused its position and power over the owners of Waipaoa for decades, so as to obtain land piecemeal from an unwilling but disempowered Maori community. While some of the methods were atypical, because this land was the only block vested compulsorily in our inquiry district, the broader themes were much the same as for every other piece of land in the rim blocks.

It beggars belief that the Crown was playing an even hand between settlers and Maori, as it should (the Treaty principle of equity). One only has to imagine what the consequences would have been had the Crown aimed such policies and machinery at European land.

10.8 WHAT WERE THE COSTS TO MAORI OF SECURING NEW TITLES TO THEIR LAND IN THE NATIVE LAND COURT? WERE THESE COSTS FAIR AND REASONABLE?

SUMMARY ANSWER: The major costs faced by the peoples of Te Urewera in securing new titles to their land were survey costs. In addition, they inevitably faced court fees, and costs associated with attending hearings (none of which were held in Te Urewera itself). But the costs of survey were high, and were inescapable,

since the law required the production of a survey plan before the court could issue orders for title. The Crown's survey costs regime for land which went through the land court was based on the premise that Maori would pay the costs – even though the colony itself was the prime beneficiary of the process of defining blocks, creating survey maps, and the clothing of Maori land with titles which facilitated its alienation. Maori were not consulted when the regime was instituted, and, despite officially expressed concern over the years about the impact of the costs, the decision that Maori should pay was never revisited. When the law was amended, its focus was largely on refining processes for ensuring that unpaid charges were recovered from Maori owners in land.

In Te Urewera, 30,968 acres were alienated in order to meet boundary survey charges. The cost to Maori owners was £3,918, £2,632 of which was met by awards to the Crown amounting to 19,385 acres, while £1,286 was paid directly in cash or by deduction from money owed to the owners by the Crown. Converted to land area, the direct payments were equivalent to 11,583 acres.

Many groups had entered court unwillingly, as the result of applications by others, not because they wished to sell, or benefit from sale, yet they still had to meet their share of the costs of boundary surveys. In the absence of any system for charging owners a standard proportion of survey costs, those costs were often inequitable. When the Crown was awarded land in satisfaction of survey costs, a further charge was imposed on the non-sellers, who had to pay part of the costs of surveying the resulting partition. It was a vicious cycle. The system itself was very unfair and, in some cases, consumed the majority of the block. In the context of rapid land alienation and the inability of communities to control it, the taking of additional land for survey costs has left a strong sense of injustice among the peoples of Te Urewera.

The Crown conceded that it could have taken further steps to ease the burden of survey costs. It accepted that survey costs were a heavy burden for many Maori communities or groups.

10.8.1 Introduction

The costs of securing new titles to their land in the rim blocks under the Crown's Native Land legislation was an important issue for Te Urewera claimants. Such costs included court fees and the associated costs of attending hearings in towns where the court sat. In particular, the claimants were concerned – then and now – about survey costs. From the time when the land court was established, provision was made in the land legislation for the conduct and authorisation of surveys of land going before the court for title investigation, the provision and approval of survey plans, and the payment of survey costs. In districts like Te Urewera, Maori applications to the court meant the arrival of surveyors and the making of survey plans for the first time. Boundary surveys of 'parent' blocks were done first, followed by partition surveys as blocks were divided by the court among claimant groups, or the Crown sought to subdivide out the interests it had purchased.

From the time the first native land legislation was passed, Parliament assumed that Maori owners would pay the costs of survey – either in cash or in land. The

land court was empowered to award costs to the surveyor or (if the Crown had made the survey) to the Crown. Generally, owners paid these costs in land.

In this section, we address the following sub-questions:

- Should Maori have had to pay for the survey of their land?
- What survey costs did the peoples of Te Urewera face? Were survey costs fair and reasonable?
- What court and other fees did they face, and what were the associated costs to them of court hearings?

We then assess the issue of costs in light of the Treaty of Waitangi, and make our findings.

10.8.2 Essence of the difference between the parties

The claimants argued that survey costs were often a heavy burden. The Crown imposed a Native Land Court system which required surveyed titles, and Maori had to take their land to the court to achieve security of title.⁷⁷³ The court could not conduct an investigation of title without a survey of the external boundary. It was a 'fundamental flaw' in the system that the Crown could approve surveys before title was determined, which meant that a debt was applied to all the land within the survey. In a majority of cases, hapu who had not applied for survey or court investigation still had to go to court, and then pay their share of the survey costs.⁷⁷⁴ Counsel for the Wai 621 Ngati Kahungunu claimants, for instance, submitted that in allowing Tahora 2 to be brought before the court, the Crown imposed substantial survey costs and forced a land court title on Ngati Kahungunu without their consent.⁷⁷⁵ And counsel for Ngati Ruapani submitted that they were forced into a hearing of the Waipaoa block which they had not wanted, and then had to pay survey costs, though they had taken no part in pre-hearing negotiations between Ngati Kahungunu and the Crown about surveying. They then lost much of their interest in and around Lake Waikareiti through the taking of lands to pay for survey costs.⁷⁷⁶

The claimants stated, moreover, that the initial title investigation was only the start of survey costs. Subsequently, blocks had to be repeatedly resurveyed, as the court partitioned them among various groups of owners. If the Crown took land as payment for a survey, or took over a survey lien, Maori had to pay the cost of cutting out the area transferred to the Crown.⁷⁷⁷ If the Crown bought undivided interests, the block would then be partitioned into Crown and non-sellers' sections and the non-sellers then had to pay a proportionate amount of the partition

773. Counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), p 69

774. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 107–109; counsel for Ngati Manawa, closing submissions (doc N12), pp 32–34

775. Counsel for Wairoa-Waikaremoana Maori Trust Board, closing submissions (doc N1), pp 67–68

776. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 28–34

777. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 107

survey on a pro rata basis.⁷⁷⁸ Thus, the system punished non-sellers ('the very ones who wanted to keep their land').⁷⁷⁹ The fact that those who did not wish to sell their land (non-sellers) nevertheless had to pay survey costs was a particular grievance.

The effects of the system were also unequal. Some groups had to bear particularly high survey costs. Ngati Haka Patuheuheu stated that they lost over two-thirds of their land to the Crown in Matahina c and c1 to cover survey costs; and Ngati Rangitihī pointed to the glaring impact of such costs in Matahina block d which had been awarded to them, stating that they had forfeited 92 per cent of the block. The Wai 36 Tuhoe claimants submitted that the Crown was awarded 12,304 acres for survey liens in respect of land awarded to Tuhoe in the Tahora block.⁷⁸⁰ In the Waipaoa block, counsel for Ngati Ruapani submitted, 5,822 acres were taken for survey costs, and the Crown ignored complaints that the survey was inadequate anyway.⁷⁸¹ Ngati Manawa stated that they lost 4,775 acres in Whirinaki 1 and 2.⁷⁸² The claimants submitted that the Crown's tabulation of survey costs for the rim blocks showed that from 15 to 20 per cent seemed to be standard; this was a 'very high transaction cost'.⁷⁸³

The Crown conceded that it could have taken further steps to ease the burden of survey costs. It accepted that survey costs were a heavy burden for many Maori communities or groups, and gave the examples of Matahina c, c1, and Tuararangaia 1 blocks in which such costs 'raise concern'.⁷⁸⁴ Counsel further conceded that in the case of these particular blocks, in which the Crown moved to secure orders in its favour to pay survey liens in 1907, '[t]he clearing of these liens . . . was perhaps unfairly abrupt'.⁷⁸⁵ In other words, the Crown moved to secure land for its liens – and did secure it – with little warning. Counsel invited the Tribunal to scrutinise these grants by the court, as well as survey costs initially awarded by the court in respect of Tuararangaia.⁷⁸⁶

The Crown suggested, however, that the greatest contributor to the relatively high cost of surveys was the 'low market value' of much Urewera land. Urewera Maori 'were not fully immersed in the cash economy', and surveyors inflated the costs of surveys because of the economic risk they took in surveying, given that it was not clear when they would be paid.⁷⁸⁷ The claimants pointed to low

778. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 9.

779. Ibid, p 7; counsel for Ngati Manawa, closing submissions (doc N12), pp 46–47; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 107–108

780. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 69

781. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 27

782. Counsel for Ngati Manawa, closing submissions (doc N12), pp 33–34

783. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 8

784. Crown counsel, closing submissions (doc N20), topics 8–12, pp 5, 45

785. Ibid, p 5

786. Ibid, p 47

787. Ibid, p 46

valuations of Maori land, sometimes 'improperly low' when survey costs were being assessed.⁷⁸⁸

There was limited agreement only between the claimants and the Crown on what kind of surveys were necessary in the Te Urewera rim blocks. The claimants argued that expensive theodolite surveys were not necessary, since much Te Urewera land could not justify a high level of definition at a high level of cost. Magnetic (compass) surveys would have been substantially cheaper.⁷⁸⁹ The Crown acknowledged that the issue of using compass rather than theodolite surveys as a possible cheaper means of defining title had arisen a number of times in the inquiry (see the sidebar on pages 1198 and 1199). It submitted that where Maori wished to participate in the new economy absolute boundaries were in fact necessary.⁷⁹⁰ Undertaking lower quality surveys would not have resulted in any saving long term.⁷⁹¹ But some of the benefits to 'non-sellers' through establishment of their title, such as farming, or gaining finance, might perhaps have been achieved through a simpler (and less expensive) form of title definition.⁷⁹²

The claimants and the Crown were not in agreement about who should have paid survey costs. The claimants queried whether Maori should have had to pay such costs at all. Counsel for Te Whanau a Kai argued that the benefits of surveys of Maori land and of alienable titles in fact accrued to purchasers. This was a 'public good'. Given the Crown's view that those who benefit should pay, it followed that 'where the prime beneficiary of a policy or programme is the public, then it is the public who should pay'.⁷⁹³ If Maori were to be liable for survey costs, a system where the costs were fixed at a percentage of a block – no more than 5 per cent – would have been fairer; the Government should have met the balance.⁷⁹⁴ Counsel added that for Maori 'these "benefits" were more illusory than real'. Maori owners were not able to gain mortgage finance on the security of Maori land titles; and in any case if it really was one of the objectives of the Maori land system – as the Crown said – to give Maori a reliable security in order to facilitate mortgage borrowing, the Crown had 'failed lamentably in that goal'.⁷⁹⁵ Counsel for the Wai 36 Tuhoe claimants suggested that there might be 'some justification' for Maori vendors meeting survey costs where Maori applied to the court for title with the 'express intention' of selling land; Tuhoe, he added, never took land to the court for that purpose.⁷⁹⁶

788. Counsel for Ngati Rangitihī, closing submissions (doc N17), pp 19, 21; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 2, 11, 34; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 40–41

789. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 72, 116–117

790. Crown counsel, closing submissions (doc N20), topics 8–12, pp 50–51, topics 18–26, p 65

791. Ibid, topics 8–12, p 5

792. Ibid, p 40

793. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 7–8

794. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 7

795. Counsel for Te Whanau a Kai, submissions in reply (doc N27), p 7

796. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 69

On the question of survey leading to land alienation, the claimants submitted that survey costs were sometimes a major aspect of alienation to the Crown. Counsel for Te Aitanga a Mahaki stated that such costs ‘initiated a cycle of debt that added pressure to sell or cede the land.’⁷⁹⁷ Counsel for Ngati Manawa pointed to Peter McBurney’s evidence that survey costs were a ‘major aspect of alienation of land to the Crown,’ while counsel for Tuhoe suggested that survey liens triggered alienation of Tuhoe lands in three blocks, and probably contributed to alienation in several more.⁷⁹⁸ Moreover the Crown failed to consider whether communities retained sufficient land for themselves before ‘compulsorily’ taking lands for survey costs.⁷⁹⁹

On the payment of survey costs, the Crown responded that those to whom benefit accrued should contribute to the cost. The claimants had provided no analysis of ‘what benefit arose from survey and where that benefit lay.’⁸⁰⁰ Maori who wished to trade in land clearly benefited from having secure legal title, and they could recover the cost through subsequent transactions. Urewera Maori did exactly that when they negotiated sales or leases. It was ‘entirely appropriate’ that those who wished to participate in the new economy were ‘primarily responsible’ for survey costs.⁸⁰¹

For non-sellers, the Crown admitted, the benefits were ‘less obvious.’ But it was ‘not unreasonable’ that those who wanted their rights identified even if not to trade in the new economy should have contributed to survey costs. They gained the benefit of a secure title, and thus the ability to transact in land in the longer term. It was unlikely, the Crown submitted, that they, or their successors, would have maintained their intention not to sell or lease.⁸⁰² In other words, Maori were always going to deal in their land at some point.

The Crown accepted that under its survey regime, land could be sold to satisfy survey costs by the charge-holder, and from 1894 the Crown reserved the right to purchase survey charges. It submitted that its survey regime was designed to ensure that Maori had their land surveyed, and to provide both them and the surveyors with some protection.⁸⁰³

In respect of court costs, the claimants pointed to the great impact of those costs, and of indirect hearing costs as a result of the land court system.⁸⁰⁴ No sittings were held within Te Urewera, and claimants were prejudiced by the venues of court sittings, and their expense.⁸⁰⁵ They challenged the view that Maori should

797. Counsel for Te Aitanga a Mahaki, closing submissions, 30 May 2005 (doc N6), p 12

798. Counsel for Ngati Manawa, closing submissions (doc N12), p 32; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 69–70

799. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 109–110

800. Crown counsel, closing submissions (doc N20), topics 8–12, pp 5, 46

801. *Ibid*, pp 5, 40, 46–47

802. *Ibid*, p 40

803. *Ibid*, p 45

804. Counsel for Ngati Rangitahi, closing submissions (doc N17), p 25

805. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 36; counsel for Ngati Hineuru, closing submissions (doc N18), pp 37–38; counsel for Ngati Manawa, closing submissions (doc N12), pp 28–30

have been required to pay court costs even though they might be unwilling participants in hearings.⁸⁰⁶

The Crown submitted that court costs were 'not substantial' in relation to the value of the land or the cost of running the court. It conceded that there 'is some evidence of hardship in meeting food costs'. The Crown submitted that there is 'very little specific evidence' that the location and timing of the hearings caused difficulties for Urewera hapu. The court was 'generally sensitive' to seasonal demands when it came to setting hearing dates, and though locations were sometimes inconvenient for some, the court had to choose locations that were generally acceptable.⁸⁰⁷

10.8.3 Tribunal analysis

10.8.3.1 *Should Maori have had to pay for the survey of their land?*

In the land court era, the impact of survey costs on Maori was universal, and we first consider whether they should have had to pay those costs at all.

It seems remarkable to us that in a colonial society where, by the early 1860s, such large regions of the North Island remained unsurveyed, decision makers quickly adopted the position that the costs of surveys Maori had to undertake in order to secure title to their land should in general be borne by Maori. Nor, as the claimants pointed out, was it just the boundary surveys. Where interests in land were sold and the Crown portion later partitioned out, a proportion of the cost of surveying the Crown partition might fall on the remaining Maori owners who had not sold their interests because they wished to keep their land. Where the Crown cut out land as payment for survey costs owing, the cost of that survey also was added to the debt of the Maori owners.

The Crown's explanation in its submissions to us was to apply a 'simple principle . . . whoever accrues benefit should contribute to cost'. This led it to the conclusion that Maori who wished to have secure title to their land so that they could participate in the new economy should indeed have been 'primarily responsible' for survey costs.⁸⁰⁸ The view of expert witness Mr Hayes – which claimant counsel challenged as being more appropriate to modern conveyancing practice – was that 'it is appropriate for the land owners to meet survey and other costs in evidencing title so as to be able to transact in their land'.⁸⁰⁹ The Crown also considered the position of Maori who did not wish to trade in their land, admitting that the benefits of 'secure legal title' to them were 'less obvious'. Counsel suggested that '[l]ittle practical thought' had been given to how a system of title might distinguish between those intending to enter the new economy, and those who wished to stay outside it – but who might well change their minds later. And counsel concluded that those who wanted their rights identified but not to trade in their land

806. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 12

807. Crown counsel, closing submissions (doc N20), topics 8–12, pp 32–33

808. *Ibid*, p 40

809. Hayes, 'Native Land Legislation Post 1865' (doc A125), p 118; see also counsel for Ngati Rangitihī, submissions by way of reply, 8 July 2005 (doc N28), p 4

The Eye that Eats Land

INOHO pouri o matau tipuna ki nga mahi a Te Karauna, a Te Kawanatanga a nga kooti a ture, kooti a whenua. I pouri nga tipuna ki nga kai ruri whenua me nga karu kai whenua [the eye that eats land] (theodolites).'

OUR ancestors remained angry with the Crown, the Government, the law Courts and the Native Land Court. They were angry with the surveyors and their theodolites.'

Alec Mahanga Ranui¹

1. Alec Mahanga Ranui, brief of evidence (Maori), 14 March 2004 (doc C14), para 7; Alec Mahanga Ranui, brief of evidence (English), 14 March 2004 (doc C14(a)), p 13

might reasonably have been expected to contribute to survey costs too, since they did get some benefit from a secure title, for instance access to finance or facilitated farming. It was unlikely that owners (or their successors) would have refrained completely from selling or leasing land.⁸¹⁰

We agree with the claimants that the Crown's justification of the application of its principle that 'those who benefit should contribute to cost' (to paraphrase) was one-sided. The assumption evidently was that Maori – and only Maori – benefited from securing legal title and from trading in their land. We do not think this is a well-founded assumption.

First, it is dubious whether Maori generally did benefit from the new titles. As we pointed out at the beginning of the chapter (section 10.2), this Tribunal has adopted the findings of earlier Tribunals that the introduced title system was imposed on Maori, that it undermined community management of land and control of alienation, and that the Crown's failure to provide a legal collective title which would give good security to lenders meant that Maori communities were severely disadvantaged in the new economy. Moreover, as we have indicated, the benefits of new titles to the peoples of Te Urewera, in the overall context of Crown purchase policy and practice in the region, were limited – and were widely seen to be limited. In the majority of the blocks before us, leaders who had wanted to keep tribal lands out of the court found that they had no alternative but to engage when individuals of their own or (more commonly) other iwi filed applications (see section 10.5). On those occasions when considered decisions were made by iwi leaders to initiate surveys and court applications, poverty and debt, rather than a wish to seize the benefits of the new economy, were also triggers. For these reasons, the

810. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

Crown's argument that it would have been difficult for a title determination system to separate out those who wanted titles from those who did not misses the point. The system itself produced the dilemma. It facilitated the entry into the court of those who – for a range of reasons – sought title. It did not provide for community determination of titles or even for community decision-making such that all those with rights would have been involved in the decision to go to court. It did not provide for legal community titles which would have allowed owners to make collective decisions as to the sale or lease of some lands, and the development (through borrowing) of some or all of those it wished to keep. In such circumstances, Maori owners generally might have been better persuaded of the merits of their contributing to survey costs. We add that the Crown's stated expectation that Maori were always going to sell or lease their land at some point suggested the inexorability of its native land system.

Secondly, in its consideration of benefit from surveys, the Crown did not consider the national benefit, despite the fact that the Maori contribution to the public good through their payment of survey costs was acknowledged at the time. The public good, moreover, was generally understood in this period to be synonymous with Pakeha settlement. Consideration of payment of survey costs should be set in the context of New Zealand's development as a colonial society whose governments (central and provincial) were in the process of providing a range of infrastructure for economic development. To saddle its indigenous people – particularly those who had scarcely entered the market economy – with the cost of surveying large tracts of North Island land was inequitable. All the more so when, as governments constantly stressed, this land was in the main intended for settlers. This was particularly the case because such costs became an issue in the context of the Crown's decision in the early 1860s to distance itself from the purchase of Maori lands whose ownership had not been determined by any kind of judicial process. The dangers of such buying became evident in the Waitara purchase of 1859–60, which led to war. Clearly it was in the national interest that the Crown provide a better system of purchase, preceded by some form of title determination. Yet in the course of this basic reform of purchase processes, responsibility for surveys shifted, as by a sidewind, onto Maori. Previously, the Crown had paid for the survey of land (both purchases and reserves) itself.

10.8.3.1.1 THE ORIGINS OF THE CROWN'S DECISION THAT MAORI SHOULD PAY FOR SURVEY COSTS

The original decision that Maori should pay for surveys of their land in the land court era was taken in 1862 when legislation providing for land courts to determine title was introduced. We make two points about this decision. First, there is little evidence that responsibility for such costs, a matter of great concern for Maori, was much discussed at all at that time. Secondly, though the cost of survey of Maori land was raised, and on occasion was debated in the years that followed, the debate focused largely on such issues as whether the level of cost was fair, and how it could be reduced. From time to time, the question of *who* should pay was raised. But it did not engage the attention of Parliament.

We have no evidence in the published record of discussions that preceded what seem to have been the crucial first decisions on the charging of survey costs. More than one Bill was prepared in 1862 when a system for Maori title determination and land transaction was mooted. The second of these, prepared by FD Bell, Native Minister in the Domett Government, which came to power in August 1862, provided for courts presided over by a magistrate, and composed ‘wholly or partly’ of Maori, to ascertain titles and grant certificates of title. Where lands were not to be reserved for the Maori owners, then after they had been surveyed and the boundaries marked, a certificate of title could be awarded to the ‘tribe community or individuals’ entitled to it. Such surveys, Loveridge notes, could be paid for with public funds.⁸¹¹ Maps and surveys requested by the Maori owners ‘of any native lands’ were to be charged to a native purposes fund. The Government would pay for survey costs.

But in the Bill that was enacted, a change had been made to this provision. Survey costs were to be repaid by Maori owners (see the sidebar opposite). As Bell explained in his minute of November 1862, which set out the main provisions of the Bill, clause 28 enabled the Governor to ‘advance money for Native surveys’. Once a tribe had applied to the court, and its title had been investigated, the court would ‘cause the land to be carefully surveyed and marked off on the ground, and a proper plan of it made’ before reaching a decision. And where an entire tribe was subsequently named as owners in a certificate of title, they might propose a plan for the sale, lease, or other dealings in their land, and raising money on the security of their land for various purposes, including ‘paying for their surveys.’⁸¹²

There is no reference in the parliamentary debates to survey costs, but Loveridge records that the Bill was considered in committee between 1 and 5 September 1862 and it was ‘very substantially altered’ during this period – though exact details ‘are in short supply.’⁸¹³

Settler parliamentarians, as Loveridge has argued, were preoccupied in this period with other issues which were of concern to them: whether native title should be recognised; how Maori customary rights should be converted into Crown titles; whether Maori themselves should be empowered to define their own titles (through courts); whether Maori should be free to dispose of their own lands (without the restrictions of Crown pre-emption), to name but a few. Beside such fraught issues, survey costs were evidently rather less pressing.⁸¹⁴

By the time the Native Lands Act 1865 was passed, the principle that Maori would pay survey costs was firmly established. There is no mention of survey costs in the parliamentary debate of the legislation.

811. Donald M Loveridge, ‘Précis of “The Origins of the Native Lands Acts and Native Land Court in New Zealand”’, January 2005 (doc 15), pp 23–24

812. Bell’s minute on the Native Lands Bill, 5 November 1862 (Loveridge, ‘Origins of the Native Land Acts and Native Land Court’ (doc A124), app 14, pp 330–331)

813. Loveridge, ‘Origins of the Native Land Acts and Native Land Court’ (doc A124), p 172

814. *Ibid*, pp 166, 173, 188

Origin of the Idea that Maori, not the Government, Should Pay Survey Costs

Clause 15 of Bell's Native Lands Bill 1862 stated: 'The Governor may, at the request of the native proprietors, cause maps and surveys to be made of any native lands, and may defray the costs thereof out of, and charge the same against any fund specially appropriated to native purposes.'¹

Section 28 of the Native Lands Act 1862 (reserved for Her Majesty's pleasure, 15 September 1862) stated:

28. Surveys may be made at request of Natives—The Governor may at the request of the Native Proprietors cause Maps and Surveys to be made of any Native lands and may defray the costs thereof out of and charge the same against any Fund specially appropriated to Native Purposes *such cost to be repaid by the Native proprietors in such manner as the Governor may direct.* [Emphasis added.]

1. *Daily Southern Cross*, 2 September 1862 (Donald Loveridge, 'Evidence concerning the Origins of the Native Land Acts and Native Land Court in New Zealand' (commissioned research report, Wellington: Crown Law Office, 2000) (doc A124), app 12, p 316)

10.8.3.1.2 RECOGNITION OF THE COSTS OF SURVEY TO MAORI

Despite the fact that the question of Maori payment for surveys seemed to have been settled by Parliament, responsibility for those costs was subsequently discussed by officials. Mr Hayes drew our attention to the fact that the Inspector of Surveys, Theophilus Heale, had considerable sympathy for the 'undue burden of survey costs on Maori.'⁸¹⁵ In his 1867 report to James Crowe Richmond on 'Surveys under the Native Lands Act', Heale's main topic was how to achieve systematic survey of North Island lands. He pointed out that surveys had been poorly conducted since the establishment of the colony, they had been made by compass meridian and had not been triangulated, there were gross discrepancies in those that had been done, and there were 'hundreds' of detached maps and no record maps on which they could be delineated.⁸¹⁶

To Heale, the operation of the native land legislation opened new opportunities to rescue the situation by establishing a complete system of triangulation.

Heale saw such a system beginning in Auckland province, but capable of being extended to cover the whole island. We note in particular what he had to say about survey costs. He thought it not his job to say how the cost of surveying land north

815. Hayes, 'Native Land Legislation Post 1865' (doc A125), p 101

816. AJHR, 1867, A-10B (Hayes, 'Native Land Legislation Post 1865' (doc A125), p 101). A record map is a reference composite map kept in the main surveying office that acted as an index.

Some Survey Terms Used in this Chapter

Magnetic surveys: Collected angular information by the use of a compass. A compass or a 'compass theodolite' (a theodolite with a compass built into its frame) was used to orientate the first observation to magnetic north. Subsequent bearings were determined by either the compass or the compass circle in the theodolite, or by observing lines with a theodolite orientated in terms of the first ('origin') bearing.

Triangulation: A technique used in surveying to determine distances using the properties of a triangle.

Historically, a baseline was measured using a surveyor's chain on areas of relatively even ground. A triangle could then be formed by establishing a survey station at each end of the baseline, with a third station established at a distant point to one side of the line. These three stations are referred to as triangulation or trigonometric stations (commonly called trig stations).

Using a suitable theodolite (see description below) set up at each station in turn, the three angles of the triangle could be determined to a known accuracy.

of Auckland should be defrayed; but he did state that the work was 'one of a true National character' (see the sidebar on page 1200).⁸¹⁷

Heale raised the question of what proportion was 'in justice chargeable to the present land claimants' (Maori). He was concerned about the costs of altering 'the tenure of two-thirds of the country' – a desirable object – and about placing 'undue [financial] pressure on the Native Land Claimants' in the course of such an important project.⁸¹⁸ In 1871, he repeated his belief that

the result of relieving the Native landowners from the task of paying for their surveys, would soon be greatly to extend the operation of the Native Land Court, and at no distant date to put an end to Maori tenure, with its interminable disputes and excitement [as he put it].⁸¹⁹

Heale thus clearly flagged the issue of who should pay for surveys, in light of the fact that surveying great tracts of North Island land was a major undertaking from which the colony would benefit. And there was some recognition in the period that Maori, by paying for surveys, did contribute to the public good. Chief Judge Fenton himself commented in August 1871 on the fact that Maori 'now indirectly

817. Theophilus Heale, 'Report by Mr Heale on the Subject of Surveys under the Native Lands Act', 2 August 1867, AJHR, 1867, A-10B, pp 4-5

818. *Ibid*, p 5

819. Heale to chief judge, 7 March 1871, AJHR, 1871, A-2A, p 20

Having the length of one side and the internal angles allows the lengths of the other two sides to be calculated using simple trigonometry. The newly calculated sides could then be used as the base of further triangles and so on until a local area or a whole region was covered by triangulation.

This process allowed all surveys in the area to be oriented in the same terms and enabled them to be connected to one another to prevent newly created property boundaries from overlapping.

Theodolite: An instrument used for measuring horizontal and vertical angles. It comprises a small mounted telescope set on a tripod, which is rotatable in both horizontal and vertical directions. Horizontal angles were usually converted to bearings (directions measured 360 degrees clockwise from 'true' north) by orienting the theodolite on existing survey lines or using sun or star shots. A theodolite can be used on hilly ground, but does need to be leveled to the horizontal plane by means of foot-screws attached to its base to provide bearing (or angles).

The main difference between a theodolite survey and a magnetic survey is that theodolite surveys use 'true north' as an origin, while magnetic surveys use 'magnetic north', whose direction moves over time as the magnetic pole moves.

contribute such large sums to the public surveys.⁸²⁰ Haultain, in his 1871 report on the working of the Native Land Acts, pushed strongly for the Government to take complete responsibility for surveys, stating that the additional expenses,

if not fully met by the payments from the Natives, would be a charge against the Provinces, which ought not to object to pay for the extension of a department which has, within the last five years, cost little over £10,000, and has put into their possession maps of survey for more than two and a half million acres of land, the cost of which has been paid for entirely by the Natives, and the value of which is estimated, by Mr Heale, at nearly £100,000.⁸²¹

In other words, Maori had made a substantial financial contribution to the production of public survey maps – which the provinces, which benefited from that contribution, should acknowledge.

Some years later, George Preece, the resident magistrate at Napier, revived the question of who should be responsible for survey costs in two successive reports to the Native Affairs Department (published in 1882 and 1883) on Maori affairs in his district (which included Wairoa). Preece evidently felt strongly about the need to find a solution to the difficulties both Maori and settlers faced in land transactions, particularly the costs involved. He urged that the Government should adopt

820. Judge Fenton to McLean, 28 August 1871, AJHR, 1871, A-2A, p 11

821. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 6

Heale, Inspector of Surveys, on the Cost of Surveys of Northern Lands

‘WHETHER this work is looked upon as an effort to set the Geography and Topography of the whole country on a sound basis, or whether it is considered specially as a means of forwarding the operation of the Native Lands Court, it is one of a truly National character. In the former point of view it will ultimately effect [give rise to] the value of every estate in the country, and lay the foundation for great future facilities in defining properties, planning public works, forming districts for political and municipal purposes, and for carrying out the far-seeing operations with a view to the culture, which characterize the Government of a civilised people.’

Theophilus Heale¹

1. ‘Report by Mr Heale on the Subject of Surveys under the Native Lands Act’, 2 August 1867, AJHR, 1867, A-10B, p 5

a new system for the alienation of Maori land, undertaking its survey, sale, and leasing, and acting as the agent for the owners. But he went further, and suggested that the Government should also foot the bill: ‘the lowest possible commission should be charged by the Government to the Natives, say 5 per cent. on the price realized by the land, to cover survey, commission and all charges.’⁸²²

This would assist settlers, who faced great difficulties buying land held under memorials of ownership, and getting good title; and it would reassure Maori that they were getting ‘the highest marketable value of their lands, and that the proceeds were not being swallowed up by expenses.’⁸²³ Even if the Government suffered a loss, ‘the country would gain by the speedy settlement of lands now unoccupied by Natives.’⁸²⁴ In other words, Preece too was thinking of the public good. In his view, the public good was not served by what he implied was considerable Maori mistrust of a system which did not deliver to them a good price for their lands.

Despite the clear flagging of the issue of who should pay survey costs by officials such as Heale and Preece, however, this never became a major issue for political debate. It surfaced only occasionally – as in the speech of William Moorhouse, a Canterbury member of the House of Representatives, who urged that the Government should carry the whole cost of surveys of Maori land (see the sidebar opposite). But it did not lead to serious debate.

822. G A Preece to Under-Secretary, Native Department, 2 July 1883, AJHR, 1883, G-1A, p 9

823. Ibid

824. Ibid

William S Moorhouse, Ashley Electorate, Speaking in 1880

‘THE whole of the expense of the surveys necessary to adjudication by the Native Land Court I would advise the Legislature to undertake free of any charge to the Natives. I would further recommend a remission of all Native Land Court and Crown-grant fees. The acceptance of this recommendation, so far as may be gathered approximately from various indications, would increase the direct annual expense of the Native administration, inclusive of surveys, by about £20,000 per annum.’

William S Moorhouse¹

1. William S Moorhouse, 28 July 1880, NZPD, vol 36, p565

The matter was not revisited when the Government began to borrow large sums for immigration, public works and development (including Maori land purchase) from 1870. In this context we might have expected survey costs to be shouldered wholly or largely by the Crown. They were costs that would not have loomed large in Government budgets – though to Maori owners they were substantial – and payment up front generally quite beyond their means. This was recognised at the time: the chief judge himself referred in 1871 to ‘the frightful expenses of the present system of surveying’;⁸²⁵ and, in the debate on the Native Land Bill in 1873, Dr Pollen (the colonial secretary) referred to the expense associated with the land court that was ‘most oppressive to the Natives . . . the mode of survey’.⁸²⁶ The reduction of survey costs was thought important enough at that time to be mentioned specifically in the preamble to the 1873 Act: ‘Whereas it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated.’⁸²⁷

But attempts to tackle the problem by having the Government take over (though not pay for) all surveying, and removing private surveyors from the field, did not succeed. It was generally understood that private surveyors were expensive because their uncertainty as to when they would be paid was reflected in their costs; this itself pointed to the fact that Maori could not pay them.⁸²⁸ But the urgings of Chief Surveyor Heale that costs could be lowered quite dramatically (by more than half) if the Government took over complete responsibility for surveys

825. Judge Fenton to McLean, 28 August 1871, AJHR, 1871, A-2A, p11

826. Daniel Pollen, 25 September 1873, NZPD, vol 15, p1366

827. Native Land Act 1873, preamble

828. Daniel Pollen, 25 September 1873, NZPD, vol 15, p1366

(though not for all their costs) – as well as facilitating proper triangulated surveys throughout the island – led to only partial reform.⁸²⁹ The 1873 Act provided that where Maori had approached the Governor to seek a survey, it would be carried out under the control of the Inspector of Surveys; and the inspector also had to authorise every other survey undertaken. Thus, the Inspector of Surveys gained more control over surveying – but private surveyors continued to operate, in Te Urewera as elsewhere.⁸³⁰ In 1873, some parliamentarians opposed their exclusion because they feared Government monopoly; others argued that Maori might resent having their access to private surveyors removed. Only between 1880 and 1886 did surveys required by the court have to be made by surveyors employed by the Surveyor-General.⁸³¹ The Premier, Seddon, was still arguing for the abolition of private surveys in 1894.⁸³²

We turn now to consider the Crown's survey regime.

10.8.3.1.3 THE NATURE OF THE CROWN'S SURVEY REGIME

The Crown, in its submissions to us, emphasised the nature of the survey regime it provided for Maori land; the Crown took 'full control of regulating surveys' and survey charges; it also prohibited the forced sale of land by private surveyors or chargeholders.⁸³³

The Crown drew on Robert Hayes' evidence on native land legislation (originally presented in the Hauraki inquiry), which included a useful summary of the statutory regime governing the survey of Maori land from 1865 to 1909. Hayes, acknowledging the problems that survey costs posed for Maori, argued that it was evident from the history of legislation regulating the survey of Maori land that the Crown was 'mindful' of such problems, and that it 'increasingly took a "hands-on" approach.'⁸³⁴ His summary traverses powers bestowed by legislation on the Native Land Court in the decades after 1865. It is too detailed to reproduce here, but we have drawn on it to categorise the main kinds of provisions in the legislation as outlined by Mr Hayes (see the sidebar opposite).

Hayes argued that the purpose of the regime was 'to ensure that Maori had the opportunity to have their lands surveyed, and provided them and the surveyors (or lienholders) with a measure of protection'. In his view, protection for Maori was evident both in the Crown's assumption of control over surveys, and in its prohibition of the forced sale of Maori land by lienholders.⁸³⁵

We accept that there were protective aspects to the legislation. For Maori, the requirement that surveyors hold a certificate of competency, that all surveyors have prior written authority of the Surveyor-General for a particular survey, and that from 1886 regulations prescribed standard rates for surveys, did seem to

829. Heale to chief judge, 7 March 1871, AJHR, 1871, A-2A, p 18

830. Native Land Act 1873, ss 69, 74

831. Native Land Court Act 1880, s 39; Native Land Court Act 1886, s 79

832. Richard Seddon, 28 September 1894, NZPD, vol 86, p 373

833. Crown counsel, closing submissions (doc N20), topics 8–12, pp 45, 47

834. Hayes, 'Native Land Legislation, Post-1865' (doc A125), p 106

835. *Ibid*, p 118

The Statutory Regime Governing the Survey of Maori Land: Key Provisions

1873

Claimants required to satisfy the Inspector of Surveys that they are able to pay for surveys in cash or willing to convey to the Crown the equivalent value in land; where payment is to be satisfied in land, the owners are to agree upon the area and location of that land; no future survey charges could be recovered in any court of law unless creditor demonstrated that the survey was authorised by the Inspector of Surveys: Native Land Act 1873.

1878

Court empowered to award surveyor payment of his survey costs in money or in land: Native Land Act Amendment Act 1878 (No 2).

1880, 1882

A survey plan implied not to be essential for the investigation of a claim, but a certificate of title or Crown grant could not issue until a plan had been deposited with the court. All plans to be approved by the Surveyor-General; Crown may survey land at request of the claimants and if the declared owners fail to pay the survey costs, court empowered to order a defined portion to be sold by public auction, or vest land equivalent in value in the Crown; court empowered to execute all instruments necessary to convey land in satisfaction of survey debts; court empowered to direct payment of the whole or part of the survey costs where the land or any part is awarded to persons other than the claimant: Native Land Court Act 1880 and Native Land Division Act 1882.

1882

Person impeding survey undertaken in terms of the Act deemed to be guilty of contempt of the court: Native Land Division Act 1882.

1886

Certified map required before court able to investigate title, although the Governor might allow an investigation based on a sketch map. Plans to be certified by the Surveyor-General; all surveys to have prior written authority of Surveyor-General and surveyor must hold certificate of competency; court empowered to make charging order in favour of surveyor to secure survey cost, with such orders to have the effect of a mortgage; and to make a charging order in favour of the Surveyor-General for surveys undertaken at request of claimants; charging orders to bear interest at 5 per cent per annum; court to authorise a surveyor to survey land and where that order has been approved by the Surveyor-General, the surveyor to enter the land and undertake the survey; obstructing a survey so authorised an offence: Native Land Court Act 1886, which repealed the 1873 Act and its amendments.

1894

Offence to obstruct survey; court empowered to charge land by way of mortgage to secure survey charges certified as reasonable by the Surveyor-General or commissioner of Crown lands or, with approval of Native Minister, to vest in the surveyor the equivalent in land; no sale under the charging order (mortgage) to be made until six months after Native Minister is notified of the intention to exercise the power of sale; Minister entitled to purchase the amount claimed where mortgagees notified their intention to exercise the power of sale; court empowered to charge interest on its charging orders at a rate it deems fair and reasonable but not exceeding 5 per cent per annum: Native Land Act 1894, which repealed earlier legislation.

1895

Holders of unsatisfied charging orders (made before 1894 Act) entitled to convert them to a mortgage under the 1894 Act; court empowered to charge interest at 5 per cent per annum from date of the Chief Surveyor's approval of survey, with interest to accrue for no longer than five years: Native Land Laws Amendment Act 1895.

1896

Crown entitled to purchase all survey charging orders, and pay any money due for surveys and for all future surveys: Native Land Laws Amendment Act 1896.¹

1. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation, Post-1865 and the Operation of the Native Land Court in Hauraki' (commissioned research report, Wellington: Crown Law Office, 2001) (doc A125), pp 106–111

afford some protection.⁸³⁶ Maori benefited from what the Hauraki Tribunal called an 'improvement in professional standards.'⁸³⁷ In one example before us, Heruiwi 4 (75,000 acres), S Percy Smith, the Surveyor-General, intervened to reduce the costs the owners faced. The surveyor, Chas Clayton, claimed he had agreed with the Maori owners of the block that the price would be twopence an acre – which would have resulted in a charge of £625. But after the Government agreed to advance the survey cost, Smith assessed the value of the surveyor's work at 1 1/2d acre, and also pointed out that deductions should be made under the schedule ratio. Clayton accepted the reduced rate per acre, but not the deductions, but was overruled by the Government.⁸³⁸ The charge remained at £343 17s 8d, the amount

836. 'Survey Regulations under "The Land Act, 1886"', 20 May 1886, *New Zealand Gazette*, 1886, no 30, pp 634–642

837. Waitangi Tribunal, *Hauraki Report*, vol 2, p 738

838. Tulloch, 'Heruiwi 1–4' (doc A1), p 47

Some Definitions

Debt: an obligation on one person to pay another.

Lien: a right which one person has to retain [or restrain the disposition of] the property of another or to have a charge over it until the debt owing by the other is paid.

Charge: an encumbrance on the land which charges the land with payment of the debt. It is like a mortgage over the land which secures the debt by giving [the charge-holder] priority over the owner(s) interests in the land.¹

1. Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker's Ltd, 1993), pp 206–207

originally sent to the court by the Assistant Surveyor-General.⁸³⁹ The surveying plan was approved.

It is hard not to conclude that in respect of costs the chief concern underlying the legislation was to ensure that surveyors were paid and that Maori owners paid them. The Crown acknowledged in submissions that after 1878 a 'compulsory element' applied to ensure satisfaction of survey liens, although 'authorisation of a process that included forced sale was, over time, significantly reduced'. Counsel stated that from 1894 the effective power to sell Maori land for survey costs moved from the court to the Crown. The Crown reserved the right to purchase survey charges, and a charge-holder who wished to exercise their 'power of sale' had to give the Crown six months' notice.⁸⁴⁰ These changes were not directed at the imposition of survey charges but merely moderated their enforcement. This provided an opportunity for the Crown to protect Maori interests. At the same time, however, Maori faced penalties for not discharging survey debt promptly; from 1886, interest was added to charging orders. This was a further provision to assist recovery of such debt. Hone Heke objected in vain to a similar provision in the 1894 Native Land Court Bill (see the sidebar over).

In 1895, as we have noted, such interest charges were limited to a period of five years.⁸⁴¹ This could have been a double-edged sword: while it limited the time for which interest could run, it was likely to provoke enforcement at the end of five years unless the Crown intervened to take over the charge.

Survey costs often aroused Maori anger at the time; they still do – as is shown by Mr Ranui's statement (which we quoted at the start of this section), and the damning term *karu kai whenua* (eye that eats land), which Maori applied to the

839. The Crown's figure is £343 18s 8d, but Berghan gives £343 17s 8d: Berghan, 'Block Research Narratives' (doc A86), pp 574, 585.

840. Crown counsel, closing submissions (doc N20), topics 8–12, p 45

841. Native Land Laws Amendment Act 1895, s 67

Hone Heke on the Proposal to Charge Interest on Survey Costs

Hone Heke, the member for Northern Maori, said, in relation to the proposal to charge interest on survey costs contained within the Native Land Court Bill 1894:

Now, it is very unfair that, where surveys are forced on the Natives whether they like it or not, the charges for the survey should be laid upon the land, and that they should be charged a cruel interest of 5 per cent. on the principal. If the Natives are unable to pay such survey-cost, the interest to be paid continues. I think that is very unfair . . . I think the rights of the Natives should be acknowledged.¹

When the Bill was before the committee of the whole House, Heke moved an amendment to clause 64, to provide that survey costs should not bear interest. The vote went against him; the amendment was lost by the overwhelming majority of 37 to nine.²

1. Hone Heke, 28 September 1894, NZPD, vol 86, p 385

2. Native Land Court Bill in Committee, 3 October 1894, NZPD, vol 86, p 499

theodolite. That is because surveys were inextricably linked with the processes of colonisation, and land loss. Maori had to grapple with them in the context of determined Crown purchase through various means: protection of its monopoly, pre-title dealings, and undivided share buying. This was a very different context from that of the established landowners whom Mr Hayes evidently had in mind when he argued that it was appropriate for owners to meet the costs of proving title so they could transact in their land. To many Maori, the equation of survey costs with acres seemed further evidence of the Crown's very large appetite for their land.

10.8.3.2 What survey costs did the peoples of Te Urewera face? Were survey costs fair and reasonable?

We consider first the survey costs incurred by the peoples of Te Urewera in their rim blocks in the latter part of the nineteenth century as a result of block boundary surveys, and (in several cases) awards to the Crown to clear survey debts. The Crown suggested that it was important to consider such costs on a block-by-block basis, and the evidence enables us to do that, although in the case of two private purchases we do not know what part of the cost – if any – Maori owners may have met. For the sake of completeness, however, we list these blocks in our table. Boundary costs, as claimants pointed out, hardly give a complete picture of survey costs they faced, because later partitions meant that charges continued to accrue. In some cases they were also charged a proportion of costs for surveying out land

Block	Size (acres)	Cost of survey	Percentage of block used to satisfy debt where land was used
Heruiwi 1–3	25,161	£179 0s 0d	—
Heruiwi 4	75,000	£343 18s 8d	1.1
Kuhawaea	22,309	—	—
Matahina C, C1	—	—	53.7
Matahina D	—	—	84.6
Tahora 2	213,350	7.8 per cent	—
Tuararangaia	8,656	£347 5s 4d	18.8
Tuararangaia 1, 2, 3B	—	—	25
Waimana	10,491	—	0
Waiohau	5,564 (<i>sic</i>)	—	—
Waipaoa	39,302	—	14.8
Whirinaki	31,500	£665 17s 6d	14.33
Ruatoki	21,450	£625 12s 6d	0

Table 10.8: The Crown's survey costs table. Certain blocks have been omitted from the table.

Source: Crown counsel, closing submissions (doc N20), topics 8–12, pp 42–44

awarded to the Crown. But the chief concern of claimant and Crown submissions was the initial round of survey costs, and that is the focus of our analysis.

In its closing submissions, the Crown responded to a Tribunal issue about the impact of survey liens and costs on the ability of the peoples of Te Urewera to retain and develop their lands. It began by providing a table setting out its estimate of the cost of survey for each of the rim blocks, which noted how the survey cost was discharged in each case, and 'where land was used to satisfy the debt, what proportion of land was utilised for that purpose'. The figures it gave were based on figures given in the research reports, and are given in table 10.8.

Note that:

- ▶ The Crown's table included also a column headed 'How survey cost discharged' which is not reproduced here. We draw on the material in that column in the discussion below.
- ▶ The Crown specified that sub-divisional surveys were not included in its consideration of costs.⁸⁴²
- ▶ Although these blocks are included in the Crown's table, we are unable, as we have noted, to comment on Tuararangaia 2 and 3, Matahina A1 to A6, Matahina B, and Waiohau 2 (which are outside our inquiry district).

842. Crown counsel, closing submissions (doc N20), topics 8–12, p 45

Block	Survey lien	How paid for	Area of equivalent value to survey costs (and percentage of block area or block purchase value)
Heruiwi 1–3	£178 17s 4d	£178 17s 4d deducted by Crown from rent owing to lessors	1,800 acres (given price per acre for Heruiwi 1) * (7.2%)
Heruiwi 4	£343 17s 8d	67 acres included in Crown purchase of Heruiwi 4A1 to cover survey lien outstanding for 4A2 (£10 1s 5d); liens not charged for other Heruiwi 4 blocks, as taken into account in Crown offer price	67 acres from Heruiwi 4A non-sellers (3.0%); for remainder of lien, up to 2,575 acres (given average price per acre paid for pre-1900 purchases) (3.5%) †
Whirinaki	£665 17s 6d	4,439 acres included in Crown purchase award to cover survey liens	4,439 acres (14.1%)
Kuhawaea	Not known	Not known	Not known
Waiohau 1	£200 0s 0d	£200 paid by owners directly to surveyor	1,474 acres (given price per acre for Waiohau 1B) ‡ (10.2%)
Tuararangaia 1	£212 14s 7d <i>(Share of original lien for whole block (£347 5s 4d) and charge for detaining surveyor, plus £36 10s 11d interest, and £30 for cutting out Crown award)</i>	881 acres awarded to Crown	881 acres (25.2%)
Matahina C, C1	£222 16s 6d <i>(Includes £27 interest, and £60 for cutting out Crown awards)</i>	1,334 acres awarded to Crown	1,334 acres (66.7%)
Matahina D	£ 92 0s 9d <i>(Includes £15 12s 6d interest)</i>	920 acres awarded to Crown	920 acres (92.0%)
Ruatoki	Nil <i>(Had been £62s 17s 6d)</i>	Lien unable to be pursued after inclusion in Urewera District Native Reserve; subsequently Native Land Court orders cancelled	Not applicable

Waimana	Not applicable (Had been £131 25 9d)	Paid by purchaser (Swindley) on owners' behalf	Not applicable
Tahora 2 (Excluding 2B, 2B1)	£1,313 16s 1d (Total £1,823 4s 3d for all Tahora 2 includes £223 4s 3d interest; reduced from Baker's claim for £1,887 7s 11d plus interest after rehearing)	£573 4s 8d deducted from payments to sellers, plus 5,922 acres awarded to Crown from non-sellers' portion (meeting remaining cost of £740 11s 5d)	11,656 acres [§] (7.6%)
Waipaoo	£687 16s 7d (Includes interest of £114 13s 6d)	5,822 acres awarded to Crown	5,822 acres (14.8%)
Total	£3,918 0s 0d (Does not include charges for Kūhawaea, Waimana, Ruatoki, or Tahora 2B and 2B1)	£2,632 paid off through award to Crown of 19,385 acres; £953 paid directly (withheld by Crown from amounts due to owners, or paid by owners to surveyor); £320 cancelled by Crown upon purchases (accommodated in price set for Heruwiwi 4 blocks); £13 left outstanding on Heruwiwi 4F2 and 4B2; unknown reimbursement made to Swindley	30,968 acres (approx) out of 344,471 acres (area excludes Waimana, Kūhawaea, Ruatoki, and Tahora 2B and 2B1) (9.0%)

* The sum of £178 17s 4d is 7.2 per cent of the Crown price for whole block in 1881 (when Heruwiwi 1 was bought) of £2,500; the equivalent proportion of 25,161 acres is 1,800 acres.

† Sixty-seven acres equates to 3.0 per cent of the Heruwiwi non-sellers' area before survey taking (2,156 acres + 67 acres = 2,223 acres). The sum of £9,033 (approximate) was used to purchase 69,670 acres (the combined area of 4A1 (less 67 acres), 4B1, 4D, 4E, 4F1, 4G, 4H, 4I). At this purchase rate, £333 17s 3d (£343 17s 8d less £10 1s 5d) would buy 2,575 acres. Comparing this figure with the area excluding the Heruwiwi 4A non-sellers' area (72,777 acres, namely 75,000 acres minus 2,223 acres), gives a proportion of 3.5 per cent.

‡ The £950 used to purchase Waiohau 1B (7,000 acres) equates to a price of £1962 19s 5d for the whole of Waiohau 1 (14,464 acres). Two hundred pounds is 10.2 per cent of £1,962 9s 5d; the same ratio in land is 14,724 acres to 14,464 acres.

§ From the 60,806 acres in Tahora 2B and 2B1, the sellers contributed the equivalent of 4,633 acres (at twopence out of two shillings per acre for survey costs) and non-sellers 369 acres. Deducting these from respectively 10,367 and 6,291 acres for the whole block of 213,350 acres gives 5,734 acres and 5,922 acres, a total of 11,656 acres out of 152,544 acres at a proportion of 7.6 per cent.

Table 10.9: Survey costs in Te Urewera rim blocks: Tribunal figures. Where the lien was not paid off in land, the percentage was calculated by determining how much land the lien would have equated to, based on respective prices per acre in the cases of Heruwiwi 1, Heruwiwi 4 (pre-1900 purchases combined), Waiohau 1B, and Tahora 2 (1889–96 purchases). We have derived our overall percentage figure from those blocks where the final survey costs actually met by the Maori owners are known. Thus we have not included in the calculation Ruatoki (which was ultimately paid by the Crown), Kūhawaea, and Waimana.

Summary of Land Lost to Survey Costs: Tribunal Figures

Total land lost directly to survey costs	19,385 acres
Equivalent acreage for amounts paid	11,583 acres
Total survey costs expressed in acres	30,968 acres

On the basis of its table, the Crown stated that between zero and 18.8 per cent of each block was used to satisfy the original boundary and partition surveys – where land was used for this purpose.⁸⁴³

On our analysis of survey costs, the rim blocks fall into four categories:

- ▶ Blocks in which survey costs are not known, or were not paid by Maori owners.
- ▶ Blocks in which survey costs were under 5 per cent of the block area or block purchase value.
- ▶ Blocks in which survey costs were between 6 per cent and 26 per cent of the block area or block purchase value.
- ▶ Blocks in which survey costs were over 50 per cent of the block area or block purchase value.

We will refer to the Crown's table as we discuss each group of blocks. Our analysis of costs met by Maori is, however, of broader scope than the Crown's; where a lien was not paid off in land, we have calculated a percentage of block purchase value by determining how much land the lien would have equated to (see table 10.9).

10.8.3.2.1 BLOCKS IN WHICH BOUNDARY SURVEY COSTS ARE NOT KNOWN, OR WERE NOT PAID BY MAORI OWNERS – WAIMANA, KUHAWAEA, RUATOKI

For the Waimana block, the figure entered in the Crown's table is nil; the Crown stated that a private party paid the title investigation survey cost.⁸⁴⁴ The survey lien was £131 2s 9d, on top of the court costs (hearing, rehearing, and partition hearing costs). Sissons gives a figure for court costs of £17; the total therefore was at least £148.⁸⁴⁵ We note briefly that the private buyer, Swindley, tried to recoup from Tuhoë the costs he paid, and was foiled only by strong opposition. Swindley, who secured 4,804 acres (Waimana 1A) in 1885 in the wake of his purchase of individual shares, paid 'at least some of the expenses' associated with the Waimana hearings (1878, 1880, and 1885) and partitions.⁸⁴⁶ The survey lien was recorded as having been paid on 10 March 1885, soon after the court made its orders at the conclusion

843. Crown counsel, closing submissions (doc N20), topics 8–12, p 45

844. Ibid, p 44

845. Sissons, 'Waimana Kaaku' (doc A24), p 56

846. Ibid, p 57

Block: Waimana

Area: 10,491 acres

Cost of survey: Not paid by Maori

of the partition hearing.⁸⁴⁷ Sissons states that Numia Kereru later gave evidence in court that Swindley had sought to recover the money from Tuhoe. According to contemporary sources, this was normal practice

where private buyers made surveys. Tuhoe were unable to repay Swindley and Kereru said that they offered 1,000 acres to him 'as compensation . . . for his expenses in connection with all the Courts' (emphasis in original).⁸⁴⁸ One thousand acres represented a third of Waimana 1C, one of the two blocks retained by the non-sellers.⁸⁴⁹ Negotiations between Swindley and Tuhoe over the issue broke down – not, it seems, because of the amount of land offered, but because of Kereru's opposition to giving land at all. Whether Swindley recouped any of his costs from the owners in other ways, we do not know.

For Kuhawaea, the Crown has entered no figure. It stated in its costs table that it appeared that survey costs in Kuhawaea were met by a private purchaser, adding that there was no discussion of this on the official record.⁸⁵⁰ Counsel for Ngati Haka Patuheuheu accepted that 'it does appear that the survey costs were met by a private purchaser [Troutbeck] with regard to the Kuhawaea Block'.⁸⁵¹

For the Ruatoki block, the Crown's table gives nil for survey costs discharged by Maori owners in Ruatoki. This was because the survey lien (for the survey made in 1893) was wiped when the block became part of the Urewera District Native Reserve.⁸⁵² The Ruatoki owners were thus spared payment of the boundary survey costs which had been incurred (at £625 these were high) by the passing of the UDNR Act, and the decision that their block would in fact be included in the reserve. Ruatoki had been partitioned in 1894, and on 22 September 1898 the survey lien was divided between Ruatoki 1, 2, and 3. A lien of £275 12s 6d was placed on Ruatoki 1, and £175 on each of the other two blocks. But the survey lien is noted on the survey ledger as having been cancelled in 1898.⁸⁵³

10.8.3.2.2 BLOCKS IN WHICH SURVEY COSTS WERE UNDER 5 PER CENT OF THE BLOCK AREA OR BLOCK PURCHASE VALUE – HERUIWI 4

Only one block falls into the category of blocks where survey costs were under 5 per cent of the block area or block purchase value: Heruiwi 4. The Crown submitted that the survey costs to the owners represented 1.1 per cent of the block's area.

847. Parker, 'Timeline' (doc K4(a)), p 12

848. The offer of this thousand acres was made to Te Kooti as well as to Swindley, and it may have been agreed with Swindley that part of the land was to go to Te Kooti; Sissons suggests that this was because Rakuraku and others hoped that Te Kooti would move to Waimana: Sissons, 'Waimana Kaaku' (doc A24), pp 57–58.

849. *Ibid.*, p 55

850. Crown counsel, closing submissions (doc N20), topics 8–12, pp 42–43

851. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 25

852. Crown counsel, closing submissions (doc N20), topics 8–12, p 44

853. Oliver, 'Ruatoki' (doc A6), pp 83–84

It purchased 64,913 acres and paid £294 2s as a proportion of the total survey cost of £343 17s 8d. A survey lien of £49 15s 8d was divided over the 10,087 acres remaining in Maori hands. This, it says, was discharged by 67 acres of land.⁸⁵⁴ However, the 67 acres that the Crown referred to only accounts for the non-sellers' contribution to the survey costs. It also represents only a part contribution, as around £13 of survey debt owed by the non-sellers on the 4B2 and 4F2 blocks remained undischarged.

Block: Heruiwi 4

Survey lien: £343 17s 8d (3.5 per cent of block purchase value)

There was no designated contribution by the Heruiwi 4 sellers to survey costs, but it seems unlikely that the Native Land Purchase Department would not have sought to recoup these costs when the Crown purchased the land. We have converted the £331 of survey costs (that is, the approximately £344 less £13) into an equivalent land area, on the basis of the average price paid per acre by the Crown in all its pre-1900 purchases. This land area was 3.5 per cent of the total area of the block.

10.8.3.2.3 BLOCKS IN WHICH SURVEY COSTS WERE BETWEEN 6 PER CENT AND 26 PER CENT OF THE BLOCK AREA OR BLOCK PURCHASE VALUE – HERUIWI 1–3, WAIIOHAU, WHIRINAKI, WAIPAOA, TAHORA 2, TUARARANGAIA 1

Most of the blocks for which we have evidence fall into the category for which survey costs were between 6 and 26 per cent of the block area or block purchase value. We comment here on the costs themselves. In the next section, we consider whether they were fair and reasonable, granted the underlying assumption that Maori should have paid some costs of survey.

A number of common issues emerge from a study of survey costs in these blocks. They include:

- ▶ costs charged to owners who had not been consulted at all, or had been inadequately consulted, by those who applied for survey, translating into awards of their land to the Crown;
- ▶ unpaid survey costs triggering subsequent alienation on a substantial scale; and
- ▶ how land was valued for survey costs, and the impact of that valuation on the amount of land taken.

We begin with Heruiwi, a block subject to pre-title dealings dating from the mid-1870s. As a result of pre-title dealings, a unique issue has arisen: whether the owners did in fact pay the survey costs. As we saw in section 10.7, survey costs became entwined with: the price to be paid for the block; advances; back rents; and adjustment of the latter two between sellers and non-sellers.

The question of payment of survey costs for the block has not been easy to unravel. We are inclined to think, however, that the costs were in fact carried by the Maori owners – though they were not satisfied in land. It seems that the

854. Crown counsel, closing submissions (doc N20), topics 8–12, p 43

Block: Heruiwi 1–3

Area: 25,161 acres

Cost of survey: £178 17s 4d (7.2 per cent of block purchase value)

owners met the survey costs through Crown deduction of the amount from back rents it owed the owners by 1881.

We comment first on what the costs were. The Crown entered no figure in the column of its survey costs table designating the proportion of each

block used to satisfy debt. It did refer to 'consideration of discharge for Crown rent for leased block (£100 per annum)'.⁸⁵⁵ The Crown recorded that it was awarded 20,910 acres after purchase of shares in the block, and stated that it covered survey costs for this 'section'.

The evidence available to us on survey costs of Heruiwi 1–3 produced a range of figures. In its table, the Crown gave the cost of survey as £179. It noted that a higher figure of £314 10s was given by Berghan and Fraser, but did not comment on the discrepancy.⁸⁵⁶ The figure of £179 for the survey cost was sourced to Tulloch, who cites Native Land Purchase Department Under-Secretary Richard Gill. Gill stated in an 1878 memorandum that the Crown had spent £178 17s 4d on the Heruiwi survey.⁸⁵⁷ Berghan gives two slightly different figures of around £314, but in fact her sources record exactly the same figure. On 23 August 1878, the Inspector of Surveys informed the chief judge that survey charges due on the block amounted to £314 10s 3d.⁸⁵⁸ Then, on 17 November 1881, Percy Smith telegraphed a list of survey liens registered in the land court which included that for Heruiwi, and gave the same amount.⁸⁵⁹ It seems to us that the higher figure (£314) is what Maori agreed to pay for the survey at the outset, while the lower one (variously given as £178 or £179) is the actual survey cost that was charged against the block. The £314 was almost certainly based on a Maori agreement to pay threepence per acre for the survey; the original area as given on the Heruiwi plan was 25,161 acres – which at threepence an acre gives a cost of £314 10s 3d. (We note below that there was a similar discrepancy between the contract price and the cost price in the case of Heruiwi 4 block.) And the survey cost for Heruiwi was recorded in the official returns from 1877 as £178 17s 4d, under the heading 'Incidentals'.⁸⁶⁰ We return to these figures below.

Our view as to how the survey costs seem to have been met is based on a comparison of the various figures recorded as owing to the Maori owners, and paid

855. *Ibid*, p 42

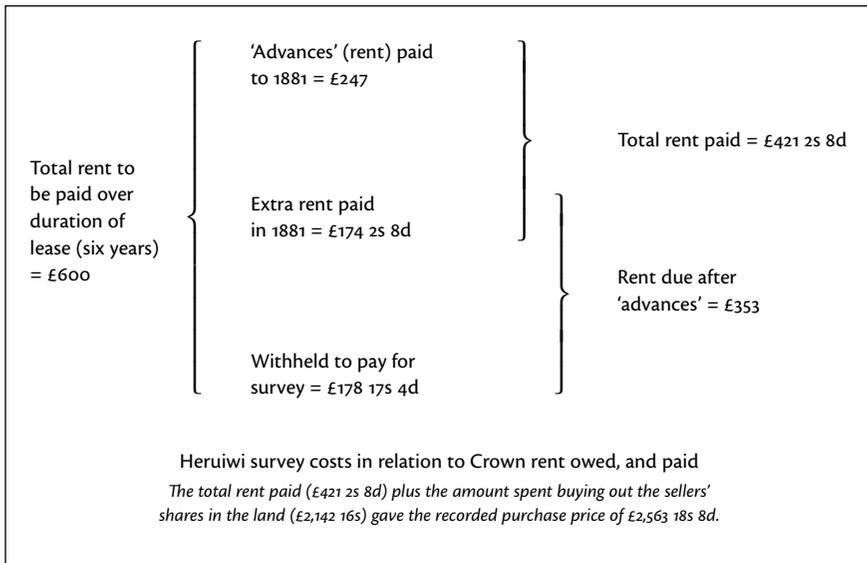
856. *Ibid*

857. Kathryn Rose, 'The Bait and the Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (Wai 1200 ROI, doc A54), p 232 (Tulloch, 'Heruiwi 1–4' (doc A1), p 24); see also McBurney, 'Ngati Manawa and the Crown' (doc C12), p 281

858. Berghan, supporting papers to 'Block Research Narratives' (doc A86(l)), p 4022

859. Berghan, 'Block Research Narratives' (doc A86), p 569; see also Berghan, supporting papers to 'Block Research Narratives' (doc A86(l)), p 4154

860. 'Lands Purchased and Leased from Natives in North Island', 1 September 1877, AJHR, 1877, c-6, p 11. There was a small increase in the amount over the years that followed.



to them, over several years, in the evidence before us. The payment of the survey costs, as we have noted, is intertwined with that of the back rents owing on the Heruiwi lease, which dated from 1875, and with payments made by the Crown as advances on the purchase of the block.

If we add the two amounts together (the sum paid by the Crown in back rents, and the sum it paid to the owners in advances – a total of £421 2s 8d) and deduct this from the amount owing to the owners for back rents (£600), the result is £178 17s 4d, which was the cost of the boundary survey. The evidence before us is as follows:

- ▶ In March 1880, when Henry Mitchell, the land purchase officer, first raised the question of an offer of Heruiwi block with the Native Department, he referred to the lease agreement then in force: 'All the Heruiwi Grantees signed deed of lease back rentals date from 1875, survey costs to be deducted.'⁸⁶¹ That is, the survey costs were to be deducted from the back rentals.
- ▶ Gill, the Under-Secretary for the Native Department, reported details of the Heruiwi lease to the Native Minister on 9 May 1881, when the purchase of the block was under consideration. He stated that '£247 only has been paid on rent account leaving £353 due on 2nd of last Feb[ruar]y . . . but the advances rent £357 [sic] will be increased by the cost of survey.'⁸⁶² This important statement shows that Gill knew that the total owing to the Heruiwi owners for rents (1875–81) was £600 (that is, £247 plus £353). We note that he had

861. Mitchell to Gill, 25 March 1880 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(l)), pp 4148–4149)

862. Gill to Native Minister, 9 May 1881 (McBurney, 'Ngati Manawa and the Crown' (doc c12), p 289)

recorded the Heruiwi survey costs himself in 1878 as £178 17s 4d – a quite separate amount from those he gave for the rents.⁸⁶³

- ▶ The official published record shows that at that time £247 had indeed either been paid as rent or been advanced to owners since 1874; and that the survey cost (£178 17s 4d, which had crept up to £183 12s 4d by 1881) was recorded separately under the heading 'Incidentals'.⁸⁶⁴
- ▶ We are not aware, however, that the £353 to which Gill referred was in fact paid to the Heruiwi owners. The only sum we know of was the £174 2s 8d paid on 2 July 1881. According to both Mitchell and Gilbert Mair (who was sent to conduct this particular purchase), this sum was paid to the owners alongside sums paid to sellers (these amounted to £2,142 16s). Mitchell specifies that the £174 was for the Heruiwi lease.⁸⁶⁵ We also know from Mair's diary that the back rents had been a major topic of discussion at the time (though he does not tell us more than this.)⁸⁶⁶ In addition, £247 had already been paid (as advances) up till 1879. These sums total £421 2s 8d. Thus, as we noted above, if we deduct those amounts (totalling £421 2s 8d), from the total £600 owing to the owners for back rents, we arrive at a figure of £178 17s 4d. This was the exact cost of the Heruiwi boundary survey.
- ▶ If we look at the figures in another way, we note that the total figure officially recorded as the cost of the Heruiwi purchase was £2,786 15s. This is evidence that figures which Mair gave the court at the subdivision hearing in 1881 as the agreed payment to Maori were not what was actually paid. On that occasion, he mentioned a total figure of £3,000, which he said would have included £500 for back rents.⁸⁶⁷ But the figures actually paid were lower because the Crown did not succeed in buying the whole block (24,394 acres) and the court thus awarded it only 20,910 acres.⁸⁶⁸

Thus, the Crown included the survey costs as part of the overall cost of the acquisition of the Heruiwi 1 block (separate from the purchase price). But the evidence suggests that though it paid the costs directly (to the Survey Department), it also deducted them from the back rents owing to the owners, who thus carried the costs themselves.

We conclude that:

- ▶ the survey was charged at the actual price of £179, not the £314 which we assume to be the contract price;

863. Gill, memorandum [c30 July 1878] (McBurney, 'Ngati Manawa and the Crown' (doc c12), p281)

864. Tulloch, 'Heruiwi 1-4' (doc A1), pp28-29; Tulloch's table is drawn from several years of returns of lands purchase and leased or under negotiation in the North Island published in the *Appendix to the Journal of the House of Representatives*.

865. McBurney, 'Ngati Manawa and the Crown' (doc c12), p 295

866. Mair diary 31, 25 June-1 July 1880 (Peter McBurney, comp, supporting papers to 'Ngati Manawa and the Crown, 1840-1927', 4 vols, various dates (doc c12(a)), vol 1, pp101-102)

867. Opotiki Native Land Court, minute book 2, 13 December 1881, fol 155

868. We thus discount Tulloch's suggestion, based on Mair's figure of £500, that the sellers' share of the back rents would have been some £428: Tulloch, 'Heruiwi 1-4' (doc A1), p35.

The Final Cost of Heruiwi 1–3, as Listed in Official Figures

The final figure of £2,786 15s comprised the £2,563 18s 8d given as the purchase price, and £222 16s 4d listed as ‘incidentals’.¹ It is clear from the correlation between the initial amount listed in the official tables as incidentals (£178 17s 4d) and Gill’s identical 1878 record of the survey cost that the £222 16s 4d included the survey cost (we note an additional figure of £36 entered as an incidental charged to the Heruiwi lease in 1878).²

1. The £2,563 18s 8d is made up of the £2,142 16s paid to the sellers, £421 2s 8d, the total of the advances paid by the Crown up to 1881, and the back rent paid in 1881.

2. See Tracy Tulloch, ‘Heruiwi 1–4’ (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A1), p 29. McBurney records that these incidentals included mapping and surveying expenses, and reimbursement for clothes destroyed by fire at a survey camp: Peter McBurney, ‘Ngati Manawa and the Crown, 1840–1927’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C12), p 282.

- ▶ the entire cost price of the boundary survey was paid (leaving no parent block boundary survey liens outstanding after the purchase of Heruiwi 1); and
- ▶ on the evidence before us, the actual price of boundary survey was subtracted from the rental due to all the owners (so that both sellers and non-sellers paid the cost of the survey).

It is our view that the Crown withheld the sum of £178 17s 4d from the amount owed the owners for back rents, to cover the survey costs. Thus, though the Heruiwi owners did not have to pay for the boundary survey in land at the time of the Crown purchase, they did in fact carry the cost of the survey. This was 7.2 per cent of the value of the land.

10.8.3.2.3.1 Further survey costs

Following the award to the Crown of the bulk of the block in 1881 (20,910 acres), those who had not sold were awarded Heruiwi 2 (2,484 acres) and Heruiwi 3 (1,000 acres). The Crown states that a ‘proportion’ of the survey cost over Maori-owned sections (Heruiwi 2 and Heruiwi 3) was registered as liens. The Auckland district survey office notified the court on 17 August 1883 that any surveying liens against Heruiwi block were to be cancelled, and replaced by a lien for £18 for Heruiwi 2, and £12 6s for Heruiwi 3.⁸⁶⁹ The Crown’s statement is based on the description of the costs to the land court by the Crown’s representative Kallender in 1895. What he said was that the charges were a ‘proportion of the original survey charge’ over

869. Assistant Surveyor-General to chief judge, 17 August 1883 (Berghan, supporting papers to ‘Block Research Narratives’ (doc A86(l)), pp 4015–4017)

the parent Heruiwi block.⁸⁷⁰ In fact, in light of our calculations above, these must have been the costs of cutting the boundary lines between the two blocks and Heruiwi 1. Thus, £30 6s was charged to the non-sellers' blocks. The Crown, drawing on Tulloch's statement

that she located no record of payment of these charges, states that no evidence is provided concerning how these liens were discharged.⁸⁷¹ In the absence of evidence we cannot assume either that the Maori owners ultimately paid them, or that the charges were remitted.

The Crown entered no figure in its table for Waiohau; it stated that this was because there was no information on the record about survey costs. Some information has, however, come to light. The purchase of Waiohau was a private one, and we do not have an exact figure for it. The issue of payment for the Waiohau survey came up during Judge Wilson's inquiry into the legality of the partition and sale of Waiohau 1B. Harry Burt, cross-examined by Mehaka Tokopounamu as to who surveyed the 14,464-acre Waiohau 1, stated that he did not know. Judge Wilson intervened to state that Mr Edgecumbe had done the survey. At that point, Mehaka Tokopounamu stated: 'We paid for it. We paid the surveyor £200 for survey.'⁸⁷² We note that Burt claimed that he had paid his solicitor a bill for £30, part of which was for surveying. But he did not argue with Tokopounamu.⁸⁷³

While it is possible Tokopounamu may have rounded off the total, his evidence given before a judge was unchallenged. It is difficult to give a comparison with other blocks on how much the survey cost relative to the value of the land, but if we use Soutter's £950 purchase of Waiohau 1B in 1886 as a benchmark, on a pro rata basis, Waiohau 1 would have been worth approximately £1,960. Thus the survey cost paid by Ngati Haka Patuheuheu is likely to have been equal to 10.2 per cent of the block.

Waipaoa, as we have seen earlier, was also subject to pre-title dealings by the Crown – but of a rather different kind. In Waipaoa, a specific agreement was made before title investigation about the payment of survey costs. That agreement was a written one between the Crown and two Ngati Kahungunu chiefs, Hapimana Tunupaura and Tamihana Huata. It was signed in November 1882 as the chiefs sought to protect Waipaoa lands in the wake of Crown attempts to buy land in neighbouring Tahora. According to Ms Stevens, the Surveyor-General approved the survey on condition that the chief surveyor at Napier negotiate an agreement with the Ngati Kahungunu applicants as to the price per acre (see the sidebar on page 1219). Such agreements were provided for by section 72 of the Native Land

Block: Waiohau 1

Area: 14,464 acres

Cost of survey: £200 (10.2 per cent of block purchase value)

870. Maketu Native Land Court, minute book 14, 6 May 1895, fol 99

871. Crown counsel, closing submissions (doc N20) topics 8–12, p 42

872. John Battersby, comp, supporting papers to 'Report on Waiohau 1 Block [1882–1920]', various dates (doc C1(a)), p 157

873. John Battersby, 'Report on Waiohau 1 Block [1882–1920]' (commissioned research report, Wellington: Crown Law Office, 2004) (doc C1), p 40

Act 1873, which required the ‘fixed rate’ to be paid for the survey to be specified as well as whether the costs were to be met in land or money. The Waipaoa agreement did not specify a fixed rate for the survey.

Stevens notes that the agreement went beyond the conditions of the Surveyor-General, in that it specified a particular piece of land at the eastern

end of the Waipaoa, known as the Matakuhia block, to pay the survey costs.⁸⁷⁴ The Crown submitted to us that the agreement was ‘an attempt to ensure that disputes were avoided and that payment for the survey was forthcoming.’⁸⁷⁵

The Crown did secure its payment in land (5,822 acres), but in the years that followed there was considerable tension, both among the claimants to the court, and as between the claimants and the Crown. We can categorise the problems arising from the Waipaoa pre-title survey agreement as:

- ▶ uncertainty on the part of the chiefs about the terms and meaning of the agreement;
- ▶ the size of the Crown award for survey costs, which Huata and Tunupaura challenged on the basis of valuation of the land;
- ▶ the allocation of survey costs among those the court found to be owners, after its investigation of title;
- ▶ the court award of land due to the Crown, which differed from that in the pre-title agreement; it was to be taken not in one block but in two blocks, half from land awarded to Ngati Kahungunu, and half from land awarded to Ngati Ruapani and Ngati Hika; and
- ▶ the subsequent inclusion of land in and around Lake Waikareiti within the area to be awarded from the Ngati Ruapani blocks to the Crown

We refer briefly to these points. In respect of the chiefs’ uncertainty as to the terms and meaning of the agreement, we note that although Preece stated that the chiefs had understood the price when they signed, Huata sought changes immediately after the agreement to the rate at which land was to be paid for the survey – at one acre for every three shillings, rather than the two shillings recorded in the agreement. Evidently he hoped that less land would be taken. At the later court hearing, Tunupaura said they had understood the land to be cut off would be a security for the cost of survey.⁸⁷⁶ It is not clear whether this was because there had been miscommunication from the outset, or because by 1889 some of the unwelcome ramifications of the agreement were evident. But the position of the Ngati

Block: Waipaoa

Area: 39,302 acres

*Survey award to Crown: 5,822 acres
(14.8 per cent of block area)*

Amount owing for survey by 1888:

£687 16s 7d (including interest of

£114 13s 6d)

874. Stevens, ‘Waipaoa’ (doc A51), p 11

875. Crown counsel, closing submissions (doc N20), topics 8–12, p 54

876. Stevens, ‘Waipaoa’ (doc A51), p 12; Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), pp 234–235

The Waipaoa Survey Agreement (English Text), November 1882

W*E the undersigned owners of the Waipaoa and Matakuhia Blocks in the Waikaremoana and Tuahu Survey Districts, which we desire to have surveyed agree to pay for such survey in land, to be marked off and surveyed under the direction of the Chief Surveyor of Hawke's Bay.*

'The payment in land to be at the rate of one acre for every two shillings of the cost of the survey.

'We further agree that the land to be given in payment for the survey shall have a frontage to the Ruakituri River, extending from Erepeti upwards as shewn [sic] on the sketch in the margin, provided that the boundary shall extend back from the River a distance of from one to two miles.

'The land to be given in payment for the survey is indicated by red tint on the sketch.'

Owners of the Waipaoa and Matakuhia blocks¹

1. 'Agreement to Pay in Land for the Survey of the Waipaoa and Matakuhia Blocks', 21 November 1882 (Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), p 11

Kahungunu chiefs that the Crown was seeking too much land for survey costs was evident from the beginning. Their concerns were also increased during the survey process itself, when the surveyor Henry Ellison was said to have tried to lay off the Matakuhia block before he surveyed the rest of Waipaoa. Ellison would later claim he had been obstructed, and would submit a claim to the land court in 1888, citing his 'detention' while carrying out the survey.⁸⁷⁷ His claim was not successful. Huata told Preece he had simply asked Ellison to leave the survey of the Matakuhia block until the whole of the block had been surveyed. He did not see how Ellison would know how much land to lay off until the final cost of the survey had been calculated.⁸⁷⁸ Nor, indeed, do we.

When the Waipaoa block finally went before the court in 1889, the size of the Crown award to cover the cost of the survey, and thus the valuation of the land, became an issue. In 1886, the Surveyor-General was informed that the cost of the survey amounted to £573 3s 1d, though by 1889 it had increased, because of interest charges, to £687 16s 7d.⁸⁷⁹ The cost of the survey in land, according to a certificate

877. Stevens, 'Waipaoa' (doc A51), p 14

878. *Ibid*, p 13

879. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 160

issued in 1888 under the Native Land Act 1886, was the Matakuhia block of 5,822 acres, which had been marked on the certified plan of Waipaoa.⁸⁸⁰ (According to Stevens, the chief surveyor later dismissed Ellison's survey as being 'unreliable', but we have no further information on his views.⁸⁸¹) When the court was preparing to make its award to the Crown for survey costs, it raised the issue of reallocating the award in two blocks, rather than one. At that point, the claimants discussed the matter among themselves and agreed to give the Crown a total of 2,000 acres, 'one in the portion already surveyed off, on the Govt Boundary [*sic*] & the other portion at Waikareiti'.⁸⁸²

The judge at once rejected this suggestion: the court alone would decide what the Government would have, but in any case the proposal for 2,000 acres 'cannot be entertained'.⁸⁸³ Tunupaura's attempts to reopen the matter, first by seeking a rehearing to secure a return of some of the land Ngati Kahungunu lost in the award, and then by appealing to the Native Minister, Edwin Mitchelson, were also unsuccessful. Tunupaura complained that the two blocks acquired by the Crown were far too large and the valuation per acre settled on had been too low. He hoped that 'the price [valuation] per acre be fixed at 5/- because Waipaoa is fine land notwithstanding it being covered with forest'.⁸⁸⁴ Lewis, the under-secretary, minuted on 18 April that Tunupaura should be informed that 'the award of land to the Crown cannot be reopened'.⁸⁸⁵ And that was the reply Tunupaura received.

The Crown submitted to us that the 1882 valuation of the land at two shillings an acre was comparable to that placed on other land in the vicinity at that time, and that Judge Wilson considered it appropriate in 1890.⁸⁸⁶ But we note that in 1897, when the Crown embarked on purchase in Waipaoa, the Surveyor-General advised that the starting price per acre should be three shillings.⁸⁸⁷ Tunupaura's determined attempt after the court's decision to have the valuation increased is evidence that Ngati Kahungunu considered it unjust. We note that they did not think payment as such was unjust – it was the amount the Crown wanted. As Tunupaura put it: 'We consider that this is a heavy loss to us for the portions set apart to pay for the survey are much too large especially as the entire block only contains 39,302 acres'.⁸⁸⁸

Not surprisingly, a further issue that emerged from the pre-title agreement was the allocation of survey costs among those the court found to be owners in the Waipaoa block. The court was critical of the Government for specifying a block

880. Stevens, 'Waipaoa' (doc A51), pp14–15

881. *Ibid*, p 40

882. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 159

883. *Ibid*, fol 160

884. Tunupaura to Mitchelson, March 1890 (Berghan, 'Block Research Narratives' (doc A86), p716); see also Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), p6234

885. Lewis to Native Minister, 18 April 1890 (Berghan, 'Block Research Narratives' (doc A86), p716); see also Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), p6233

886. Crown counsel, closing submissions (doc N20), topics 8–12, p53

887. SP Smith, minute to Sheridan, 22 April 1897 (Stevens, 'Waipaoa' (doc A51), p34)

888. Hapimana Tunupaura to Native Minister, March 1890 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), pp6234–6238)

Award of Land to the Crown for Survey Costs in the Waipaoa Block, 1889

The court awarded the Crown 5,822 acres to be taken in two blocks of 2,911 acres each (designated Waipaoa 1, at the eastern end of Waipaoa, and Waipaoa 2, at the western end).

The court awarded eight other divisions of the block to Maori: part 3 to Ngati Hinaanga, part 4 to Ngati Wahanga, part 5 to Ngati Poroara, part 6 to Ngati Tapuae, part 7 to Ngati Mihi, part 8 to Ngati Hinetu, part 9 to Ngati Hika, and part 10 to Ngati Ruapani and Ngati Hika.

Waipaoa 2 (2,911 acres) was cut out from Waipaoa 10, the block awarded to Ngati Ruapani and Ngati Hika (leaving them 2,909 acres).¹

1. Wairoa Native Land Court, minute book 3B, 28 April 1889, fol 166; Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), pp 35–36, map 8

to be taken before the owners of that block had been determined by the court. It pointed out that it could not have been known in 1882 whose part of the land the survey costs had been charged against:

In the Govt case the land has been taken in a portion of the Block to recoup the survey, before the owners of the block & of that portion were known. Now the block is in two parts belonging to two sets of owners, but owing to the pressure brought by Mr Baker to bear on the natives, the portion of land for payment of survey was taken from one set of owners only. In that Mr Baker has placed the Govt in a false position.⁸⁸⁹

The law in fact was quite clear that the owners had to be declared by the court first, before a particular piece of land could be agreed on in payment of survey costs, and it was the court that was empowered to order a 'defined portion, to be ascertained and agreed upon between the Inspector and the Native owners of any land so surveyed' to be transferred by the owners to the Crown for survey costs.⁸⁹⁰ Having flexed its muscles, the court upheld (under 1886–88 legislation) the Government's claim to land for the survey costs. As we have seen, it moved to award the Crown two blocks in different parts of Waipaoa, stating that this would be fairer, because Ngati Kahungunu and Ngati Ruapani would then share the costs (see the sidebar above).

889. Wairoa Native Land Court, minute book 3B, 15 April 1889, fol 158; see also Stevens, 'Waipaoa' (doc A51), p 21

890. Native Land Act 1873, s 73

Was the allocation to Ngati Ruapani of half the survey costs (or, rather, their equivalent in land) fair? There are two issues here. The first is whether any should have been charged to Ngati Ruapani. Counsel for the Wai 945 Ngati Ruapani claimants pointed out rightly that the survey agreement had been made entirely by two Ngati Kahungunu leaders.⁸⁹¹ As we noted in section 10.5, however, the survey was not obstructed by Waikaremoana chiefs, and one Ngati Ruapani leader had cooperated with it. Hapi Tukahara identified himself as a ‘member of Ngatiruapani’ at the hearing, and stated that he had conducted the survey on part of the block (from Aniwaniwa to Pukepuke) ‘on behalf of Ruapani’, because ‘we owned this part of the block’.⁸⁹² He denied the statement of Wi Hautaruke (claiming through Ruapani and Tuhoe) that Tukahara had helped because he was paid wages. The court’s view at the time was that those with interests in the land had endorsed the Ngati Kahungunu arrangement by assisting with the survey and agreeing to have their case heard based on the survey plan.⁸⁹³ It is possible, of course, that they did so because they considered it better to be involved than not, once the survey was under way.

The second issue is whether the costs were shared fairly across the owners of the various subdivisions. That hinges on the identity of Ngati Hika, who received a separate award in Waipaoa 9, as well as being included with Ngati Ruapani in Waipaoa 10. Waipaoa 9 (12,600 acres) was over twice the size of Waipaoa 10 (5,020 acres) and was awarded to 45 owners of Ngati Hika. Waipaoa 10 was awarded to 132 owners (including 31 Ngati Hika, who were also in Waipaoa 9). The Crown’s survey-costs block was cut out of Waipaoa 10 – the smaller of the two blocks, with the most owners. Ngati Hika were claimed as a hapu by both Ngati Kahungunu and Ngati Ruapani, and Tunupaura told the court that he had put Ngati Hika on both the western and eastern sides of the block because they had rights on both sides.⁸⁹⁴ In other words, if Waipaoa 9 and 10 are taken together as land awarded to Ngati Ruapani and its hapu, then over half the parent block went to Ngati Ruapani. If, however, the award of Waipaoa 10 was intended to include only those Ngati Hika who had the closest links to Ngati Ruapani, then the Crown award fell heavily on those owners in Waipaoa 10. We cannot take the matter any further.

A further grievance for Ngati Ruapani arose from the court’s decision to change the allocation of land to the Crown for survey costs. After Waipaoa 2 was designated, the boundary in the west of the block was drawn to take in a third of Lake Waikareiti. Counsel for the Wai 945 Ngati Ruapani claimants submitted that the decision to adopt the deposited plan, with the boundary running across the lake rather than to its edge (the latter as shown in a very basic drawing made by Dennan, the Crown’s representative in court) ‘was made entirely by a handful

891. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 27–28

892. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), p 252

893. Wairoa Native Land Court, minute book 3B, 12 April 1889, fol 146 (Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), p 255)

894. Stevens, ‘Waipaoa’ (doc A51), p 24

of officials in the Survey and Native Land Purchase departments.⁸⁹⁵ The Crown maintained that the land court selected the Lake Waikareiti boundary, citing the concern of officials at its inclusion of part of a lake.⁸⁹⁶ But the sketch plan deposited in the court, certainly by May 1889, must, we assume, have been supplied by a surveyor, or a Crown official; the court simply received the plan.⁸⁹⁷ Stevens states that it was the discrepancy between the two plans that aroused concern within the Survey Department. An application for a rehearing was considered – and the idea rejected. The Surveyor-General, S Percy Smith, however, commented:

that the Under Secretary of the Native Department had said that he had talked to Williams [the chief surveyor at Napier] about the matter in Napier recently and that they had agreed that the boundary as set forth on the plan that had been deposited with the court should be accepted as the correct one.⁸⁹⁸

This was the plan showing the boundary crossing the lake. Percy Smith himself was not very happy with the boundary (perhaps because it reduced the amount of dry land in the Crown's award). One possible motive for putting the boundary through Waikareiti, however, was to reduce costs, as the judge had instructed that the cost of surveying this unforeseen partition in the western part of the block should be met by the Crown.⁸⁹⁹ (This was despite an earlier request by the Crown's representative that the court consider whether the Government would receive extra land for the cost of the survey that would now be required.⁹⁰⁰) We consider the impact of this boundary for those who claimed rights in the lake in a later section of the chapter.

We turn next to Tahora 2. We give figures for the whole of Tahora 2 (since our discussion of the survey below necessarily relates to the whole block) and figures for Tahora 2, *excluding* Tahora 2B and Tahora 2B1, which were awarded to Ngati Ira (Whakatohea).

In Tahora 2, as in Waipaoa, there was a history of pre-title dealings, and we have already outlined the Crown's encouragement of the early surveys in the region made by Charles Alma Baker. We have also discussed the circumstances in which Tahora 2 was dragged into the land court as a result of applications by individuals who did not represent their hapu, and were found not to have interests in the land (see section 10.5). Central to the progress of the hearing was the survey secretly done by Charles Alma Baker in 1887–88, leading to the completion

895. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 28

896. Crown counsel, closing submissions (doc N20), topics 8–12, p 52

897. The sketch was enclosed in a note from Brooking, registrar of the land court, to Sheridan at the Native Office, Wellington, on 17 May 1889. See Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6247–6248.

898. SP Smith to chief surveyor, Napier, 17 July 1889 (Stevens, 'Report on the History of the Waipaoa Block' (doc A51), p 25)

899. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 163

900. Stevens, 'Waipaoa' (doc A51), pp 21–22

Block: Tahora 2 (whole block)
Area: 213,350 acres
Area effectively purchased to satisfy lien: 16,658 acres (7.8 per cent of block area)
Deducted from payments to sellers: £1,036 10s 4d
Area awarded to Crown from non-sellers' portion: 6,291 acres
Amount owing for survey by 1893: £1,823 4s 3d (including £223 4s 3d interest)

Block: Tahora 2 (excluding 2B, 2B1)
Area: 152,544 acres
Area effectively purchased to satisfy lien: 11,656 acres (7.6 per cent of block area)
Deducted from payments to sellers: £740 11s 5d
Area awarded to Crown from non-sellers' portion: 5,922 acres
Amount owing for survey by 1893: £1,313 16s 1d

of a plan. As we have seen, the plan was eventually approved by the Government – despite its knowledge of forcefully expressed Maori opposition, and the agreement among all the leading chiefs of the many hapu that the survey should never have taken place and the hearing should not proceed.

The question of who should pay for the survey arose immediately, once the court had given judgment in the case. In submissions, the Crown did not really address the claimants' concerns, reflecting those of many rangatira at the time, about loss of land for an unwanted survey. It accepted, however, that once the survey went ahead, it was 'an important part of the chain of events that led to title investigation and loss of land and money'; but, as we have seen, it also considered that title determination was bound to have occurred at some point anyway – and with it, presumably, a survey.⁹⁰¹

10.8.3.2.3.2 Did those found to be the owners of Tahora 2 have to pay the survey costs, even though the survey had been done in secret and the owners had not wanted one?

The question of the survey lien went before the court after the title investigation concluded. On 12 April 1889, Baker applied for survey costs of £1,887 7s 11d. Counsel for Te Whanau a Kai described this sum as 'staggering . . . a ruinous expense to the owners,'⁹⁰² and he submitted that 'the legality of the survey is a less significant point than the issue as to whether the Tahora owners should have ended up having to lose land for a survey they did not ask for and did not want.'⁹⁰³ For once the surveying plan had been certified (although, as we have seen, it

901. Crown counsel, closing submissions (doc N20), topics 8–12, p 59

902. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 17

903. Ibid, p 19

Tahora 2 Survey Costs: Key Issues

Did those found by the court to be owners in Tahora 2 have to pay the survey costs, even though the survey had been done in secret, and the owners had not wanted one?

Why were the tribal owners not able to cut out the block they chose within Tahora 2 to pay the survey costs?

How were the survey costs ultimately paid?

should not have been), the court took the view that it had no choice but to accept any charging order that the surveyor might seek to place on the land.

Was this the case? The claimants did not think so; they questioned the court's decision. Baker applied for his costs under sections 81, 82, and 83 of the Native Land Court Act 1886.⁹⁰⁴ The claimants pointed to the evidence of Professor Binney, who questioned the court's interpretation of the Act on this point. She cited sections 81 and 83, stating that the court was not in fact *required* to make orders: the court 'may make an order' in favour of the surveyor. Counsel for Te Whanau a Kai also maintained that the provisions of sections 82 and 83 were not mandatory. He submitted that section 82 allowed the court to order that where a claimant or counter-claimant had paid for a survey, other parties whose rights were recognised by the court could share in the survey costs. And section 83 gave the court 'yet another option' in such cases: it might make an order in favour of the surveyor himself, if it seemed that Maori were indebted to him for the survey and plan costs. Given these provisions, counsel submitted, the court 'could have turned Baker down.' But he concluded that though the legislation did leave the court 'some room for manoeuvre' in practice the court did not consider it had a choice.⁹⁰⁵

Counsel queried Judge O'Brien's statutory interpretation skills, but we note that Judge O'Brien had in fact sought advice from the chief judge about his power to award survey costs in the case. Chief Judge Seth Smith's reply was that when judgment had been given O'Brien might proceed to deal with the surveyor's claim at once. If Baker's employers (that is, Nikora and Hautakuru) were found to be the owners of the land, then section 81 of the Act would apply. If other Maori were found to be the owners, then sections 82 and 83 would apply.⁹⁰⁶

904. O'Brien, file note, 12 June 1889, NLC 89/252, Tahora 2A file, Maori Land Court, Gisborne

905. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 28

906. O'Brien to chief judge, no date, and Smith to O'Brien, 19 December 1888 (Boston and Oliver, 'Tahora' (doc A22), p 81)

**Provisions Regarding Payment to Surveyors:
Sections 81, 82, and 83 of the Native Land Court Act 1886**

81. Security for surveyors' charges—If at any time it be made to appear to the Court that it has been certified by the Surveyor-General, or any other officer authorized by him for the purpose, that money was owing to any certified surveyor by Natives for any plan used or accepted as aforesaid, or for the survey on which such plan was founded, and that any such sum or any part thereof is still owing and unpaid, the Court may make an order in favour of such surveyor, that the estate and interest in the land the subject of such survey of the Natives owing such money shall be charged with the payment to such surveyor of the amount so owing.

Such charge shall have the effect of a mortgage of such estate and interest in favour of the surveyor.

82. Cost of survey by unsuccessful Natives—If any claimant or counter-claimant to Native land shall have had the same surveyed at his own cost, and on investigation of the title to such land it shall be found that other Natives are entitled to the whole or any part thereof, it shall be lawful for the Court, in case it shall order a certificate of title to any other than the Natives who made such survey, to order also that the whole or a proportionate part of the cost of such survey and of the plan used by the Court the result of such survey, shall be paid to the Natives who made such survey by the Natives in whose favour the order for a certificate is made.

Such order shall have the effect of a mortgage of the land the subject of such certificate in favour of the claimant for the amount mentioned in such order.

83. Court may make order in favour of surveyor—Instead of making such order in favour of the Natives aforesaid, the Court may make it in favour of any certificated surveyor to whom it may appear that such Natives are indebted for the cost of such survey and plan, provided that such plan be 'approved' as aforesaid.

In our view, the judge had no room to move at all. Section 82 gave the court authority to award costs in situations where those who had made the survey were found not to be owners. Those who were not owners had no land to which a charge for the survey costs could be attached. Awarding no survey costs was not an option; the entire regime was based on the premise that Maori would pay the costs. For this reason, the opposition of tribal leaders to the survey charges was not likely to have gained much traction – despite its unanimity, and despite the judge's stated sympathy with their position. At the survey costs hearing, opposition to the charge was expressed by all those who gave evidence – Pere, Tamaikoha of Tuhoe, and Ngaiti of Ngati Wahanga and Ngati Hinaanga. Wi Pere attacked

the survey on all counts – and argued that, in the circumstances, those who had undertaken it should pay for it.

The judge acknowledged the anger of those in court, but it was at this point that he said he had no choice – if the survey and the plan had been certified, the court must award the surveyor his costs. But he left the door open to the parties to challenge the amount.⁹⁰⁷ He then awarded the full sum to Baker, making two orders. The first charged the sum owing to Baker on Tahora 2. The second was an order that the costs be ‘apportioned according to acreage’ on each of the 12 Tahora divisions (when their acreages should be ascertained); the Maori owners of each division should meet their proportionate share of the cost.⁹⁰⁸ (We consider the significance of these orders below.) The spokesmen for the owners expressed their anger about the award in strong terms: Wi Pere said, ‘we will not pay a single penny’; Tamaikoha stated, ‘I shall leave this confiscation of the land to be decided by some other authority as to whether it is right or wrong’;⁹⁰⁹ and Ngaiti said, ‘if this Court proceeded to make awards under the Act of course that was the court’s only course but I on the part of all the people – distinctly state that we will not pay the cost of this Survey.’ Pere pointed out that most of the Tahora land was inalienable and that the Maori owners could not raise a mortgage against it.⁹¹⁰

Wi Pere cabled the Native Department at once to warn that the owners would not pay Baker:

Tahora No 2 awarded to us. Applicants for survey found not entitled – Their names not in list even. According to new Act [1886] survey costs awarded owners[,] unanimously objected. If govt pay surveyor they do so at their risk. People found Owners of land will not pay survey. Am sending letters with reasons – gave objections to Court.⁹¹¹

And applications filed immediately after the decision were for both a title and survey lien rehearing. Wi Pere’s lawyers applied for a rehearing of the lien on several grounds. O’Brien responded in a memorandum to the chief judge, stating his readiness to reduce the lien if the owners could give him convincing reasons why he should, but said that they had rejected the payment of the lien outright. ‘My sympathies,’ he wrote, ‘were wholly with the people, who I thought had a real grievance, but it seemed my duty to give the surveyor his order, leaving the

907. Opotiki Native Land Court, minute book 6, 12 April 1889, fol 9

908. Gisborne Native Land Court, minute book 24, 13 April 1889, fols 222–223; Boston and Oliver, ‘Tahora’ (doc A22), pp 83–84. We have discussed the assessor’s opposition to charging an award against the owners elsewhere in this chapter.

909. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 98; Gisborne Native Land Court, minute book 24, 12–13 April 1889, fols 220, 222; Boston and Oliver, ‘Tahora’ (doc A22), p 84

910. Opotiki Native Land Court, minute book 6, 12 April 1889, fol 10, 13 April 1889, fol 15

911. Wi Pere, Wiremu Pomare, and others, 13 April 1889 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 98)

parties to apply for a rehearing, & I did so.⁹¹² The chief judge, Seth Smith, did subsequently grant the application for a rehearing of the survey lien on 5 March 1890, on several grounds – among them that the owners, having not been consulted at the time of the survey, had had no opportunity to negotiate the survey cost. This was particularly damaging because regulations under the 1886 Act made provision for survey rates in accordance with block size, but Tahora 2 was so large it was off the scale, so the survey cost had to be settled by negotiation.⁹¹³ But the chief judge also stated that the legality of the survey itself would not be revisited. His position, in summary, was that ‘The Native owners have reaped the benefit of the survey and ought therefore to pay for it.’⁹¹⁴

10.8.3.2.3.3 Why were the tribal owners not able to cut out the block they chose within Tahora 2 to pay the survey costs?

A second issue is the attempts of the tribal leaders to meet the survey charge, and their inability to do so in the way they wished. The Tahora survey lien was reheard in October 1891 by Judge David Scannell. In the circumstances it was not surprising that William Rees, Wi Pere’s lawyer, reported that an agreement had been reached between his clients and Baker’s lawyer, that the amount of the charge should be set at £1,600. As Rees pointed out, the charge – with interest – otherwise amounted to about £2,000. Baker, who had earlier tried to get Wi Pere to drop his application for a rehearing of the survey costs, agreed to pay £200 himself in a ‘private arrangement.’⁹¹⁵ (No further information was given about this arrangement.)

Rees advised the court that the owners had reached agreement with Baker that the £1,600 would be a charge on the whole Tahora 2 block. He and Pere also explained that the owners proposed that a piece of land, at its narrowest point, be cut out as soon as possible to pay off the charge; it would be sold by the four tribes for that purpose. The northern portion of this tract was to be the share of ‘Urewera’ and Whakatohea; the southern portion that of Ngati Kahungunu and Te Aitanga a Mahaki.⁹¹⁶ Rees told the court that the owners intended to seek permission for the proposed sale, and to have restrictions lifted from that part of the block.⁹¹⁷

Once the court had ordered the £1,600 charge in favour of Baker, Rees approached the Native Minister on behalf of the Maori owners to ask the Government to take over the charge. He reiterated that the owners were prepared to cut out a portion of the block adjoining lands held by the Crown; Baker’s solicitor, A E Whitaker, was travelling to Wellington and would point out on a tracing

912. O’Brien to chief judge, 12 June 1889 (Boston and Oliver, ‘Tahora’ (doc A22), p 92)

913. Boston and Oliver, ‘Tahora’ (doc A22), p 94

914. Order for rehearing of survey lien, Tahora 2, HGS Smith, 5 March 1890 (Boston and Oliver, ‘Tahora’ (doc A22), p 94)

915. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 99

916. WL Rees, and Wi Pere, Gisborne Native Land Court, minute book 22, 30 October 1891, fols 249–250

917. Binney states that Tamaikoha had earlier provided for meeting Tuhoe survey costs: when he sought restrictions on blocks awarded to them, he sought none on Tahora 2AE2 (1,792 acres) or on Tahora 2B1: Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 93–94, 100.

the part of the block proposed. It is clear this was a serious offer.⁹¹⁸ Boston and Oliver state that this was 'a strip of land separating the northern and southern portions of Tahora No 2.'⁹¹⁹ Part of the tract was 2B1, and it seems, they suggest, that the remainder was in 2C3. At the same time, Rees indicated that the Maori owners would sell further land to the Crown.

The Government's response pointed to the extent of the problem that payment of the survey costs would pose for the owners. Cadman replied that the Government would be prepared to accept the offer and purchase the lien, but that it had first to be assured that indisputable title to the proposed block had been conferred on the owners. 'On no account', he added in his minute, 'can the Govt first take over the lien & then open negotiations for land in satisfaction thereof.'⁹²⁰ In other words, the Government had to be assured that the survey charge was tied to the actual land the owners were offering. Binney states that the process of sorting out the lien would prove to be 'neither smooth nor quick'; and the owners would lose by it.⁹²¹

In fact, the problem was a glaring one. The root of it lay in the unusual circumstances of the Tahora survey, which was commissioned by people found ultimately to be non-owners.

Judge O'Brien, as we have seen, had had his doubts from the beginning about how to proceed, and had sought the advice of Chief Judge Seth Smith as to how he should apportion survey costs. Could he make an order for the whole amount, and direct that survey costs be charged proportionately on each division of the block once those divisions had been ascertained? The chief judge's reply was that O'Brien would need to defer any order to apportion survey costs until the subdivisions were surveyed. The judge could make an order charging the whole block, but he (the chief judge) doubted whether the court could apportion it to the divisions afterwards; in fact he did not think such an order could be registered.⁹²²

As we noted above, the chief judge referred Judge O'Brien to sections 82 and 83 of the Native Land Court Act 1886.⁹²³ These were the sections that applied where non-owners had made a survey as in Tahora 2. Where the non-owners had also paid for the survey, section 82 empowered the court to order that they be repaid by those found to be owners of the surveyed land. The section specified that the court's order was to take effect as a mortgage of the surveyed land in favour of those who had paid for it. Section 83 applied where the survey had not yet been paid for. In that case, the court could order that the owners of the surveyed land owed the surveyor his costs, and put a charge on the land in favour of the sur-

918. Rees and Day to Native Minister, 5 November 1891, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

919. Rees and Day to Native Minister, 5 November 1891 (Boston and Oliver, 'Tahora' (doc A22), p 124; Binney, 'Encircled Lands, Part 2' (doc A15), p 100)

920. A Cadman, minute, 1 December 1891, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

921. Binney, 'Encircled Lands, Part 2' (doc A15), p 100

922. Boston and Oliver, 'Tahora' (doc A22), p 81

923. Smith to O'Brien, 19 December 1888, Tahora 2A file, Maori Land Court, Gisborne

veyor. Thus, those found to be owners of the surveyed land would make it subject to a mortgage to the surveyor for the amount of his costs.

In the survey lien hearing, it was clear that the judge had taken the chief judge's advice. He stated in the court that: 'we must award surveyor costs of survey on such survey and plan being duly approved'. And, as we have seen, he made two orders – one attaching the charge for the costs to Tahora 2, and one that the costs should be attached to the divisions when they were surveyed. This was the judge's response to his dilemma about charging the costs (about which he again consulted the chief judge); as he noted privately, he doubted his power to make orders until the areas of the block divisions had been ascertained, since the orders 'were to be based on area & to have the effect of a definite charge by way of mortgage'.⁹²⁴ Baker had surveyed Tahora 2, but Tahora 2 had been awarded in large divisions – which were not surveyed – and some of which had immediately been subdivided. Lists of names for memorials of ownership had been put in for the various divisions of the block – not for Tahora 2. But the charge, by sections 82 and 83, was tied to the whole block Baker had surveyed, and this was the only charge the Crown could safely have taken over, given those provisions.⁹²⁵ As we will see, the court's decision, and the Government's caution – both reflecting the circumstances of the survey itself – were to have far-reaching consequences.

10.8.3.2.3.4 How were the survey costs ultimately paid?

The Native Minister's cautions about accepting Rees' offer of land to meet the survey costs, led to a stalemate. The owners now had to find another method of paying the huge lien – and not only the lien, but the mounting interest on it. It was clear that the owners could not take on the further cost of the subdivision surveys, so that the lien could be shared among the various divisions. Rees' legal partner, VG Day, wrote again in April 1893 conveying an offer from 'Wiremu Pere and other Native owners' that the Government purchase 20,000 acres in the centre of the block, so placed that 'one half would be taken from the land of each of the two principal hapus owning the land'. Though the land court had 'found that it had no power' to cut out a block in satisfaction of the lien, he said, the owners had always been willing to sell some land to pay it off.⁹²⁶ They were now nervous about the increase in the amount they owed and were anxious to pay it off 'before the whole of the land is eaten up with interest'. So they offered to sell to the Crown at five shillings an acre.⁹²⁷ We note that they intended to offer more land than would have met the survey costs, doubtless in an attempt to make the offer attractive to the Crown. Sheridan, however, in his reply at the end of May 1893, conveyed

924. O'Brien, file note, 12 June 1889, NLC 89/252, Tahora 2 A file, Maori Land Court, Gisborne

925. Sheridan of the Native Land Purchase Office raised another obstacle, from his point of view, namely rule 15 of the Native Land Court, which he interpreted as meaning that 'no further partition' of the block could be made for the time being: Sheridan to Rees and Day, 27 May 1893 (Binney, 'Encircled Lands, Part 2' (doc A15), p 100).

926. Victor Grace Day to Minister for Native Affairs, 20 April 1893, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

927. Day to Cadman, 20 April 1893 (Boston and Oliver, 'Tahora' (doc A22), p 124)

the Government's counter-offer of two shillings an acre – based on Percy Smith's advice that the land was 'exceedingly broken and inaccessible'. He added that the only possible solution was for the Crown to buy undivided shares across the whole block, and hold back from each a proportionate amount of the survey lien.⁹²⁸

Soon afterwards, Baker's solicitors – Whitaker and Russell – pushed the issue and served notice of a forced sale to recover the lien, which remained attached to the whole block. Day again appealed to the Government to intervene and buy part of the land on the following grounds:

- ▶ If a forced sale took place, the land would probably not realise more than would simply pay off the lien – despite the huge size of the block.
- ▶ Because of the native land legislation, the Maori owners could not raise the money to pay off the lien themselves; they could not deal in the land because of the large number of owners and the size of the block.
- ▶ A Government purchase of part of the block would clear the lien and would protect the interests of the owners in the greater portion of the block.⁹²⁹

Boston and Oliver considered that the proposed forced sale 'gave the government leverage to extract a low price for the land', and it is clear that it strengthened the Government's hand; Sheridan commented to Cadman that 'The holder of the survey lien is not in a position to dispose of the land to satisfy the liens. Partition surveys of the extent of £2000 will be necessary before titles can issue.'⁹³⁰

That is, the Government was well aware that another £2,000 would have to be paid for partition surveys, on top of the £1,800 or so already owing, before titles could issue, the liens could be registered against the divisions of the block, and Baker could recover the amount owing to him. Clearly the owners were not in a position to pay for the extra surveys. The Minister's response to Day, that the Government would offer two shillings per acre for the whole block 'or for an area sufficient to cover survey lien on obtaining a land transfer title from either the Native owners or any other person', was thus hardly helpful.⁹³¹

In short, because the survey costs had been charged against the whole Tahora block – so that a discrete piece of land could not be cut off to meet survey costs – and because the surveyor's solicitors were threatening the sale of the whole block, the way was open for the Crown to start buying individual shares on its own terms. We cannot see that the Government made any real attempt to assist the owners, or to meet them halfway. Instead, Crown negotiations for Tahora No 2 began in August 1893, and it bought undivided individual interests. It rejected an offer from owners to increase the amount of land they would sell to the Government to 50,000–100,000 acres at three shillings an acre. Instead, the Native Minister held firm on two shillings, and on purchase from individual owners. The

928. Sheridan to Day, 27 May 1893, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington; see also Boston and Oliver, 'Tahora' (doc A22), p 124

929. Day to Minister for Native Affairs, 2 June 1893, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

930. Sheridan to Cadman, no date (Boston and Oliver, 'Tahora' (doc A22), p 125)

931. Sheridan to Day, telegram, no date, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

Government did ‘not feel disposed to make any arrangement with the holder of the survey lien.’⁹³² Moreover, Brooking, the Crown’s purchase agent, deducted twopence per acre from each share he purchased, as a contribution to the survey lien – that is, as counsel for Te Whanau a Kai noted, the real price per acre was 1s 10d. Brooking’s initial calculations were made on the basis of the original lien of £1,887 7s 11d rather than the £1,600 awarded in 1891, but the mistake was later rectified by officials. After interest of 5 per cent was added to the £1,600, however, the amount owed by the owners was still £1,823 4s 3d. This sorry episode for the owners, not at all of their making, added power to the Crown’s purchase machine.

In February 1896, the Crown sought definition of its interests in the Tahora 2 blocks. At the hearing in April, RJ Gill (on behalf of the Crown) laid before the court information about Crown purchases, stating the area purchased by the Crown and the proportion of each block owed by Maori to settle the survey lien, which the Crown now took over. No subdivisional surveys had yet been done, and Gill estimated the size of each block. The Napier district surveyor pointed this out, commenting that no registration of the lien could occur until the completion of the subdivisional surveys. But, according to Boston and Oliver, officials decided to prepare certificates for each subdivision anyway.⁹³³ Ultimately, then, the lien was divided and charged against each of the Tahora blocks – as opposed to the owners’ wish to consolidate it. Crown purchases had accounted for more than 124,000 acres (or some 58 per cent of the block).⁹³⁴

By means of the twopence per acre deduction, the Crown secured £1,036 10s 4d (56 per cent of the total owing) from the sellers. Binney points out that the money went into a consolidated fund held by Baker’s solicitors towards repayment of the lien, without crediting any interest towards the fund.⁹³⁵ In other words, as the sellers’ contribution was collected, it was imprudently held in a non interest-bearing account, rather than earning interest or being applied to paying off the interest-bearing lien. The remaining £786 13s 11d debt was recovered from the non-sellers in land amounting to 6,291 acres, valued at 2s 6d per acre.⁹³⁶ If one-twelfth of the Crown’s land purchasing is added (that is, twopence out of two shillings) to the 6,291 acres, then effectively 16,658 acres of Tahora 2 land were used to satisfy the Crown’s lien for the boundary survey.

The Crown’s calculation is that the survey costs amounted to 7.8 per cent of the whole block.⁹³⁷ With that we agree. Our calculation of the costs for Tahora 2 excluding Tahora 2B and 2B1 is that they amounted to the slightly lower proportion of 7.6 per cent.

This figure was a more moderate proportion than in a number of other blocks, and we might well accept that the land would have gone before the court at some

932. Day to Minister for Native Affairs, 10 June 1893, and draft reply approved by Cadman, 26 June 1893, MA-MLP 1 1900/101, box 59, Archives New Zealand, Wellington

933. Boston and Oliver, ‘Tahora’ (doc A22), p 135

934. *Ibid*, pp 131–133

935. Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 101, 105–106

936. Boston and Oliver, ‘Tahora’ (doc A22), pp 134–136

937. Crown counsel, closing submissions (doc N20), topics 8–12, p 44

The Payment of the Tahora 2 Boundary Survey Lien

Survey lien agreed to at 1890 rehearing	£1,600	0s	0d
Plus interest at 5 per cent per annum	£ 223	4s	3d
Total value of survey lien	£1,823	4s	3d
<i>Paid towards survey lien</i>			
Sellers' contribution	£1,036	10s	4d*
<i>(Twopence out of two shillings per acre price retained by Crown from sale of 124,403 acres)</i>			
Non-sellers' contribution	£ 786	13s	11d
<i>(Crown award of 6,291 acres at 2s 6d per acre)</i>			
Total paid	£1,823	4s	3d

* As one-twelfth of the proceeds from the sale of 124,403 acres were consumed in meeting the sellers' contribution, this equates to the entire proceeds from selling 10,367 acres.

Consequently, the Crown acquired 16,658 acres of Tahora 2 (6,291 acres plus 10,367 acres) solely by virtue of the survey lien. Excluding Tahora 2B and 2B1, the Crown acquired 5,922 acres from the non-sellers and 5,734 acres from the sellers, a total of 11,656 acres.

point and, under the existing system, the survey costs would have become a lien on the land anyway. But it is very unlikely that one immense block would have gone before the court had the various tribal owners themselves made the decision to seek title investigation. Had smaller surveyed blocks been involved, survey charge orders would more easily have been registered, and parts of the blocks cut out to meet survey costs. It is because the various tribal groups with rights in the land were opposed not just to the secrecy of the survey, but also to its outcome – the dragging of such a huge block into the court – that they were so frustrated. Underlying their deep-seated anger was the perception that the law had worked not only to allow their land to be manipulated into the court against their wishes, but to ensure that they could not escape the full costs associated with such a suspect process. As it was, the costs had to be charged against the whole block; they could not be charged against all its divisions until they were surveyed, which the owners – already burdened with an enormous lien – could not afford. Early on, the owners put forward the sensible suggestion that, to share the charges fairly among the various tribal groups who had rights in such an artificially constructed block, they should select a tract which allowed them all to contribute. But they were stymied by the law.

It is clear that the owners' inability to dispose of the survey costs as they had wished, with one piece of land in one hit, left them vulnerable. The threat of

Baker's solicitors to force a sale of Tahora 2 failed to prompt a sympathetic or constructive response from the Government to the unusual situation in which the owners found themselves.

We conclude that the Crown took advantage of the situation to start purchasing as much land as possible in the block on its own terms, and at its own price, dealing with individuals in a climate very much to its advantage.

Because the original, secret survey had involved such a huge block, tribal leaders' attempts to control the process of alienation triggered by their survey-costs dilemma and to retain the major part of the land, or to sell strategically for development purposes, were doomed. And the Crown's low purchasing price enabled it to take more land for the survey costs.

In Whirinaki, as in Tahora, the Crown moved to enforce the payment of the lien for the original boundary survey by deducting the amount owing both from sellers (as it simultaneously bought into the blocks), and non-sellers. Not only this, but the remaining owners were charged a share of the cost of surveying out the land owing to the Crown for the original set of survey costs, with interest added.

The Whirinaki survey was carried out in 1887, but liens were not attached to the title until after a rehearing in 1893. They were payable to the surveyor Henry Mitchell. Whirinaki 1 was charged with a lien of £399 10s 6d, and Whirinaki 2 with a lien of £266 7s – that is, the survey was charged at approximately fivepence an acre.⁹³⁸

Following the bankruptcy of Henry Mitchell in 1894 (see below for a discussion of Mitchell's debts), the Crown took over the survey liens on the two blocks in 1895. By that time, interest of £18 2s 10d had accrued (ultimately, that sum was not collected from the owners, as the Crown forgot to ask for it at the court hearing).⁹³⁹ The Crown moved to settle the liens by taking land at some three shillings an acre. Tulloch states that it is 'unclear' how this figure was arrived at, as there is no information in the relevant files as to what factors may have been taken into account in deciding it. At the same time, the Crown began to purchase individual interests in the blocks, and – as in Tahora 2 – a proportion of the lien was deducted from payments made to those Maori selling, while the non-sellers gave up land in proportion to their share of the lien. Tulloch states that the Maori owners carried the full cost of the original lien of £666, which was paid in land amounting to 4,439 acres.⁹⁴⁰ The Crown's purchases over and above the area needed to satisfy the lien amounted to just over 17,000 acres.

Block: Whirinaki

Area: 31,500 acres

Survey lien: £665 17s 6d

Amount of land to satisfy the lien:

4,439 acres (14.1 per cent of block area)

938. Tulloch, 'Whirinaki' (doc A9), p 37

939. Ibid, p 39

940. Ibid, pp 38–39

1887 Whirinaki Survey Costs: Liens Charged to Blocks in 1893

Whirinaki 1	£399 10s 6d
Whirinaki 2	£266 7s 0d
Acreage of land paid by owners to satisfy liens	4,439 acres

Further survey costs were incurred in Whirinaki after surveys were made in the wake of the Crown purchases. Subsequently, Sheridan of the Native Land Purchase Office sent a memorandum to the Surveyor-General requesting that the original survey lien on the blocks be withdrawn so that the Crown could gain its certificate of title. He added that 'The residue of these blocks still held by the Natives although, now freed from liability in respect of the original survey lien, are chargeable with a reasonable proportion of the partition surveys for which fresh liens should be lodged.'⁹⁴¹

Remaining Maori-owned blocks totalling 10,349 acres acquired liens amounting to £50 15s 11d, on which interest was charged at 5 per cent per annum.⁹⁴² In 1899, the Crown took further land from two of the blocks to discharge these liens, amounting to 351 acres. This brought the total paid by the owners of Whirinaki lands to £718 9s 5d, equating to 4,790 acres (15.2 per cent of the block).⁹⁴³ There were still outstanding liens against some small Whirinaki subdivisions in 1917.

10.8.3.2.3.5 Whirinaki as an example of the costs of later partitions of a block

Whirinaki was one of several rim blocks in which the level of partitioning went well beyond the boundary survey and first partition, whose costs owners had to meet as they secured initial title to their land. Though claimants' submissions concentrated on the first round of costs, they often noted that survey costs continued to accrue as later partitions were made. In the Whirinaki, Waiohau, Waimana, and Ruatoki blocks, each of which contained land capable of supporting economic utilisation at the level of the family farm, this was certainly the case. Over time, the owners' common holdings on these blocks were broken up as individuals and whanau sought to cut out their interests into properties that they could develop, or alternatively sold or leased areas to neighbours or external purchasers.⁹⁴⁴ These multiple levels of partition meant that survey costs were an ongoing burden for owners. The owners in Whirinaki 2 (3B2A) are a typical example (see the sidebar

941. Sheridan to Surveyor-General, 29 July 1897 (Berghan, 'Block Research Narratives' (doc A86), p740)

942. In fact, the final sum was £52 11s 11d, as the Crown did not collect on the £2 8d lien owing on Whirinaki 2(1), which was an inalienable reserve.

943. Tulloch, 'Whirinaki' (doc A9), pp 44-47

944. See, for example, Sissons 'Waimana Kaaku' (doc A24), pp 69-95.

Survey Costs in the Whirinaki 2(3B2A) Block

Within the blocks developed for farming, the experience of the owners of what became Whirinaki 2(3B2A) was probably typical. In 1895, they were among the 148 owners of the 12,600-acre Whirinaki 2 block, who ended up including an extra 1,775 acres within the sale of 10,150 acres to the Crown, in order to meet the boundary survey cost of £266 7s.

Four years later, the 49 non-sellers (who had been awarded the 2,050-acre Whirinaki 2(3) block), gave up another 70 acres of land to pay for the cost of separating the Crown and non-sellers' awards. This had amounted to £2 8d for Whirinaki 2(1) and £10 8s 2d for Whirinaki 2(3).¹

The first internal division of owners' interests within the Whirinaki 2(3B) block then occurred in 1903; on this occasion, it was split five ways, the resulting new blocks ranging in size from the 80-acre Whirinaki 2(3B2) block up to the 746-acre Whirinaki 2(3B3) block.² The available evidence does not reveal the cost of surveying out these partitions, although some indication may be gained from the partitioning of the neighbouring 2(1) block (which encompassed 400 acres) in 1911. In 1916, liens totalling just over £82 were registered against the five blocks that were created by this partition, with the closest in size to the Whirinaki 2(3B2) block having a lien against it of £13 11s 8d.³

The Whirinaki 2(3B2) block itself was to remain intact until 1921, when just under half of the block was sold to the settler Thomas Anderson. The non-sellers had their interests cut out as the 40-acre 2(3B2A) block, with the survey lien subsequently registered against it coming to £14 18s 5d. When it is considered that Anderson only paid £47 15s 9d for his 38 acres, this price was extraordinarily high in comparison.⁴ It is likely, however, that the cost of actually getting a surveyor from Whakatane or Rotorua was to blame. In the breakdown of costs for the survey of the Whirinaki 2(3B3) block in 1926, the field work and plan drawing both accounted for about one-third of the £34 7s 6d each, but the other one-third was for travel time and expenses.⁵

1. Tracy Tulloch, 'Whirinaki' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A9), pp 32, 38, 43–44

2. Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(r)), vol 18, pp 6284–6287)

3. Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), p 743; Tulloch, 'Whirinaki' (doc A9), p 138

4. Tulloch, 'Whirinaki' (doc A9), pp 116, 133, 138

5. K M Graham, chief surveyor, to the registrar, Rotorua Native Land Court, 2 July 1926 (Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6409–6410)

Issues Arising from the Tuararangaia Survey

What were the bases of the costs charged to the owners in 1898?

What was the basis of the court's award in land to the Crown in 1907?

opposite). These costs were less frequent for owners of blocks such as Tahora 2 and Waipaoa, but here they were still generated by each round of Crown purchasing.

In Tuararangaia, similar issues related to survey costs arose in respect of the application for survey, and its undertaking without the knowledge of a number of groups with rights in the land. But there were also particular issues in this block relating to the amount of land lost to the owners as extra costs were loaded onto them:

- ▶ the later charging of 'the Urewera tribe' for delays caused to the surveyors (as a result of lack of consultation at the outset);
- ▶ the award of land to the Crown for unpaid liens in 1907;
- ▶ a clerical error which increased the size of that award; and
- ▶ later deductions for surveys that were not carried out.

The Crown has expressed its concern about the basis of the Tuararangaia costs, and their impact on those who had to pay them.⁹⁴⁵

Block: Tuararangaia 1

Area: 3,500 acres

Crown award, 1907: 881 acres (25.2 per cent of the block value)

Amount charged against block for 1907 survey: £212 14s 7d (including detention charge of about £45, about £36 10s interest, and £30 for cutting out Crown award)

10.8.3.2.3.6 What were the bases of the costs charged to the owners in 1898?

The Tuararangaia survey, like Tahora 2, was carried out by Charles Alma Baker, in 1885; the cost (as recorded in 1893) was £347 5s 4d. It seems probable that this was the agreed price, as it accords approximately with a price of sevenpence an acre, which was the fee set for blocks of Tuararangaia's size in 1886.⁹⁴⁶ For the charges as at 1898, see the sidebar over.

How did these charges arise? Peter Clayworth has documented the events which led to the application for extra costs for surveying delays, on the basis of evidence given in the course of the 1890–91 Tuararangaia title investigation; as we noted above, it is evident that Te Whaiti Paora (described as a chief of Ngati Hamua and

945. Crown counsel, closing submissions (doc N20), topics 8–12, pp 45–47

946. 'Survey Regulations under "The Land Act, 1885"', 19 May 1886, *New Zealand Gazette*, 1886, no 30, p 636

The Survey Department's Application for Survey Costs, 1898

Total for the three Tuararangaia blocks	£260 7s 3d
Total in survey costs	£155 1s 3d
Additional amount sought for 'detention' of surveyors (39 days)	£105 6s 0d
Claim against Tuararangaia 1 (3,500 acres)	£140 8s 3d
Proportion of detention charge owed by Tuararangaia 1	'about £39'

Patuheuheu⁹⁴⁷) did not represent all the people in whose name he applied for survey in 1884. As we understand it:

- ▶ After Te Whaiti Paora's application, he and Mehaka Tokopounamu of Patuheuheu guided the surveyor Baker over the block; the party included two young Tuhoe men.
- ▶ Other parties who claimed rights in the land had no prior knowledge of the survey; the survey party was discovered by some young men out pig hunting, who reported it to leaders of Ngati Awa and Warahoe; a party of Warahoe and Ngati Awa went to interrupt the survey; Penetito Hawea of Ngati Awa later claimed to have led this group, who stopped the survey party north of Moetahanga Stream, confiscated the survey instruments (the theodolite was said to have been broken), and escorted them back to Te Teko.
- ▶ Evidently after negotiation, Penetito Hawea agreed to allow the survey to continue, and accompanied the party to mark out the eastern boundary of the block.
- ▶ When the survey party moved into the eastern part of the block, as a line was to be cut marking the eastern boundary they were stopped again, this time by a group of Tuhoe, at the Kotorenu Stream; the survey party again returned to Te Teko; subsequently, the party returned (this time accompanied by Hawea's son) and the survey of the eastern boundary was completed.⁹⁴⁸

In 1898, Kallender, who appeared in court on behalf of the Crown, made no statement about who had detained the surveyors, and produced no evidence in support of his claim. Akuhata Te Kaha objected to the charge for delays on the ground that the surveyor had come onto the land before some of the owners had consented to the survey. The court, however, made the order in favour of the Crown. Immediately afterwards, the Tuararangaia No 2 case was called, and Tamati Waka objected to the costs for delay because Ngati Pukeko had not delayed the survey; they had neither applied for the survey, nor did they know it was being made. At this point, Judge Wilson stated that 'the N'Pukeko [*sic*] tribe should not be made to suffer for delays caused by the Uriwera tribe'. But to pacify the

947. Clayworth, 'Tuararangaia' (doc A3), p 48

948. *Ibid*, pp 48-49, 84-85

chief surveyor, he would amend the order just made for Tuararangaia 1 'by adding thereto the proportion of the £12 7s due [the total claimed for delays against Tuararangaia 2] to recoup the Survey Depart.'⁹⁴⁹ (It seems the court also transferred part of the same charge against Tuararangaia 2 to Tuararangaia 3B.)

It is alarming that the survey office should have claimed over £100 for survey delays over the whole block, dividing the amount by three so that the charge would fall on all the owners, without producing any evidence as to who was deemed responsible – or why 39 days should be claimed.⁹⁵⁰ It is more alarming that in such circumstances the judge should have accepted the claim – and should so lightly have dismissed the objections made on behalf of the Tuararangaia 1 owners, and a Tuararangaia 3 owner, while accepting those made on behalf of Tuararangaia 2 owners. His comment that the delays had been 'caused by the Uriwera tribe' indicates that he was not familiar with the circumstances of the survey, that he evidently did not consider he ought to inquire into them, and that he was prepared simply to hold Tuhoe, the iwi, responsible.⁹⁵¹ We endorse the Crown's statement in its closing submissions that the amount was charged against Tuararangaia 1 (and 3B) blocks 'on the pretext that "the Urewera tribe" [as a tribe] were responsible for the delays. As Clayworth demonstrates, this is not the case.'⁹⁵² As the Crown submitted, it is thus 'not clear on what basis Wilson considered it appropriate to award such costs.'⁹⁵³

Judge Wilson himself gave no explanation of his award, but it seems to us that he may have found himself in difficulties in his evident wish to meet the Crown claim – as indeed the chief surveyor doubtless found himself in difficulties establishing a legal basis for the claim. At the time the survey was made (1885) the only provision in force relating to penalties for obstructing a surveyor was section 13 of the Native Land Division Act 1882, which referred specifically to surveyors authorised to enter on land to which the Act applied – that is, land held under a title derived through the land court, the division of which might be sought by a native grantee or grantees. The provision was not relevant to the Baker survey of Tuararangaia. Subsequently, the legislation did provide more generally for penalties for obstruction of surveys, but we note that the offence was capable of commission only by a particular individual or individuals, who could be fined or imprisoned for their conduct. It was not an offence able to be committed by, or attributable to, an entire tribe in a corporate sense, or for which land could be taken, directly or indirectly, by the enforcement of a survey lien.⁹⁵⁴

The chief surveyor was not able to cite such provisions because they postdated the 1885 survey, and he thus fell back on a charge based on lost surveying days (though we do not know how this was calculated). There was provision from 1886 for a surveyor to record periods of detention in a 'Return of Work Form' under the

949. Whakatane Native Land Court, minute book 6, 8 December 1898, fol 115

950. Clayworth, 'Tuararangaia' (doc A3), p 91

951. *Ibid*, p 86

952. Crown counsel, closing submissions (doc N20), topics 8–12, p 47

953. *Ibid*

954. Native Land Court Act 1886, s90; Native Land Court Act 1894, s 64

category ‘Detention by Native opposition or other cause’, but there is no evidence that Kallender submitted such a form to the court.⁹⁵⁵ Nor could we find any provision under which the court might make an order for costs against owners for days lost through detention of a surveyor.

The result of the court’s decision was that an amount was charged against the land of all 716 owners. No offence had been alleged against them, or proved. It is beyond doubt that some of them would not have known of the incident or that the allegation was being made, nor that the court was about to adjudicate on the issue. They were not summonsed or notified or given the opportunity to be heard. In any event, the Crown sought and got land for the commission of an unproven summary offence. We cannot imagine that European land would be taken in such a fashion.

What was the basis of the court’s award in land to the Crown in 1907? Because the Tuararangaia 1 owners did not (or could not) pay the original costs, they subsequently faced further costs. In 1907, the chief surveyor applied to the Native Land Court for an award in land for unpaid costs in various Matahina and Tuararangaia blocks; the application was advertised in the *Gazette* of 4 July for hearing at a court sitting on 7 August. In fact, it was on 27 September that the Crown cases were called and it was then that the Crown representative, Mr Ballantine, told the court, speaking of all the blocks in the Crown application: ‘I have been here for several days and have invited the owners to pay up for the charging orders in their cases, but they have not done so, and I must now ask the Court to cut out of each block a sufficient area in each case to pay the survey charges &c.’⁹⁵⁶

The charge against Tuararangaia 1 at the time the Crown applied for hearing had been £146 3s 8d (of which over £45 – some 30 per cent – was the charge for obstruction of the survey). It is hard to imagine that the Tuararangaia 1 owners were greatly inclined to meet that particular cost. Some owners may have been aware of the Crown’s application, if they had seen the *Gazette* notice. We assume that at least some owners were in court – not because any spoke, but because it was recorded in the minutes at the end of the Tuararangaia cases that ‘In these three cases the orders will not be made until the rising of the Court.’⁹⁵⁷ This suggests that the court was prepared to give the owners a short breathing space to make the payments required. The payments had, however, just gone up by nearly 50 per cent (see the sidebar opposite).

The Tuararangaia owners thus lost over a quarter of their block to survey costs. We add that they lost out in this award in three further respects:

- ▶ In what the Crown referred to it as a ‘mathematical error’ (which seems to have been the case), the area taken from Tuararangaia 1 was recorded as 881 acres, when it should (on the basis of the given valuation of the land)

955. See ‘Form of Annual Return by Field Surveyors’ in ‘Survey Regulations under “The Land Act, 1885”’, 19 May 1886, *New Zealand Gazette*, 1886, no 30, pp 634–642, especially p 639.

956. Whakatane Native Land Court, minute book 9, 27 September 1907, fol 177

957. *Ibid.*, fol 179

Court Award to the Crown in Tuararangaia 1, 1907

Original (unpaid) charge (including over £45 for obstruction charge)	£146 3s 8d
Interest of 5 per cent for five years increased charge to	£182 14s 7d
Plus cost for cutting out Crown award	£ 30 0s 0d ¹
Total charges on the block	£212 14s 7d
Award to Crown (25.2 per cent of the block)	881 acres

1. Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 88

have been 851 acres.⁹⁵⁸ (The Crown has accepted this mistake, which cost the owners an additional 30 acres.)

- ▶ The valuation itself, at five shillings an acre, is questionable (see the sidebar over).
- ▶ The Crown failed to survey the boundaries of the areas to be cut out – despite the extra charge (in land) which the Tuararangaia owners paid for this purpose. A surveyor sent to start a second series of surveys was transferred to another department before he had made much progress. Clayworth's evidence was that a 1915 document 'clearly shows that the boundary lines of the subdivisions within the original Tuararangaia block were drawn on the 1885 plan without benefit of a proper survey.'⁹⁵⁹ A memorandum from the chief surveyor of the South Auckland district written in 1982 'also clearly states that the original subdivision of Tuararangaia 1B was drawn up without a survey.'⁹⁶⁰ In other words, the owners had lost further acres of their land merely to fund the drawing of lines on a map.

The story of survey costs and land loss in Tuararangaia 1 is not a happy one, as the Crown has conceded. It points to repeated carelessness of Maori owners' rights on the part of Crown officials and the land court; and it underlines the severe impact that legislative provisions penalising owners for the non-payment of liens could have.

10.8.3.2.4 BLOCKS IN WHICH BOUNDARY SURVEY COSTS EXCEEDED 50 PER CENT – MATAHINA C, C1, AND D

The issues in the three Matahina blocks before us are similar to those in Tuararangaia: they include the amount of land taken in 1907 to discharge survey debt

958. Clayworth, 'Tuararangaia' (doc A3), p 8

959. Ibid, p 93

960. Ibid

The Valuation of Tuararangaia 1 in 1907

There is a lack of evidence as to how the value of five shillings an acre was arrived at by the court or the Crown. Clayworth stated that he had been unable to find any reference to any on-site valuation of the Tuararangaia block before 1914.¹ Stirling thought it possible that Charles Buckworth, the local land agent and local body valuer who had given an 'estimate' of the value of Matahina blocks to the Crown, may have supplied an estimate for Tuararangaia. (There was no appeal in the case of Tuararangaia, so Buckworth was not called to give evidence about the block, as he was later in Matahina D. But his Matahina evidence, as we will see, reveals he had not inspected the land and knew it only in a 'general' sense.) A formal valuation required the land to be inspected.

There is some evidence about the value of Tuararangaia from mid-1912. Judge Browne, who had to estimate the value of Tuararangaia 1B (1,000 acres), relied on the sales of adjacent (and unnamed) lands to guide him, and estimated the value of the block at 15 shillings to £1 per acre. That is, three to four times (not five times, as

1. Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 87

which had earlier accrued, the authorisation of the survey of the Matahina subdivisions, and the valuation of the land on which the award to the Crown was based.

The Crown has expressed its concern at the proportionate costs for surveys of small blocks, noting in particular Matahina C, C1, and D. Matahina C and C1, each of 1,000 acres, were awarded to Ngati Haka Patuheuheu after a rehearing of the Matahina block (1884); Matahina D (also 1,000 acres) was awarded to Ngati Rangitihi. The figures the Crown gives as necessary for the clearance of survey liens in 1907 were: for Matahina C, 667 acres; for C1, 667 acres; and for Matahina D, 920 acres.⁹⁶¹ We consider here the circumstances in which so much of the small blocks awarded to Ngati Haka Patuheuheu, and to Ngati Rangitihi, should have been taken for survey costs.

10.8.3.2.4.1 What were the circumstances in which the 1907 awards to the Crown were made?

The background to the awards was unusual in some respects. The survey in question was made in 1885 following a rehearing of the Matahina block and orders for

961. Crown counsel, closing submissions (doc N20), topics 8–12, pp 43, 45

Stirling says) the 1907 estimate relied on by the Crown, which is similar to the gap between the 1907 estimate for Matahina D and the value of the land in 1910.²

The first Government valuation located for Tuararangaia dates from 1914, and is for Tuararangaia 2B (793 acres). District Valuer Burch, who conducted the valuation, did not refer to any previous valuation of the Tuararangaia lands. He valued it (saying the land was not worth a great deal) at six shillings per acre (the owners sought £1 per acre). There was no valuation of the southern 1,000 acres of Tuararangaia 1B when its owners offered it to the Crown as an education endowment in 1912. But land in the northern part of the block was valued at 10 shillings per acre when it was sold as a donation to the war effort in 1915. Stirling notes that it is not clear on what basis the value of the land was considered to have doubled since 1907, since again the land had not been inspected, and suggested it may have been a reciprocal gesture to acknowledge Tuhoë's patriotism.³ On the other hand, that is less than the value Judge Browne gave Tuararangaia 1B in 1912.

We conclude that the ascription of a value to the Tuararangaia land in 1907 was casually made – and the low value translated into a large award to the Crown.

2. Bruce Stirling, 'Te Urewera Valuation Issues' (commissioned research report, Taneatua: Tuhoë-Waikaremoana Trust Board, 2005) (doc L17), pp 85–86

3. *Ibid*, pp 87–88

10 new subdivisions; it was organised by Henry Mitchell in response to a request from 'at least some of the block's owners', and carried out by Mr Brigham.⁹⁶² (This followed an earlier boundary survey of the whole block, and the award to the Crown of 8,500 acres for that cost.) In 1891, Mitchell applied to the court for the 1885 survey costs to be charged against each of the subdivisions (except Matahina A1 and Matahina A6). The court made the orders asked for, which included £54 charged against Matahina C and C1, and £62 10s against Matahina D.⁹⁶³

In March 1894, Henry Mitchell was declared bankrupt in the Auckland Supreme Court. Tulloch states that he had carried out surveys in the Rotorua, Bay of Plenty, and Galatea districts on borrowed money in the late 1880s and early 1890s (Hutton Troutbeck, for instance, made him advances), but he 'ran into difficulties when the Maori owners of the blocks were unable to sell the land to private buyers in order to settle the survey debts.'⁹⁶⁴ We note that Mitchell was acting as agent for a company which had earlier been involved in negotiations for the purchase of part of Matahina A1; he told the court in February 1891 that he had a 'beneficial

962. Cleaver, 'Matahina' (doc A63), p 68

963. *Ibid*

964. Tulloch, 'Whirinaki' (doc A9), p 37

Issues Relating to Matahina c, c1, and D

What were the circumstances in which the 1907 awards to the Crown were made?

What awards did the court make to the Crown in 1907?

What were the circumstances of the owners at the time of the awards?

Did the owners of the three Matahina subdivisions seek surveys?

Was the valuation of the Matahina c, c1, and D blocks fair?

Block: Matahina c, c1

Area: 1,000 acres each

Award to Crown for survey debt,

1907: 667 acres each (66.7 per cent of block area)

Block: Matahina D

Area: 1,000 acres

Award to Crown for survey debt,

1907: 920 acres (92 per cent of block area)

interest in the land, as well as a survey lien on it.⁹⁶⁵ He secured a partition of 19,000 acres from Matahina A1 block (which became A1B) in favour of himself and James Wilson, both 'apparently representing an Australian syndicate'.⁹⁶⁶ Whether such investments led to his financial difficulties we do not know. In February 1891, Mitchell had, however, been awarded 6,000 acres of Matahina A1 to cover survey charges on Matahina A2, A3, and A4.⁹⁶⁷ When he became bankrupt, all the money owed to him for surveys became the property of the official assignee, John Lawson. Charging orders were obtained, and registered as mortgages against four Matahina blocks, including Matahina c and c1, and D, in October 1896 (in accordance with the Native Land Act 1894 and its amendments). The official assignee's solicitor, ET Dufaur, wrote to the Surveyor-General, asking that the Government take over the survey liens. This proposal was rejected, and on 8 December 1897, the blocks were included in a list of 17 blocks advertised to be sold. (Most of the blocks were connected with the bankruptcy of another surveyor, Oliver Creagh, whose liens had also become the property of the official assignee; his surveys, however, were unconnected with those of Mitchell.⁹⁶⁸)

965. Whakatane Native Land Court, minute book 4, 6 February 1891, fol 254 (Cleave, 'Matahina' (doc A63), p 70)

966. Cleave, 'Matahina' (doc A63), p 73

967. Ibid, pp 68–70

968. ET Dufaur to JA Tole, 17 December 1897, and advertisement of sale, newspaper excerpt, no date (Crown counsel, comp, supporting papers to 'Matahina c and c1 Issues relating to the Survey of the Blocks: Documents to Accompany the Historical Evidence of Dr John Battersby', various dates (doc A41(a)), pp 30–33, 35)

The Department of Lands and Survey was concerned about the proposed sale, since there were restrictions on the titles of a number of the blocks. These did not in fact include the Matahina blocks (see section 10.9). The Solicitor-General, whose opinion on the legality of the sale was sought in October 1897, concluded that the Supreme Court would 'restrain any such intended sale'. But the official assignee persisted with the sale. Even after the Crown deposited the amount of the survey lien, interest and registration fees on all the blocks (amounting to £703) with the public trustee, the official assignee readvertised the sale at a later date (13 January 1898), holding out for the payment of other expenses, 'such as advertising auction sale, Solicitor's costs &c'.⁹⁶⁹ The issue 'dragged on', according to Battersby, but the sale of the land was averted. Battersby stated that in preventing the sale, the Crown had 'incurred considerable costs over and above the initial survey liens, including registration of the mortgage, costs of advertising the sale and [the Official Assignee's] legal fees'.⁹⁷⁰

10.8.3.2.4.2 What awards did the court make to the Crown in 1907?

The Crown moved to secure the various amounts owing on the Matahina blocks from their Maori owners in mid-1907. Among the applications to be heard at a sitting of the land court on 7 August 1907 were several from the chief surveyor, Auckland land district, in respect of four Matahina blocks and three Tuararangaia blocks. The applications were made under section 65 of the Native Land Court Act 1894, 'that a defined portion of land may be vested in applicant, in lieu of survey costs'.⁹⁷¹ The costs listed in the notice for the three blocks with which we are concerned here were: Matahina C, £67 18s 3d; Matahina C1, £67 18s 3d; and Matahina D, £76 8s 3d.

The applications were heard by the court on 27 September. We have already mentioned Mr Ballantine's appearance on behalf of the Crown, and his statement that despite his presence for several days, the owners of Matahina and Tuararangaia had not yet offered to pay the costs owing. He therefore asked the court to cut out enough land in each case to pay 'the survey charges &c' (see the sidebar over).⁹⁷²

We note that it appears that the court did not include the legal costs when it made the assessment in land (since at three shillings an acre a total of £100 rather than £111 gives 666 acres).⁹⁷³

969. Mueller to Assistant Surveyor-General, 9 December 1897 (John Battersby, 'Matahina c and c1 Issues relating to the Survey of the Blocks: Historical Evidence' (commissioned research report, Wellington: Waitangi Tribunal, 1995) (doc A41), p 11)

970. Battersby, 'Matahina c and c1' (doc A41), p 11

971. 'Native Land Court Notices', 22 June 1907, *New Zealand Gazette*, 1907, no 58, p 2021

972. Whakatane Native Land Court, minute book 9, 27 September 1907, fol 178

973. A note about sources for these overall figures: see T Anaru to Under-Secretary, Native Department, 21 January 1925 (TR Nikora, comp, supporting papers to 'Matahina c & c No 1 Blocks', 2 vols, various dates (doc A39(a)), vol 1, p 40). The court itself recorded the figures as £67 18s 3d (correcting its own first figure of £67 13s 8d), plus £13 10s interest for Matahina C and C1, which would have given a total figure of £81 8s 3d for each block: Whakatane Native Land Court, minute book 9, 27 September 1907, fol 179.

Breakdown of Costs for Matahina c and c1 (1907)

Survey costs	£ 54 0s 0d
Order and registration fee	£ 2 5s 1d
Registration of transfer	£ 0 5s 0d
Crown solicitor's fee	£ 0 10s 8d
Official assignee's costs	£ 10 12s 10d
Crown solicitor's fee	£ 0 4s 8d
Total	£ 67 18s 3d*
Interest added	£ 13 10s 0d
Total	£ 81 8s 3d
Cost of cutting out area for Crown	£ 30 0s 0d
Final total for each block	£111 8s 3d

Court order: 667 acres (valued at three shillings an acre)

* Figures provided by the court registrar in 1925.

The court noted that this was 'all the block except [80?] acres in the NE corner'.⁹⁷⁴ Evidently in light of this, no figure was given for the cost of cutting out the Crown's land; the appropriate additional amount would have meant a total greater than the acreage of the block.

Though no owner objections were recorded to these awards, there was clearly confusion about them. The court recorded that the Matahina orders should remain 'in abeyance' until the end of the court's sitting in Whakatane and Opotiki 'as the owners are not clear about the charges in some instances, and hope to be able to me[et] some of the cases by paying up'.⁹⁷⁵

It seems a reasonable assumption that any Matahina owners who were present in court were having some difficulty understanding the increase in the charges, and the amount of their blocks the court had awarded to the Crown. In its costs table presented to us, the Crown separated out the proportion of the Crown credit over Matahina c, c1, and d blocks relating to survey alone, recording 53.7 per cent in the case of the first two blocks, and 84.6 per cent for Matahina d.⁹⁷⁶ In other words, the Crown did not count the interest and legal fees. As we have seen, the basis of the amount awarded to the Crown in 1907 was not clear even then: the

974. Whakatane Native Land Court, minute book 9, 27 September 1907, fol 179

975. Ibid

976. Crown counsel, closing submissions (doc N20), topics 8–12, p 43

Breakdown of Costs for Matahina D

Amount owing for survey charges and costs	£78	8s	3d
Corrected in court minute book to	£76	8s	3d
Interest	£15	12s	6d
Total	£92	0s	9d*

Valuation of land at two shillings an acre: 920 acres

* Rounded to £92

legal fees seem not to have been counted, but the interest was. But from the point of view of the Maori owners at the time, we doubt that the details mattered much.

To pay Crown charges, Matahina c and c1 owners (Ngati Haka Patuheuheu) were to lose 66.7 per cent of their land; the Matahina D owners (Ngati Rangitihī) 92 per cent. The greater part of those charges were in fact survey charges, and they were obviously disproportionate and unjust.

We note that it was ironic that the Crown should now take so much of the land in the blocks, when 10 years before it had sought to stop the mortgagee sales in the interests of the Maori owners. And the Matahina blocks were also protected in 1897 by Government concern for the majority of the other blocks advertised for sale, whose titles were restricted.

10.8.3.2.4.3 What were the circumstances of the owners at the time the awards were made?

None of the owners evidently came forward with payments, and the court's orders therefore took effect.⁹⁷⁷ We do not think it surprising that the owners did not meet the costs involved. Ngati Haka Patuheuheu were in a particularly distressing position at the time. We discuss in chapter 11 the circumstances in which their entire community at Te Houhi was forced to evacuate their homes and their land, in the wake of a series of questionable land transactions, culminating in a Supreme Court decision in June 1905 that the title of a settler, Margaret Beale, was good even though it derived from a fraudulent transaction on the part of another settler, Harry Burt. The judge, Edwards, acknowledged that the defendants had 'suffered a grievous wrong'.⁹⁷⁸ The people of Te Houhi were finally forced to leave their village

977. Cleaver, 'Matahina' (doc A63), p75

978. Binney, 'Encircled Lands, Part 2' (doc A15), p 336; *Beale v Tihema Te Hau and Attorney-General* (1905) 24 NZLR 883, 885 (TR Nikora, comp, supporting papers to 'Matahina c & c No1 Blocks', 2 vols, various dates (doc A39(b)), vol 2, p 128)

during May–June 1907; Binney states that many fled into the Urewera mountains, and only returned some time later to their new settlement site at Waiohau.⁹⁷⁹

The timing of the Crown's applications to the court to secure Matahina land to clear the owners' debts to the Crown must thus come into question. We have recorded the Crown's concession that the 'clearing of these liens [Matahina and Tuararangaia] in 1907 was perhaps unfairly abrupt';⁹⁸⁰ and we welcome a concession on this matter. An acknowledgment of the particular circumstances of both Ngati Haka Patuheuheu and Ngati Rangitihī at the time might also have been appropriate at this point. We find it hard to believe that the chief surveyor at Auckland could have been unaware of the troubles of the Te Houhi community in particular, given the publicity surrounding the Supreme Court hearing in Auckland, and subsequent hearings of charges in the same court against some of those arrested for 'forcible detention' of the Te Houhi land, as the Beales sought their eviction. The Government had certainly been aware of the progress of events at Te Houhi.⁹⁸¹

We have no evidence that the timing on the part of the Government in respect of the Matahina c and c1 blocks was deliberate; but it could hardly have been worse. Whether any Ngati Haka Patuheuheu owners were present in court is not clear (the court, as we have seen, referred to the confusion of some owners and their hope of being able to avoid the Crown take of land – but it referred generally to owners of the four Matahina blocks before the court). But even if Ngati Haka Patuheuheu owners had, at such a time of upheaval, seen the *Gazette* notice, and even if some owners were in fact present in court, we are inclined to agree with Tama Nikora that payment for survey costs of Matahina c and c1 would hardly have been possible. Not only was their community and its means of survival being dismantled, but they already had legal fees arising from their recent troubles to cope with (see the sidebar opposite).⁹⁸²

Ngati Rangitihī were also in a difficult position at the time. The Central North Island Tribunal noted a report of the Stout–Ngata commission, published in 1908, which focused on Rotorua and Thermal Springs District Lands. The commission, reporting on Ngati Rangitihī at Matata, noted that the iwi (in the wake of the Tarawera eruption) was mainly located in the coastal area. Ngati Rangitihī were anxious to acquire ownership of the 2,000-acre coastal Hauani reserve which the Government had made available to them after Tarawera. The people had understood the land was a gift, but found that they were supposed to pay rent, which they could not. They therefore decided to sell their share of the Pokohu block in order to buy the Hauani reserve and another small reserve on which they were living, and to stock the reserve. They numbered over 4,000 people, the commission

979. Binney, 'Encircled Lands, Part 2' (doc A15), p 346

980. Crown counsel, closing submissions (doc N20), topics 8–12, p 5

981. Binney, 'Encircled Lands, Part 2' (doc A15), pp 336–346

982. Nikora, supporting papers to 'Matahina c & c No 1 Blocks' (doc A39(a)), vol 1, pp 13–14; see also Binney, 'Encircled Lands, Part 2' (doc A15), p 347

Tuhoe View of the Crown's Decision to Seek Charging Orders in 1907

'IT was not possible for Patuheuheu to consider payment of survey costs for Matahina c & c No 1 in 1907, if indeed they knew anything about it, because Patuheuheu were still then affected by wrongful dispossession from Waiohau 1B or Te Houhi and their very means of existence. Given the plight of Patuheuheu, the Crown should not have taken land from Patuheuheu.'

Tama R Nikora¹

1. Tama R Nikora, 'Matahina c & c No 1 Blocks' (commissioned research report, Taneatua: Tuhoe-Waikaremoana Maori Trust Board, 1995) (doc A39), p 14

reported, and they were occupying fewer than 200 acres at Matata, which could not support them.⁹⁸³

10.8.3.2.4.4 Did the owners of the three Matahina subdivisions seek surveys?

The claimants raised the issue whether the Maori owners of Matahina c, c1, and d had in fact sought survey of their small subdivisions in the first place. Counsel for Ngati Rangitihī stated that it was clear that Ngati Rangitihī did not request the survey for the 'meagre interest' the court had awarded them in the block, yet Matahina d was surveyed anyway.⁹⁸⁴ Counsel for Ngati Haka Patuheuheu submitted that the injustice of the high cost of the survey charges against their blocks was compounded by the fact that they 'had never sought to alienate their interests in the Matahina Block and nor had they sought any survey of the block.'⁹⁸⁵

The question of Ngati Haka Patuheuheu involvement in seeking a survey in 1884 was at issue between Crown and claimant historians. Mr Cleaver examined the arguments of both parties as presented to the Wai 46 inquiry in light of the (limited) evidence.⁹⁸⁶ He concluded that the Ngati Awa chief Rangitukehu was evidently involved in requesting the 1885 survey of the whole Matahina block, though there is evidence that some among Ngati Awa were 'strongly opposed' to the survey. He thought it possible that Rangitukehu might have requested the survey only of the Ngati Awa subdivisions of the Matahina block (comprising by far the greater part of the land). If that were so, however, Mitchell would still have had to survey

983. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 644–646

984. Counsel for Ngati Rangitihī, closing submissions (doc N17), p16

985. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p108

986. Cleaver noted that the most important file on the issue of survey costs, which dealt with the 1885 survey, appears to have been either 'lost beyond recovery' or destroyed: Cleaver, 'Matahina Block' (doc A63), p 81.

the portions that had not been awarded to Ngati Awa because of shared boundaries. (Given the location of the Matahina C, C1, and D blocks in relation to the Matahina A blocks, all the boundaries of the C and D blocks would have been surveyed anyway in the course of survey of the outer boundary or the A block partitions; the only boundary not in this position was the boundary between C and C1.) Cleaver noted that Dr Battersby did not present evidence to show that Patuheuheu and Ngati Haka were involved with the survey, but he agreed with Battersby that it was ‘impossible to conclusively assert that [they] . . . were not involved’ in it. One ‘outsoken’ owner in Matahina C who had been in court in 1891 had not objected to the charges at the time. There is not enough evidence, in Cleaver’s view, to reach a firm conclusion.

We are persuaded, however, by Mr Nikora’s argument that there was no logical reason for Patuheuheu and Ngati Haka to have sought an expensive survey of land that was ‘relatively unproductive.’⁹⁸⁷ In particular, as Cleaver points out, there is no evidence that they ever tried to sell the blocks – and thus a key ‘logical reason’ is removed from the frame.⁹⁸⁸ It is more likely than not, in our view, that Ngati Haka Patuheuheu did not seek a survey. We have no evidence as to whether they approved it or not. The loss of much of the block to survey charges should be considered in that context.

10.8.3.2.4.5 Was the valuation of the Matahina blocks fair?

We turn finally to the issue of the valuation of the land awarded the Crown for survey costs and fees. This is important for the simple reason that the low values at which the court assessed the land in the three blocks meant that a high acreage was awarded. Bruce Stirling made the point graphically when, after considering the evidence, he stated that the 1907 value of Matahina C was ‘likely to have been somewhere between three to six times what the Crown estimated, or 9 to 15 shillings per acre,’ rather than the three shillings which was the value the court worked on. (By our calculations, three to five times.) ‘These sorts of values would have reduced the land lost to survey liens in 1907 to between 148 and 247 acres in each block, rather than the 667 acres that was instead taken.’⁹⁸⁹ (Stirling’s calculations are based on the total figure for the blocks of £111 8s 3d, rather than the lower figure of £100.)

We note first that Ngati Rangitahi did appeal against the Crown’s taking of land from Matahina D, and their case was heard in the appellate court at Maketu in March 1909. Cleaver states that the appellant, Hemana Mokonuiarangi, cited three grounds: the absence of the appellants when the case was heard, the fact that the appellants’ successors had not been appointed, and the valuation of the land at the low price of two shillings per acre. In court, however, he addressed only the third issue – the valuation of the land taken. Challenging the valuation, and claiming that there was totara on the block which, though not accessible at the time

987. Nikora, ‘Matahina C & C No1 Blocks’ (doc A39), p 12

988. Cleaver, ‘Matahina’ (doc A63), pp 78–79

989. Stirling, ‘Te Urewera Valuation Issues’ (doc L17), p 84

might be one day, he called for a new one. In his view, the open land was worth two shillings an acre, and the forest £1 an acre.⁹⁹⁰ The Crown representative Mr Ballantine explained that two shillings an acre was the Valuation Department estimate which, he said, was 'all I had to go on.'⁹⁹¹ Ballantine's witness, Mr Buckworth, the Whakatane County Council's valuer, told the court he had never visited the block, but knew the Matahina area 'generally'. He described Matahina D in rather scathing terms, as 'very inaccessible' and 'practically valueless.'⁹⁹² He thought two shillings was too high a price for the land. The Appellate Court upheld the land court's decision. In its judgment, the court stated that Mokonuiarangi had provided no evidence to support his assertion that the valuation had been too low. It was guided, in short, by Buckworth's statements.⁹⁹³

Cleaver, considering the value of Matahina D, pointed to a Crown offer soon afterwards in January 1912 to buy part of the block (Matahina D2) for £40, or 10 shillings an acre. The offer was based on valuations carried out by officers of the Valuation Department. (This followed special valuations of several Matahina blocks, including Matahina D, carried out by Tai Mitchell in 1910. Mitchell valued Matahina D at 16s 6d per acre – which, however, the Valuation Department disputed, reducing the valuation of all the blocks.⁹⁹⁴) About half of Matahina D2 was forested, and Cleaver thus considered the price offered for the land in 1912 gives an accurate indication of the value of the remaining area of the Matahina D block. He concluded:

The Crown's offer to purchase Matahina D2 for 10 shillings an acre strongly suggests that an improperly low value was ascribed to Matahina D when 920 acres of the block was acquired for survey costs. It seems unlikely that the value of this land could have increased by 500 per cent in the five years between 1907 and 1912.⁹⁹⁵

We agree.

For Matahina c and c1, Cleaver suggests, it is unclear whether the land taken for survey costs was appropriately valued. In the absence of a Crown offer to buy in 1912, no valuation of those blocks was carried out. The Crown and claimant witnesses, Battersby and Nikora, thus compared the 1907 valuations with those of surrounding blocks, and they did not agree on how the evidence available should be weighed. Cleaver's view was that Battersby and Nikora's assessments were not made on the basis of a comparison of the physical characteristics of the blocks, which in his view was a crucial criterion. As he pointed out, the subdivisions of Matahina block were considered of different value in 1907, presumably on the basis of access, soil fertility, and quantities of standing timber: Matahina c blocks

990. Cleaver, 'Matahina' (doc A63), p77

991. President's Appellate Court, minute book 10, 8 March 1909, fol 108 (Cleaver, 'Matahina' (doc A63), p77)

992. Ibid, fol 109 (p77)

993. Cleaver, 'Matahina' (doc A63), p77

994. Stirling, 'Te Urewera Valuation Issues' (doc L17), p79; Cleaver, 'Matahina' (doc A63), pp 84–85

995. Cleaver, 'Matahina' (doc A63), pp77–78

Market Prices Offered for Adjoining Land

Waiohau 1B South and North (across the river from the Matahina c blocks): sold for 11s 5d an acre and 12 shillings respectively (1907) – four times the estimated value of parts of the Matahina c blocks taken for survey costs.

Waiohau 2 block (nearby): Government valuation 11 shillings an acre (1914), after owners offered to sell, less than the 1913 valuation of 16 shillings an acre; but after private purchasers bid for the land, the Government offer increased to £1 15s 6d per acre.¹

1. Bruce Stirling, 'Te Urewera Valuation Issues' (commissioned research report, Taneatua: Tuhoë-Waikaremoana Māori Trust Board, 2005) (doc L17), p 81

were valued at three shillings an acre, Matahina B at five shillings, and Matahina D at two shillings, Battersby, he noted, provided no details of the characteristics of the Matahina c blocks, and thus no real basis for his conclusion that the 1907 'Government valuation' of those blocks 'seems a standard value comparable to that of surrounding land at the time.'⁹⁹⁶ In any case, we note, there was no proper Government valuation in 1907, based on inspection of the land – and there should have been.

Stirling, while acknowledging that the Matahina c blocks seem to have contained no millable timber, and that Crown officials continued to have a low opinion of their value, pointed to two factors which should be considered in evaluating the price on which the Crown survey award was based. The first was the 'acknowledged gap between Government valuation and market price' which he considered more important than comparability of land, where there is evidence of market prices being offered for adjoining land (see the sidebar above).

The second factor was evidence pointing to the under-valuing, or under-estimating, of all other Matahina blocks in 1907 (see the sidebar opposite).

The scale of undervaluing of Matahina c, Stirling has suggested (as we noted above) is likely to lie somewhere between these two figures – that is, somewhere between three and six (five) times the 1907 estimate.⁹⁹⁷

Stirling's figure is itself, very obviously, an estimate, but his overall point is about the absence of a proper valuation for Matahina c land at the time survey costs were awarded to the Crown, and about the translation of a low estimate into a very substantial acreage. We have not been able to establish any requirement in 1907 for the court to secure a Government valuation when awarding survey costs. But the Crown's standard had been established in 1905 in the Māori Land Settlement

996. Cleaver, 'Matahina' (doc A63), p 81

997. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 84

Valuations of Other Matahina Blocks, 1910

Matahina B special valuation: almost twice the Crown's 1907 estimate.

Matahina D: eight times the Crown's 1907 estimate.

Act, which provided that the Crown had to buy Maori land at Government valuation; prices paid could not be less than the capital value of the land assessed under the Government Valuation of Land Act 1896. The purpose of that provision was to ensure that Maori land was not undervalued. Other sections in the 1905 Act relating to the lease of land vested in or managed by Maori Land Boards also use the capital value of the land as assessed under the Government Valuation of Land Act 1896 as a benchmark. And it is clear from the fact that the Crown's representative Ballantine called a valuer as his witness at the Matahina D appeal hearing that valuation was considered appropriate in relation to survey costs – even if, in this case, it had not properly been carried out.

It is hard to see why a Government valuation should not have been required in the case of survey costs – given that it was specified in every other transaction relating to Maori land after 1905. The importance of such a valuation to Maori owners was no less in this context than in any other.

The story of Matahina C, C1, and D survey costs reflects badly on the Crown, and we acknowledge the Crown's concession made in our hearings that in these cases survey costs were a 'heavy burden.'⁹⁹⁸ Matahina illustrates the worst case scenario for owners – but one that was always possible under the Crown's legislative regime. The Crown suggested that the small size of the blocks was a factor in the outcome; but for the Ngati Haka Patuheuheu and Ngati Rangitihi owners, these blocks – all that was left of their taonga tuku iho – were highly valued, and the impact of the liens was acutely felt. The commercial valuation of land, of course, took no account of traditional values and uses.

10.8.3.2.5 WERE SURVEY COSTS FAIR AND REASONABLE?

This is the key issue before us. It was contested between the Crown and the claimants – though the Crown made welcome concessions in respect of particular blocks. Crown counsel conceded further that the Crown 'could have taken further steps to ease the burden of survey costs.'⁹⁹⁹

We begin with the figures themselves (see table 10.9). The total amount for survey costs for the blocks for which we have figures was £3,918. Of this, £2,632 was paid by Maori owners in land amounting to 19,385 acres, while £1,286 was paid directly (withheld by the Crown from amounts due to owners, or paid by

998. Crown counsel, closing submissions (doc N20), topics 8–12, p 46

999. Ibid, p 40

*I*N these Native Land Court proceedings, we suffered badly as [a result of] the cost of surveys and other actions, in other words, we paid for our own colonisation.’

David Potter¹

1. David Potter, brief of evidence, 26 March 2004 (doc C41), p 25

owners to surveyors). Converted to land area, the direct payments were equivalent to 11,583 acres. Together, payments made by the Maori owners in land and cash amounted to 30,968 acres. This is equivalent to 9 per cent of the total land area of 344,471 acres in the blocks subject to survey costs. The overall proportion should, however, be treated with caution since the individual block ratios span a wide range. The 10 blocks for which we have figures, or can calculate them, range from 3.5 per cent to 92 per cent; one is under 5 per cent, seven are in the 6 to 26 per cent category, and at the upper end, three are over 50 per cent. These were, we stress, almost entirely figures for the first round of boundary survey costs. They do not include subsequent partition costs, other than costs for partitioning out the land secured by the Crown to meet unpaid survey costs.

These figures themselves tell us something about the allocation of survey costs to Maori land. Costs fell on different groups of owners inequitably. The system, as counsel for Te Whanau a Kai submitted, was arbitrary and unfair.¹⁰⁰⁰ Given that these costs had to be met by all Maori owners, this was not acceptable. The basis of the allocation of costs had not, as far as we are aware, been considered. Nor does there seem to have been any systematic monitoring of their impact on those groups who had to pay them. Otherwise, we must expect that inequities would have become evident, and would have been addressed. Counsel for Te Whanau a Kai, who considered it ‘arguable . . . whether Maori should have had to pay survey costs at all’, given the public benefit derived from individualisation of titles, suggested that if any costs were to be charged to them, they should have been fixed as a percentage of the block, with the Crown paying the rest. He suggested ‘no more than 5 per cent of a block’s value’ – a figure that echoed George Preece’s 1883 suggestion.¹⁰⁰¹

We do not feel comfortable suggesting a particular percentage ourselves, but we think that a minimal percentage in the vicinity of 5 per cent would have been suitable as a starting point, and subject to adjustment either way for factors such as accessibility, size, and terrain. We agree that, where Maori embarked on dealing in their lands, they should have made some contribution to the survey costs, but that it should not have exceeded a relatively small share of the land concerned. The

1000. Counsel for Te Whanau a Kai, submissions in reply (doc N27), p 8

1001. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 7

survey costs in only one of the inquiry district blocks were under 5 per cent. It is clear that figures of over 10 per cent were too high, and that, where costs amounted to over 50 per cent of the land, this was completely unacceptable. Even a seemingly more moderate figure of 7.8 per cent in such a big block as Tahora, when expressed in money or acres, aroused justifiable anger among Maori owners.

The question of what proportion of survey costs Maori might have paid raises the further questions:

- ▶ Whether full surveys were needed for title investigation.
- ▶ Whether full surveys were needed where sale was not the immediate object.

The claimants asked whether expensive theodolite surveys were necessary in the Te Urewera rim lands. Would not cheaper magnetic (compass) surveys have sufficed? Would not sketch plans have been adequate? We note that Tuhoē raised the issue of the cost of surveys repeatedly with the Crown in the mid-1890s, and that Premier Seddon finally made a concession on this point, realising that the leaders were anxious because 'the subdivision surveys seem to you a first proceeding in order to take possession of your lands.'¹⁰⁰² When the Urewera District Native Reserve Act 1896 was passed, providing for the central Te Urewera lands to be constituted a native reserve and (among other things) for a new process for determining land titles within the reserve, it required only that ownership be investigated on a sketch plan prepared and approved by the Surveyor-General as 'approximately correct'. The cost of the sketch plans would be borne by the Government.¹⁰⁰³ In other words, the Crown recognised Te Urewera anxieties about survey costs, and was prepared to act to meet at least some of those costs. (We discuss the issue of the extent of its concession on costs in chapter 9.)

Mr Nikora, himself a surveyor for many years, argued that in the case of the Matahina c blocks:

it just did not make any sense to carry out a survey to accuracy in length of 0.02 metres when the end result was to lose two thirds of the land. A magnetic survey would have been satisfactory. A full legal title survey in 1885 was just not necessary because Patuheuheu were not wanting to sell their land.¹⁰⁰⁴

His last point is a telling one. We have shown that in over three-quarters of the rim blocks, unwilling groups were pulled into the court on the back of applications by others, simply in order to protect their rights. And in the 1890s (when most purchasing occurred in Te Urewera rim blocks), the completion of court hearings and the titling of land was the signal for Crown purchase agents to move in to buy individual interests. Only in a minority of cases did a considered decision to take land to the court to sell come first. In these circumstances we must ask

1002. 'Urewera Deputation, Notes of Evidence', pp 20–21 (Cathy Marr, comp, supporting papers to 'Urewera District Native Reserve Act 1896 and Amendments', 2 vols, various dates (doc A21(b)), vol 2, pp 184–185)

1003. Urewera District Native Reserve Act, s 7

1004. Nikora, brief of evidence (doc C31), p 15

why magnetic surveys would not have sufficed until transactions were imminent. Crown counsel, considering the benefits of surveys to non-sellers – which they suggested included ‘farming, finance security, leasing, licenses for timber extraction, etc’, conceded that some ‘could perhaps have been achieved by a more simple (and less expensive) form of definition.’¹⁰⁰⁵ They added that there might have been ‘significant practical difficulties’ in separating out those who merely wanted to have their rights identified and secured, but who did not wish to sell or lease, from those who wanted secure title so they could ‘take up new economic opportunities.’¹⁰⁰⁶ We return to the point we made earlier, that had communities been provided with legal title, and been empowered to make collective decisions about their lands, such difficulties would hardly have loomed so large. And if communities had been in a position to manage decisions as to alienation of certain blocks, they could also have managed the process of securing more accurate surveys sufficient for title registration purposes under the Land Transfer Act, as they were needed. In short, the question of survey costs cannot be considered in isolation from the Crown’s processes for title determination and land purchase.

10.8.3.2.6 THE INESCAPABLE COSTS FACED BY MAORI OWNERS – CROWN POLICIES OF THE 1880S AND 1890S

A number of the grievances of Te Urewera claimants about survey costs can be traced to particular Crown policies. They include:

- ▶ unauthorised surveys, and the charging of the resulting survey costs to those found to be owners;
- ▶ penalties for those who obstructed surveys;
- ▶ the charging of survey costs to the land of those Maori owners who did not wish to sell;
- ▶ charging Maori owners who had not been able to meet survey debts interest of up to 5 per cent per annum;
- ▶ charging the costs of cutting out land owed to the Crown in payment of survey costs, to the Maori owners of the block in question; and
- ▶ lack of provision for valuation of Maori land being taken for survey costs.

10.8.3.2.7 UNAUTHORISED SURVEYS, AND THE CHARGING OF THE RESULTING SURVEY COSTS TO THOSE FOUND TO BE OWNERS

Crown processes which allowed individuals to pull land into the court without the mandate of their hapu were reflected in the survey regime itself. Any claimants were able to embark on a survey. The fact that authorisation of surveys was an issue in several of these blocks underlines the lack of provision for community decision-making and consensus on starting surveys. The most dramatic and terrible example before us is that of Tahora 2. Not only were two individuals able to instigate a survey which was conducted in secret, but that survey was certified by the Surveyor-General. The result was a hearing of a huge block in which many

1005. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

1006. Ibid

tribal groups had interests, and the foisting of the costs of that survey on those found to be owners, when those who had contracted with the surveyor were found to have no rights. The Native Land Court Act 1886 contained provisions which ensured that, where non-owners made a survey, the costs of the surveyor would still be met by those who were found to be owners. Even so, Parliament cannot have foreseen an outcome such as that in *Tahora 2*, where very high costs had to be met by a number of different tribal groups – who found themselves unable to share the costs imposed on them by cutting out a tract of land carefully chosen for that purpose, because the law did not allow it. The survey charge, by law, rested on the whole unwieldy block that had been secretly surveyed. Given the unique situation, the duty of the Crown (before it started buying individual interests) was to intervene, and amend the legislation – at the very least to make special provision for *Tahora 2*. It was not unusual to include a section or sections in a Native Land statute dealing with a specific block. Seddon, the Premier and Native Minister, speaking as he introduced the Native Land Court Bill in 1894, noted Maori concern about unauthorised surveys:

As the law stood in the past no doubt many surveys took place when the real owners of the land had never made any application at all. A man desiring to purchase would go to the surveyor, and the surveyor worked with the intending purchaser and obtained the signatures of some who had no right to the land; but with these names, and a claim to be interested in the land, the surveys have taken place; and many Natives have complained of this. Eventually the survey has been made, and the surveyor has had a lien on the land, which has remained standing there. Sometimes he has had the power of forcing a sale, and by this machinery the land has been put into the market and sold.¹⁰⁰⁷

It is ironic that despite Seddon's evident disapproval of a scenario in which a surveyor's lien led to the sale of the land of those who had never applied for the survey at all, the Crown had at the same time begun to buy into *Tahora 2* – a purchase triggered by the costs of Baker's survey, and by officials' failure to consider a response more helpful to the owners. To buy up individual interests in *Tahora* with a view to securing as much land as it could within the block was not a reasonable response.

10.8.3.2.8 PENALTIES FOR THOSE WHO OBSTRUCTED SURVEYS

The development of legislative penalties for obstructing surveys likewise sent a message to Maori about the importance of being the initiators – or of cooperating with those who were. Such penalties, aimed at individuals, were introduced in 1886. But they were not in force in 1885 when the *Tuararangaia* survey was conducted by Baker. As we have seen, this did not stop Crown officials from taking a claim to the court in 1898 based on delays caused by the alleged 'detention' of surveyors by some individuals, and to seek costs against all the owners in three

1007. Seddon, 28 September 1894, NZPD, vol 86, p 373

subdivisions of the block. The court obliged by holding ‘the Uriwera tribe’ responsible and exacting the costs in land from owners in two of the subdivisions. It shared the amount that would have fallen to owners in the third block among those of the other two. This was clearly unjust – as both officials and the judge must have realised, given that the legal penalties introduced since 1885 were directed at individuals, not at a community of landowners.

10.8.3.2.9 THE CHARGING OF SURVEY COSTS TO THE LAND OF THOSE MAORI OWNERS WHO DID NOT WISH TO SELL

A particular grievance of the claimants was the fact that survey liens, or proportions of them, were charged on the lands of non-sellers in Te Urewera rim blocks. In Tahora 2 (excluding 2B and 2B1), the amount paid by non-sellers amounted to 5,922 acres. The Whirinaki owners paid the lien they owed in land amounting to 4,439 acres.

Legislation provided a mechanism by which the court could allocate such charges. Section 65 of the Native Land Court Act 1894 gave the court wide-ranging powers. Once the Surveyor-General or commissioner of Crown lands certified an amount owing for survey, the court could charge the amount by way of mortgage on the land or instead, with the approval of the Minister, ‘vest a defined portion of or interest in any such land in any such person in fee-simple in satisfaction and discharge of such cost of survey’. The Minister might pay the amount claimed under any such mortgage, and the Surveyor-General would then become the mortgagee (creditor). As this is an important (if complex) provision, we reproduce part of it in the sidebar opposite.

We note two examples of Crown compromise on the matter of survey costs charged to non-owners. In one case, the court exercised its discretion under the Act, and the Government responded to court moves to secure better outcomes for Maori owners in respect of survey costs which the court regarded as unjust. When the Crown’s representative Kallender sought a charging order for a survey lien of £343 17s 8d on Heruiwi 4 in May 1895, the judge asked him to check if the block had been sold to the Crown. If it had, the judge said, ‘it would be manifestly unfair to burden the shares of those who have not sold with the whole of the lien.’¹⁰⁰⁸ The case, according to Tulloch, was adjourned, though the court minutes record that an order was made ‘against the land purchase [illegible] as it appears that they have bought most of the block the award to be pro rata as against area of each share.’¹⁰⁰⁹ At first officials in Wellington stood their ground. Sheridan replied to a query that ‘Crown purchases do not relieve residues [that is, land retained by Maori] from any survey costs to which they are otherwise liable.’¹⁰¹⁰

But, before long, the Crown backed away from its original application. The £343

1008. Rotorua Native Land Court, minute book 42, 13 May 1895, fol 169; see also Tulloch, ‘Heruiwi 1-4’ (doc A1), p 83

1009. Maketu Native Land Court, minute book 14, 6 May 1895, fol 100 (Tulloch, ‘Heruiwi 1-4’ (doc A1), p 83)

1010. Sheridan to Kensington, 7-9 October 1898 (Berghan, ‘Block Research Narratives’ (doc A86), p 585)

Section 65 of the Native Land Court Act 1894

65. Mode of securing payment of survey fees—The Court may charge by way of mortgage, on such terms as may seem just, any land or parcel of land to secure the payment of an amount to be certified by the Surveyor-General or commissioner of Crown lands for the district in which the land so surveyed is located as being the reasonable cost or portion of the cost of any survey thereof, whether heretofore made or in course of progress at the time of the passing of this Act, to such person as the Court may consider entitled to such payment, or may (subject to the approval of the Minister), in lieu of such mortgage, vest a defined portion of or interest in any such person in fee-simple in satisfaction and discharge of such cost of survey: Provided that no sale under any such mortgage shall be made until the expiration of six months after written notice, signed by or on behalf of the person claiming to exercise the power of sale, and specifying the land intended to be sold and the sum intended to be realised, shall have been lodged in the office of the Minister at Wellington.

The Minister may, out of any moneys available for the purchase of Native lands, pay the amount claimed under any such mortgage, or such other amounts which the Surveyor-General shall certify as being a fair value for the same, and take an assignment thereof in the name of the Surveyor-General.

lien was cancelled by the chief surveyor, and replaced with smaller liens for the Heruiwi subdivisions (4A, 4B2, 4C, 4F2) retained by Maori.¹⁰¹¹ These represented a proportion of the original boundary survey costs for Heruiwi 4 and subdivisional costs.

We note in this case, first, the judge's protest at the Crown's intention of recovering a substantial charge from the Heruiwi 4 non-sellers and, secondly, officials' initial restatement of Crown policy, and evident unwillingness to admit that it might be unfair. It is remarkable both that the judge expressed his concern and that the Government eventually responded to it.

The second case of compromise saved the Waimana 1C owners from the imminent loss of their block of over 3,000 acres. As we have seen, a dispute among the owners over reimbursing Swindley in land for the original survey and court costs ended in his not receiving payment from them (as far as we know), but meant that the cost of subdivisional surveys was not paid either by Swindley or by Tuhoe in 1885. As a result, a lien was attached to Waimana 1C block (3,179 acres), which had been assigned to Tuhoe non-sellers. By 1898, interest had accumulated on this sum. The Department of Lands and Survey, which had taken over the mortgage, prepared to put the whole block up for auction to recover its money – but the

1011. Tulloch, 'Heruiwi 1-4' (doc A1), p84

Government forestalled department officials.¹⁰¹² Tuhoe leaders, who wanted to establish a school (and had written to the Education Department about this the previous year), were able to persuade the Government to pay off the lien, stop the auction, and establish the school on 1c; the Government also agreed not to partition out the school site from the block.¹⁰¹³

Sissons, aware that such an intervention on the part of the Government was not usual, suggested that it may have been motivated 'by a desire to gain greater co-operation from Te Waimana leaders in the process of determining the boundaries and individual owners for hapu blocks being created within the Urewera District Native Reserve'. He referred particularly to disquiet on the part of Tamaikoha and Rakuraku at the Urewera Commission's procedures. We have to discount this suggestion, as the commission did not begin sittings in Te Urewera until early 1899. The Government paid off the Waimana 1c lien between February and August 1898.¹⁰¹⁴ And the outcome, whatever the Government's motives, appears to have been satisfactory to the owners.

On the broad issue, we are in agreement with the claimants that the charging of the land with survey costs in this way amounted to penalising those who wished to keep their land.

10.8.3.2.10 CHARGING MAORI OWNERS WHO HAD NOT BEEN ABLE TO MEET SURVEY DEBTS INTEREST AT UP TO 5 PER CENT PER ANNUM

The charging of interest for unpaid liens, provided for in legislation from 1886, seems less good business practice than simply punitive. The charge in 1886 was 5 per cent; from 1894 the court was given discretion to add interest to costs charged to land; the sum was not to exceed 5 per cent. From 1895, interest was not to accrue for more than five years.¹⁰¹⁵ The court generally charged 5 per cent. As we have seen, this meant that the amounts owners owed rapidly increased. The Tahora 2 owners contemplated sale because they feared the interest on the large sum they owed would balloon. Ngati Kahungunu leaders told the court in 1889, when asked, that they could not meet the survey charges owing on the Waipaoa block in cash, which amounted to £687 16s 7d – including £114 13s 6d interest.¹⁰¹⁶

10.8.3.2.11 CHARGING THE COSTS OF CUTTING OUT LAND OWED TO THE CROWN IN PAYMENT OF SURVEY COSTS, TO THE MAORI OWNERS OF THE BLOCK IN QUESTION

The addition to the owners' bill of the cost of surveying out the land awarded to the Crown for charges owed to it also seems punitive rather than necessary. These charges in the Matahina c and c1 blocks, while not high in themselves, contributed

1012. Sissons, 'Waimana Kaaku' (doc A24), p 64

1013. Ibid, p 65; see also Habens to Surveyor-General, 22 July 1898 (Brent Parker, comp, supporting papers to 'Timeline relating to the Waimana Block', various dates (doc K4(b)), p 175)

1014. Sissons, 'Waimana Kaaku' (doc A24), p 65

1015. Native Land Court Act 1886, s 86; Native Land Court Act 1886 Amendment Act 1888, s 25; Native Land Court Act 1894, s 66; Native Land Laws Amendment Act 1895, s 67

1016. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 160

– with the interest – to the appalling costs faced by Ngati Haka Patuheuheu. Together, they translated into two-thirds of C and C1 blocks. Ngati Rangitihī were spared a charge for cutting out the Crown's award from Matahina D only, it seems, because 92 per cent of the block had already been swallowed in survey and interest costs. Not enough land remained to satisfy any further charge.

10.8.3.2.12 LACK OF PROVISION FOR VALUATION OF MAORI LAND BEING TAKEN FOR SURVEY COSTS

The remaining issue is valuation of land taken for survey costs. This was an important issue for the claimants, because valuation of course affected how much land the Crown could take. It was also important where the Crown set a purchase price, and then deducted an amount from that to meet survey costs. Before 1905, the Crown named its own price per acre when purchasing, as we have seen. In Tahora 2, it insisted on its own price of two shillings an acre (when the owners had sought first five, then three), then deducted twopence an acre from that towards the survey lien, thus effectively buying the land at 1s 10d an acre. In Waipaoa, Huata and Tunupaura of Ngati Kahungunu made an agreement for survey, which specified a value for the land to be taken for costs at a rate of two shillings per acre. Very soon afterwards, however, they asked for three shillings; it seems probable that they discovered too late how much land would be taken at the rate stipulated in the agreement. And they turned to both the court and the Crown subsequently to try to get the valuation of their land revised, without success.

After 1905, when Government valuations were required (though not specifically for survey takings) witnesses were called in the court to give evidence on the value of land. This implies some acceptance on the part of the Crown that, given the new regime on valuation of land when alienation was involved, it was of some relevance also for land awards for survey costs. But as we have seen in the cases of Tuararangaia and Matahina, this could be a somewhat haphazard process; Government valuations based on examination of the particular blocks involved was not insisted on.

10.8.3.2.13 CONCLUSION

We conclude that the survey costs regime was flawed, and that there was little concern on the part of the Crown about its impact on Maori communities. This was not always true, but occasional examples of official flexibility in relation to survey charges are somewhat eclipsed by a more evident lack of interest – over a prolonged period – in how Maori owners coped with the loss of land involved. In the case of the three Matahina blocks with which we are concerned, for instance, there was no inquiry into whether the loss of the greater part of the blocks to their owners would leave them landless (as was required at the time in relation to alienations). The Lands and Survey Department was prepared to put Waimana 1C up for auction to recover the survey charges on the block – and the owners were thrown a lifeline largely because the Education Department was interested in responding to their wish for a school there.

By contrast with official indifference, the peoples of Te Urewera were deeply

concerned about survey charges. The extent of Crown purchasing activities in blocks where the owners had to pay off their survey liens in land underlines the fear of 'disastrous' survey costs that would be so strongly expressed when Seddon visited Te Urewera.¹⁰¹⁷ The remarkable thing is that while the Crown was addressing those fears in practical terms in the Urewera District Native Reserve, the attempts of its officials to secure survey charges (and interest on them) in the rim blocks continued unabated.

We referred at the beginning of this section to the issue debated by the Crown and claimants as to whether Maori – or the public – benefited from surveys of Te Urewera land. We have found that between 1881 and 1930, the Crown purchased nearly 60 per cent of the land in the rim blocks awarded to claimants in our inquiry, and that it achieved this by disempowering hapu through its legislation and its purchase policies. More than 82 per cent of the land passed into Crown or settler hands. This was, as the Crown so often explained, the purpose of Crown policies. T W Lewis put it in precisely these terms to the Native Land Laws commission in 1891: the Native Land Court system was designed to facilitate the transfer of land from Maori to settlers (see section 10.2).¹⁰¹⁸

It is in this context that we have to consider the imposition of a survey regime which required Maori to bear the costs of survey of their lands. As surveyors moved into Te Urewera for the first time, taking measurements and marking boundaries on their plans so that blocks could be recorded on colonial maps, the process of 'opening up' the country to settlement and creating transferable titles got under way. This, clearly, was seen as a public good. The peoples of Te Urewera should not have borne more than a small part of these costs. (We add that they should certainly not have been charged for the erection of trig stations – yet they were. We were taken aback to find that the owners of Heruiwi 4 were charged £78 for 'triangulation for erection of 8 new trig stations; renewing 2 old stations "destroyed by the Maories"; additional costs resulting from length of time since last survey'.¹⁰¹⁹)

For their own purposes, when Maori were ready to go to the court to have their titles confirmed (which, in our view, should have followed their own title determination process), sketch plans would have been adequate. The costs of surveys sufficient for land transfer title were a different matter. It was for the Crown to consider the allocation of those costs, and the extent to which it carried them or passed them on to settlers.

We find ourselves in agreement with the Hauraki Tribunal that it is

difficult to see what Maori gained, in the medium and long term, from having their land surveyed and passed through the court: most commonly it was the prelude to a succession of partitions and sales. On the other hand, the purchasers of land,

1017. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp57, 84

1018. David Williams, brief of evidence, 20 February 2004 (doc c3), p 26

1019. McBurney, 'Ngati Manawa and the Crown' (doc c12), p 340

including the Crown and the general community, gained from putting Maori under the obligation of having full surveys made of their land.¹⁰²⁰

10.8.3.3 What court and other fees did the peoples of Te Urewera face and what were the associated costs to them of court hearings?

In addition to survey costs, Maori faced costs arising from the hearings themselves: both the direct fees charged by the court, or by those who assisted them to prepare their cases, and the costs arising from their attendance at hearings. The claimants argued that these costs were unreasonable, especially when they were unwilling participants, and the Crown replied that the costs were not in fact substantial.

10.8.3.3.1 COURT AND OTHER FEES

Court fees were less onerous than survey charges. The Crown, in its closing submissions, provided a table setting out estimated land court hearing costs for Tuhoe 'hapu or individuals' for most but not all of the rim blocks, based on that supplied by Clementine Fraser in her general evidence on Tuhoe experience of the court. Such costs averaged £1 per day, the Crown stated, and ranged in total from £3 for Waiohau to £16 for Tuararangaia.¹⁰²¹

The table supplied, though helpful, seems to us to have some limitations. First, it does not provide a full picture of the court and associated fees faced by the peoples of Te Urewera. Court fees were set at £1 per party per day, payable by a party whether they were presenting their own case or cross-examining the witnesses of others, plus two shillings for each witness called by the conductor of a case.¹⁰²² The full amount charged claimants and those parties deemed 'counter-claimants' by the court during an initial title investigation in the district was more substantial. In Tuararangaia, for instance, it came to £37 14s, including title fees. (We note that the Tuhoe claimants were charged £1 on each of three days on which they neither gave evidence nor cross-examined witnesses.)¹⁰²³ The total fees (including title certificates) for parties in the initial Waipaoa hearing came to £44 4s.¹⁰²⁴ From at least 1880, the schedule of fees specified that fees might be charged 'at Judge's discretion'.¹⁰²⁵ The 1885 Rules of the Court stated more specifically, however, that the fees might, at the judge's discretion, be 'remitted or abated', and for the first time specified that they might either be paid 'when they accrue or be charged against any land' involved.¹⁰²⁶ It is evident that occasionally judges did waive fees, but this was not common. Court fees were usually required to be paid up front, which often meant borrowing.

1020. Waitangi Tribunal, *Hauraki Report*, vol 2, p 780

1021. Crown counsel, closing submissions (doc N20), topics 8–12, pp 31, 98–102

1022. 'Schedule of Order in Council', 5 April 1870, *New Zealand Gazette*, 1870, no 21, p 188

1023. Whakatane Native Land Court, minute book 3B, 4 December 1890, fols 260, 276

1024. Wairoa Native Land Court, minute book 3B, 26 March 1889–23 April 1889, fols 79–167

1025. 'Rules of the Native Land Court', 2 December 1880, *New Zealand Gazette*, 1880, no 114, p 1706

1026. 'Rules of Native Land Court', 2 June 1885, *New Zealand Gazette*, 1885, no 35, p 719

Matahina Hearing at Whakatane

NATIVES assembled requested that they may be granted an hour to consider the question of One pound fee payable or demanded by the Court for each party per diem and two shilling for each witness.

'Court adjourned for an hour.

'Court resumed at 11 am.

'Te Waretini . . . applied that the remainder of this day be given them to arrange for the payment of the fees . . . Penetito Hawea stated in reply . . . he could not agree to a further adjournment as he was prepared to pay his fees.'

Whakatane Native Land Court¹

1. Whakatane Native Land Court, minute book 1, 7 September 1881, fol 63

Secondly, Maori who appeared in the land court faced a wider raft of fees than is allowed for in the Crown's table. The case of Ruatoki is a good example – even though ultimately Tuhoe did not have to pay the fees because of the Urewera District Native Reserve. The Crown calculated the fees charged for 11 days' hearing, over a period of five months in 1894, as totalling £12. But Paula Berghan records that the chief judge, George Davy, informed the chairman of the Native Affairs Committee that costs in that hearing, which he described as 'a lengthy one', amounted to £293 16s.¹⁰²⁷ The chief judge did not give a breakdown of the costs. One source of the discrepancy may be the fees charged after judgment was given in September 1894 (not included in the Crown's tables). Oliver states that after September, the court continued to hear evidence for inclusion in the ownership lists, and to decide relative interests. Then, in December, a partition hearing was held.¹⁰²⁸ But a search of the minute books, including the judge's minute books, shows that the following costs were recorded between May and December 1894 (that is, both before and after judgment was given): May, £65 4s; August, £57 3s; September, £25 7s; October, £47 5s; November, £47 2s; December, 12 shillings.¹⁰²⁹ (By the rules of the Native Land Court dated 30 October 1888, a judge was required to keep an account of all fees accruing in respect of business before him, and to send a copy at the end of each month to the Receiver-General.¹⁰³⁰) These

1027. Davy to chairman, 12 August 1902 (Berghan, 'Block Research Narratives' (doc A86), p 196)

1028. Oliver, 'Ruatoki' (doc A6), p 71

1029. Judge Scannell's minute book 39, 31 May 1894, fol 250; Judge Scannell's minute book 43, 29 September 1894, fols 37, 178; Whakatane Native Land Court, minute book 4A, 31 October 1894, fol 112; Whakatane Native Land Court, minute book 4B, 1 December 1894, fol 106; Whakatane Native Land Court, minute book 4B, 5 December 1894, fols 129–130

1030. 'Rules of the Native Land Court', 30 October 1888, *New Zealand Gazette*, 1888, no 59, p 1156

totals amount to some £244, which is fairly close to the figure the chief judge gave the Native Affairs Committee.

In addition to hearing costs for Ruatoki, there were the costs of appeals in the appellate court: the fees were £20 2s, and the forfeited deposit was £35. Despite the recommendation of the Native Affairs Committee that these appeal costs (£55 2s) should be refunded, the chief judge decided against it.¹⁰³¹

The chief judge's figure for Ruatoki is a reminder that the full picture of fees borne by parties before the court cannot be gained by looking simply at initial title investigation fees. Daily fees were charged on each occasion when parties were before the court: for rehearing, partition, subdivision, or any other purpose, such as the determination of succession claims. The costs of filing an application for rehearing was £5.¹⁰³² In 1891, for example, Harehare Atarea and Toha Rahurahu each had to pay £5 when they applied for a rehearing of Heruiwi 4 block.¹⁰³³ Typically, fees in cases where succession to a deceased owner was decided were two shillings for each witness and 10 shillings for an order for registration (the latter first specified in 1885).¹⁰³⁴ Put another way, at the land prices paid for most rim blocks, it cost at the least several acres to succeed to an interest.

We note also that in addition to fees payable for court appearances, there were a number of other fees associated with hearings, and with securing title. We have already referred to the £1 title fees (for a certificate of title or memorial of ownership), and fees for court orders. There were also fees for inspection of papers (2s 6d from 1880) and for plans (10 shillings) and inspection of plans in the Survey Department (2s 6d) and, after 1880, for filing a document (three shillings). In April 1893, Te Marunui Rawiri wrote from Karatia to the registrar seeking evidence regarding certain blocks (clarified in a subsequent letter as Kuhawaea 1 and 2). He was told the evidence was 'somewhat long' and it would cost 20 shillings to copy it. The following month he sent a pound note, plus stamps, totalling 22s 6d (saying he wanted it in Maori, since he didn't understand English), and the copy was made.¹⁰³⁵

In addition, there were interpreters' fees. In 1890, the scale of fees for interpreters for Native Land Court work, published in the *Gazette* specified a daily fee of two guineas (£2 2s), with additional fees. For example, for interpreting a deed there was a fee of one guinea (£1 1s), while for translating a deed into either Maori or English the cost was 7s 6d.¹⁰³⁶

Crown officials were perfectly aware of the broad trends concerning costs of the land court process. From time to time, as we have seen, they advised the

1031. Berghan, 'Block Research Narratives' (doc A86), pp 196–197; see also 'Report by Chief Judge on Petition of Te Pakoura and Others', 12 August 1902 (Paula Berghan, comp, supporting papers to 'Block Research Narratives', 18 vols, various dates (doc A86(k)), vol 11, p 3584)

1032. 'Rules of the Native Land Court', 15 March 1890, *New Zealand Gazette*, 1890, no 14, p 317

1033. Tulloch, 'Heruiwi 1–4' (doc A1), p 68

1034. 'Rules of Native Land Court', 2 June 1885, *New Zealand Gazette*, 1885, no 35, pp 719–720

1035. Miscellaneous Kuhawaea correspondence (Bright, supporting papers to 'Alienation History of the Kuhawaea No 1, No 2A and No 2B Blocks' (doc A62(a)), pp C35–C40)

1036. 'Interpreters' Fees', 15 March 1890, *New Zealand Gazette*, 1890, no 14, p 318

Government of the situation and suggested remedies. In our view, the burden of the fees Maori had to meet should not be underestimated.

10.8.3.3.2 ASSOCIATED COURT HEARING COSTS

None of the Native Land Court hearings involving Te Urewera rim blocks were held in the rohe. Instead, they were held at Whakatane, Opotiki, Matata, Rotorua, Wairoa, or Gisborne. Costs to Te Urewera people of attending the court included travel and living costs during court sittings. In some instances, these distant hearings caused considerable expense and hardship, impacting on the health and well-being of claimants. Numerous requests were made by Te Urewera hapu for the location and/or timing of hearings to be moved, but they enjoyed little success.

The first hearings about which concerns of the peoples of Te Urewera are recorded were the combined hearings at Matata for Heruiwi, Waiohau, Karamuramu, and Pukahunui, together with Kaingaroa 1 and 2 hearings. Several of those blocks are outside our inquiry district, but we are mindful that claimants have pointed out that it is important not to restrict our consideration of the experience of their tipuna to our inquiry district boundaries. The Ngati Manawa applicants for the Heruiwi block hearing had asked that it take place at Galatea (as had the Ngati Apa and Ngati Hineuru claimants for Pukahunui). To Ngati Manawa this must have seemed an unremarkable request, as in March 1878 notice was given in the *New Zealand Gazette* that the Kaingaroa 1 hearing would take place at Galatea.¹⁰³⁷ McBurney suggests at the time it was probably intended to hear the Heruiwi and Pukahunui blocks at the same time.¹⁰³⁸

After the first day (19 June), however, the court adjourned first to Opotiki (on 28 June) and then to Matata (on 12 July).¹⁰³⁹ The latter was 80 kilometres away (by road) from Galatea. This prompted an immediate reaction from the Ngati Manawa claimants who, as Gilbert Mair noted in his diary, 'strongly protested against its being adjourned from Galatea . . . they would not attend Matata'.¹⁰⁴⁰ Subsequently, Mair met with the Ngati Manawa claimants who explained that the move would disrupt their garden cultivation, and would also make them dependent on their Ngati Rangitihī relatives.¹⁰⁴¹

The Matata hearings ran from around mid-July to late September 1878. The concerns of the Ngati Manawa claimants were well founded as by mid-August 1878, Te Mauparaoa told the court that Ngati Rangitihī had run out of food; as the court minutes recorded, '[s]everal other chiefs' had also 'spoke as to the want of food', at which point, having 'admitted the force of their argument', the court directed the district officer to 'report their condition to the Government without delay'. The Government response (in terms of Ngati Manawa) was for the Crown land

1037. McBurney, 'Ngati Manawa and the Crown' (doc c12), pp 193–194

1038. Ibid, pp 194–195

1039. Opotiki Native Land Court, minute book 1, 19 and 28 June 1878, fols 69–70

1040. Mair diary 25, 28 June 1878 (McBurney, 'Ngati Manawa and the Crown' (doc c12), p 195)

1041. McBurney, 'Ngati Manawa and the Crown' (doc c12), pp 194–195

purchase agent, Henry Mitchell, to advance £40 and £50 against Ngati Manawa's interests in Pukahunui and Heruiwi respectively.¹⁰⁴² Given that the Crown subsequently paid just over two shillings an acre for the Heruiwi 1 block, this advance for food was eventually converted in the transfer of more than 400 acres of Heruiwi 1 to the Crown.

In 1879, Ngati Manawa, Ngati Apa, Warahoe, Ngati Hineuru, Patuheuheu, and Ngati Hamua all faced rehearings for Kaingaroa 1 and 2. Following a meeting in May 1879, Rawiri Tahawai wrote on their collective behalf to Chief Judge Fenton requesting that the rehearings be held at Galatea (Karatia).¹⁰⁴³ Henry Mitchell advised against this move though, reporting to the Native Minister:

Galatea is a very unsuitable place for holding a Court, food being always scarce amongst the Natives and Transport of European supplies very expensive. There is no suitable building for Holding a Court there and the Distance from any telegraph station is 50 miles traversable only on horseback. Matata on the other hand is the natural support for all the Kaingaroa country & where the Natives have cultivated very extensively this season in view of the Court sitting before September. There are suitable buildings for the Court and the officers' accommodation & also for any number of Natives.¹⁰⁴⁴

In 1884, Rawiri Parakiri asked Chief Judge Macdonald to hear title applications for Whirinaki and other blocks (including Heruiwi 4 and Tuararangaia) at Te Teko, stating that 'great has been the suffering of this people in past Courts which sat at Matata and Whakatane. Those places were very distant from our district, and we suffered from the stopping idly at distant places among strangers.'¹⁰⁴⁵

In the view of the licensed interpreter, it 'would be a great boon' if the Ngati Manawa request was granted as their lands were extensive they were 'entitled to receive great consideration.'¹⁰⁴⁶ But ultimately Te Teko was rejected as a hearing location after Court Registrar Hammond received conflicting advice over its suitability. According to Alfred Preece, the hotel was too small and there was nowhere to hold the court, whereas a Mr Fraser considered the hotel large enough for the court staff, and thought a courtroom could be created by making minor alterations to the Te Teko barracks.¹⁰⁴⁷

Again in 1885, Harehare Atarea asked Chief Judge Macdonald to hold future hearings for Whirinaki, Tuararangaia, and Heruiwi 4 at Galatea, stating that 'many of our lands are being adjudicated upon in other district[s] and all those lands

1042. Ibid, pp 229–230

1043. Ibid, p 206

1044. Mitchell to Sheehan, 9 July 1879 (McBurney, 'Ngati Manawa and the Crown' (doc C12), p 212)

1045. Rawiri Parakiri to Chief Judge J E Macdonald, 22 February 1884 (Tulloch, 'Whirinaki' (doc A9), pp 26, 35)

1046. Covering note, licensed interpreter [name illegible], 25 February 1884 (Tulloch, 'Whirinaki' (doc A9), p 36)

1047. Berghan, 'Block Research Narratives' (doc A86), pp 733–734

were lost in consequence of the distance from our settlement and our food.¹⁰⁴⁸ A few months later, Harehare wrote again (on behalf of Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu) suggesting Te Teko as a good alternative, observing that ‘there will be no suffering for us in that district, nor any loss there. We have a settlement with houses there for us Maoris’. He also reported that ‘we are preparing a wooden building for the Court at Galatea and preparing food also.’¹⁰⁴⁹ And Parakiri pointed out that Te Teko was near the telegraph office at Whakatane.¹⁰⁵⁰

As it happened, any possibility that the court might sit at Galatea or Te Teko in the near future was ended by the Tarawera eruption. As Doig has noted, the middle reaches of the Rangitaiki Valley were covered by 15 to 30 centimetres of rock and ash, which meant that the land at Te Teko became a temporary desert, in which no cultivation could take place.¹⁰⁵¹ Galatea received a lighter coating of ash, but Ngati Manawa living there still took temporary refuge on their lands in the Heruiwi 4 block.¹⁰⁵²

The Whirinaki hearing was finally held at Whakatane in October and November (that is, spring) 1890. If the location in Whakatane was, in the circumstances, the best that could be managed, or was a response to a small group who asked that it be held there, the timing of the hearing – especially given the court’s knowledge of the difficulties the location would cause for the general Ngati Manawa community who lived in or near Whirinaki – was thoughtless to say the least. It was held during the planting season, and at a time when an influenza epidemic had broken out. Tulloch points out that the Whirinaki hearing lasted three and a half weeks, and was immediately followed by a Heruiwi 4 hearing. Together, the hearings kept Ngati Manawa claimants away from their homes and cultivations for some six weeks. And she stresses the context of these hearings for Ngati Manawa: they had already incurred ‘significant costs’ as a result of attending earlier hearings in Matata and Whakatane for title determination of other blocks, including Kaingarua 1, Kuhawaea, and Heruiwi.¹⁰⁵³ In 1912, Gilbert Mair would state that attending hearings in Whakatane was a cause of ‘grievous and unnecessary hardship’ to Ngati Manawa. He added that he had known Ngati Manawa ‘to squander many thousands of pounds through being forced to attend the Land Court at Whakatane, to say nothing of sickness and death caused by want of food and proper accommodation.’¹⁰⁵⁴

If Mair’s comment on costs seems an overstatement, it should be set in the

1048. Harehare Atarea to Chief Judge JE Macdonald, 11 June 1885 (Berghan, ‘Block Research Narratives’ (doc A86), p 569)

1049. Harehare to Chief Judge JE Macdonald, 3 October 1885 (Berghan, ‘Block Research Narratives’ (doc A86), p 735)

1050. Rawiri Parakiri and others to Chief Judge JE Macdonald, 22 February 1884 (Tulloch, ‘Whirinaki’ (doc A9), p 36)

1051. Suzanne Doig, ‘Te Urewera Waterways and Freshwater Fisheries’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A75), p 11

1052. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 215; Rose, ‘A People Dispossessed’ (doc A119), p 89

1053. Tulloch, ‘Whirinaki’ (doc A9), pp 26–27, 35

1054. Mair to Native Minister, 24 May 1912 (Tulloch, ‘Whirinaki’ (doc A9), p 35)

context of the cost of provisions at the time. The Central North Island Tribunal noted that when hearings of the Maketu blocks were relocated to Tauranga in November 1879 and the Crown agreed to pay the costs, rations for 200 people for six weeks cost about £300.¹⁰⁵⁵ And Mair's observation on sickness is a reminder of the conditions that people might have to live in while attending court hearings. Camping in tents – especially but not exclusively in the winter – often meant coping with wet and mud, without clean water or sanitation.¹⁰⁵⁶ The alternative was to live in expensive hostelrys, on credit with the attendant temptations of readily available alcohol. There was no lack of storekeepers who set up shop at prolonged court sessions to exploit the needs of those attending the court.

The Whirinaki rehearing was held in winter 1893, and on that occasion the Inspector of Schools, James Pope, recorded the absence from Te Houhi of 'the chief and nearly all the people . . . away at the Rotorua Land Court'.¹⁰⁵⁷ Rose thought that Ngati Haka and Patuheuheu may not in general have attended hearings in a large group,¹⁰⁵⁸ but Pope's comment testifies both to the kind of community mobilisation that could and did occur during hearings, and to the chance recording of such mobilisation by a visitor.

The Crown seemed not to give much weight to evidence that the location and timing of the hearings caused difficulties for Urewera hapu. It submitted that the court was 'generally sensitive to seasonal factors such as the planting and harvesting of crops' when it came to setting hearing dates. We note that in November 1880, the principal Ngati Awa chiefs sought an adjournment of the Matahina hearing, stating that the tangi for the chief Apanui was being held, that the various parties were very short of food, and it was the planting season.¹⁰⁵⁹ On this occasion, the court granted the request. But, as we have shown, the court was not always so responsive. In February 1885, when the Waimana partition hearing was held at Opotiki, an adjournment was sought by one of the parties (Jemima Shera) who had been 'taken by surprise by the hearing suddenly coming on'. Judge Mair reported to the chief judge on 11 February that he had already adjourned the case twice before, and that all parties were present except Mrs Shera. Under pressure from the chief judge, however, Mair capitulated. He sent a telegram to the Native Department the following day stating that he had adjourned for a further three days to suit Mrs Shera. But this meant that 'around 50 other claimants from the Urewera and Waimana were kept waiting in a place where they have no relations and no food'.¹⁰⁶⁰

We welcome the Crown acknowledgement that there 'is some evidence of hardship in meeting food costs'.¹⁰⁶¹ Counsel referred in closings to some of the avail-

1055. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 516

1056. Tuhoe attending hearings at Matata in the 1880s were sometimes reduced to eating wild taro, toxic to young children: Potter, brief of evidence (doc C41), p 20.

1057. Rose, 'A People Dispossessed' (doc A119), p 88

1058. *Ibid*

1059. Whakatane Native Land Court, minute book 1, 4 November 1880, fol 28

1060. Parker, 'Timeline' (doc K4(a)), p 11

1061. Crown counsel, closing submissions (doc N20), topics 8–12, p 33

able evidence of food shortages affecting Ngati Manawa and Ngati Apa, Ngati Kahungunu, and Matahina claimants. Costs were incurred when hearings were held at a distance from community bases, and people could not supply themselves (and their visitors) from their gardens. In such circumstances, people had to feed themselves as best they could; they might gather local resources. (David Potter gave evidence that Tuhoe attending hearings at Matata in the 1880s were sometimes reduced to eating wild taro, toxic to young children).¹⁰⁶² Or they had to buy food from stores on credit.¹⁰⁶³ The Crown told us that there is evidence that, where the Government was buying blocks, it occasionally deducted from the purchase price the cost of food and accommodation it had paid for Maori to attend hearings for those blocks, despite the fact that this was not in accordance with Crown policy at the time.¹⁰⁶⁴ This underlines the fact that Maori had difficulty meeting such costs, and ultimately paid in land.

We accept the Crown's argument that the location of court sittings could not always satisfy all claimant groups, but we cannot but draw the contrast with later Urewera commission hearings, held in many of the main kainga of Te Urewera, and well attended. In the case of land court sittings, there does not seem to have been any great concern on the part of officials to meet Maori requests for locations nearer their homes, or about the costs to the people of attending distant hearings. Premier Seddon responded positively to Tuhoe in 1894, agreeing that a land court hearing might be held in Ruatoki so that the people would not have to travel long distances or to sell land to meet the costs of attending court in distant places.¹⁰⁶⁵ In fact, the court was later held at Whakatane. Though hearings of some Te Urewera rim blocks were not long, it is clear that the cost of provisions, even for a period of two weeks, could be high. We reiterate the conclusion of the Central North Island Tribunal that the problems with venues and costs of hearings reflected the overall lack of Maori involvement in the design and running of forums to determine land titles. Had there been such involvement, the Tribunal concluded, 'it is hard to imagine that they [Maori] would have placed the pressure on people and their economic and social well-being to the extent that the court did'.¹⁰⁶⁶

We reiterate also that the various costs Maori applicants faced were cumulative. Court costs and associated hearing costs had to be met at once, which often meant borrowing, and led ultimately to the sale of land.

10.8.3.4 *Treaty analysis and findings*

Ultimately, the Crown's system for survey costs, charging Maori in their own land for its survey while at the same time it purchased large tracts intended for settlement, cannot be justified in Treaty terms. Only if we could say that the peoples of Te Urewera generally benefited as a result of the titles they secured, that economic

1062. Potter, brief of evidence (doc C41), p 20

1063. Berghan, 'Block Research Narratives' (doc A86), p 570

1064. Crown counsel, closing submissions (doc N20), topics 8–12, p 33

1065. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp 54, 58

1066. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 518

growth and well-being followed, could we say that the system was justified. Quite the opposite is true. The New Zealand courts and many earlier Tribunals have found that the principle of partnership inherent in the Treaty requires the Crown to act reasonably, honourably, and in good faith. The Central North Island Tribunal described the obligations of partnership as including:

The duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything that altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.¹⁰⁶⁷

We find the Crown in breach of the principle of partnership, and also the principle of good government in that it failed to consult with Maori about the basis of a system for survey costs, and failed to consult Te Urewera leaders about the implementation of its system within their rohe – despite the fact that those costs would have to be borne by Maori.

As we have seen, it did consult – and listen – in the mid-1890s, in the context of much wider discussions with Te Urewera leaders about their land and autonomy, with the result that key concerns of the peoples of Te Urewera about survey costs were met in the new Urewera District Native Reserve legislation (see chapter 9). Such consultation was practical and – had it been undertaken sooner – might have produced acceptable solutions. But the rim blocks (other than Ruatoki) continued to be dealt with under the native land legislation, and Te Urewera owners in those blocks continued to have to meet survey costs for which they were liable under that legislation.

We find further that the Crown breached the Treaty principles of good government and of active protection, in that it:

- ▶ failed to heed advice that 'undue pressure' on Maori claimants would result from their having to pay the whole cost of surveys;
- ▶ responded to evidence that such costs were heavy not by streamlining the surveying system and concentrating surveys of Maori land in the hands of district surveyors, but by providing regulations which standardised fees, and improving its policing of private surveyors, who continued to operate;
- ▶ failed to consider what the basis of a fair system of transaction costs should be;
- ▶ failed to monitor the operation of the regime it established, and to ensure that it worked equitably for different groups of owners;
- ▶ failed, therefore, to legislate to ensure more equitable outcomes for groups of owners in respect of the allocation of survey costs;
- ▶ failed to provide adequate or appropriate remedies for owners who, by law, had to meet the costs of boundary surveys they had neither sought nor

1067. Ibid, vol 1, p173

wanted (and which, in the case of Tahora 2, had been carried out in secret at the instigation of non-owners);

- ▶ provided a survey costs regime which focused unduly on ensuring recovery of costs from Maori (usually in land), and on penalising owners who failed to meet them promptly by charging interest – which translated into more land;
- ▶ failed to ensure that the court had an obligation to inquire, when charging survey costs on land in accordance with the established regime, into whether owners would retain sufficient land in a block once the court order took effect;
- ▶ failed, before 1905, to ensure fair valuations of land it took for survey costs; and, after 1905, when it required Government valuation of land being purchased, failed to make legislative provision for the valuation of land for survey costs;
- ▶ applied to the court in the case of Tuararangaia 1 for costs to be charged to all the owners of the block for the detention of a surveyor by a few individuals of Tuhoe, and secured an order accordingly, allowing the court to defeat the provisions of the law (section 14(12) of the Native Land Court Act 1894) as to penalties for obstructing surveyors; and
- ▶ failed to consider the impact on the peoples of Te Urewera of the inescapable and cumulative costs (survey costs, court fees, and the costs of travel, food, and accommodation involved in attending court hearings) of securing new titles to their land, and to provide appropriate assistance.

The system was very unfair. And it is in the context of rapid land alienation, and the inability of communities to control it, that the taking of additional land for survey costs has seemed such an imposition, and left such a strong sense of injustice among the peoples of Te Urewera. It seems to us that, when combined with the other many and various flaws in the native land system, in a very real sense the dispossession was being funded by the dispossessed.

10.9 WHAT PROTECTION MECHANISMS WERE THERE FOR MAORI IN RESPECT OF THE ALIENATION OF LAND AND HOW EFFECTIVE WERE THOSE MECHANISMS IN TE UREWERA?

SUMMARY ANSWER: In respect of its Treaty duty of active protection, the Crown provided three mechanisms to protect Maori in their land dealings, and in the retention of sufficient land for their present and future needs. The most important, in terms of its potential for success in our inquiry district, was restrictions on alienation. This mechanism was not available to the leaders of Te Urewera as a meaningful option until 1889, after which they restricted almost three-quarters of the land that passed through the court. In theory, this ought to have restored some collective control over alienations, and prevented any sales until the community and its leaders were truly ready and willing to sell (when a majority could apply to remove the restrictions). This majority requirement was reduced to one-third in 1894. In reality, however, the Crown purchased individual interests as if

there were no restrictions on titles. Restrictions were never formally removed. The Crown's purchases were unlawful in this respect, and in breach of the Treaty principle of good government. The Crown also failed to provide for restrictions in legislation setting up the Validation Court and the Urewera commission, thus preventing the renewal of restrictions on the titles of Tahora 2 and Ruatoki. By these various means, 93 per cent of restricted land was no longer protected within just a few years of restrictions on alienation having been placed on block titles. Thus, restrictions provided nothing more than the illusion of protection, and the Crown itself was responsible for rendering them ineffective. This was a very disappointing outcome in Treaty terms, and an obvious violation of the Crown's duty of active protection.

The second protection mechanism was the requirement for the Crown to reserve sufficient land for the present and future needs of the peoples of Te Urewera. In our inquiry district, the earliest provision was for district officers to consult Maori and obtain agreement to setting aside reserves. The Native Land Act 1873 specified that such reserves were to provide sufficient land for present use and as endowments for the future. No such reserves were established in Te Urewera before the position of district officer was abolished in 1886. From 1889, when the majority of land in the rim blocks passed through the court, the Government left it to the court to impose restrictions if the people appearing before it had insufficient land. Having thus provided for 'reserves' to be made at the time of title investigation or partitioning, the Crown refused to create reserves when it was purchasing land in the rim blocks. Maori were told that it was no longer Crown policy to make reserves. Given the Crown's purchase of restricted land in the 1890s, and its unilateral cancellation of all restrictions in 1909, this meant that no true reserves were ever made. The Crown's reserve policies were a resounding failure in the Te Urewera rim blocks, in breach of its Treaty obligation of active protection.

The third protection mechanism was the requirement that all purchases of Maori land be vetted against statutory standards, by trust commissioners and the Native Land Court in the nineteenth century, and by Maori land boards in the first part of the twentieth century. The Crown exempted itself from such scrutiny. Counsel suggested that Maori could rely on its utmost honesty and scrupulous behaviour in its dealings with them. It cannot be shown that the Crown's purchases would not have passed the kind of examination made by trust commissioners. In terms of private purchases, the trust commissioners' inquiries in Te Urewera appear to have taken place after partitioning, so that the original transactions were not actually subject to scrutiny. Apart from Waiohau (discussed in chapter 11), this cannot be shown to have had prejudicial effects. The so-called 'majority rule', however, by which private purchasers were not supposed to be able to obtain land without community agreement, did not provide any such protection in Te Urewera. Finally, the Maori land board system did not provide true protection of Maori interests in its process for scrutinising and confirming sales, because of the fundamental flaw that allowed small minorities of owners to alienate land (and at a single meeting). This system permitted the forced sale of the interests

of majorities of owners for blocks in Te Urewera, in breach of Treaty principles. Maori were denied representation on the land boards, in breach of the principles of partnership and autonomy.

10.9.1 Introduction

The Crown's duty of active protection has been discussed by the Court of Appeal, and by the Waitangi Tribunal in many of its reports. The Central North Island Tribunal pointed out that the need to do justice to Maori, and to protect their just interests, was a common theme among the pronouncements of nineteenth-century officials and legislators. Of all the Crown's Treaty duties, this one was often in their minds – or was brought to their attention.¹⁰⁶⁸ In our inquiry, the Crown accepted that it had had a duty to protect Maori interests by providing safeguards in dealings with land, by providing means for Maori to retain their land for so long as they wished to do so, and by protecting a sufficiency of land in their possession. But the Crown stressed its view that matters had to be brought to its attention before it could be expected to act. The first Native Land Acts, we were told, contained no protection mechanisms. It was not until experience showed that Maori wanted and needed protection in their dealings that such mechanisms were added to the legislation. Similarly, the Crown argued that unless it was brought to its attention that Maori in the rim blocks were becoming landless, there was no expectation that it could or should have done anything to prevent it.¹⁰⁶⁹

So what protection mechanisms did the Crown provide? Those of relevance to our inquiry were:

- ▶ Court-imposed restrictions on alienation, available at the time of title investigation or partitioning of particular blocks.
- ▶ Provisions for reserves, designed to ensure that Maori communities retained 'sufficient' land for their direct use and maintenance, and as 'endowments' for the future.
- ▶ Mechanisms for the vetting of purchases, to safeguard Maori from making transactions that were unfair to them, in violation of any aspect of the law, or that would render them landless. Nineteenth-century mechanisms included special trust commissioners and the Native Land Court itself. After the 1909 reforms, Maori land boards were responsible for carrying out these protective functions.

10.9.2 Essence of the difference between the parties

The Crown and claimants agreed that the Treaty guaranteed Maori the active protection of their interests by the Crown. They also agreed that positive mechanisms were established to carry out this Treaty duty in relation to land, including reserve-making, restrictions on alienation, and the establishment of systems to vet

1068. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 181–188; vol 2, pp 429–435

1069. Crown counsel, closing submissions (doc N20), topics 8–12, pp 68, 76, 85–92

transactions and protect Maori in their dealings. Vetting was done by trust commissioners and the Native Land Court in the nineteenth century, and by the Maori land boards in the first part of the twentieth century. The parties agreed that the Crown made honest efforts to protect Maori interests.

Conceptually, the Crown saw protection mechanisms as Government-imposed restrictions that fettered Maori freedom, and therefore had to be balanced against the right of Maori to deal with their land as they saw fit. The claimants, on the other hand, saw protection mechanisms as a fundamental necessity, to be worked out and administered in conjunction with Maori, so as to provide for their *tino rangatiratanga* while actively protecting their interests.

The Crown's view was that restrictions on alienation were intended to provide temporary protection. They were to provide a 'cushion' to protect land in Maori ownership and to help Maori keep sufficient land in the meantime, until they were fully ready and willing to sell land and protect their own interests in the new economy. Many Maori, we were told, resented even this much of a fetter on their freedom of action. Given a strategic choice in court, Te Urewera leaders only sought restrictions on four of the 11 rim blocks, even though restrictions were available at all times. In order to balance the Crown's duty of protection with the right of Maori to deal with their land, restrictions were not – and could not be – a means of reserving land forever. The Crown accepted, however, that standards for the removal of restrictions were lowered in the 1890s, allowing the Crown to remove them in order to purchase land, and permitting the court to remove them at the request of just one-third of the owners.¹⁰⁷⁰ Fundamentally, the Crown argued that restrictions did what they were designed to do in Te Urewera: provide temporary protection.

The claimants considered restrictions on alienation to be a very important protection, sought by Te Urewera leaders to protect their lands from unwanted alienations. In their view, the Crown was two-faced in its use of this protection mechanism. On the one hand, it provided restrictions as a means of preserving land that Maori wanted to retain; but, on the other hand, it purchased restricted lands extensively and almost immediately after restrictions had been imposed, without even bothering to remove them. As a result, restrictions were nothing more than another way of prohibiting private purchases and creating a Crown monopoly.¹⁰⁷¹

Restrictions became part and parcel of the Crown's reserve-making policies. The claimants relied on the preamble and terms of the Native Land Act 1873 to demonstrate the Crown's awareness of its duty to reserve a sufficient land base for hapu. Relying on many reports of the Waitangi Tribunal, they argued that reserving land for individuals or for a subsistence lifestyle was not enough. The Crown was required actively to protect the retention of sufficient land for traditional resource-use and for commercial farming, as hapu chose. The claimants contended that, as

1070. Ibid, pp 4, 89–91

1071. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–36, 39; counsel for Ngati Hineuru, closing submissions (doc N18), pp 25–27

a means of carrying out this obligation, policies for reserve-making and restrictions on alienation were an object failure in Te Urewera.¹⁰⁷²

The Crown's view was that restrictions and reserves were never meant to be truly permanent, as that would have been an unreasonable fetter on Maori freedom to deal in their lands.¹⁰⁷³ It accepted, however, that it had a duty to prevent landlessness:

The Crown accepts that it had some obligation to make a general assessment of the overall position of Maori landholding in areas where there was some indications of an insufficient land base. This was to be balanced with the right of Maori to deal with their lands as they saw fit. There is insufficient evidence that indications were made that Urewera hapu did not have a sufficient land base.¹⁰⁷⁴

Further, the Crown argued that there is insufficient evidence to determine whether district officers carried out their responsibilities under the 1873 Act to make reserves, or the extent to which reserves were actually made in Te Urewera.¹⁰⁷⁵

With respect to vetting, the Crown argued that it provided systems for checking transactions and ensuring that Maori were treated fairly and not allowed to become the victims of fraud. In particular, the Crown pointed to what it called a 'majority rule' in the native land laws before 1909, preventing private buyers from dealing with other than the whole community. The provision that transactions were legally void unless the community agreed to the sale in court, or a majority agreed to a partition for sale, was sufficient protection of Maori interests.¹⁰⁷⁶ In addition, trust commissioners and the court checked each private transaction against statutory standards of fairness. The Crown maintained that there is no evidence this system allowed any substantive injustices, with the exception of the Waiohau fraud.¹⁰⁷⁷ Further, the Crown submitted that it was not subject to independent vetting, but nonetheless acted in a scrupulously honourable manner in its transactions. It cannot be shown that any substantive injustice resulted from the Crown's purchases not being audited in this way.¹⁰⁷⁸

The claimants relied on the Tribunal's report *Turanga Tangata Turanga Whenua*, and on the evidence in this inquiry, to suggest that the supposed 'majority rule' provided no protection for Maori. Individual purchasers were willing to take the risk and buy up shares until they had enough to secure a partition. Transactions were 'void' only until the court confirmed them, which it routinely did. In the case of Waiohau, both the court and the trust commissioner failed to vet transactions

1072. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 4–9, 39–40, 54; counsel for Ngati Manawa, closing submissions (doc N12), p 54; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 28

1073. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 22, 68, 76, 85–91

1074. *Ibid*, p 68

1075. *Ibid*, p 76

1076. *Ibid*, pp 4–5, 13–16, 90

1077. *Ibid*, pp 78, 87–91

1078. *Ibid*, pp 6, 65, 85, 88, 91

properly or enforce any kind of majority rule.¹⁰⁷⁹ In terms of the Crown's transactions, the claimants did not agree that it was safe to exempt the Crown from independent vetting. In their view, the failure to have its dealings checked by the trust commissioners was a breach of its protective obligations.¹⁰⁸⁰ In terms of private transactions, the claimants were concerned that trust commissioners checked post-partition dealings, and were unable to go behind them and so inquire into the original transactions that underlay the partition.¹⁰⁸¹

The Crown did not make submissions about the Maori land board system, or the vetting of purchases in the twentieth century. It did, however, note the end of what it called the 'majority rule' in 1909.¹⁰⁸² For the claimants, the most problematic aspect of the 1909 system was the provision for meetings of owners. It allowed minorities (sometimes very small) to alienate land without the consent or even knowledge of other owners, because of the very low quorum requirements. In their view, this was a serious Treaty breach.¹⁰⁸³

10.9.3 Tribunal analysis

As we mentioned above, there were three main protection mechanisms:

- ▶ restrictions on alienation, placed on titles at the time of first hearing or partitioning;
- ▶ reserves, to ensure that Maori retained 'sufficient' land for their present and future use; and
- ▶ mechanisms for the vetting of purchases, including trust commissioners, the Native Land Court, and Maori land boards.

We deal with each of these mechanisms in turn.

10.9.3.1 Restrictions on alienation

In our inquiry district, the most important protection mechanism was the placing of official 'restrictions' on the sale or leasing of Maori land. It was avidly sought by Te Urewera leaders, who succeeded in getting some two-thirds of the land in the rim blocks protected by restrictions on alienation. These restrictions were placed on titles by the Native Land Court at the time of hearing. Typically, they prevented any alienation of the restricted land except by way of lease. Even then, the lease was not allowed to be for longer than 21 years. Some restrictions did not permit any alienation at all, even short-term leases. If they had worked as apparently intended (and as Maori believed they would), then the rate of land alienation in the rim blocks would have been greatly reduced.

1079. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 30–35, 67–68

1080. Counsel for Ngati Manawa, closing submissions (doc N12), p 54; counsel for Ngati Hineuru, closing submissions (doc N18), p 19

1081. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 29; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 15

1082. Crown counsel, closing submissions (doc N20), topics 8–12, p 4

1083. Counsel for Ngati Manawa, closing submissions (doc N12), pp 47–48; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 41; counsel for Ngati Hineuru, closing submissions (doc N18), p 29

As David Williams' evidence set out for us, the legislative regime governing restrictions was complex and changed frequently.¹⁰⁸⁴ Relying on Professor Williams' evidence, the Crown suggested that its purpose was not the protection of Maori land in Maori ownership for all time. Rather, the Crown's intention was to protect land in Maori ownership until each tribe had adapted to the colonial economy and to the practice – and consequences – of selling land.¹⁰⁸⁵ Crown counsel alluded to article 2 of the Treaty when they submitted: 'Restrictions were intended to protect Maori in the retention of their lands (for as long as they wished to retain it) and in their dealings.'¹⁰⁸⁶

In effect, the creation of this kind of legal protection arose from some recognition that without it, Maori could not prevent the uncontrolled and excessive alienation of their land. As T W Lewis explained to the Native Land Laws commission in 1891, the Native Land Court system was designed to facilitate the transfer of land from Maori to settlers.¹⁰⁸⁷ An ongoing theme in the nineteenth century, however, was the Crown's duty of active protection of Maori interests. One concrete expression of that duty was the creation of a regime supposed to prevent Maori landlessness on the one hand, and on the other to protect land in Maori ownership until they were truly ready and willing to alienate.

The restrictions regime could do these two quite different things because it allowed for restrictions to be initiated by either side: Maori or the court. From 1888 (just before most of the land in the rim blocks went through the court), the judge was 'empowered and directed' to inquire whether Maori had sufficient inalienable land for their support, at the time that any particular block was having its title investigated. If the answer was 'no', then the judge had to place restrictions on the new titles. The same thing had to be done at subsequent partition or subdivision hearings.¹⁰⁸⁸ The intention was to prevent landlessness. Tribal leaders, however, had the opportunity to ask for restrictions on blocks themselves, regardless of whether they had what the law deemed 'sufficient' land for their support without it. As we shall see, Te Urewera leaders took up this protection with great enthusiasm, and the court usually granted their requests as a matter of course. Thus, a large quantity of land in the rim blocks ended up protected by restrictions on alienation.

10.9.3.1.1 RESTRICTIONS UNDER THE 1873 REGIME – EVERYTHING AND NOTHING

As we have seen, the rim blocks went through the court in two distinct phases. The first five blocks had their title investigated from 1878 to 1882. Waimana, Waiohau, and Heruiwi 1–3 were heard in 1878. Matahina was heard in 1881 (and reheard in 1884), and Kuhawaea had its title investigated in 1882. The main Act in force

1084. Williams, brief of evidence (doc c3), pp 9–10, 18–25; David Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999), pp 275–283

1085. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 89–90

1086. *Ibid*, p 89

1087. Williams, brief of evidence (doc c3), p 26

1088. Native Land Court Act 1886 Amendment Act 1888, s 13

at the time of these hearings was the Native Land Act 1873. This Act's provision for restrictions on alienation has caused great confusion over the years. We view the Turanga Tribunal's interpretation as definitive.¹⁰⁸⁹ In essence, all Maori land had restrictions on the titles, but any of it could be sold with the agreement of all the owners, or a majority could partition it for sale.¹⁰⁹⁰ This was distinguished from what we might call the true restrictions on alienation, which could only be removed with the prior consent of the Governor. These restrictions were intended to protect reserves for the occupation and endowment of hapu, which were provided for in a different part of the Act.¹⁰⁹¹

This was changed in 1878, when Parliament reintroduced the possibility of restrictions for blocks that were not reserves. Under the 1878 Act, a judge could recommend to the Governor that restrictions be placed on the alienability of land 'forming the subject of investigation before him', if, in the judge's opinion, the land needed to be reserved for the 'use or occupation' of any of its owners.¹⁰⁹² This was extended in 1880 to a positive duty on the part of the court. It had 'in every case' to inquire as to the 'propriety of placing any restriction on the alienability of the land or any part thereof'.¹⁰⁹³ From then on, the court could put these restrictions on titles itself. They could only be removed by the Governor in council, which continued to distinguish them from the section 48 restrictions still imposed on all titles by the 1873 Act.

The Crown has suggested that all the rim blocks passed through the court when restrictions on alienation were available at the time of title investigation, but that Maori themselves did not seek them, except in four instances: Heruiwi 4, Whirinaki, Tuararangaia, and Tahora 2.¹⁰⁹⁴ We do not accept this submission. The first three blocks to pass through the court (Waimana, Waiohau, and Heruiwi 1–3) did so in June to July 1878. This was four months before the Native Land Act Amendment Act 1878 (No 2) came into force, in November of that year. Thus, it was not possible for the tribal leaders to request restrictions on the alienation of these blocks.

10.9.3.1.2 RESTRICTIONS UNDER THE REVISED 1873 REGIME – THE COURT'S DUTY TO INQUIRE

The next two blocks passed through the court after the 1878 and 1880 changes in the law: they were Matahina, awarded to Ngati Awa in 1881, and Kuhawaea, which was awarded to Ngati Manawa in 1882. The court minutes do not reveal any inquiry as to whether Kuhawaea should be made inalienable.¹⁰⁹⁵ As we have seen, the majority of Ngati Manawa had resisted taking this land to court, and had wanted to ensure its protection for future generations. But a purchase had already

1089. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 440–444, 459–460

1090. Native Land Act 1873, ss 48, 49, 62, 65

1091. Native Land Act 1873, preamble, ss 24–31

1092. Native Land Act Amendment Act 1878 (No 2), s 3

1093. Native Land Court Act 1880, s 36

1094. Crown counsel, closing submissions (doc N20), topics 8–12, pp 90–91

1095. Whakatane Native Land Court, minute book 2, 26–28 September 1882, fols 15–35

been initiated by the lessee, Troutbeck, and the block was awarded in two parts: Kuhawaea 1 (21,694 acres, intended for sale), and Kuhawaea 2 (586 acres, intended for the non-sellers).

In 1883, a private purchaser began trying to buy up individual shares of Kuhawaea 2. Ngati Manawa wrote to the Government, saying that they had asked the court to make Kuhawaea 2 inalienable.¹⁰⁹⁶ Hira Potakurua wrote: 'It is not pleasing that that part should be alienated. This is an urgent request from us, that the land should be made inalienable that no person might be able to sell [their] share, lest we the tribe who live at the settlement should be in great distress.'¹⁰⁹⁷

Judge Puckey responded that no request had in fact been made in court to put restrictions on the alienation of Kuhawaea 2. The Government's view was that there was no way to make land inalienable after title had been awarded, even if all the owners asked for it. Thus, restrictions could not be placed on Kuhawaea 2.¹⁰⁹⁸ In our view, this was a weakness in the legal regime. There was no reason why Maori owners' ability to seek restrictions on alienation should have been confined to title investigation or partition hearings. The needs, circumstances, or wishes of the owners might have changed after these initial hearings. There was an obvious imbalance in the system. The law permitted an ever-reducing number of owners to apply for the removal of restrictions at any time, yet there was no capacity for them to apply for new restrictions unless they also wanted to partition their land.¹⁰⁹⁹ No prejudice was suffered in this instance, however, as Kuhawaea 2 was not alienated at this time.

In 1884, the court reheard the title for Matahina, awarding most of the block to Ngati Awa, with small sections for Ngati Haka Patuheuheu, Ngati Rangitihī, and Ngati Hamua. This rehearing resulted in the first restrictions on alienation in the rim blocks. Two small urupa sections were restricted, as were two of the other sections granted to Ngati Awa. But no restrictions were placed on the land awarded to the claimants in our inquiry.¹¹⁰⁰

The court next dealt with partitions of Waimana and Waiohau. As with Kuhawaea, these blocks were being partitioned for private sale. In 1882, there had been a further change to the law, allowing the court to put restrictions on the titles of blocks created by partition, even if there had been no restrictions on the parent block.¹¹⁰¹ This was carried out in Waimana in 1885. Swindley agreed to the creation of a 600-acre reserve (Waimana 1B) for the sellers in his part of the block, which was then made inalienable. This restriction protected the reserve from alienation. In 1905, when it was partitioned by the owners, the new titles were restricted from alienation.¹¹⁰² This only lasted until 1909, when the Liberal Government unilat-

1096. Bright, 'Kuhawaea' (doc A62), p 53

1097. Ibid

1098. Ibid, pp 53-54

1099. Technically, the law did not provide for owners to seek restrictions even then, but it did compel the judge to inquire as to whether restrictions were needed.

1100. Cleaver, 'Matahina' (doc A63), pp 62-64

1101. Native Land Division Act 1882, s 4

1102. Sissons, 'Waimana Kaaku' (doc A24), pp 54-55, 86

erally annulled all restrictions on alienation without the consent of the owners, or their having the capacity to object in any particular case.¹¹⁰³ Waiohau was partitioned in September 1886, but no restrictions were placed on the non-sellers' part of the block (see chapter 11). As we shall see, none of them was in court to have asked for restrictions.

10.9.3.13 RESTRICTIONS AFTER 1888 – UREWERA LEADERS SEEK TO PROTECT THEIR LANDS

In 1886, Donald McLean's 1873 regime was swept away. The legislation of 1873, 1878, and 1880 was all repealed. Two new Acts were passed, designed to work in tandem. The first was the Native Land Court Act 1886. This Act no longer required the court to inquire into whether restrictions were needed, and gave it no power to put restrictions on titles. Instead, all land was supposed to be dealt with under the new system of block committees and commissioners, created by the Native Land Administration Act 1886. Presumably, the Government thought that if Maori committees were given real power to control alienation, restrictions were no longer necessary. The Administration Act was never used, however, and it was soon repealed by the Atkinson Government in 1888, restoring 'free trade' (and purchase of individual shares). In the same year, the court's power to put restrictions on titles was also restored. When investigating title or partitioning, the court had to find out whether each individual owner had 'a sufficiency of inalienable land for his support.'¹¹⁰⁴ If not, the court 'shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency.'¹¹⁰⁵ This was the law in force when most of the remaining rim blocks passed through the court in 1889 and 1890.

At the same time, the court was given a new power: to remove restrictions. Before 1888, this had been the sole responsibility of the Governor in council. As David Williams has shown, the power to remove restrictions was extended throughout the Liberal period.¹¹⁰⁶ In 1888, either the Governor in council or the court could remove restrictions at the request of a majority of owners.¹¹⁰⁷ The court's jurisdiction only applied to new restrictions, and it could only be exercised by means of a 'public inquiry' into whether the owners in fact agreed to the request, and had sufficient other land for their maintenance and support. All owners actually present in court had to agree.¹¹⁰⁸

When the Liberals took office in 1891, they made it easier to remove restrictions. In 1892, the Native Land Purchases Act gave the Governor power to remove

1103. Williams, brief of evidence (doc c3), pp 9–10, 27

1104. Native Land Court Act 1886 Amendment Act 1888, s13

1105. *Ibid*

1106. Williams, brief of evidence (doc c3), pp 24–25, 27–28

1107. Native Land Act 1888, s5 (for the Governor in council); Native Land Court Act 1886 Amendment Act 1888, s6 (for the Native Land Court)

1108. Native Land Court Act 1886 Amendment Act 1888, s6

Restrictions on Alienation: Key Provisions for our Inquiry

1873

Restrictions are put on titles by the Native Land Court, preventing alienation unless all owners agree to sell, or a majority agrees to partition the land for sale. A more stringent restriction is put on the titles of reserves created by district officers in consultation with the Maori owners. Such restrictions can, however, be turned into the ordinary restrictions (allowing sale) with the agreement of the Governor in council: Native Land Act 1873.

1878

The Native Land Court can recommend to the Governor that restrictions be placed on titles, if it considers it necessary to reserve any land coming before it (these restrictions can only be removed by the Governor in council): Native Land Act Amendment Act 1878 (No 2), section 3.

1880

The Native Land Court has to inquire at title investigation as to whether restrictions are needed, and to put them on titles if so: Native Land Court Act 1880, section 36.

1882

The Native Land Court can put restrictions on titles at the time of partitioning, regardless of whether the parent block was restricted: Native Land Division Act 1882, section 4. The Native Reserves commissioner can ask the court to put restrictions on any block that he thinks needs to be reserved: Native Reserves Act 1882, section 29.

1883

Sixty days' public notice is required before the Governor can remove restrictions: Native Land Laws Amendment Act 1883, section 16.

1886

Previous legislation relating to restrictions is repealed. New legislation does not provide for the Native Land Court to put restrictions on titles: Native Land Court Act 1886.

1888

The Native Land Court's power to impose restrictions is restored. When deciding title or partitioning, it must inquire as to whether the owners have sufficient inalienable land for their support. If not, the court has to put restrictions on the titles of the land before it, so as to reserve a sufficiency. At the same time, the process for removing restrictions is specified. Any restrictions ordered from now on may be

annulled by the court on application by a majority of the owners, but only after a public inquiry and after notice has been given. The court must satisfy itself that the owners have sufficient other land, and all the owners appearing in court must agree: Native Land Court Act 1886 Amendment Act 1888, sections 6, 13. Alternatively, the Governor in council can remove any restrictions on the application of a majority of owners: Native Land Act 1888, section 5.

1889

When owners apply to the Governor to remove restrictions, the Native Land Court has to inquire as to whether the owners of the land have sufficient other land for their support, and make a report to the Governor: Native Land Court Acts Amendment Act 1889, section 17.

1890

When a majority of owners apply to the Native Land Court for the removal of restrictions, the concurrence of all owners present in court is no longer required: Native Land Laws Amendment Act 1890, section 3.

1892

For the purposes of sale to the Crown, the Governor in council can remove any restrictions. None of the previous requirements for removing restrictions apply in this case: Native Land Purchases Act 1892, section 14.

1894

Restrictions may be removed with the consent of one-third of the owners, so long as they have sufficient land for their support. Restrictions imposed before 1888 can only be removed by the Governor, on the recommendation of the Native Land Court: Native Land Court Act 1894, section 52.

1909

All restrictions on alienation are cancelled: Native Land Act 1909, section 207.

or declare void any restrictions, for the purposes of sale to the Crown.¹¹⁰⁹ This was a major change. Previously, the Governor in council had consented to (or refused) requests from owners that restrictions be removed. Now, for the purpose of Crown purchasing, the Government could simply remove any restrictions on its own initiative. There was no requirement for the owners to consent (or even to be consulted). The downgrading of restrictions was further signified in the same year, when the Native Land (Validation of Titles) Act stated that any failure

1109. Native Land Purchases Act 1892, s14

to remove restrictions could not prevent validation of a 'bona fide' sale.¹¹¹⁰ The Liberals saw restrictions as a technicality to be evaded or set aside, rather than as a key protection of Maori land in Maori ownership for so long as they wished to keep it. In 1894, the requirement that a majority of owners apply for the removal of restrictions was reduced to one-third.¹¹¹¹ Finally, in 1909, all restrictions placed on titles were cancelled by the Native Land Act of that year, regardless of the wishes or situation of the owners.¹¹¹²

Most of the land in the rim blocks went through the court in 1889 to 1890, with Ruatoki being investigated later in 1894. For the reasons set out in the previous section, this was the first real opportunity for Urewera leaders to seek the protection of their land at the time of title investigation, and they took full advantage of it. The whole of the Whirinaki and Ruatoki blocks were made inalienable. The great majority of Tahora 2 was also placed under restrictions. Only two relatively small sections, intended to be sold for survey costs, were not made inalienable. Most of Tuararangaia was made inalienable. One-third of Heruiwi 4 was placed under restrictions. The only block for which no restrictions were made was Waipaoa.¹¹¹³

As far as we can tell, the court simply agreed to leaders' requests to make their land inalienable.¹¹¹⁴ Only in the case of Ruatoki does it seem clear that restrictions may have been made on the initiative of the judge and not the owners.¹¹¹⁵ In two of these cases – Whirinaki and Ruatoki – the titles were reheard. In both cases, restrictions were renewed for the revised titles.¹¹¹⁶

Thus, the titles to 389,258 acres of land were investigated by the court between 1889 and 1894. Of that land, 283,242 acres (73 per cent) was made inalienable. If, however, we include the earlier blocks in that calculation, 60 per cent of the original land in the rim blocks had been placed under restrictions by 1894.¹¹¹⁷ If

1110. Native Land (Validation of Titles) Act 1892, s 9

1111. Native Land Court Act 1894, s 52

1112. Native Land Act 1909, s 207

1113. Tulloch, 'Whirinaki' (doc A9), p 32; Oliver, 'Ruatoki' (doc A6), p 73; Boston and Oliver, 'Tahora' (doc A22), pp 79–80; Binney, 'Encircled Lands, Part 2' (doc A15), pp 99–100; Clayworth, 'Tuararangaia' (doc A3), pp 75–76; Tulloch, 'Heruiwi' (doc A1), p 62

1114. Whakatane Native Land Court, minute book 3, November 1890–December 1891, fols 202, 204, 213, 216, 228, 240; Whakatane Native Land Court, minute book 4, January 1891, fol 210 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(l)), pp 3895, 3897, 3906, 3909, 3921, 3925, 3952); Tulloch, 'Heruiwi 1–4' (doc A1), p 62; Opotiki Native Land Court, minute book 5, 11 April 1889, fols 338–340; Whakatane Native Land Court, minute book 3, 25 November 1890, fol 202 (Berghan, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(o)), vol 15, pp 5093–5095); Whakatane Native Land Court, minute book 4, 29 January 1891, fols 199–200 (Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(p)), vol 16, pp 5414–5415); Whakatane Native Land Court, minute book 3, 24 November 1890, fols 196, 199

1115. Whakatane Native Land Court, minute book 4B, 4 December 1894, fol 126

1116. Whakatane Native Land Court, minute book 5, 8 May 1897, fol 218; Tulloch, 'Whirinaki' (doc A9), p 127

1117. This figure includes Waimana 1B but does not include the 74,360 acres of Matahina awarded to Ngati Awa.

Section 207(1) of the Native Land Act 1909

207. All existing restrictions on alienation of Native land removed—(1) All prohibitions or restrictions on the alienation of land by a Native, or on the alienation of Native land, which before the commencement of this Act have been imposed by any Crown grant, certificate of title, order of the Native Land Court, or other instrument of title, or by any Act, are hereby removed, and shall, with respect to any alienation made after the commencement of this Act, be of no force or effect.

restrictions on alienation had worked as intended, all this land would have been retained until its collective owners wished to deal in it.

The Crown argued that it faced a dilemma at this time. There was a risk of being too 'paternalistic', and of restrictions preventing Maori from expressing their tino rangatiratanga in terms of strategic decisions to sell or retain land.¹¹¹⁸ We find this argument specious. First, the Crown took away the power of Maori communities and their leaders to make such decisions when it insisted on bypassing community structures and buying from individuals. Secondly, Crown counsel submitted:

However, it is apparent many Maori resented any fetter on their ability to deal with their lands as they saw fit. This placed the Crown in the difficult position of trying to balance its active protection responsibilities, with the rights of Maori to partition, develop, and/or deal with their lands if they so wished.¹¹¹⁹

There is no evidence that Te Urewera leaders felt themselves oppressed or unduly fettered by restrictions. Rather, they were the ones who sought to have restrictions imposed on the great majority of their land in 1889 and 1890, in the hopes of preventing just such an outcome as the rapid, uncontrolled alienation of individual shares. Did they change their minds quickly, and seek to sell restricted lands? There is evidence that Ngati Manawa leaders were willing to lift restrictions on part of Heruiwi 4, and that Turanga leaders were also willing to sell some of Tahora 2. In the case of Heruiwi, Atarea warned that the owners were facing starvation, while in Tahora 2, Wi Pere wanted collective rather than individual negotiations.¹¹²⁰ But in each case, the wishes of the leaders were disregarded. No attempt was made by the owners to actually lift the restrictions. New restrictions were placed on the dwindling residue blocks each time the Crown's interests were

1118. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 22, 85, 89–90

1119. *Ibid*, p 4

1120. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–79; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 37–40

partitioned. It was all to no avail, as we shall see in the next section. The problem was not an excess of Crown paternalism – it was a serious failure in the Crown's active protection of Maori interests.

10.9.3.1.4 HOW EFFECTIVE WERE THE RESTRICTIONS IN PREVENTING ALIENATION ?

In our view, restrictions on alienation were the most inaptly named of the Crown's protection mechanisms. They had no effect whatsoever in preventing alienation. After extensive inquiry, we are still baffled as to how land that was legally protected could simply be sold as if it were not. For all of these sales, the purchaser was the Crown. Claimant counsel submitted that the Crown treated alienation restrictions as 'having the additional gloss "except to the Crown"'.¹¹²¹ We agree. The result was that restrictions only protected land that the Crown did not want.

As we have seen, restrictions were placed on the whole of Whirinaki, almost all of Tahora 2, and one-third of Heruiwi 4. The Crown was certainly aware of these restrictions. In 1891, T W Lewis noted that the most valuable part of Heruiwi 4 was protected by them: 'If the proposed Native Land Bill passes it will place Govt in a position to purchase restricted lands – at present it would be impossible to obtain a title to any portion of the only Block the Surveyor General considers worth buying.'¹¹²² Legislation was enacted the following year, allowing the Governor to remove restrictions or declare them void, so that land could be sold to the Crown.¹¹²³ The Hauraki Tribunal, however, noted that land was sometimes purchased without the restrictions having actually been removed.¹¹²⁴ Indeed, this was apparently common enough for the validation legislation of 1892 to specify that this was not – in itself – sufficient cause for the court and Parliament to invalidate a past transaction.¹¹²⁵ The Native Land Court Act of 1894, however, stated that the Native Land Court could not ratify a new transaction if restrictions had not been properly removed.¹¹²⁶

In all three of these blocks, the Crown purchased individual interests as if there were no restrictions. As a result, it obtained two-thirds of Whirinaki, the majority of Tahora 2, and almost all of Heruiwi 4. All of the Crown's purchasing took place in defiance of the legal restrictions. Even though the Crown had given itself the power to remove these protections whenever it wanted, through the Native Land Purchases Act 1892, it never actually exercised that power in Te Urewera. Despite searching the *Gazettes*, the witnesses in our inquiry could find no orders

1121. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31

1122. Lewis to Native Minister, 17 June 1891 (David Alexander, comp, supporting papers to 'Native Land Court Orders and Crown Purchases', 3 vols, various dates (Wai 212 RO1, doc C4, vol 3), p K208); see also Tulloch, 'Heruiwi 1-4' (doc A1), p 72

1123. Native Land Purchases Act 1892, s 14

1124. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 706, 751

1125. Native Land (Validation of Titles) Act 1892, s 9. Under this Act, the court's decisions had to be confirmed by Parliament (s 17).

1126. Native Land Court Act 1894, s 53(1)(d)

in council removing restrictions for Whirinaki, Tahora 2, or Heruiwi 4 blocks.¹¹²⁷ Nor did the court remove the restrictions, as it was empowered to do upon application by a majority (1888) or one-third (1894) of the owners. Peter Clayworth theorised that the court might have considered the act of selling to equate to an application to remove restrictions, but we cannot accept that argument as sound.¹¹²⁸ Crown counsel offered no explanation for why restrictions on alienation were not removed in a lawful manner.¹¹²⁹

According to counsel for Te Whanau a Kai:

The net effect was that the alienation restriction, supposedly a protective mechanism, did nothing more than shut out private purchasers while leaving the Crown free to carry on with its individualised share buying from the Tahora owners, a somewhat ironical outcome.¹¹³⁰

Of the 283,242 acres made inalienable by 1894, the Crown purchased 122,087 acres (43 per cent) in the 1890s. Restrictions had had no effect in protecting these blocks, barely a few years after tribal leaders had sought to make them inalienable.

Was the court unaware that the Crown had purchased restricted lands? The answer to this question is 'no'. In the case of Whirinaki, the court renewed the restrictions for the unsold portions at the hearing where the Crown's interests were partitioned in 1895.¹¹³¹ (It did the same again in 1899 when more land was taken for new survey charges.¹¹³²) Some surviving parts of Heruiwi 4 also had restrictions renewed.¹¹³³

In our view, the answer to this puzzle may lie in the meaning and effect of section 76 of the Native Land Court Act 1894. This provision came into force before the court was called upon to partition Crown interests out of any of the Te Urewera lands restricted from sale. It stated:

Nothing in this Act contained shall limit or affect the power of the Crown to purchase or acquire any estate, share, right, or interest in any land or Native land, nor the power of any Native to cede, sell, or transfer any such estate, share, rights, or interest to the Crown, and when the Crown claims to be interested under any deed, contract, or other document, the same shall, on production, be admitted as evidence, and have due effect given thereto, notwithstanding any law in force to the contrary.¹¹³⁴

1127. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 36; Crown counsel, closing submissions (doc N20), topics 8–12, p 91; Tulloch, 'Heruiwi 1–4' (doc A1), pp 79, 90; Tulloch, 'Whirinaki' (doc A9), p 53

1128. Clayworth, 'Tuararangaia' (doc A3), pp 80–82

1129. Crown counsel, closing submissions (doc N20), topics 8–12, pp 89–91

1130. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 35

1131. Tulloch, 'Whirinaki' (doc A9), p 53

1132. *Ibid.*, pp 43–46

1133. Tulloch, 'Heruiwi 1–4' (doc A1), p 85

1134. Native Land Court Act 1894, s 76

We did not receive submissions on the meaning and effect of this section of the Act. As we see it, this was a far-reaching provision. It may explain the apparent failure of the court to vet Crown transactions, and its apparent indifference to the Crown's failure to remove restrictions on alienation before purchasing so much of the restricted land in the rim blocks.

Although the court placed new restrictions on some of the land that survived Crown purchasing, Tahora 2 was a large and important exception. As far as we can tell, no restrictions were placed on the land that was left after the Crown partitioned its interests in 1896.¹¹³⁵ This appears to have been the result of a flaw in the legislation setting up the Validation Court. The status and titles of the residue blocks were decided in 1896 by that court instead of the Native Land Court. As we read the legislation, the Validation Court could exercise some of the same powers as the Native Land Court, but it had no authority to place restrictions on titles.¹¹³⁶ Similarly, the Ruatoki restrictions were removed when its titles were cancelled by legislation in 1900.¹¹³⁷ Like the Validation Court, the Urewera commission, which was given the task of reinvestigating the Ruatoki titles, had no power to reimpose the restrictions on alienation.¹¹³⁸

The effect of these two actions was that restrictions were removed from another 100,000 acres of land, between 1896 and 1900. It might be argued that for Ruatoki and parts of Tahora 2, alternative protections were provided – inclusion in the Urewera District Native Reserve for Ruatoki, and in the East Coast Trust for Tahora 2. We accept that point. Nonetheless, 93 per cent of restricted land had lost its restricted status within a decade.

Restrictions on alienation had proven to be totally ineffective. They were either ignored by the Crown, which purchased the land anyway, or removed when the land was made subject to legislation that did not provide for them. This was a sorry record indeed. The tribal leaders of Te Urewera had few means to combat the sale of individual interests. Restrictions on alienation, sought so comprehensively when this land passed through the court in 1889 and 1890, had seemed to be at least one protection against unwanted sales. The reality, as we have seen, was otherwise.

Four restricted blocks, totalling almost 28,000 acres, did survive the era of Liberal purchasing unscathed: Tuarangaia 1 (3,500 acres), Heruiwi 4C (2,195 acres), Ruatoki (21,450 acres), and Waimana 1B (600 acres). The Crown had not attempted to purchase these blocks. Nor, apart from land for survey costs, did the Crown seek to obtain any more of the restricted Urewera lands before 1899, when it called a temporary halt to Government purchasing nationwide. By 1909, the Crown was ready to resume a full purchasing programme. As part of its native land law reforms, all surviving restrictions were cancelled in that year. As we have seen in section 10.7, Tuarangaia 1 and Heruiwi 4C were alienated soon after this

1135. See Tairawhiti Validation Court, minute book 4, 16 April 1896, fols 178–191

1136. See Native Land (Validation of Titles) Act 1893

1137. Urewera District Native Reserve Act Amendment Act 1900, s 2(2)

1138. See the Urewera District Native Reserve Act 1896 and its amendments.

The Validation Court

By the late 1880s, there was confusion and despair over the state of titles to Maori land. The frequent and often contradictory changes to the native land laws had created uncertainty on the part of both purchasers and sellers, who had entered into a series of incomplete or technically invalid transactions. This was particularly so on the East Coast. From 1889 to 1893, Governments experimented with a variety of quasi-judicial inquiries. The final result was the Validation Court, established as a separate court of record in 1893, although staffed by Native Land Court judges and officials. The court's task was to validate any transactions that were defeated by technical flaws, but which would have been valid if conducted between Europeans. Fraud or deliberate evasion of the law was not to be tolerated. On the one hand, this set aside a host of special protections for Maori (such as restrictions on alienation or the trust commissioner's certificate). Professor Alan Ward considered this a 'very dubious proceeding'. On the other hand, the court was supposed to ensure that the transaction had not been unfair to the Maori owners. Parliament had the final say in validating each transaction.¹

In Te Urewera, the Validation Court played an important role in respect of Tahora 2, as we shall explain in chapter 12, which deals with claims about the East Coast trust.

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 463–464; Alan Ward, *National Overview Report*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, p 286; see also Native Land (Validation of Titles) Act 1892, Native Land (Validation of Titles) Act 1893

blanket cancellation. By this time, the Crown saw restrictions solely as a means of preventing landlessness. From its perspective, they were no longer needed because the Maori land boards would check each transaction from that time on, to ensure that no individuals would be rendered landless. The wider role of restrictions in protecting land in Maori ownership, at the request of the community's leaders, was forgotten. It had not worked in Te Urewera in any case.

We turn next to the question of 'landlessness', and the Crown's provision of mechanisms to prevent it in the nineteenth century.

10.9.3.2 Reserves and restrictions as a means of preventing landlessness

In our inquiry, the Crown and claimants agreed that the Crown had a Treaty duty to protect Maori from landlessness. They did not, however, agree on whether that duty was active or passive, nor did they agree on the essential meaning of 'landlessness'.

Native Minister McLean Tells Parliament the ‘Chief Object’ of the 1873 Act

‘HE (Mr McLean) considered that the chief object of the Government should be to settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.’

Donald McLean¹

1. Donald McLean, 25 August 1873, NZPD, vol 14, p 604

The claimants’ position was stated by counsel for Ngati Haka Patuheuheu:

It is submitted that there is an overall duty of the Crown to ensure that the hapu retain sufficient land so as to remain a properly functioning unit. It is submitted that the Crown was well aware of its duty to protect Maori from landlessness as is evidenced by certain provisions and wording of the Native Land Act 1873.¹¹³⁹

In particular, the claimants relied on the preamble of the 1873 Act:

Whereas it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated: And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land: Be it therefore enacted . . .¹¹⁴⁰

In the claimants’ view, the key phrases were ‘sufficiency of their land for their support and maintenance’, and ‘establishing endowments for their permanent general benefit’.¹¹⁴¹

The 1873 Act established a mechanism to carry out the intention expressed in

1139. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 4

1140. Native Land Act 1873, preamble

1141. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 4

the preamble. Under section 24, district officers were to select, with the agreement of Maori, a 'sufficient quantity of land' for their benefit, to include both land for their immediate 'support and maintenance', and for permanent endowments.¹¹⁴² The Act included a minimum measure for 'sufficiency': reserves were insufficient unless, when added together, they totalled 'not less than' 50 acres for every man, woman, and child.¹¹⁴³ The fact that this was a minimum figure was stressed by the words 'not less than', and by section 32, which specified that nothing in the Act was to limit, constrain, or prevent the making of other or additional reserves.

Having selected land with the agreement of Maori communities, the district officer had to obtain the approval of the Governor in council, get the land surveyed, and then apply for an investigation of its title in the court.¹¹⁴⁴ Once title was decided, the Governor was to gazette the reserve with a notice that the land was 'inalienable by sale lease or mortgage, except with the consent of the Governor in Council first obtained'.¹¹⁴⁵ The owners could apply to the Governor in council for the reserve to be treated as if its title had been decided under section 47, which would change its status to land that could be sold.¹¹⁴⁶ Thus, the owners could change their mind about reserving this land, so long as the Government agreed.

In 1886, this Act (and its reserve-making provisions) was repealed. District officers were abolished. By this time, however, there was an alternative mechanism in place. The Native Reserves Act 1882 provided for a commissioner of native reserves, or his agent, to attend court hearings and apply to show why 'any land being adjudicated upon . . . should be rendered subject to any restrictions, conditions, or limitations on alienation, so as to prevent the Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance'.¹¹⁴⁷ It would then be up to the court to decide whether to issue a title with restrictions or, with the consent of its owners, place it as a reserve under the Public Trustee. The Government's intention was that a special commissioner should maintain an 'inheritance for the race'.¹¹⁴⁸ Alexander Mackay was appointed but the post was left vacant after his resignation in 1884.¹¹⁴⁹

This meant that by 1888, the only provision for reserves was the court's duty to inquire as to whether Maori bringing land before it had sufficient inalienable (that is, reserved or restricted) land for their support. If not, the court was to impose restrictions on the block before it, regardless of whether or not its owners wanted to reserve that particular piece of land.¹¹⁵⁰ From 1888 onwards, as we have seen,

1142. Native Land Act 1873, s 24

1143. Ibid

1144. Ibid, ss 24–26

1145. Ibid, s 30

1146. Ibid, s 31

1147. Native Reserves Act 1882, s 29

1148. Jenny E Murray, *Crown Policy on Maori Reserved Lands, 1840–65, and Lands Restricted from Alienation, 1865–1900*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 79

1149. Ibid, p 79

1150. Native Land Court Act 1886 Amendment Act 1888, s 13

restrictions served a dual purpose in Te Urewera: to prevent unwanted alienations (the Maori leaders' purpose) and to reserve a minimum for the prevention of landlessness (the Crown's purpose). The Government thus surrendered any active role, as had been provided for originally with the district officers and then the commissioner of native reserves, leaving everything to the court.

In our inquiry, the Crown accepted that district officers had had a duty to work with Maori and make reserves under the 1873 Act. Crown counsel submitted:

There is little evidence of what reserves were promised or made in Te Urewera. It is not clear whether this is a gap in the record or an indication that reserves were not widely considered in this period of time. This prevents determination being made concerning reserves.¹¹⁵¹

We do not accept this submission. If the district officer had met with Maori communities, set apart reserves in the rim blocks, and had had them surveyed and investigated by the court, then that would have been identified by the historians in our inquiry. Similarly, if the commissioner of native reserves (or his agent) had been present in court and requested reserves, that too would have been ascertained. In fact, no Urewera blocks were investigated during Mackay's brief tenure as commissioner, which ended in 1884.

We accept, however, that we lack evidence of whether the district officers tried to carry out their duty. Te Whitu Tekau attempted to keep all land in this district out of the court – in that circumstance, district officers were unlikely to have much success in trying to get agreement to the surveying and court investigation of reserves. For those who did not resist the court – mainly Ngati Manawa – there is no evidence of reserve-making in the rim blocks. In any case, the majority of land passed through the court after the abolition of the district officers.

During the pre-1886 period, most of the land that was sold was alienated privately. The only exception was Heruiwi 1, which was purchased by the Crown. No reserves were made, on Gill's recommendation to the Native Minister: 'I recommend the purchase[,] the price to be two thousand five hundred pounds and back rents due about two hundred pounds[, and] no reserves to be made in the block. Please wire me if you approve.'¹¹⁵²

The only reserve for sellers in this period was the Waimana 1B block, which was set aside with the agreement of Swindley. This was a pre-emption-style reserve – that is, it was land purchased by Swindley and returned to the community for that purpose.¹¹⁵³

In the second round of hearings and purchasing (1889 to 1899), the court placed restrictions on the great majority of land, and the Crown purchased without regard to either those restrictions or the making of reserves. In Whirinaki, the purchase agent agreed to a 400-acre reserve for all the owners (sellers and non-sellers). The

1151. Crown counsel, closing submissions (doc N20), topics 8–12, p 76

1152. Gill to Native Minister, 7 May 1881 (Berghan, 'Block Research Narratives' (doc A86), p 566)

1153. Sissons, 'Waimana Kaaku' (doc A24), pp 54–55

Reserve-making in the Crown Pre-emption Era

In the period from 1840 to 1862, the Treaty gave the Crown the right of pre-emption: the sole right to buy land that Maori wished to alienate. The Crown’s practice during these years was to make reserves for the present and future needs of Maori when conducting purchases. Such reserves were intended for a variety of purposes: to secure enough land for Maori to continue their customary economy; to secure land for farming in the new economy (often cropping but sometimes for pastoral farming); to provide income from leasing; and to provide endowments for the future. The usual practice was to purchase a block of land, and then to return agreed portions of it to Maori as reserves, or to be placed under commissioners for leasing on their behalf.¹

1. See, for example, Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, chs 7, 9

Government refused to increase this reserve to 1,000 acres, arguing (as we have seen) that Maori could reserve land simply by not selling it. Otherwise, the surviving pieces of Whirinaki belonged to the non-sellers.¹¹⁵⁴ Whirinaki appears to have been unique in this respect – no reserves for sellers were made in Heruiwi 4, Tahora 2, or Waipaoa. Reserves were sought by Wi Pere and Rees in 1895, when trying to put the negotiations for Tahora 2 on a tribal footing.¹¹⁵⁵ The Crown’s tactic of purchasing from individuals made it virtually impossible for sellers to negotiate reserves.

The Government’s policy on reserves for sellers was explained by Sheridan in November 1895, when Ngati Manawa leaders sought the above-mentioned reserve in Whirinaki:

I don’t quite understand what these Natives want because the question of reserves is entirely in their own hands. If they want a reserve of 1000 acres they have only to accept payment for shares reduced by that amount but if they imagine we are going to pay them in full for the land and then give it back to them you [Gill] had better let them understand that that is not the way we do things nowadays. Give them every facility for making what reserves they desire on the conditions set out above [in effect, the partitioning of non-sellers’ interests at the hearing] as long as they do not pick the eyes out of the block.¹¹⁵⁶

1154. Tulloch, ‘Whirinaki’ (doc A9), pp 43–46

1155. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), pp 25–26

1156. Sheridan to Gill, November 1895 (Tracy Tulloch, comp, supporting papers to ‘Whirinaki’, various dates (doc A9(a)), p c5)

Sheridan was referring here to the original pre-emption era, where the Crown purchased a block of land from a community (there were no ‘non-sellers’), and reserved a significant part of it for their continued use, regardless of what other land they retained. This policy had been followed in the case of the four southern blocks in the mid-1870s, as we saw in chapter 7. It was replaced in part in 1873 by the pre-purchase task of district officers, who were to work with communities to ensure the reservation of ‘sufficient’ land for use and for endowments. Under that policy, none of Heruiwi 1–3 was actually reserved for the sellers. Some individuals were non-sellers and thus kept part of the land.

In our inquiry, the Crown stated its position in these terms:

The Crown accepts that it had some obligation to make a general assessment of the overall position of Maori landholding in areas where there was some indications of an insufficient land base. This was to be balanced with the right of Maori to deal with their lands as they saw fit. There is insufficient evidence that indications were made that Urewera hapu did not have a sufficient land base.¹¹⁵⁷

It follows from this that the Crown saw its duty as a passive one in the 1890s. The court would ensure that a ‘sufficiency’ was restricted from alienation as the blocks passed through it, and the Crown would simply purchase land wherever it could, unless something happened to convince it that the sellers were being rendered landless. No reserves were made (except one small reserve in Whirinaki). Yet the new, post-1888 policy – court-imposed restrictions – was pointless. The Crown simply ignored restrictions on alienation as if they did not exist. Such restrictions do not appear to have qualified as an indication that Urewera hapu might not have a sufficient land base. In 1891, Lewis’ only concern about the Heruiwi 4 restrictions was that they prevented the Crown from purchasing the best land. He looked forward to the day when the Crown could buy restricted land whenever it wanted – a situation given legislative authorisation in 1892.¹¹⁵⁸ No consideration was given as to why the land was restricted, or whether uncontrolled selling of it by individuals would render communities landless.

In our view, the fact that the court had placed restrictions on the land, and that the law required it to do so where Maori otherwise had insufficient land, was a clear signal to the Crown. Landlessness was at least a potential risk in such situations, otherwise the relevant provision in the 1888 Act was meaningless. In the Crown’s view, however, the whole debate is academic. There is nothing to show that there was a real risk of landlessness in the rim blocks at this time. On the contrary, there was a perception that Tuhoe and others still owned a large area of land, which was locked up as an official reserve from 1896. Apart from Ngati Haka Patuheuheu, who were recognised as having very little land by 1907, ‘landlessness

1157. Crown counsel, closing submissions (doc N20), topics 8–12, p 68

1158. Lewis to Native Minister, 17 June 1891 (Alexander, supporting papers to ‘Native Land Court Orders and Crown Purchases’ (Wai 212 RO1, doc C4, vol 3), p K208)

does not assume the same prominence in this inquiry district as in some others.¹¹⁵⁹ Dr Loveridge suggested another way of looking at this question. For those Maori who still retained a substantial land base in the 1890s, this decade was the last opportunity for the Crown to have assisted them with its development, instead of assiduously purchasing it from them. In his view, the Crown could have chosen to invest in Government-guaranteed loans for Maori development, as it had for settlers, but this would have required it to 'back off and take the pressure off'.¹¹⁶⁰ By 1900, the Crown knew that its continued purchasing was making landlessness a potential outcome for all Maori. This message was reinforced by the Stout-Ngata commission in the first decade of the twentieth century.¹¹⁶¹ We return to the question of land development in chapter 18 of our report.

Were Maori hapu in fact left with insufficient land for a viable cultural, social, and economic base? We will return to this question in our section below on the impacts of land alienation. Here, we address the Crown's protective mechanisms and how well they functioned. As we see it, the Crown failed to set aside reserves, failed to respect its own legislative restrictions on alienation, and failed to inquire whether its purchases from individuals were making it impossible for communities to retain a sufficient land base for their present and future needs. Claimant counsel put to us that the Crown's duty may be measured in light of the actual mechanisms provided at the time to ensure a 'sufficiency' was retained. 'The evidence before the Tribunal,' we were told, 'shows that the Crown failed to provide any inalienable reserves having absolute restrictions against sale.'¹¹⁶² We agree. The Crown, having failed to provide truly inalienable reserves, had failed in its duty to the Maori owners. The owners had asked for 60 per cent of their land in the rim blocks to be made inalienable, and the court had agreed to their requests. The fact that the Crown itself was purchasing this supposedly inalienable land exacerbated the failure of this protection mechanism.

10.9.3.3 *The vetting of purchases in the nineteenth century*

Nineteenth-century purchases of land from Maori were supposed to be checked by independent commissioners and the Native Land Court to ensure that they met statutory standards for the protection of Maori. From 1867 to 1900, vetting was provided for under three series of Acts: the Maori Real Estate Management Acts,¹¹⁶³ the Native Lands Frauds Prevention Acts,¹¹⁶⁴ and the Native Land Acts. The first

1159. Crown counsel, closing submissions (doc N20), topics 8–12, p 92

1160. Donald Loveridge, under cross-examination by counsel for Ngati Manawa, Taneatua School, Taneatua, 13 April 2005 (transcript 4.16(a), p 293)

1161. Donald Loveridge, under cross-examination by counsel for Nga Rauru o Nga Potiki, Taneatua School, Taneatua, 13 April 2005 (transcript 4.16(a), p 310)

1162. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 9

1163. Maori Real Estate Management Act 1867; Maori Real Estate Management Act Amendment Act 1877; Maori Real Estate Management Act 1888; Maori Real Estate Management Act 1888 Amendment Act 1893

1164. Native Lands Frauds Prevention Act 1870; Native Lands Frauds Prevention Act 1870 Amendment Act 1873; Native Lands Frauds Prevention Act 1881; Native Lands Frauds Prevention Act 1881 Amendment Act 1888; Native Lands Frauds Prevention Acts Amendment Act 1889

The Stout–Ngata Commission Recommends Reserving Land

As part of its decision to resume purchasing on a major scale (after the moratorium at the turn of the century, described in section 10.7), the Liberal Government commissioned Sir Robert Stout and Apirana Ngata to carry out an audit of Maori land. The Government wanted an informed opinion as to:

- ▶ how much land particular tribes needed reserved for their own use;
- ▶ how much was available for lease; and
- ▶ how much could safely be sold.

Land could be reserved exclusively for its owners' use under part 2 of the Native Land Settlement Act 1907. In our inquiry district, only a few blocks were examined. The commissioners recommended that Waimana and Waiohau 1A be reserved, except for land already (or about to be) leased. It also recommended that Matahina c be leased, that Matahina c1B be sold, and that Tuararangaia 1B be incorporated.¹

In 1909, the Government duly reserved Waimana and Waiohau 1A under the Native Land Settlement Act.² In the same year, its Native Land Act provided a means for Maori land boards to approve sales of such reserved land: the board could process sales in the usual manner, so long as there was a final confirmation from the Native Minister.³ Subdivisions of Waimana were routinely sold or leased under this mechanism, at the initiative of Maori owners. Some sales were for the purpose of establishing whanau dairy farms; others because pieces were too small to be used except as part of neighbouring farms. Of the 3,972 acres reserved in 1909, 52 per cent had been sold or leased by 1930.⁴ Small pieces of Waiohau 1A were also sold.⁵ Parties made no submissions about this reserving of land, so we make no further comment about it.

1. Robert Stout and Apirana Ngata, 'Native Lands and Native-Land Tenure: Interim Report of Native Land Commission on Native Lands in the County of Whakatane', 23 March 1908, AJHR, 1908, G-1C, pp 4–5

2. 'Declaring Land to be Subject to Part II of "The Native Land Settlement Act, 1907"', 14 December 1909, *New Zealand Gazette*, 1909, no 105, p 3245

3. Native Land Act 1909, s 298(b)

4. See Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 16 vols, various dates (doc A86(q)), for a selection of relevant documents on this point. Examples include: Under-Secretary to Native Minister, 13 December 1926; RN Jones to registrar, Wairiki District Maori Land Board, 5 May 1924 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(q)), vol 17, pp 5739, 5747); see also Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Blocks' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 70–96.

5. Bernadette Arapere, 'A History of the Waiohau Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), pp 53–55, 63–64; Berghan, 'Block Research Narratives' (doc A86), pp 709–714

set of Acts (Maori Real Estate Management) established a regime to protect the interests of minors.¹¹⁶⁵ The second series of Acts (Native Lands Frauds Prevention) established trust commissioners to vet all private transactions. Purchasers could not get a title registered without a commissioner's certificate, verifying that the alienation had been conducted according to the standards set out in the Acts. Finally, the Native Land Acts entrusted the court with a second set of independent checks, usually in parallel with the other Acts. An issue debated in our inquiry was whether the Crown was also bound by this system of vetting.

In essence, the Crown presented us with five arguments about the nineteenth-century regime for vetting transactions:

- ▶ the 'majority rule' was enforced for private purchases;
- ▶ the trust commissioners' regime cannot be shown to have been ineffective;
- ▶ minor technicalities in the law may have been breached but no substantive injustice was done;
- ▶ the Waiohau fraud was atypical, and did not reveal systemic failures; and
- ▶ the regime did not apply to the Crown in any case. (Although it was not explicit, we take it that the Crown's position rested on the constitutional principle that legislation does not bind the Crown unless specifically stated to do so, or by necessary implication.)

We begin our discussion with the first of the nineteenth-century private purchases in the rim blocks, which was Swindley's purchase of Waimana 1A from 1880 to 1885.

10.9.3.3.1 NINETEENTH-CENTURY PRIVATE PURCHASES – WAIMANA

According to Robert Hayes, the 1873 Act created a regime in which the only safe route for private purchasers to buy Maori land was to negotiate with the community as a whole, and get their agreement to the transaction. Even with all the owners' signatures, the transaction was still void until the Native Land Court awarded title to the purchaser. If a majority of the community had agreed to a sale, then they (not the purchaser) could apply for a partition, whereupon the court would divide the land between the purchaser and the non-sellers.¹¹⁶⁶ Opinions differ as to when the alienation legally occurred, and therefore as to when the trust commissioner was supposed to check its bona fides. The Turanga Tribunal noted that it was usual for trust commissioners to certify deeds before the land was partitioned and the alienation took legal effect. Justice Richmond queried this in 1885, observing that the commissioners were being asked to certify something that could not legally exist.¹¹⁶⁷ In Te Urewera, the practice was for the court to partition the land and award it to the sellers, not the purchaser, after which new deeds were arranged for the trust commissioner to check and certify.

1165. Although some references were made in evidence and submissions to the treatment of minors, we lacked sufficient evidence to address the relevant claim issues. We thus make no further reference to the Maori Real Estate Management regime in this report.

1166. Hayes, 'Waiohau' (doc L15), pp 4-7

1167. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 455-456

In the Crown's submission, the 'majority rule' protected the right and authority of owners to control alienations as a group. The fact that pre-court dealings were legally void was the first line of protection. Then, until the community of owners convinced the court that all of them agreed to a sale, or that a majority wanted to partition, there was no valid transaction. Thus, the risk lay with the purchaser. Nonetheless, the Crown acknowledged that pre-court dealings had a 'commercial reality', as opposed to a strictly legal reality.¹¹⁶⁸

In the case of Waimana, Swindley followed the same practice as the Crown in Heruiwi 1–3, even though he eventually had the support of Tamaikoha. As soon as the Native Land Court title was issued, Waimana became vulnerable to the picking off of individual interests. Jemima Shera was an immediate and obvious threat to the Swindley-Tamaikoha alliance and lease. She bought undivided Te Upokorehe shares. Swindley had little choice but to protect his interests by converting his lease to a purchase, and Tamaikoha had little choice but to let him. Individual shares were purchased over a five-year period, in the face of opposition from Rakuraku and Te Whiu. Payments, too, were made individually – £40 to each seller. Although they led a determined resistance, Rakuraku and his supporters were powerless to stop the process when it was conducted in this way. Also, by the time the majority approved the partition in court, this was the end of the process, not the beginning. Thus, community decision-making by consensus was subverted.¹¹⁶⁹

Although the 'majority rule' did not work in the way that Hayes has claimed, it did result in the partitioning of the block between the Tuhoe sellers and non-sellers in 1885, with a 600-acre reserve for the sellers. The court did not award Waimana 1A to Swindley, although he was in court and contributed to the selection of land and boundary lines. It was clear that his transaction was behind the partition. The sellers made a legal transfer of the block to Swindley's lawyers two days after title was awarded to them.¹¹⁷⁰ It was this transaction which was then checked and confirmed by the trust commissioner, and not the original purchases by Swindley.¹¹⁷¹ As far as the minutes show, the judge did not vet the transaction before making the partition.¹¹⁷²

Similarly, John Balneavis sought a partition for his sister, Mrs Shera, of her share and the three shares that (he told the court) she had 'purchased'. The judge (without any apparent inquiry into the bona fides of this purchase) ordered 'a piece to be cut out for Mrs Shera.'¹¹⁷³ This piece (Waimana 1E) was awarded to Jemima Shera and the three sellers, who then made an official 'sale' of their shares following the

1168. Crown counsel, closing submissions (doc N20), topics 8–12, p 16

1169. Sissons, 'Waimana Kaaku' (doc A24), pp 51–59; Binney, 'Encircled Lands, Part 2' (doc A15), pp 310–323

1170. Sissons, 'Waimana Kaaku' (doc A24), pp 53–56; Opotiki Native Land Court, minute book 3, 10 February 1885, fol 83

1171. Parker, 'Timeline' (doc K4(a)), p 12

1172. Opotiki Native Land Court, minute book 3, February 1885, fols 82–85, 92–93

1173. Ibid, 16 February 1885, fol 93

The Trust Commissioners' Regime

In 1870, the Native Lands Frauds Prevention Act created trust commissioners to check that transactions were not contrary to equity or good conscience, or to a trust, and that the price had not included alcohol or guns (sections 3 and 4). The commissioner was also to ensure that the price had actually been paid, that Maori had understood the transaction, and that they had sufficient other land for their 'support' (section 5). No purchaser could register a title without a trust commissioner's certificate (section 6). This regime remained in place, with amendments, until 1894. In 1888, the legislation specified that the Crown was not subject to the trust commissioners' regime (Native Lands Frauds Prevention Act 1881 Amendment Act 1888, section 8). The Liberal Government abolished the position of trust commissioner in 1894 (Native Land Court Act 1894, sections 114 to 116 and the first schedule). Since the Liberals were reintroducing pre-emption, and the trust commissioners had no role in certifying Crown transactions, they were no longer seen as necessary.

court award. The majority of owners had no say in this partition, or the sale that underpinned it. Brent Parker did not find a trust commissioner's certificate for this transaction.¹¹⁷⁴

Thus, the vetting mechanisms worked in such a way as to facilitate the transaction, rather than provide any real check on it. The 'majority rule' was a technicality that protected land only until a majority of shares had been purchased, rather than a meaningful protection for community decision-making, whether at the time of partition or earlier. As we have seen, Tamaikoha's people did agree to the sale (although a majority of interests was only purchased over a long period of time). Rakuraku's people opposed the sale, but had no power to enforce customary constraints or the need to reach consensus. Nor could the community (or the 'majority') control or prevent the sale of individual shares to Jemima Shera, and the partition of those shares to facilitate their transfer.

10.9.3.3.2 NINETEENTH-CENTURY PRIVATE PURCHASES – KUHAWAEA

The purchase of Kuhawaea 1 by Hutton Troutbeck, the lessee, is difficult to untangle. As we have seen, the majority of Ngati Manawa, led by Harehare Atarea, did not want to sell this land to Troutbeck. They wanted to maintain the relationship with their lessee, but they also wanted to keep this land for future generations.¹¹⁷⁵ Robert Pouwhare and Peter McBurney commented that it was among the

¹¹⁷⁴ Ibid, 17 February 1885, fol 95; Parker, 'Timeline' (doc K4(a)), p 12

¹¹⁷⁵ McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 288–289, 318–324; Binney, 'Encircled Lands, Part 2' (doc A15), pp 36–42

best of the Rangitaiki lands.¹¹⁷⁶ The sale was spearheaded by a young chief of senior lineage, Pani Te Hura.¹¹⁷⁷ The rest of the tribe was unable to prevent the survey and title investigation from going ahead. From the evidence available to us, it appears that Troutbeck did not have majority support for a sale, although he did have some support when the title was heard in 1882. At that hearing, the great bulk of Kuhawaea was partitioned as Kuhawaea 1, and 'earmarked' for sale to Troutbeck. The 92 owners were (supposedly) all 'sellers'.¹¹⁷⁸ Nonetheless, this information was not supplied to the court. According to the orders, the block was partitioned to create a separate piece for Ngati Apa (Kuhawaea 2), rather than for non-sellers.¹¹⁷⁹ From the summary of the hearing in the minutes, the lease was mentioned several times in court, but not the sale.¹¹⁸⁰

After the award of title, Troutbeck collected the signatures that he needed to complete a sale. This process took almost a year (October 1882 to September 1883), with the final payment made in August 1883. It then took a further nine months to confirm the sale.¹¹⁸¹ According to Nicola Bright, this delay was 'because of a number of discrepancies in the information for the certificate of title'.¹¹⁸² We have no evidence about the nature of those discrepancies. It may well be that one was the purchase price. When Judge Brookfield certified the transaction in June 1884, he accepted that £7,000 had been paid.¹¹⁸³ Bright and McBurney queried this figure, noting the view of Henry Bird of Ngati Manawa that only £2,550 was paid.¹¹⁸⁴ We have no evidence to determine the facts of this matter. In any case, Judge Brookfield certified that he had carried out the Native Land Court's vetting of the transaction, based on a final deed of September 1883.¹¹⁸⁵ We have no information on whether a trust commissioner also reviewed and certified this purchase.

It seems clear that the 'majority rule' did not in fact protect the interests of Ngati Manawa. It proved impossible for Atarea and the majority to prevent this sale. We have no solid information on how the protective mechanisms functioned in terms of vetting Troutbeck's transaction.

1176. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 318; Pouwhare, brief of evidence (doc C15), p 41; see also Gilbert Mair's assessment: Binney, 'Encircled Lands, Part 2' (doc A15), p 36

1177. He was also known as Pani Harehare, Peraniko Pani, Aperaniko Te Hura, and Pani Ahuriri: Binney, 'Encircled Lands, Part 2' (doc A15), p 39.

1178. McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 318–322; Binney, 'Encircled Lands, Part 2' (doc A15), pp 36–42; Bright, 'Kuhawaea' (doc A62), pp 53–54

1179. Whakatane Native Land Court, minute book 2, 20 October 1882, fol 148

1180. *Ibid*, September 1882, fols 15–35

1181. Bright, 'Kuhawaea' (doc A62), pp 53–54; McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 319, 321

1182. Bright, 'Kuhawaea' (doc A62), p 54

1183. Judge Brookfield, certification of Kuhawaea 1 transfer, 16 June 1884 (Bright, supporting papers to 'Kuhawaea' (doc A62(a)), p D4)

1184. Bright, 'Kuhawaea' (doc A62), p 54; McBurney, 'Ngati Manawa and the Crown' (doc C12), p 319

1185. Judge Brookfield, certification of Kuhawaea 1 transfer, 16 June 1884 (Bright, supporting papers to 'Kuhawaea' (doc A62(a)), p D4)

10.9.3.3.3 NINETEENTH-CENTURY PRIVATE PURCHASES – WAIOHAU

Fraudulent dealings over the Waiohau block were a serious grievance to Ngati Haka Patuheuheu and Tuhoe. We address their claims about this fraud in chapter 11. Here, we note briefly some key points relevant to the vetting system.

First, the 'majority rule' did not work to protect this block either. There were two purchasers at work, neither of whom had managed to acquire a majority of shares. One of those buyers, Harry Burt, was nonetheless able to convince the court (with the support of some Ngati Manawa grantees) that the majority of owners had agreed to a partition for sale to him.¹¹⁸⁶ The result was a partition in the names of just two people, who then proceeded to sign a deed of sale. It was this deed, and not Burt's earlier purchases, which the trust commissioner certified as meeting the requirements of the Native Lands Frauds Prevention Act.¹¹⁸⁷ As Crown counsel noted, the commissioner could not go behind the partition and the court title. His task was simply to certify that the owners named by the court had understood the deed and the transaction, that the purchase price was paid (and sufficient), that the price had not included alcohol or guns, and that the transaction was not contrary to 'equity or good conscience'.¹¹⁸⁸ The trust commissioner's inquiry was not one that could have uncovered the truth of these matters, because it did not examine the original purchases.

The Native Land Court, on the other hand, did not carry out its requisite checks. The original purchase of individual interests included improperly witnessed signatures, alienation of minors' interests, and (so it was alleged) alcohol and firearms as part of the payment.¹¹⁸⁹ All of this was concealed from the trust commissioner by the post-partition 'sale', but ought to have been exposed in the Native Land Court. Also, as was clear, Burt did not have a majority of the pre-1886 owners' signatures. The system of vetting clearly failed in this instance.¹¹⁹⁰

In our inquiry, the Crown blamed the individual judge concerned (Judge Clarke), and argued that this was not a fault in the system.¹¹⁹¹ That may be so, but we can say with certainty that in all three of these nineteenth-century private purchases, the 'majority rule' did not work in the way that Hayes said it was supposed to. That was a significant failing of the supposed protections in the 1873 native land laws regime. Also, post-partition checks by the trust commissioner – which took place in both Waimana and Waiohau – were, by definition, ineffective, because the original transactions (or partial transactions) were not being vetted. While the purchaser got a chance to perfect or conceal earlier flaws, and also to collect more

1186. Hayes, 'Waiohau' (doc L15), pp 7–13

1187. Battersby, 'Waiohau 1 Block' (doc C1), p 10

1188. Crown counsel, closing submissions (doc N20), topics 8–12, p 79; Hayes, 'Waiohau' (doc L15), pp 5, 7

1189. Binney, 'Encircled Lands, Part 2' (doc A15), pp 50, 58–59; Hayes, 'Waiohau' (doc L15), p 8; Battersby, 'Waiohau 1 Block' (doc C1), pp 43–48

1190. Hayes, 'Waiohau' (doc L15), pp 7–8

1191. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 39, 78–80

signatures, this was only after the court had in effect validated the original transaction by granting the partition.

Nonetheless, the Crown has suggested that there was no substantive injustice to the claimants, other than in the case of Waiohau. We do not agree. Had the ‘majority rule’ worked in the manner it was supposed to, as posited by Hayes, then we doubt that either the Waimana or Kuhawaea sales would have taken place. It is clear from the historical evidence that – in both cases – the communities’ leaders favoured leasing, and that the purchases only happened because of the lessees’ ability to buy individual interests. This was a critical flaw in the native land laws. As to the system of post-partition checks, we cannot say for certain whether or not injustices took place. The evidence does not allow us to make a finding on that point (except for Waiohau, as we explain in chapter 11).

10.9.3.3.4 WERE THE CROWN’S PURCHASES SUBJECT TO VETTING ?

According to the Crown, it exempted its transactions from vetting by trust commissioners, but this did not take away its responsibility to purchase land in an entirely scrupulous manner.¹¹⁹² From 1888, the law specified that nothing in the Native Lands Frauds Prevention Acts applied to the Crown, or to anyone working on behalf of the Crown.¹¹⁹³ Before this, practice had varied: some Crown transactions had been inspected and certified, and others had not.¹¹⁹⁴ There was only one Crown purchase in Te Urewera before 1888. In that case (Heruiwi 1–3), the Crown did not take its deed to the trust commissioner for certification. Tracy Tulloch noted that there was at least one technical flaw – the sale of a minor’s interest had not been counter-signed by a Native Land Court judge, as required by law.¹¹⁹⁵

The rest of the Crown’s purchases in the rim blocks took place after the 1888 amendment. We have no information on whether (or how) the Native Land Court checked those transactions. In some cases, such as Heruiwi 4, the technical requirements of the law had all been observed.¹¹⁹⁶ In other cases, such as Whirinaki, the court disregarded irregularities.¹¹⁹⁷ As we have already noted, the court also seems to have ignored the Crown’s failure to remove restrictions on alienation for many of the blocks that came before it. It may be that section 76 of the Native Land Court Act 1894 freed the Crown from the court’s scrutiny. In any case, none of the Crown’s transactions in Te Urewera was refused by the court.

10.9.3.4 Twentieth-century vetting: the role of the Maori land boards

From 1909, the Crown entrusted the Maori land boards with the task of protecting Maori in their land dealings. For multiply owned blocks (more than 10 owners),

1192. Crown counsel, closing submission (doc N20), topics 8–12, pp 6, 91

1193. Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s 8

1194. Waitangi Tribunal, *Hauraki Report*, vol 2, p 705; Hayes, ‘Evidence on the Native Land Legislation’ (doc A125), pp 148–152

1195. Tulloch, ‘Heruiwi’ (doc A1), pp 35–36, 43

1196. *Ibid*, pp 76, 79

1197. Tulloch, ‘Whirinaki’ (doc A9), p 40. The irregularities concerned the proper witnessing of the purchase of minors’ interests.

the boards were interposed between buyer and seller (or lessor and lessee) as the body to execute the legal arrangements and deliver secure titles to private buyers.¹¹⁹⁸ As we have seen, the board summoned a meeting of assembled owners to determine whether they (or, at least, a quorum of five) were willing to sell or lease their land, and on what terms. For blocks with 10 or fewer owners, the parties could deal with each other directly, but the board still had to check and confirm the alienation.

In either case, the board had to be satisfied that the price was fair, that the alienation was not contrary to equity or good conscience, and that each individual Maori vendor would not be rendered 'landless'. In other words, much the same checks as the trust commissioners had once performed were considered necessary. The board, however, had a broader mandate than the trust commissioners: it had to confirm that the sale or lease was in the public interest (that speculators were not accumulating land), and in the best interests of the owners.¹¹⁹⁹

One of the more controversial of the board's roles was its task of ensuring that no individual Maori would become landless, and therefore (as it was viewed at the time) a burden on the State.¹²⁰⁰ According to the Central North Island Tribunal, the focus of the 1900 legislation – and of the Stout–Ngata commission – was on reserving enough land for the community. This included ensuring sufficient customary resources as well as land for communal farming, with leased land to be available for future generations. The 1909 and 1913 legislation marked a total change of direction. The emphasis switched to preserving enough land for each individual, and for subsistence only. There was to be no provision for future generations.¹²⁰¹

The 1909 Act defined a landless individual as one whose total interests in Maori land were 'insufficient for his adequate maintenance.'¹²⁰² Rather than overturning a sale, the board could apply for the court to cut out the interests of individuals who would otherwise become 'landless'. This requirement could be evaded in two ways: section 373(2) provided that no purchase would be invalid if the Crown breached the requirement, and section 425 stated that the board could apply to the Governor to waive the requirement, so long as the individual concerned could earn a living some other way.¹²⁰³ In 1913, the provision was watered down by the Reform Government, which empowered the board itself to waive the clause without reference to the Governor. From that point on, the board could approve an alienation that would render individuals landless, so long as the land was useless for supporting them anyway, or they had another means of making a living.¹²⁰⁴

When the board performed these functions, it did so without any Maori representation. The right of local Maori to elect members had been abolished in 1905, with the switch from councils to boards. Carroll and Ngata both asked the

1198. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686

1199. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 857–858

1200. *Ibid*, pp 862–863

1201. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 689–692

1202. *Ibid*, p 691

1203. *Ibid*

1204. *Ibid*

James Carroll Versus William Herries in 1913: The Right of Maori to Representation on the Boards is Debated in Parliament

The Honourable Sir James Carroll:

First of all, the excision from the Board of any Native representation. The Board is dealing not with European land, not with Crown land, but with the land owned by the Natives; and surely it is a universal principle, recognized by all civilized races, that there should be representation on any Board dealing with the interests and property of those concerned – representation of those concerned . . . In all other cases, too innumerable to mention, there is Maori representation where their interests are concerned. But in this case why is the Maori member taken off? Because he was a check, perhaps, against any unfair dealing; because he was a discretionary unit that might examine and study transactions between Maoris and Europeans that came before the Board for confirmation . . .¹

The Honourable William Herries (Native Minister):

What advantage was the Maori representative? Honourable members say glibly that he represented the owners of the land. What owners did he represent, I would like to know. Very often the owners of the land would sooner see him off the Board than on. Just imagine, supposing that they had a Land Board in the ancient Highlands, if a Stewart of Appin had to go before a Board on which there was a Campbell: what trust would he have in his hereditary foe? What trust would some of the Ureweras have in an Arawa? What trust would a Ngatikahungunu have in a Ngatiporou? The matter has been brought before me in that respect, too. They say that each tribe should have a representative. The whole system of the Maori representative was a farce. It is only advanced, I know, by the honourable gentleman for party purposes . . .²

1. James Carroll, NZPD, vol 167, p 837

2. William Herries, NZPD, vol 167, p 857

Government to include local Maori leaders on the boards in 1913, when Herries dropped the nominated Maori member and made the boards consist of the land court judge and registrar. The Government refused this request.¹²⁰⁵ Maori had no role whatsoever in deciding how (and how far) their own interests would be protected, other than as petitioners to the board, the court, and the Native Minister.

1205. Tom Bennion, *The Maori Land Court and Land Boards, 1909–52*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 14

10.9.3.4.1 PRIVATE PURCHASES THROUGH MEETINGS OF ASSEMBLED OWNERS

For this part of our inquiry, the claimants' main grievance was with the meetings of owners system. We have already discussed this system for the Crown's purchases. In Te Urewera, there were only a few meetings called for the purpose of private purchases. At issue were some of the last pieces of surviving land for Tuhoë and Ngati Manawa. Tahora 2AD2 (3,276 acres) was sold in 1911. Kuhawaea 2 (586 acres) was sold in 1913. Also, half of Whirinaki 2(3B2) (78 acres) was sold in 1921. It will be recalled that Kuhawaea 2 was particularly important to Ngati Manawa, who had strongly resisted its alienation in the nineteenth century. There were no other private sales through the meetings of owners system between 1909 and 1930.

The private purchases of Tahora 2AD2 and Kuhawaea 2 have key features in common:

- ▶ The board did its best to ensure that the owners got the highest possible price. It appears to have taken the approach that sales were in the interests of owners, so long as the best possible price was obtained.¹²⁰⁶
- ▶ The board did not refuse sales on the basis of potential landlessness. We have no information as to what checks the board carried out in respect of Tahora 2AD2. We do know that some owners of 2AD2 complained of virtual landlessness to the Crown in 1911, because of sales of their Urewera District Native Reserve lands, before the sale of 2AD2 went ahead.¹²⁰⁷ In the case of Kuhawaea 2, the board decided that no checks were necessary, because it knew that the 'vendors have plenty of other land'.¹²⁰⁸
- ▶ The board did not go behind the decision of meetings of owners, even though opposition to the sales emerged afterwards. Once a resolution was passed and confirmed, the board called no further meetings to reconsider it, no matter how low the attendance at the original assembly. It became the 'agent' of the owners to execute the transaction, and the owners had no power whatsoever to revoke that agency.¹²⁰⁹ Those who were absent were 'deemed to have consented', regardless of whether they protested otherwise.¹²¹⁰ In both of these private purchases, the resolution to sell was made by minorities, and strong opposition was evident soon after the board had confirmed the sales.

In Tahora 2AD2, protest was led by Te Whiu Rakuraku, Tutakangahau, and Takao Tamaikoha. Petitions were signed by many more people than the 4 per cent of owners (12 of 267) who were at the meeting and had voted in favour

1206. Boston and Oliver, 'Tahora' (doc A22), pp198–200, 212; registrar to Urquhart, 3 April 1916; Urquhart to registrar, 17 June 1916 (Bright, supporting papers to 'Kuhawaea' (doc A62(a)), pp A36, A38)

1207. Boston and Oliver, 'Tahora' (doc A22), p 199

1208. Judge Browne, 13 July 1914 (Bright, 'Kuhawaea' (doc A62), p 62; Bright, supporting papers to 'Kuhawaea' (doc A62(a)), p A31)

1209. Native Land Act 1909, s356(6)

1210. Native Land Amendment Act 1913, s100(2). See also sections 344 and 345 of the Native Land Act 1909, which required dissenting owners to sign a memorial of dissent at the meeting so that their interests could be cut out.

of the sale.¹²¹¹ The people of Waimana complained that ‘the real owners and those who lived permanently on the land did not agree to its alienation.’¹²¹² Native Minister Herries refused appeals to intervene on their behalf, since the board had approved the purchase and a deposit had been paid.¹²¹³

In Kuhawaea 2, there was a slightly different outcome, because three owners had registered their dissent at the meeting. The legislation preserved their rights: they were allowed to partition their interests out as Kuhawaea 2A. One of the owners of 2B protested that his vote was incorrectly recorded at the meeting, and that the sale was invalid, but to no avail.¹²¹⁴ (The vote had been recorded as five to three in favour of sale, with only eight of 33 owners in attendance.)

- ▶ There was a long and expensive process to deliver secure titles to private buyers. As the Central North Island Tribunal emphasised, the boards had to sort out the tangled mess that the Crown’s native land title system had become.¹²¹⁵ Titles had to be updated, successions had to be arranged, surveys had to be made, and (in the case of Kuhawaea 2) a partition had to take place. As a result, it took several years for each of these transactions to be completed and for the buyers to get their titles and the owners their money. Survey costs were routinely deducted from the purchase money.¹²¹⁶

The third private purchase involving the meeting of owners system took place in 1921. A local farmer, Thomas Anderson, wanted to buy the 78-acre Whirinaki 2(3B2) block.¹²¹⁷ The board called a meeting of owners, at which the 12 owners present represented around half of the 7.5 shares in this block.¹²¹⁸ Two owners dissented, holding one-third of a share between them, but only one of them (Patiti Paerau) signed a memorial of dissent. In his memorial, he made it clear that he was objecting on behalf of other owners too (who were not present).¹²¹⁹ In a letter to the board, Patiti Paerau pointed out that his whanau was farming the land. They were, it seems, farming much more than the few acres their shares entitled them to, but they wanted to continue farming it, and to keep the land in Maori ownership in accordance with the wish of their elders.¹²²⁰

1211. Boston and Oliver, ‘Tahora’ (doc A22), pp 201–202

1212. Te Whiu Rakuraku and 36 others, Waimana, to Herries, 2 April 1913 (Boston and Oliver, ‘Tahora’ (doc A22), p 201)

1213. Boston and Oliver, ‘Tahora’ (doc A22), pp 201–202

1214. Bright, ‘Kuhawaea’ (doc A62), pp 62–66; Native Land Amendment Act 1913, s100(2)

1215. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686

1216. Boston and Oliver, ‘Tahora’ (doc A22), pp 201–205, 207–208, 209–215, 223, 322–323; Bright, ‘Kuhawaea’ (doc A62), pp 62–66

1217. Herbert Macdonald, ‘Report of Meeting of owners’, 12 February 1921 (Tulloch, supporting papers to ‘Whirinaki’ (doc A9(a)), p Q6c)

1218. *Ibid* (pp Q6a–Q6c)

1219. *Ibid* (pp Q6a–Q6b); ‘Memorial of Dissent’, 12 February 1921 (Tulloch, supporting papers to ‘Whirinaki’ (doc A9(a)), pp Q7a–Q7b); Paerau (Albert Warbrick) to Judge Ayson, 2 May 1921 (Tulloch, supporting papers to ‘Whirinaki’ (doc A9(a)), pp Q8a–Q8b).

1220. Paerau (Albert Warbrick) to Judge Ayson, 2 May 1921 (Tulloch, supporting papers to ‘Whirinaki’ (doc A9(a)), pp Q8a–Q8b)

In this case, the board did not confirm the resolution until after the Native Land Court had cut out the interests of Paerau and of the people he told the board he represented.¹²²¹ The court hearing revealed that the owners were equally split – 11 owners with half of the shares were classed as non-sellers, while the other half of the shares belonged to the sellers. The majority of the block (40 acres) was partitioned for the non-sellers, with the purchaser getting a slightly smaller share (38 acres) – this was because Paerau's people were keeping the 'hilly end of the block'.¹²²² Judge Ayson, having made this partition, then sat the next day as president of the Waiariki District Maori Land Board to confirm the sale to Anderson.¹²²³

What this shows is that the meeting of owners had revealed the wishes of only half of the owners. Those who wanted to keep the land had to settle for a partition – although in that sense they were luckier than the owners of Kuhawaea 2, whose objections were not put in writing at their meeting (other than those of the three individuals who voted against the resolution). From the limited number of cases in our inquiry, it is not clear to us how much discretion the board – or the court – had in the matter of partitioning dissenting interests. The difference between Kuhawaea 2 and Whirinaki seems to be that Paerau specified in his memorial of dissent that it was also on behalf of others.

In sum, the low quorum requirement for the meetings of owners system is a concern for private purchases, as it is for Crown purchases. The degree of opposition to the sale of Tahora 2AD2 shows that the 4 per cent of owners who voted at the meeting did not represent the will of the community of owners. While the evidence is not as strong for Kuhawaea 2, there was clearly significant opposition in both cases. For Whirinaki, the owners were evenly split, but that was not revealed at the meeting (which was dominated by the sellers). The native land laws were weighted in favour of sales, so the board did not (or could not) investigate post-meeting dissent so as to re-evaluate the decisions to sell. The most it did in Te Urewera was, as in the case of Kuhawaea 2 and Whirinaki 2(3B2), arrange for the interests of those whose dissent was recorded in writing at the meeting to be partitioned. Everyone else down through the generations lost their rights. Nor could the Native Minister intervene, as petitioned by Tuhoe in 1913. Once the board had confirmed a sale, there was no way of stopping it under the 1909 Act. For these sales to have been pushed through in the teeth of opposition, usually put as the view of those who were actually living on and using the land, shows serious flaws in the Native Land Acts of 1909 and 1913, and in the system of meetings of owners and the board that was governed by those Acts. So long as the price was good and the owners had another piece of land somewhere, sales would be approved.

1221. 'Confirmation of a Resolution Passed by Assembled Owners', 19 November 1921 (Tulloch, supporting papers to 'Whirinaki' (doc A9(a)), p Q9)

1222. Rotorua Native Land Court, minute book 69, 18 November 1921, fols 322, 330

1223. 'Confirmation of a Resolution Passed by Assembled Owners', 19 November 1921 (Tulloch, supporting papers to 'Whirinaki' (doc A9(a)), p Q9)

Waimana 1B1D1: Tuhoe Owners Buy Out their Co-owners

The alienation of Waimana 1B1D1 was an exceptional case. It did not fit any of the patterns as we have described them in this section. First, Waimana lands still in Maori ownership were reserved from sale under the Native Land Settlement Act 1907, so no land could be sold without the permission of the Native Minister. Alienation was thus controlled directly by the Minister as well as the board. Secondly, the alienation of Waimana 1B1D1 was driven mainly by Tuhoe owners trying to buy out their co-owners, with one party apparently acting on behalf of a Pakeha lessee. Thirdly, the early stages of its alienation took place before there were enough owners to require a meeting of assembled owners under the 1909 Act. At that point, the Tuhoe buyers and the board squabbled over who had to pay the sellers, and the transaction fizzled out. The buyers only acquired a single interest. Later, another Tuhoe owner wanted to buy out all his co-owners' shares (except those owned by the previous buyers). By this time, successions had expanded the number of owners to the point where a meeting was required. Ultimately, as a result of that meeting in 1929, the board confirmed sale of part of the block, with the Native Land Court partitioning it in 1930. This drawn-out process lasted from 1918 to 1930.

Waimana 1B1D1 was created in 1914. It was a block of 12 acres with eight owners. Thus, it did not (at that point) require a meeting of owners for its alienation. This small piece of land became the subject of a three-way contest between local Tuhoe (Tiaki and Mereana Maraea, and J F Boynton) and the lessee, B W Hughes. It appears from the records that Tiaki Maraea may have been a front for Hughes, who actually paid the money for the purchase. Instead of dealing directly with the owners in 1918, Maraea and Hughes tried to get the board to pay the owners, who they claimed were scattered all over Te Urewera. The board refused to do this, but it does appear to have confirmed the alienation, subject to the Minister's consent

10.9.3.4.2 PRECEDENT CONSENT INSTEAD OF A MEETING OF ASSEMBLED OWNERS – TAHORA 2AE1(2)

Tahora 2AE1(2) was a block of 1,082 acres. It was one of the two last pieces of Tahora 2AE left in Maori ownership. As we saw above, the Crown purchased individual interests in the other block (2AE3(2)) from 1921. In the case of Tahora 2AE1(2), which had 18 owners, there ought to have been a meeting of assembled owners when F Tiffen applied to buy or lease the land in 1911. According to Boston and Oliver, there was such a meeting in late 1911, and it voted to accept a resolution to sell to Tiffen at £1 an acre. They do not supply a reference for this statement.¹²²⁴ We have no certain information as to what happened – we cannot be certain

1224. Boston and Oliver, 'Tahora' (doc A22), p 213

(which was required under section 298 of the 1909 Act). While the evidence is sketchy, it appears that the board failed to apply for the Minister's consent, and Maraea failed to pay any of the owners. The purchase lapsed by 1922. Instead, the board confirmed the sale of a single interest, that of Taiha Tamarau, to Hughes in 1922. As far as we can tell from the records, this purchase of an undivided interest was then confirmed by the Minister. According to information supplied by the purchaser, Tamarau owned 90 acres at Waikaremoana and 10 acres at Ruatoki, which was deemed sufficient for his support.

In 1929, JF Boynton (who was himself an owner) applied to the board for a meeting of owners to buy this land, apart from the interests acquired by Maraea. Successions had increased the number of owners from eight in 1914 to 33 in 1929, so a meeting of owners was now required. Boynton supplied the usual list of other lands held by the owners. According to that list, more than half of the owners had fewer than 20 acres each, although some of them had undefined interests in additional blocks.

We have no information as to how many owners were present at the meeting, but the resolution was passed. The court partitioned the block and the board confirmed the sale of 1B1D1B to Boynton in 1930, which (at 7 acres 3 roods 25 perches) formed two-thirds of the old block. Mereana Maraea received her share and that of Taiha Tamarau, amounting to around four acres. There may have been other, undisclosed purchases behind Maraea's share, which was agreed among the parties at the partition hearing.¹

1. Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera, 1870–1930', 18 vols, various dates (doc A86(q)), vol 17, pp 5763–5783; Whakatane Native Land Court, minute book 23, 30 September 1929, fols 188–189

whether there was no quorum, or it may be that there was in fact no meeting. We suspect the latter, because the prospective purchaser had applied to the board for 'precedent consent' just a few months before the ability to do so was abolished in 1912.¹²²⁵ Under this provision, purchasers could get the prior consent of the board to collect the individual signatures of the owners, instead of holding a meeting.¹²²⁶

From the evidence available to us, the board granted precedent consent, and Tiffen proceeded to get signatures to a memorandum of transfer. Although the

1225. 'Applications for precedent consent to alienations under section 209 of the Native Land Act, 1909', 1 December 1911, *New Zealand Gazette*, 1911, no 100, p 3675; Parr and Bromfield to Judge Browne, 26 January 1912 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(o)), p 5218). The provision for precedent consent was abolished by section 8 of the Native Land Amendment Act 1912.

1226. Native Land Act 1909, s 209

owners appear to have signed his deed in 1912 and 1913, there was later much Maori opposition to confirming the sale.¹²²⁷ Takao Tamaikoha took a leading role in this opposition, just as he was prominent in the opposition to the sale of Tahora 2AD2.¹²²⁸

The opponents of the sale alleged that they had not understood the deed, and had not wanted to sell the land.¹²²⁹ They tried to get the board not to confirm the sale. Tiffen's lawyers made a settlement of £50 to one of the objectors, who had got herself a lawyer, and paid a shilling each to all of the other owners.¹²³⁰ The board considered this a suitable compromise, and confirmed the sale in April 1913.¹²³¹ In the lawyers' view, 'the Natives in the particular block, have no idea of the principles of morality, as applied to sales, and are continually endeavouring to blackmail our client.'¹²³² As requested by Tiffen, the board 'adhered' to its confirmation after April 1913, despite opposition from Takao Tamaikoha and other owners.¹²³³

In terms of its landlessness checks, the board relied on information supplied by Tiffen.¹²³⁴ From 1909, the Government entrusted this kind of investigation to the purchaser, not the board, who had to produce a list of other lands held by the sellers. The list was usually compiled from Native Land Court records.¹²³⁵ The Hauraki Tribunal was critical of this system, noting that 'the quality of these holdings, the revenue they yielded, the debts they carried, and the needs of the alienors and their families remained unchecked.'¹²³⁶

10.9.3.4.3 THE PROTECTIVE FUNCTIONS OF THE BOARD FOR PRIVATE PURCHASES FROM 10 OR FEWER OWNERS

In addition to sales under the meetings of owners system, the board had the task of approving purchases where there were 10 or fewer owners. Such purchases took place among the smaller subdivisions of the Waimana, Waiohau, Kuhawaea, and Whirinaki blocks. We lack sufficient evidence as to how the board performed its functions in respect of these alienations, and make no further comment on them.

1227. Boston and Oliver, 'Tahora' (doc A22), pp 213–215, 323; Parr and Blomfield to Judge Browne, 10 July 1913 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(o)), pp 5210–5211; see also pp 5203–5221)

1228. Boston and Oliver, 'Tahora' (doc A22), pp 202, 213–215

1229. Parr and Blomfield to Judge Browne, 10 July 1913 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(o)), pp 5210–5211)

1230. Boston and Oliver, 'Tahora' (doc A22), pp 213–215

1231. Parr and Blomfield to Judge Browne, 10 July 1913; minute by the president, 9 April 1913 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(o)), pp 5209, 5211)

1232. Parr and Blomfield to Judge Browne, 10 July 1913 (Boston and Oliver, 'Tahora' (doc A22), p 213)

1233. Boston and Oliver, 'Tahora' (doc A22), pp 213–215, 323

1234. 'Schedule of other lands held by Maori vendors or lessors', 1912; Parr and Blomfield to President, 2 February 1912; 'Tahora 2AE1 Sec 2: Other Lands', 1913 (Berghan, supporting papers to 'Block Research Narratives' (doc A86(o)), pp 5212–5216; 5219–5220)

1235. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 717

1236. Waitangi Tribunal, *Hauraki Report*, vol 2, p 862

10.9.4 Treaty analysis and findings

The Crown accepted in our inquiry that it had had a duty to protect Maori interests by providing safeguards in dealings with land, by providing means for Maori to retain their land for so long as they wished to do so, and by protecting a sufficiency of land in their possession. In order to carry out this duty, the Crown set up protective mechanisms, including restrictions on alienation, reserves, and processes for vetting the fairness of transactions. As the Turanga Tribunal found, a fair and generous approach to these protection mechanisms would have gone a long way to keeping the Crown’s Treaty obligations.¹²³⁷

10.9.4.1 Restrictions on alienation

In Te Urewera, restrictions on alienation were not available as a protection mechanism for the Waimana, Waiohau, and Heruiwi 1–3 blocks. Legislation did not provide for them. Restrictions were available by the time Kuhawaea went through the court, but that hearing was based on partitioning with a view to sale. Waimana was partitioned for the same reason in 1885. For the Waiohau partition in 1886, the non-sellers were not present to have sought restrictions. Thus, restrictions were only really an option for the second round of title investigations in 1889 and 1890. Te Urewera leaders took full advantage of this protection, obtaining restrictions for three-quarters of the land that passed through the court.

As claimant counsel pointed out, the Crown treated these restrictions as ‘having the additional gloss “except to the Crown”’.¹²³⁸ Of the 283,242 acres made inalienable by 1894, the Crown purchased 122,087 acres (43 per cent) in the 1890s. Restrictions were lifted from another 100,000 acres by 1901, as a result of Tahora 2 blocks being dealt with by the Validation Court and Ruatoki by the Urewera commission (neither of which could put restrictions on the new titles). Although the Crown refrained from purchasing between 1899 and 1905, all restrictions were cancelled unilaterally in 1909, without investigating the circumstances of the owners or obtaining their consent. Lands formerly restricted were then alienated to the Crown and private buyers in the early twentieth century.

We accept that alternative protection mechanisms were provided for Ruatoki (inclusion in the Urewera District Native Reserve) and for parts of Tahora 2 (inclusion in the Carroll–Pere and East Coast trusts). We review the effectiveness of these protections elsewhere.

Our findings are as follows:

- ▶ The Crown breached its Treaty duty of active protection when it failed to provide proper restrictions on alienation under the 1873 Act. As a result, Waimana, Waiohau, and Heruiwi 1–3 could not be protected by restrictions. The 1878 amendment came too late for these blocks.
- ▶ Under the 1888 legislation, restrictions on alienation provided an opportunity for the Crown to exercise its duty of active protection of tino rangatiratanga.

1237. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 456–457

1238. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31

Tribal leaders sought to protect their land in the rim blocks by restricting almost three-quarters of it from alienation as it passed through the court.

- ▶ The Crown did not respect the tino rangatiratanga of the claimants (nor their best interests) when it purchased individual interests in land that communities had specifically reserved from alienation. Worse, it did so in a manner that ignored its own protective mechanism. This was a serious failure in the Crown's duty of active protection. In our view, the Crown did not act in good faith when it provided a means for Maori to protect land in their ownership until they were truly willing to alienate it, and then treated that protection as a simple nullity. The Liberal Government's intentions were shown in the Native Land Purchase Act 1892, which empowered the Crown to remove any restrictions on alienation whenever it wanted to purchase land, regardless of whether this would render Maori landless, and regardless of the wishes or consent of the owners. Even if the Crown could be shown to have acted lawfully under this Act in Te Urewera, it would still have been a serious breach of the Treaty.
- ▶ Restrictions on alienation were the only legal mechanism for Te Urewera leaders to prevent the bleeding of individual interests to the Crown. The total failure of restrictions in that respect had a serious impact on the ability of the peoples of Te Urewera to retain their land for so long as they wished, as the Treaty had guaranteed that they should do.
- ▶ The unilateral cancellation of all restrictions in 1909 was in breach of the Treaty principle of partnership, and the Crown's duty actively to protect the interests of Maori, and in the manner Maori themselves had sought to protect them.

10.9.4.2 Reserves

Restrictions on alienation became part of the Crown's policy to ensure that Maori retained sufficient land for their present and future use. As claimant counsel submitted, the Waitangi Tribunal has found in many of its reports that the Crown was required to ensure retention of sufficient land for hapu. Subsistence was not the standard; rather, if the Treaty was to be carried out fairly for both Maori and settlers, Maori had to retain enough land and resources for customary uses and for development in the new economy.¹²³⁹ As we have seen, this policy was carried out in a variety of ways in Te Urewera. The Crown no longer made reserves while it was purchasing, which had been standard practice earlier. When Ngati Manawa sought reserves in Whirinaki in the 1890s, the Government replied 'if they imagine we are going to pay them in full for the land then give it back to them you [Gill] had better let them understand that that is not the way we do things nowadays.'¹²⁴⁰ The Government's argument was specious, maintaining that Maori could

1239. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 4–8

1240. Sheridan to Gill, November 1895 (Tulloch, comp, supporting papers to 'Whirinaki' (doc A9(a)), p c5)

reserve land for themselves by not selling it, while fully aware that communities could not in fact control individual sales or negotiate reserves in the 1890s.

Instead of making reserves from purchases, the Crown wanted land set aside for reserves before it started purchasing. We credit the Crown with good intentions in this respect. From 1873 to 1886, district officers were supposed to identify land vital for immediate use and as future endowments, and then to get the agreement of its Maori owners for the land to be taken to the court and reserved. Also, from 1882 the Native Reserves commissioner had a duty to seek the reservation of land when it passed through the court. There was, however, no commissioner from 1884, and no district officers from 1886. When most of the land in the rim blocks had its title investigated, reserve-making responsibilities had devolved to the court. If the people seeking title or partitions did not have an (undefined) minimum of inalienable land, then the court was supposed to put restrictions on whatever land was before it, regardless of the wishes of the owners. In Te Urewera, tribal leaders took advantage of this (as we have seen) to restrict the bulk of land as it passed through the court. This had no effect in protecting it from Crown purchasing.

At the turn of the century, new reserve arrangements were made between the Crown and Maori. Land that was still in customary title (plus Ruatoki) was placed in the Urewera District Native Reserve. Southern Tahora 2 was protected in the Carroll–Pere trust and later the East Coast trust. We will address these arrangements later in our report.

We make no comment here on whether Maori were rendered landless in the rim blocks, or whether alienations in the rim blocks contributed to landlessness for iwi in our inquiry. We address that question below. Here, we note the failure of the Crown's reserves schemes as far as Te Urewera was concerned:

- ▶ First, the district officers and Native Reserves commissioners made no reserves.
- ▶ Secondly, except for one 400-acre reserve in Whirinaki, the Crown made no reserves when it was purchasing.
- ▶ Thirdly, the Crown set aside restrictions on alienation and purchased land reserved by the Native Land Court as if it had never been reserved.
- ▶ Fourthly, all restrictions were cancelled by legislation in 1909.
- ▶ Fifthly, the Maori land board's checks were focused on the present generation of individual owners, and were based on the narrow category of information supplied by purchasers.

We take it as indicative of the prevailing climate of Government opinion that, from 1913, the boards could confirm alienations that would render individuals landless, so long as they had the potential to make a living some other way.

By these actions, the Crown breached its Treaty duty of active protection. It failed to respect the wishes of the owners, it failed to make meaningful provision for reserves, and it even failed to protect the reserves that were created.

10.9.4.3 Vetting private purchases and the 'majority rule'

According to the Crown, Maori were protected in their ability to make community decisions about their land because it provided for a 'majority rule' in legislation

until 1909. Private purchasers would be deterred from buying up individual interests because they either had to get the agreement of all owners to a sale, or at least of a majority to partition the land for a sale. This protective mechanism was supposed to be enforced by the Native Land Court. Trust commissioners and the court were also to protect Maori more widely in their dealings by checking transactions for fairness and adherence to the law.

In fact, lands of significance to the claimants in our inquiry were purchased in Waimana, Waiohau, and Kuhawaea without being protected by this supposed 'majority rule'. Purchasers bought up individual interests, usually over a number of years. In the case of Waiohau, Burt had not even acquired a majority of interests. While we accept that there was some agreement from tribal leaders to the Waimana and Kuhawaea sales, it was clear from the evidence that these lands would have remained leased if purchasers could have been truly restrained by law from picking off individual interests.

With regard to the checks carried out by the trust commissioners, we note that in at least two of the three cases they were restricted to post-partition deeds and arrangements. The transactions underlying the partitions were not subject to their independent scrutiny. As a result, the trust commissioner's inquiry was incapable of uncovering the Waiohau fraud.

We find the Crown in breach of the Treaty for not providing an effective legal deterrent to the purchase of individual interests. While the Waimana, Kuhawaea, and Waiohau lands were not extensive in acreage, they included some of the best farmland in the rim blocks, and were highly valued as ancestral land by their Maori owners. The Crown's theoretical 'majority rule' gave no protection. The Crown breached the plain meaning of the Treaty by subverting the tino rangatira-tanga of tribal communities and their leaders, and allowing individual interests to be picked off outside the rules and constraints of either custom or British law. The fact that it was private buyers at work and not the Crown does not reduce the Crown's Treaty responsibility. In terms of the trust commissioners, we make no finding. With the exception of Waiohau, we are not able to say whether any injustice took place as a result of the manner in which the trust commissioners carried out their duties.

The Crown exempted itself from the trust commissioners' regime in Te Urewera. In the Crown's submission, this cannot be shown to have resulted in substantive injustice. We agree. The claimants demonstrated some failures on the part of the Crown to meet legal requirements in the execution of its deeds, but we lack systematic evidence on the problem or its effects.

10.9.4.4 Vetting private purchases: Maori land boards and meetings of assembled owners system

In our inquiry, the claimants' main concern about the system set up in 1909 was its use of meetings of assembled owners to secure sales, while allowing such meetings to operate on a quorum of only five owners. In this part of our chapter, we have considered how the meetings of owners system worked in practice for private alienations.

It is clear that meetings took place at which minorities voted to sell land, and whose decisions were confirmed by the board, despite the emergence soon afterwards of significant opposition. In the case of Tahora 2AD2, it is almost certain that a majority opposed the sale. For Kuhawaea 2, there also appears to have been majority opposition. In Whirinaki 2(3B2), the owners were evenly split, but the sellers dominated the meeting and so their decision was given effect. Those who registered dissent at meetings had their interests protected by partition. Others lost their interests in their ancestral land. By law, the owners had no rights after the meeting: it was up to the board to decide whether or not to confirm the resolution, the owners could not reverse a confirmation by the board, and even the Native Minister could not lawfully intervene (despite appeals and petitions). In one case, Tahora 2AE1(2), the owners did not even have the chance of making a group decision, because the board granted 'precedent consent' for a local farmer to buy up individual interests. As with the other sales, there was a great deal of opposition that was, in effect, ignored by the board.

We find that the Crown breached its Treaty duty of active protection when it failed to provide a fair and proper system for groups of owners to make collective decisions about their land. The ability of the board to confirm resolutions made by minorities (sometimes tiny minorities) at a single meeting; the removal of the legal rights of all other owners to stop, revisit, or reverse the decision; and the restriction of the minimal protection of partition to dissent registered at the meeting: all were in breach of the Crown's duty actively to protect the interests and authority (tino rangatiratanga) of the Maori owners over their lands. In effect, the board was empowered to conduct a forced sale of the interests of a majority of owners. It was little consolation that the board almost always ensured that a fair price was paid. It is impossible to say whether local Maori representation on the boards would have made this system any fairer, but we find the Crown in breach of the principles of partnership and autonomy for refusing to allow Maori to elect representatives to the body thus empowered to confirm or refuse sales of their land.

10.10 WHAT WERE THE IMPACTS ON THE PEOPLES OF TE UREWERA OF THE OPERATION OF THE NATIVE LAND COURT AND OF THE ALIENATION OF THEIR 'RIM' BLOCKS?

SUMMARY ANSWER: The Crown's land court and its land purchase policies and practices laid siege to the authority of Te Urewera communities over their land, as embodied in and expressed by their rangatira. That authority was undermined by processes which allowed individuals to take steps of great import for community lands, drawing blocks into the court despite the fact that there had been no community decision to do so – or on occasion in defiance of a decision not to do so. Community authority was undermined by the court itself, which was empowered to make decisions about complex rights in the Te Urewera rim lands. Grievances about a number of those decisions have remained till the present. And community authority was undermined by the individualised titles ordered by the court, which opened the way to ready purchase from individuals, and to land loss on a large

scale. Thus, at a crucial time in their history, as they faced the challenges of Pakeha settlement and colonial law, hapu communities were left without legal powers over their land. Rangatira who hoped to protect their communities confronted these systems with varying degrees of success, but none was able to secure the lasting well-being of their community.

The impact of land court processes and land loss on the cultural fabric of Te Urewera was deeply felt by the claimants. They resented the way in which their relationships with their whenua were reduced to providing particular kinds of proofs of occupation, and their whakapapa became the basis for lists of 'owners' of blocks. They resented the language of the court, and the values it seemed to enshrine. And they were profoundly conscious of the impact of land loss on their responsibilities of kaitiakitanga, and on the transmission of cultural knowledge.

In terms of economic prejudice, the Crown acquired land through means that were coercive, unfair, and in breach of the Treaty (sections 10.7 and 10.8). Private purchases were also in breach of Treaty principles, due to the failure of the Crown's protection mechanisms (section 10.9). The loss of at least 82 per cent of the land in the rim blocks was the prejudicial effect of these Treaty breaches. Ngati Ruapani lost all their lands, while Ngati Manawa, Ngati Hineuru, and Ngati Rangitihī were rendered virtually landless within the rim blocks. The other tribes lost the majority of their lands.

Maori clearly suffered economic harm as a result. There was a significant contraction of their customary economy, on which their physical and cultural survival depended. This exacerbated the effects of earlier losses: from the Bay of Plenty raupatu, the Crown's acquisition of the four southern blocks, and the Native Land Court's awards of land (to the sole ownership of some at the expense of others) in the rim blocks. Some resource use continued on forest lands after alienation, but Maori economic capability was nonetheless reduced. Further, Maori lost most of their best quality lands in the rim blocks, and also their best timber. This deprived them of development opportunities in the colonial economy. While such opportunities were more limited in Te Urewera than in some parts of New Zealand, there was still potential for European-style farming and forestry. The loss of these opportunities, as a result of alienations in breach of the Treaty, was a prejudicial effect of those Treaty breaches. Later in the report, we assess what Maori were able to do with the few lands that remained to them in the rim blocks.

10.10.1 Introduction

The operation of the Native Land Court in the rim blocks of Te Urewera, and the loss of land that followed the award of title, had a destructive impact on the peoples of the region. In earlier sections of this chapter, we have established the extent to which the native land legislation, the operations of the court and the Crown's purchase policies and practices breached the principles of the Treaty. Here, we consider the prejudice arising from those breaches we have identified. We look first at the impact of court and land alienation processes on the authority (tino rangatiratanga) of communities, and the ability of the rangatira to protect the customary rights of those communities. We consider ways in which they undermined

'KA noho nga mahi a te Kooti Whenua Maori me te whakataunga o nga ture hei whakamana i te tangohanga o nga whenua hei tauira marama tonu o te tikai o te Karauna ki te iwi Maori.'

'THE operation of the Native Land Court and the imposition of legislation to justify the taking of lands provide one of the most cogent examples of the lack of respect that the Crown had for our peoples.'

Tamati Kruger¹

1. Tamati Kruger, brief of evidence (Maori), 18 October 2004 (doc H31(a)), p 4; Tamati Kruger, brief of evidence (English), 18 October 2004 (doc H31), p 4

and were perceived to undermine the philosophies, values, and beliefs of the peoples of Te Urewera, and their relationships with their land. Finally, we examine the economic impacts that flowed from the loss of land. We ask, in particular, whether any groups were left landless in the wake of land court and purchase processes, and examine the losses of each claimant iwi in our inquiry district by 1930.

Crown counsel submitted that we lack a sufficient 'social and economic portrait' of Maori communities in the period before the introduction of the land court to enable us to assess whether it was 'a major portal of social change'. In particular, there was limited knowledge of Maori engagement with the nineteenth-century economy. In the Crown's view, the question of 'what the native land laws "did to" Maori society' ought to be part of a wider inquiry into how the peoples of Te Urewera engaged with 'modernity' – though counsel did not elaborate on this proposition, or suggest how this engagement might be understood.¹²⁴¹ We accept that such broad studies might provide an interesting context in which to study the operations of the land court, and land alienation, but we are concerned here with the evidence before us. We accept the reality of pervasive change in the latter part of the nineteenth century – including the development of settler towns on the Bay of Plenty coasts and at Gisborne on the east coast, in the wake of war and the Crown taking of land in both regions. But the point, as far as the Tribunal is concerned, is the kind of tools the Crown provided to Maori to assist their engagement with the new economy. We have found those tools to be wanting. Despite the Crown's understanding of Maori politics and the collective authority of communities, and despite widespread agitation for a better system of title determination, the Crown refused to replace the land court nationally – though it did finally agree to try an alternative system in Te Urewera itself in the mid-1890s. Nor did it withdraw its purchase officials in the border lands before 1900 (and then only briefly).

1241. Crown counsel, closing submissions (doc N20), topic 8–12, p 3

10.10.2 Social and cultural impacts

How did the Crown's failure to provide for Maori to determine their own title allocation, and for a legal community title, impact on the authority of Te Urewera communities over their land? Mana, as we have explained in chapter 2, was central to the philosophies, the knowledge systems, and the values of the peoples of Te Urewera. We refer readers to that discussion, based on the tribal evidence before us. We discussed the relationship between the hapu community and their rangatira in Te Urewera society: the wide-ranging responsibilities of the rangatira to protect the mana of the hapu, protect its knowledge, protect its lands and resources, and protect the well-being and future of the hapu. That relationship, we were told, was at the heart of the exercise of authority. Rangatira were mandated to make decisions on behalf of the hapu so as best to protect its interests; but it was expected that they would act with the advice and support of the people.

We explained that in Te Urewera society, as in any society, norms and rules provided a degree of certainty for everyone as to the nature of their rights, how others would recognise them, and what constituted infringement. The origins of rights lay in ancestral relationships with the land, in discovery, sometimes in conquest (often combined with ancestral rights), and always with long-established occupation. Where mana whenua (in broad terms, the exercise of authority over land) was most firmly established, it seems to have been focused in a particular hapu or community. In parts of the border lands where settlement may have been less important than guaranteed access to resources, rangatira of Te Urewera communities (who might well also be affiliated to hapu of neighbouring iwi) negotiated rights with leaders of those hapu. Tuhoe, Ngati Ruapani, and Ngati Kahungunu leaders similarly negotiated their rights with one another on the ground in the lands south-east of Lake Waikaremoana, as we saw in chapter 7.

But as settlers and Crown negotiators arrived in the rim lands, and as all the rim blocks in succession went through land court hearings from the 1870s on, and were subject to court title orders, the authority of communities over tribal lands and over the exercise of customary rights began to diminish. This was the inevitable outcome of the failure of the Crown to provide for hapu communities to exercise legal powers over their lands. Their authority was neither endorsed nor protected. The Crown has suggested that the 'strong social controls exercised by a community were not destroyed' by the operations of the land court; the court, after all, was only one forum where leadership might be exercised.¹²⁴² We do not discount the attempts of rangatira to control aspects of court processes, or the judges' consultation with them on particular matters such as lists of names to be entered on the titles. But we have seen how applications for court hearings could bypass rangatira, and we have seen also that ultimately it was the court – not rangatira – that made the crucial decisions about the recognition of rights, and the size of awards to each claimant group. Above all, the community and their rangatira were disempowered in respect of controlling alienation, and of managing their lands at a time when Pakeha settlement and economic change presented

1242. Crown counsel, closing submissions (doc N20), topic 8–12, pp 17, 19

great challenges. As the Turanga Tribunal pointed out, the 1873 Native Land Act took the community 'out of the equation altogether . . . There was no requirement for community meetings let alone community consensus.'¹²⁴³ In all these respects, the authority of Te Urewera communities over their lands was under siege.

10.10.2.1 *What kinds of prejudice resulted?*

First, court processes were prejudicial to communities in that they empowered individuals to take decisions of enormous import for tribal land without the support of the community. The law allowed unrepresentative individuals to bring the Waimana and Tahora 2 blocks into the court. The 'secret survey' of the Tahora block drew a wide range of hapu and iwi from the eastern regions of Te Urewera into court to protect their customary rights, despite their overwhelming opposition to a court hearing. Leaders of Ngati Kahungunu, Tuhoe, Upokorehe, and Ngati Patu unsuccessfully opposed the hearing. Rakuraku Rehua told the judge that 'We . . . are at a loss to understand how in reference to application of two or three persons as against the voice of a large body of people, the court can't take into consideration the application of the people.'¹²⁴⁴ The authority of all the communities with rights in the lands encompassed by Tahora 2 block had been set at naught by the court. The Kuhawaea and Tuararangaia blocks were also brought before the court by younger chiefs who did not have the support of groups on whose behalf they made applications. As we have seen, the Tuararangaia owners, ironically, all paid the price for the unauthorised survey and the active opposition of a few individuals to it when the court later decided to charge the owners for obstruction. This was an outcome that community decision-making about survey and a court application – had it been provided for – would have avoided. The case of Tahora was more prejudicial, since the survey of such a large block and the consequent court hearing resulted in huge survey costs and the arrival of Crown purchasers to take advantage of the position. And Tamaikoha, one of those pulled in at Tahora, had even had to resort to the court to protect land at Waimana (to which his people had indisputable title) because other claimants (who were found not to be owners) made an application.

Secondly, the authority of communities came under pressure because of the difficulty, in the adversarial court system, of protecting their customary rights and interests.

We have endorsed the finding of previous Tribunals that the court was an inappropriate forum for the determination of customary title. In the rim blocks, where rights were generally shared and overlapping, the court – constituted as it was – faced considerable challenges. That this was no small matter is very evident in the lasting bitterness some decisions of the court left in their wake. We have stated earlier that we are not making findings on mana whenua; nor are we able to revisit court judgments. But in our hearings well over 100 years later, it was

1243. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 444

1244. Opotiki Native Land Court, minute book 4, 6 February 1889, fol 247 (Boston and Oliver, Tahora (doc A22), p 47)

very evident that grievances about many of those decisions had not been forgotten. Claimants in our inquiry clearly felt that they had suffered lasting prejudice as a result. The failure of the court to recognise and provide for rights about which evidence had been presented, or to provide appropriately in its awards for different kinds of rights or, in some cases, its failure to recognise well-established rights where no evidence was given but inquiry by the court would have uncovered them, has not been forgotten.

We turn now to discuss some of these grievances. We look at blocks such as Matahina, which was claimed by and largely awarded to Ngati Awa, who are not claimants before us but who also had grievances associated with this block (settled by the Ngati Awa Claims Settlement Act 2005). We are mindful of the difficulty we face because our concern here is solely with the grievances of claimants in our inquiry. We confine ourselves to those grievances, and do not intend to cause prejudice or offence to other groups.

The court's award of the Matahina block aroused strong feelings among two groups of claimants before us. Tuhoe speakers told us about the Patuheuheu claim to the area south of Waikowhewhe. They were awarded no part of the block in the 1881 title investigation, and only 2,000 acres in the 1884 rehearing. Alec Ranui of Ngati Haka Patuheuheu spoke to us of the importance of the lands of Matahina to Tuhoe, whose authority, he said, had been 'paramount' there; he named pa, cultivations, a waahi tapu where the bones of their ancestors lay: 'we lived on these lands, we gathered food here, we fought here, we also died here.'¹²⁴⁵ But until the arrival of the land court, they had never been evicted from the land. Te Kooti's matakite (prediction), however, was that Matahina would be taken, and he had composed a waiata for the land (see the sidebar opposite).

Tamaroa Nikora, who gave a detailed analysis of the evidence presented to the land court, concluded that the decision of the court was contrary to the weight of evidence it received. He pointed to the failure of the court to give weight to 'detailed [Patuheuheu] evidence' of 'pa, kainga and cultivations south of Waikowhewhe', where Ngati Awa gave none; to the court's acceptance of an 'exaggerated' claim by Ngati Awa to conquest of all the Matahina land; to the court's having 'constructed a notion of Patuheuheu having been 'incorporated' into Ngati Awa when there was no such evidence'; and to the court's failure to recognise the significance of the tatau pounamu at Ohui, which he stated effected a boundary between Tuhoe and Ngati Awa. He argued that the court also failed – when it did finally recognise Patuheuheu customary interests – to do so in accordance with the extent of those interests. He pointed to a hui held after the first hearing at which Ngati Awa and Patuheuheu resolved the question of the Waikowhewhe boundary, after which Patuheuheu sought, unsuccessfully, to withdraw their claim for a rehearing. The rehearing thus cost Patuheuheu the benefits of their agreement with Ngati Awa rangatira. Finally, in Mr Nikora's view, the court's rulings were internally inconsistent: it denied Tuhoe claims in the Whirinaki and Heruiwi hearings on the basis that the tribe had relinquished an earlier interest in favour of another tribe, but

1245. Ranui, brief of evidence (doc C14(a)), p 14

Te Kooti’s Waiata for Matahina

*Haere ra Matahina, e huna i a koe,
 Haere ra Matahina, te ora o te tangata
 Haere ra Matahina, te pono o te tangata ki nga tira haere
 Kauaka te mahara e rangirangia mai he mate
 Ka ronaki ki te nui raorao
 Kai Te Kapu o Te Ringa na na i whatoro
 To te tangata hemonga, he moni – eei!*

*Farewell Matahina, for you are lost
 Farewell Matahina, the well being of human kind
 Farewell Matahina, bountiful to travelling parties.
 Do not remember it; its burning-off is completed.
 It slopes steadily down to the level vastness
 It was Te Kapu o Te Ringa (the cup of the hand) that stretched out
 Man’s demise is money.¹*

1. Alec Mahanga Ranui, brief of evidence, 14 March 2004 (doc C14(a)), pp 16–17

did not apply the same principles in Matahina; had it done so, Ngati Awa would not have been found entitled ‘to assume the rights of Ngati Hamua, Warahoe and Patuheuheu.’¹²⁴⁶

Searching for reasons as to ‘why the Native Land Court got the decision so wrong,’ as he put it, Mr Nikora suggested that the absence of senior Tuhoe chiefs from the court might have meant that the case was not as strongly argued as it could have been; that Judge Mair who sat on the rehearing might have favoured Ngati Awa at the expense of Tuhoe, whom he had fought against; and that the judges were ‘hopelessly incompetent to deal with evidence of customary interests.’¹²⁴⁷ His strong criticisms of the court reflect the anger of Tuhoe at decisions which they consider cost them 20–30,000 acres south of Waikowhewhe Stream, and which they have never accepted.¹²⁴⁸ (They still maintained before us that Ngati Awa have not been able to ‘answer the simple question of what is the evidence of customary associations of Ngati Awa with any areas south of Waikowhewhe.’)¹²⁴⁹

Mr Ranui underlined the frustration of Ngati Haka Patuheuheu at the ‘morsels’ of the block the court left them with: ‘Ka nui te takariri o matau tipuna ki te kooti

1246. Nikora, brief of evidence (doc c31), pp 8–9

1247. Ibid, p 10

1248. Ibid, p 13

1249. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 62

whenua mo tenei tahae whenua na te mea ko matau te mana whenua te mana tangata i runga i a Matahina. (Our ancestors were clearly agitated with the Native Land Court for this theft of land because we asserted mana over Matahina.)¹²⁵⁰

For Ngati Rangitihī, the court's decisions about Matahina have also been a source of lasting distress. They claimed that in 1881 they were 'stripped' by the court of their customary interests in Matahina, based on conquest and occupation, and maintained by seasonal use and occupation.¹²⁵¹ David Potter stated that 'all of the relevant customary evidence' was before the court in 1881, but the court failed to take it into account.¹²⁵² The court was simply inadequate. He gave evidence that Ngati Rangitihī had sent a petition to the Native Minister, two weeks after the court's decision in 1881, asking him to transfer decision-making about 'Pokohu' (as the land was known to them) from the Native Land Court to them.¹²⁵³ They told him that they would never move off the land, and made a strong statement of rights passed down from their ancestors and the exercise of their authority there. They asked the Minister to 'look carefully into':

- › The pa sites of our ancestors
- › The hopes, thoughts and aspirations of our ancestors
- › The food gathering places on the land in which our ancestors lived and down to our present occupation.
- › The burial sites of our ancestors down to our times
- › The traditional living places on the land in which our ancestors lived and down to our present occupation.
- › Our houses that stand on that land
- › Our horses that have fallen upon that land
- › Our present cultivations on that land.
- › Our forests growing upon that land
- › Prohibitions on seasonal food cultivations and other resources of our ancestors.

These are our concerns brought before the court that weigh heavily on our minds.¹²⁵⁴

This poignant statement expresses the relationship of Ngati Rangitihī with their land over generations, their fear that it might be lost to them, and their anxieties about court processes. As we have seen, Ngati Rangitihī were awarded 1,000 acres at the rehearing in 1884. But the claimants endorsed the conclusion of Philip

1250. Ranui, brief of evidence (doc C14(a)), pp 6, 17

1251. Counsel for Ngati Rangitihī, closing submissions (doc N17), pp 10–12

1252. Potter, brief of evidence (doc C41), p 41

1253. Counsel for Ngati Rangitihī referred to Mrs P Rondon's evidence that she had always known the Matahina block as Pokohu lands. Counsel cited Philip Cleaver's research report to the effect that the Matahina block was known as Pokohu block in the 1870s; the name then appeared to have been changed to Matahina in 1881 at the time of the first title investigation. The name Pokohu was then given to the block immediately to the west of Matahina block: counsel for Ngati Rangitihī, closing submissions (doc N17), pp 5–6.

1254. Petition to Native Minister, 28 October 1881 (Potter, brief of evidence (doc C41), p 53; see also pp 39–40)

Cleaver that these awards were so small as to actually constitute a decision against them, despite the change of the court's award in principle.¹²⁵⁵ (As far as we are aware, the claimants did not try to petition Parliament about the outcome.)

The court's decisions about Matahina, as speakers from both Ngati Haka Patuheuheu and Ngati Rangitihī told us, have remained a serious grievance for them, passed down from generation to generation.¹²⁵⁶

For Ngati Whare, as we discussed in section 10.5, a particular grievance was the failure of the court to make sufficient inquiry into the extent of customary rights in blocks before it – since in large measure they boycotted the court, refusing to lodge applications or defend their claims against others.¹²⁵⁷ The result, they said, was inadequate recognition of Ngati Whare rights in lands designated by a number of block names: Kaingaroa 1, Heruiwi, Kuhawaea, Whirinaki, Heruiwi 4, Pukahunui, and Pohokorua.¹²⁵⁸ Only some Ngati Whare individuals were included in blocks awarded to Ngati Manawa, we were told, and the awards thus fail to convey any sense of recognition of Ngati Whare rights. 'Rather, the inclusion appears to have been made mainly through individuals with significant Ngati Manawa connections, or as people of mana who may have been placed on blocks in an acknowledgement of the interests of their iwi.'¹²⁵⁹

Anaru Te Amo spoke of Ngati Whare's opposition to the operation of the land court, consistent with their support of Te Whitu Tekau, and to any attempt to bring their customary land under the new system. 'As a result, land in which Ngati Whare had interests was brought before the Native Land Court by other iwi, and to the large part our customary interests in these lands were removed from Ngati Whare.'¹²⁶⁰ Ngati Whare argued – and we accept their argument – that they were prejudiced by the Crown's failure to provide a mechanism that enabled the land court to decline to award title to blocks if the majority of customary holders in those lands preferred simply to retain their lands in customary title.¹²⁶¹ They should not have been forced to choose between conversion of their customary rights into a Crown-derived title – at least the kind of title on offer – and total lack of protection in the new title system for their customary rights. As it was, they lost

1255. Counsel for Ngati Rangitihī, closing submissions (doc N17), pp14–15

1256. See, for example, Pouwhare, brief of evidence (doc C15); Potter, brief of evidence (doc C41); Nikora, brief of evidence (doc C31).

1257. In closing submissions, Ngati Whare modified their earlier position that they had not engaged with the court at all, based on evidence which had come to light since their pleadings. In light of that evidence, they considered that the inclusion of names in the Whirinaki block classed as 'Ngati Wharekoiwi' strongly suggested 'some kind of Ngati Whare presence' at that hearing – though no specific evidence was given as to their rights: counsel for Ngati Whare, closing submissions (doc N16), sch 1, p 141.

1258. Not all those blocks, of course, fall within our inquiry district, but Ngati Whare drew our attention to the fact that their grievances were not confined to our district.

1259. In two instances only – the inclusion in Whirinaki of a list from the hapu Ngati Wharekoihiwi and that of a group of Ngati Te Au in Kuhawaea – is there perhaps evidence of recognition of hapu of Ngati Whare, and, in the latter case, Ngati Te Au were not distinguished in any way within the lists of owners: counsel for Ngati Whare, closing submissions (doc N16), p 51, see also sch 1, p 141.

1260. Anaru Te Amo, brief of evidence, September 2004 (doc G34), p 11

1261. Counsel for Ngati Whare, closing submissions (doc N16), p 45

not only their rights, but the opportunity of having their korero about those rights set down in the court's records. Had the Crown's title system operated as they suggested, that in itself would have meant protection of their rights. As it was, they took what they perceived as the only alternative to a Crown-derived title, and land loss – staying away. Because of that, their tribal community was rendered invisible in the court records. In the new title system, where recognition of customary rights by the court mattered, theirs remained unrecognised. To the extent that other kin groups were unrepresented in particular court hearings, they too were prejudiced.

For all hapu, the court's inability to offer community title compromised its recognition of their rights (see section 10.6). Seasonal rights to pass through or harvest became lost in the new title or were recognised in court awards on the same footing as rights of the established communities. Judge Gudgeon's explanation of one of his decisions epitomised the shortcomings of court titles. In *Heruiwi 4*, he placed an urupa in which both Ngati Manawa and Ngati Hineuru had buried their dead in the Ngati Hineuru block (4A) – on the grounds that more Hineuru than Manawa people were buried there. Ngati Manawa's repeated applications for a rehearing in 1891 had no effect.¹²⁶²

Court decisions (once any rehearing had taken place) froze rights at a point in time. Where rights were rejected, the impact was permanent. Whereas customary rights might always be renegotiated as relationships among hapu strengthened or waned, or circumstances changed, the new titles allowed for no such flexibility. Where the court found against those who claimed rights, it also, as the claimants saw it, disinherited the generations that followed. That perhaps accounts in no small part for the lasting anger about some court decisions.

Thirdly, communities struggled to retain authority over land that had passed through the court. When land emerged, newly titled, from the court, exposure to alienation and partition followed. In particular, the lack of a legal community title, and the listing of individuals on titles, each empowered to sell the share newly bestowed upon them, greatly eased the process of alienation, undermining the attempts of rangatira to preserve the land of their hapu. At a crucial time when the money economy reached Te Urewera, the safety net of the community (as the Turanga Tribunal put it) was removed.¹²⁶³ Purchasers offered cash at a time when they were one of the few sources of cash, and there was every inducement for people to sell. As storekeepers extended their business into the rim areas of Te Urewera, it was easy for people to fall into debt simply to pay for everyday items that quickly came to be seen as necessities: clothing, tea, sugar, flour, tobacco. As we have seen, court costs and the cost of travel to court venues would also have played their part. Poverty would be exacerbated, as we have seen, by widespread crop failure in the 1890s and early 1900s. Above all, empowering individuals to sell

1262. Tulloch, 'Heruiwi 1–4' (doc A1), pp 63, 65–66. Judge Gudgeon provided this explanation in a report to the chief judge on an application for a rehearing.

1263. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 529

their shares meant the shrinking of the key asset that hapu might profitably have developed in the new economy – and thus reduced their chances of success.

It is clear that this was not what Te Urewera peoples had sought. Leaders throughout the region – not just those of Te Whitu Tekau – preferred leases to sale. They wanted to retain their land. Had the Crown supported rather than undermined the leasing economy, hapu might have enjoyed the kind of relationship that the Waimana people initially had with Swindley, and retained the option of later regaining possession of the land and farming it themselves. But Te Urewera leaders could not hold determined Crown or private purchasers at bay. This was compounded by the fact that restrictions on alienation were utterly ineffective in Te Urewera; they were either ignored by the Crown, or removed. Nor could rangatira negotiate prices for land that the community might have decided to sell to raise finance. In the context of Crown monopoly buying this was an added barrier to securing a fair price, and thus of maximising the value of their land to ensure that it brought a good return. In blocks like Waimana 1A, Tahora 2, and Waipaoa, the returns Tuhoe, Ngati Kahungunu, Ngati Ruapani, and Ngati Hineuru owners received were modest, ranging from less than £10 each to £40 to £50 each. Such payments, as the Tribunal has noted, were often spread over a number of years (as different owners made the decision to sell), and did not form the basis of a community putea; there were no legally empowered community managers. Prices improved after 1905, as we have seen, but they were still paid to individuals. Under the meetings of assembled owners system introduced in 1909, the community, far from being re-empowered (as Carroll, the Native Minister, seemed to have hoped), remained sidelined. The alienation of smaller partitioned blocks was decided by a handful of those who had been declared owners. And the Crown was prepared to bypass decisions by such meetings to secure a transaction at its own price.

Sale often looked the most attractive proposition anyway since, as the claimants pointed out, Maori found it so difficult to borrow because the titles that had been visited on them offered no security. The Central North Island Tribunal has pointed to the 'significant barriers' Maori were facing by the 1890s, and until the 1920s, 'to accumulating or borrowing finance to develop their lands in order to enter the modern farm industry.'¹²⁶⁴ Yet without access to reasonable credit like other landowners of 'limited means', they had little prospect of success.

Despite all this, some rangatira made sustained efforts to protect their communities, both during and after the court process. We think of Hapimana Tunupaura of Ngati Kahungunu, who fought unsuccessfully to reduce the amount of land the Waipaoa owners had to pay for survey costs. Nor, as we have seen, did he succeed in securing from the Crown the return of land that his people had wanted as a reserve for a kainga, and for their urupa there – land lost to them after the court unexpectedly awarded part of it to the Crown for survey costs. He could not protect Ngati Ruapani, who had aligned their case with his, from loss of one-third of Lake Waikareiti, which was included in the Crown's award for survey

1264. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 955

costs. Though the parties agreed with the creation of a block at Waikareiti, they did not agree to its size, nor to the boundary line which was drawn contrary to their wishes. This would prove to be the precursor to the loss of the whole lake. Tunupaura did succeed, at the original hearing of the block in 1889, in securing hapu divisions when title orders were made. But the Crown contemplated extensive purchase in the block, and the Surveyor-General advised against survey of the divisions. When the Crown finished buying individual interests, all those who had not sold had their interests regrouped, in 1903, in a block called Waipaoa 5. This 'lumped together' Ngati Ruapani and Ngati Kahungunu, Richard Niania told us; and the placement of the blocks 'had little regard of traditional customary interests with every non-seller's interests placed in the same block regardless of their hapuu affiliations'.¹²⁶⁵ As Marr put it, this 'finally overturned the efforts made by the chiefs at the time of the original hearing to recognise and allocate lands based on traditional hapu interests and authority in the block'.¹²⁶⁶ Neither the Crown nor the court, in our view, showed the least regard for the customary rights of the owners, or their attempt to preserve those rights through the title processes provided.

We think also of Harehare Atarea, the Ngati Manawa leader, who sought to strategically engage in the court in order to protect his people's customary rights, and to sell selected portions of their estate in order to raise capital for development. For a time, this worked. The case of Ngati Manawa is both poignant and telling. They did indeed raise substantial sums through their extensive sales (both inside and outside our inquiry district), but they did not achieve lasting prosperity at all. Partly this was because their economic base had been devastated by the wars, partly because – as they re-established their mana – they gave a great deal of the proceeds of sales away; or simply spent it when eager storekeepers turned up on their doorstep.¹²⁶⁷ They did, however, also become successful crop and sheep farmers for a period in the 1880s. But in the end, Atarea was defeated first by the Tarawera eruption (which covered their grazing and cultivated land with several inches of ash and mud and killed hundreds of their animals), then by flooding, frosts, and crop failure.¹²⁶⁸ As the people were reduced to poverty, Atarea was unable to control alienation. His offer of 6,000 acres of Heruhiwi 4B and 4F, some of Ngati Manawa's best land, resulted in the Crown's move to buy from individuals so that it secured 16,000 acres. Kuhawaea 1 was sold, despite his own objections, and those of the majority of Ngati Manawa.

Finally, we think of the Tuhoe leader Tamaikoha who, after his initial sale to Captain Swindley, determinedly protected Waimana. Tamaikoha was already anxious about Waimana, we must conclude, given that the Kennedy brothers of Te Upokorehe had taken rent money from Swindley and then applied for a court hearing in 1878. In his attempts to control the fate of the land when it was before

1265. Niania, brief of evidence (doc 138), p 39

1266. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), p 270

1267. McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 126–128, 243, 248–250, 260, 319

1268. Ibid, pp 129, 318, 355–356, 374–376; David Armstrong, 'Ika Whenua and the Crown, 1865–1890' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A46), p 91

the court, Tamaikoha gave in only 12 names for the title. Sissons suggested that he probably saw the 12 as trustees, and this is certainly borne out by the inclusion on the list of key rangatira: Te Ahikaiata, Tutakangahau, Paerau, Kereru Te Pukenui, Te Whiu, Netana Rangiihu, and Hemi Kakitu. And, as Tuhoe kaumatua Te Wharau Tapuae later explained, ‘It was arranged at the first hearing that only a few of the chiefs were to be admitted so [as] to hold the land. The lesser people were all kept out lest they should sell.’¹²⁶⁹

Tuhoe tribal leaders thus dominated the list; and Binney points out that they were the leaders who had collectively agreed to lease Waimana to Swindley, but not to sell.¹²⁷⁰ Tamaikoha thus used the list of owners to protect the land, and retain the mana of Tuhoe over it.

But Tamaikoha himself sought a rehearing because he wished to widen the lists of owners; Binney says that he acted on his authority as rangatira, and, recognising his obligations in this new situation, ‘sought to include individuals and hapu closely connected by residence and kinship with Tuhoe, and specifically those of Ngati Raka who had been excluded.’¹²⁷¹ In particular, Rakuraku had been omitted from the list following ‘very bitter disputes’ with Tamaikoha as to the right to lease Waimana.¹²⁷² In the wake of the 1880 rehearing, the new list had 66 names (Tuhoe, Ngai Turanga, Ngati Raka, and Te Upokorehe) – and Rakuraku headed the list of 10 Urewera/Ngai Turanga names. Tuhoe rangatira remained on the list of 41 Tuhoe; indeed their ranks were strengthened by the addition of Te Purewa, Te Whenuanui, and Numia Kereru.¹²⁷³

He included them because they had assisted him in defending Waimana, to ‘uphold the mana of Tuhoe’: ‘Tuhoe was my ancestor on this land . . . (though some chiefs did not have rights by occupation), they helped me uphold the mana of my Ancestors Rongokarae and Tuhoe.’¹²⁷⁴ This was, Sissons and Binney agree, Tamaikoha’s statement of Tuhoe rangatiratanga, ‘an expression of the mana of the ancestors in which all participated.’¹²⁷⁵

And he maintained his determination to protect ancestral rights later, when the matter of shares arose – as it inevitably must have – in the course of subdivision of Waimana 1C in 1905. By then there were questions of the rights of those who did not occupy the land. Tamaikoha secured an agreement with Numia Kereru that all owners should have equal shares. His authority was challenged by some within his own party, however, who took the question to the land court, arguing

1269. Whakatane Native Land Court, minute book 8, 11 August 1905, fol 185 (Jeffrey Sissons, comp, supporting papers to ‘Waimana Kaaku: A History of the Waimana Block’, various dates (doc A24(a)), p 99); ‘Native Land Acts, 1873–74’, 21 June 1878, *New Zealand Gazette*, 1878, no 116, p 1650 (Sissons, ‘Waimana Kaaku’ (doc A24), p 45)

1270. Binney, ‘Encircled Lands, Part 1’ (doc A12), p 347

1271. *Ibid*, pp 347–348

1272. *Ibid*, p 347

1273. Opotiki Native Land Court, minute book 1, 19 March 1880, fol 4 (Sissons, ‘Waimana Kaaku’ (doc A24), pp 48–49)

1274. Whakatane Native Land Court, minute book 8, fol 201 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 315)

1275. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 322; Sissons, ‘Waimana Kaaku’ (doc A24), p 50

that those who lived permanently in the valley should have more shares than those who did not. Tamaikoha's view, he told the court, was still that ancestral rights were equally important: 'I have not changed my mind. I still have kind thoughts for all the grantees.'¹²⁷⁶ But the judge overruled him.¹²⁷⁷

Yet Tamaikoha had kept the remaining Waimana lands out of the court till 1905. In the end he had to accept partition, which he had hoped to avoid; and the result of that process, by 1930, was fragmentation such that few owners could derive any significant economic benefit from their sections. (We will consider this process in a later chapter.)

Even a rangatira of great mana, in other words, was unable to prevent such processes from rolling to their almost inexorable conclusion in his own backyard. He held it off, but he could not stop it. Professor Binney concluded her study by reviewing the life of Tamaikoha. Although he attempted to control the engagement with the colonial economy and, after the initial sales, successfully blocked sales over a prolonged period, the operations of the native land legislation had cumulative effects. 'In touching on the life of just one senior chiefly leader', Binney wrote, 'I also note the systematic erosion of his continued capacity to act effectively as community leader. That, too, is part of this history of loss.'¹²⁷⁸

10.10.2.2 Conclusion

In the latter part of the nineteenth century, the land court and the Crown's alienation processes undermined the authority of Te Urewera rangatira over the land of their communities in a range of ways.

We find ourselves unable to agree with the Crown that tribal social controls survived the operation of the native land legislation and the activities of Crown purchase agents. The Crown implies that the fact that rangatira might not have been able to exercise their authority in respect of tribal land would not detract from its exercise in other spheres. We think this is to miss the point of much of what the claimants said in our hearings. It is also to miss the point of the determined efforts of Te Whitu Tekau to keep the Native Land Court and land alienation at bay – precisely because they saw this as the key to protecting mana motuhake. And it was why Te Urewera rangatira were prepared to negotiate with Seddon in the mid-1890s. It may be true that the rangatira with whom Seddon met, and who negotiated the creation of the Urewera District Native Reserve, hardly looked like leaders whose rangatiratanga was irrevocably undermined. But they were negotiating precisely because they feared the continuation of land court processes in Te Urewera, and of land alienation. They knew that they had to seize the moment, and they were under no illusions at that time that the future of their communities was assured.

We remind the Crown of the words of Colin Te Pou: 'To those who wanted to sell their shares in land, the iwi and the hapu no longer had mana to say yes

1276. Binney, 'Encircled Lands, Part 2' (doc A15), p 315

1277. Sissons, 'Waimana Kaaku' (doc A24), p 73

1278. Binney, 'Encircled Lands, Part 1' (doc A12), p 477

or no over the lands.¹²⁷⁹ 'The Maori land court', he said, 'took the authority over land away from the Maori people within Tuhoe.'¹²⁸⁰ Robert Pouwhare talked of the impact of the land court on the tribal authority of Ngati Haka Patuheuheu ('nga mana whakahaere o nga rangatira o Ngati Haka-Patuheuheu'),¹²⁸¹ or the ability of the rangatira to lead their people. Referring to the loss of Ngati Haka Patuheuheu lands, he said: 'It undermined our tribal authority and tino rangatiratanga.'¹²⁸² And Tama Takao stated that the whanaungatanga (relationships) of the Waimana rangatira were sourced from the same land. He illustrated this point with the following pepeha:

<i>Kotahi te whakaaro</i>	<i>Thought was as one</i>
<i>Kotahi te whenua</i>	<i>The land was as one</i>
<i>Kotahi te tangata</i>	<i>There was one person</i>
<i>Kotahi te mana</i>	<i>There was one authority</i> ¹²⁸³

He explained that 'no matter how many people there are we are still one.' All of the people 'share in the mana.' The land court, and land laws under which it operated, 'never understood or was able to follow the spirit of what was said.' It never understood the collective imperative that underpinned this society, and instead worked to undermine the ethos of 'one person, one authority, and one land.' 'The main rationale was to lacerate and divide the land.'¹²⁸⁴

10.10.2.3 *What were the impacts on the cultural knowledge and worldviews of the peoples of Te Urewera?*

The Native Land Court, it was impressed upon us at the marae we visited, was an alien institution. The evidence we heard over many months conveyed deeply held beliefs and an overwhelming sense that the land court was an intrusion into Te Urewera society. The Crown argued that the court may not have been a 'major portal' of social change, but was merely an aspect of the modernising society and economy that the colonists brought with them. But we are not prepared to discount the evidence of so many kaumatua and kuia who expressed a deep sense of loss in the wake of the arrival of the land court. In part this stems from a sense of alienation arising from processes which ultimately people felt they could not control. The court, of all Government institutions – even if it did not sit in Te Urewera – was an ever-present reality in people's lives. It is clear that the old people saw it as central to change, because its processes seemed not to be in tune with their own tikanga – and because it was seen as fronting the Kawanatanga agenda to acquire the land.

1279. Colin Te Pou, simultaneous translation of oral evidence, Waiohau hearing, 25 March 2004

1280. Te Pou, brief of evidence (doc c32(a)), p 9

1281. Robert Pouwhare, brief of evidence, 17 November 2003 (doc B10), pp 7–8

1282. Ibid, p 15

1283. Tame Takao, brief of evidence, 26 March 2004 (doc c33(a)), pp 4, 8

1284. Ibid, p 8

We must not fall into the trap of thinking that because people came into the court, because they gave their whakapapa, because their leaders did their best to make its processes work for them, either taking the initiative or responding in self-defence, that people felt comfortable with what was happening in court. These were pragmatic responses which took place on one level. But kaumatua who spoke to us were talking about change, and about impacts on the cultural fabric of Te Urewera at a much deeper level.

They talked of their relationships with Papatuanuku. 'The land is my source of life', Mr Kereopa told us. 'I am threaded and woven through my ancestress Papatuanuku.'¹²⁸⁵ According to Mr Kereopa, the Crown's regime for dealing with land failed to take account of the significance of the ancestral origins of land:

My question to you: what is the land? Is it what you see outside? What you see there is Papatuanuku. It is within Papatuanuku where the whenua is . . . Therefore, your Maori Land Court, yes it is correct – it is a Maori Land Court – but there is confusion in that Court as to where the whenua, the Maori land, actually is.¹²⁸⁶

The law allowed the court to blunder into the realms of Te Urewera philosophies with limited cultural understanding. The korero of kaumatua who stood to speak during our hearings conveyed their relationships with the realm of the atua: the roots and significance of custom, law, and knowledge were sourced in that realm.

They conveyed also the layers of whakapapa through generations, and the histories of their tipuna recorded in the land in many placenames. Whakapapa, as we discussed in chapter 2, records relationships, descent from chiefly ancestors and linkages across hapu and whanau, and tribal alliances. That knowledge is carefully preserved, to maintain a record of connections, and a basis for upholding rights of land trusteeship. The peoples of Te Urewera transmitted knowledge of their histories through whakapapa, placenames, wahi tapu, and tipuna whare. Waiata tawhito, Te Hue Rangi told us, are 'statements expressing links to the land and the mana of a person over the land'.¹²⁸⁷

But in the court, people's relationships with their whenua were reduced to providing particular sorts of proofs of occupation, in accordance with new rules. Te Urewera kaumatua spoke to us about whakapapa being called on in an artificial forum, for purposes which ultimately served to separate people from the land, rather than reinforcing their relationship with it. Whakapapa became the basis for lists of 'owners', unheard of before because those whose relationships entitled them to exercise rights of various sorts (and thus also to meet their responsibilities to the community) were known within the community. Colin Te Pou drew attention to the superseding of community authority over allocation of rights to the land and its resources, and the transmuting of customary rights exercised in

1285. Hohepa Kereopa, brief of evidence, no date (doc c18), para 25

1286. Hohepa Kereopa, simultaneous translation of oral evidence, 26 November 2003, Waimana

1287. Te Hue Rangi, simultaneous translation of oral evidence, 21 January 2005, Taurau Marae, Ruatoki

accordance with tikanga, into shares held by those named on the lists of owners: 'If the Maori land court is analysed it didn't follow Maori customary law, it instead followed the government list of names that stated who had ownership of the land . . . Because of these laws Maori customs were lost from the land.'¹²⁸⁸ In customary terms, there could be no finite 'list'. In successive generations, rights held in some branches of the whanau might wane, while others – because of particular relationships – might matter more. The new lists, of course, were radical in that they bestowed individual rights of alienation; they were so often the basis for processes of land loss. In that way, they contravened the nature and purpose of whakapapa. In Edward Rewi's view, the new authorities did not understand whakapapa: 'The Crown never related land to concepts like whanau, hapu, iwi or kaitiaki. It was just another asset to them.'¹²⁸⁹

Tama Takao also told us about the difference between the court and Tuhoe's values. 'The spirit of the language of the Maori Land court is vastly different from the spirit of the language of Tuhoe.'¹²⁹⁰ The language of the court was rooted in the aspiration of acquiring the land. The language of Tuhoe had its own origins: '[it] originated from Rangiatea, and descended through the genealogy and all its dimensions were connected to the land.'¹²⁹¹ Humility and hospitality are fundamental values:

When Maori, Tuhoe and all the tribes entered into court there was a completely different language that was heard. It was a language that goaded, it was a language that belittled, it was a language without any spirit, it was language vastly different from what Tuhoe knew. As well as the words that were used to encompass that language.¹²⁹²

The operation of the court only served to belittle the 'authority and sovereignty of the language and spirit of Tuhoe'. 'Through the loss of the land the people also became lost.'¹²⁹³

Mr Kereopa compared the operations of the court and land alienation to 'Te Atahapara' – 'that time at night where all is still and the spirit leaves the body and wanders through the realms and dominions of Te Ao Maori'. If the spirit does not return to the body during the time of Te Atahapara, 'the being will be incomplete and distorted upon awakening'. The court (and the loss of land that followed) represented Te Atahapara – 'the bearer of fear for the night'. 'This is my view of what the Land Court did to my female ancestress Papatuanuku and my connections to her.'¹²⁹⁴

The alienation of Te Urewera lands in conjunction with the work of the court led to the dramatic shrinking of takiwa within which hapu and iwi had established

1288. Te Pou, brief of evidence (doc C32(a)), p 12

1289. Edward Charles Rewi, brief of evidence, September 2004 (doc G35), p 5

1290. Takao, brief of evidence (doc C33(a)), p 6

1291. *Ibid*, pp 6–7

1292. *Ibid*, p 7

1293. *Ibid*, pp 7, 9

1294. Kereopa, brief of evidence (doc C18), para 22

*‘K*o te raru o te Kooti Whenua Maori he kaipono kia rite ai au ki te moa ano hei matakitaki noa. He haehae i toku tipuna i a Papatuanuku. He whakawharengaro i te whenua o taku tipuna. He haehae i nga whakatipuranga o taku tipuna. E whakangangaioire ai Te Kooti Whenua Maori ki te whakahakore i au i te mahuri o Papatuanuku.’

*‘T*HE problem of the Maori Land court is that it believes I’m just like a moa, all I do is observe. It sought to lacerate my ancestor Papatuanuku; to make her barren. It is slashing at the generations of my ancestor. The Maori land court is attempting to leach the vitality away from the saplings of Papatuanuku.’

Hohepa Kereopa¹

1. Hohepa Kereopa, brief of evidence, no date (doc c18), pp 8, 16–17

and exercised their customary rights. It disrupted the transmission of cultural knowledge. When people no longer lived on the land, or hunted its resources, or made journeys across it, few new places could be named; many old names could be easily forgotten. There would be no new waiata about events that took place on the land. People would be separated from wahi tapu. No new tipuna whare would be built. Tame Takao expressed his sadness in these words:

Ko te whakapapa a te Kooti Whenua Maori he whakawharengaro i te Tangata kia kore e heke nga rawa ki nga uri. Ko nga rawa e korero ake nei; nga maumaharatanga o nga mahi whenua; nga mahi maara; nga matauranga o raro o runga i te whenua me te wai me te atea hoki.

The genealogy of the Maori land court makes the collective womb of the people infertile, in order that the assets will not be handed down to the children. The assets that I speak of are the recollections of working of the land, the cultivations, the surrounding knowledges above and below the land, the water and the space as well.¹²⁹⁵

The role of caring for and protecting the land, or kaitiakitanga, was paramount to the peoples’ relationship to the land. As we explained earlier, care of the land had a spiritual dimension – the mauri of any particular place, of all lifeforms, had to be cared for and conserved. As the land passed into the ownership of others, the ability of tangata whenua to fulfil their responsibilities as kaitiaki of the land, the waters, and their resources diminished. This marked not just a relinquishing of relationships, but a diminishing of their spiritual world.

1295. Takao, brief of evidence (doc c33(a)), pp 4, 8

I DO not think that strategies of development that transgress our values can lead to progress when viewed through our eyes. Such strategies, I believe, will inevitably diminish our identity and corrode our ways of life.

‘By way of example, I refer to the Native Land Court. It is clear that the Native Land Court was a development for the government, propelling our many societies toward the fulfilment of the Crown’s objectives of opening our lands up for settlement. The damage that this progress did to our connections to our whenua and indeed each other is one of the reasons that our people are here before the Tribunal. To us, this cannot be seen as progress.’

Peipi Richard Tumarae¹

1. Peipi Richard Tumarae, brief of evidence, 14 February 2005 (doc K26), p 2

The impact of these changes could be seen in Mr Kereopa’s dark view of the court and its legacy. ‘It is clear now that the purpose of the Maori land court was to separate me from my ancestor, from my genealogies and all its functions, that makes me a Maori.’¹²⁹⁶ Edward Rewi of Ngati Whare spoke in the same way: ‘The whakapapa must not be broken, it goes back to Papatuanuku and Ranginui, to the land and sky itself. Te Taurahere, the tying of the knot, is often referred to.’ At some point in the past, he said, ‘the rope had been broken.’ And if the connections were completely lost, ‘Ngati Whare may become extinct like the moa.’¹²⁹⁷

As connections between the land and its peoples were broken, culture and identity were also damaged. And that, we were told, was a very high price to pay for progress (see the sidebar above).

10.10.3 Economic impacts

As we have seen (sections 10.7 and 10.8), the Crown’s acquisition of land in the rim blocks involved serious Treaty breaches. It was coercive and unfair. The great bulk of land loss occurred as a result of these acquisitions, which were conducted by subverting the Treaty rights and authority of communities and their leaders, and by payment of unfairly low prices. The remaining land loss occurred as a result of private purchases. In section 10.9, we concluded that the failure of the Crown’s protection mechanisms meant that these purchases too were in breach of the Treaty. Any harm to Maori from the loss of all these lands was thus a prejudicial effect of Treaty breach. In this section, we assess the economic consequences of these alienations. Inevitably, land loss – if not properly compensated – results in a reduction of economic capability. How do we measure this? We begin by

1296. Kereopa, brief of evidence (doc C18), para 26

1297. Rewi, brief of evidence (doc G35), pp 4–5

Iwi or hapu affiliation of majority of owners in court award	Area according to original court award (acres)	Area alienated by 1930 (acres)	Area retained in 1930* (acres)	Retained area (percentage of original)*
Tuhoe	25,082	19,387	7,035	26.6
Tuhoe and Te Upokorehe (Tahora 2A)	24,668	19,034	2,316	10.8
Te Whanau a Kai and Te Aitanga a Mahaki	96,424	72,072	27,323	27.5
Ngati Kahungunu (excluding Ngati Hika)	43,670	27,168	13,911	33.9
Ngati Ruapani and Ngati Hika	21,331	21,331	0	0
Ngati Manawa	142,752	132,993	9,307	6.5
Ngati Hineuru	5,880	4,213	1,740	29.2
Ngati Rangitahi	1,000	920	80	8.0
Ngati Haka Patuheuheu	16,464	8,605	8,052	48.3
Total	377,271	305,723	69,764 [†]	18.6 [†]

* These figures have been adjusted to account for survey discrepancies (which were set out in section 10.4).

† As we noted in sections 10.4 and 10.7, these figures unavoidably overstate the amount of land remaining in Maori ownership, because the Crown (as at 1930) had purchased interests in a number of blocks that had not yet been partitioned. In reality, the claimants retained less than 18.6 per cent of their lands in the rim blocks. This point should be borne in mind when we use these figures in our analysis.

Table 10.10: Amount of land alienated per tribal group by 1930.

Ngati Whare are absent from this table because they did not attend the court and thus received no awards.

establishing how much land was left for each tribal group by 1930, after the picking off of individual interests. We then look at the impact of land loss on the customary economies of the peoples of Te Urewera. We conclude by looking at the range of economic development opportunities denied the owners by the alienation of their land, which had been carried out in breach of the Treaty.

10.10.3.1 What was the extent of land loss in the rim blocks?

By 1930, the peoples of Te Urewera retained less than 18 per cent of their lands in the rim blocks. The alienation of their land was part of an ongoing process across a much wider district. Many iwi who suffered losses in the rim blocks also lost land in neighbouring areas, outside our inquiry district – both before and after the introduction of the land court into Te Urewera. Some groups also had land in the Urewera District Native Reserve, which was purchased by the Crown in the 1910s and 1920s (see chapter 14). We do not discuss land alienation in the rim blocks in the context of broader alienation here, but we draw readers' attention to the fact that for all of these iwi the loss they had suffered there by 1930 is a part of a bigger story. Table 10.10 illustrates the extent of land alienation in the rim blocks, and the amount that had been retained by 1930.

The conclusion that can be drawn from this table is that all iwi suffered considerable loss of the land awarded to them in the rim blocks. Ngati Ruapani lost all of the land they had been awarded. For some iwi – notably Ngati Manawa, Ngati Rangitihī, and Ngati Hineuru – the loss of land was so great as to render them virtually landless within the rim blocks. Other iwi, including Tuhoe, Ngati Kahungunu, Te Whanau a Kai, and Te Aitanga a Mahaki, lost the majority of their lands. We note, however, that the amount of land actually retained in Maori hands was lower than appears from these statistics. For Te Whanau a Kai, all of their land was locked up in the East Coast Trust. The situation was similar for Ngati Kahungunu – almost all of their land in the rim blocks was in the trust, and so effectively out of their hands. In fact, the majority of retained land was located in southern Tahora 2 and effectively alienated from Maori until the trust was wound up in the 1950s (see chapter 12). Of the remainder, the Crown was part-owner of some blocks, where it had not yet partitioned out its interests (see sections 10.4 and 10.7). Thus, the figure of 18.6 per cent was inflated; the real figure was lower.

10.10.3.2 How did the loss of land affect the customary economy?

The lands within the rim blocks contained a range of resources that were crucial to the economies of peoples of the region. These resources were drawn from the low-lying areas, where crops were cultivated, and from the more mountainous regions – from the forests, rivers, lakes and wetlands. Over generations, the people developed specialised techniques for taking birds and eels, and for harvesting forest foods and plants. By the early nineteenth-century, they had developed a series of sophisticated economies, taking advantage of the different resources, environments, and microclimates of the various rohe. As we discussed in chapter 2, tribes were known for particular prized foods and resources. Their economies

had both internal and external dimensions – they provided the basis for communities to feed themselves and develop their home infrastructure, and also to look outside the region, by trading with other tribal groups and making the customary exchanges that sustained relationships and upheld mana (see chapter 2).

Changing relationships (which meant change in access to resources) and new resources or technologies were rapidly accommodated in the customary economy. Stokes, Milroy, and Melbourne pointed out the problem with using the word ‘traditional’ in this context: ‘To suggest [that] traditional means only pre European contact is an academic and largely irrelevant distinction.’¹²⁹⁸ Potatoes and pigs, they said, were two recent imports that have become an ‘integral part of the forest economy since the 1840s.’¹²⁹⁹ This was because they were used for ‘traditional’ purposes according to customary rules: for food (often instead of fernroot or kumara), for upholding mana in the hosting of manuhiri (guests), and for exchange with other tribes. There was, of course, some overlap with the new colonial economy, in which both pre- and post-contact resources were used for trade with European settlers (and attempts to obtain money). We will consider the opportunities for European-style economic development in the next section. Here, we note that the customary economy continued to function in Te Urewera (as, in important ways, it still does today), incorporating new resources and technology where seen as necessary or desirable. Many of the older practices of crop cultivation, herb and plant gathering, hunting, and fishing remained of importance and continued to supplement the new additions. In this section we investigate how land loss affected the customary economies of Te Urewera.

The outlying areas of Te Urewera helped support a wide-ranging population, and constituted the resource base for quite different economies. Tuhoë relied on the lands that bordered their central communities (Ruatahuna, Maungapohatu) as a crucial part of their economy. Resources could be found or grown in the border lands that were not available or could not be cultivated in the harsher climate of the interior. The western lands were the primary resource base for Ngati Manawa and Ngati Whare, as the Waikaremoana lands were the primary resource base for Ngati Ruapani. The western lands were also important for iwi such as Ngati Rangitihī whose rohe stretched further to the west (well beyond our inquiry district). The same applied to the iwi of the east and south – Te Aitanga a Mahaki, Te Whanau a Kai, and some hapu of Ngati Kahungunu – for whom the Tahora and Waipaoa lands supplemented resources obtained in other lands. Murton has observed that the early European visitors to the rim blocks saw the land as being inhospitable and the people materially poor compared with Maori who lived in the more benign environment of the coast.¹³⁰⁰ However, despite the challenges

1298. Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera: Nga Iwi Te Whenua Te Ngahere, People Lands and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), p 27

1299. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 28

1300. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp101–102

of the environment in the central lands, the peoples of Te Urewera utilised all its resources to sustain their economies.

Hapu established many permanent settlements in some areas of the rim block lands. The Waimana Valley was one such place, where numerous kainga were located.¹³⁰¹ Some kainga and pa were located along the Rangitaiki River, which constituted the western boundary of the Waiohau, Kuhawaea, and Whirinaki blocks. For Ngati Haka Patuheuheu, for example, the land that became Matahina c was said to have been a place of seasonal resource use; the permanent settlement, Te Houhi, was on the opposite side of the Rangitaiki.¹³⁰² Settlements were also located on the eastern bank of the Wheao River, in the Heruiwi 4 block.¹³⁰³ Others were located further up into the mountain ranges. Kawharu and Wiri provided us with detailed evidence of the numerous Ngati Manawa settlements and camps in the Heruiwi, Whirinaki, and Kuhawaea blocks – the places that were occupied and those that were visited seasonally for their resources.¹³⁰⁴ The eastern lands contained fewer kainga and pa.¹³⁰⁵ But there were exceptions – particularly in the northern parts of the Tahora 2 block.¹³⁰⁶ And even in the harsh climate of the Waipaoa block, around Lake Waikareiti, communities had maintained a presence for seasonal use.¹³⁰⁷

From their home bases (sometimes in lands outside the rim blocks), people moved seasonally in order to harvest particular resources; they were highly mobile.¹³⁰⁸ Jack Ohlson called this ‘te takina nekeneke’: ‘the term takina nekeneke refers to a migration of whanau and hapu groups to certain parts of the forest in order to hunt and gather food resources.’¹³⁰⁹

A number of resources could be found across most of the lands of the rim blocks. These resources did not merely provide food – they also provided the basis of community infrastructure, including shelter, clothing, medicines, transport, and all their other material necessities.

Essential food resources were gathered from some of the more forested areas. Fern root, or aruhe, provided an important source of carbohydrate and was harvested in almost all areas.¹³¹⁰ In the Waimana block, communities managed

1301. Sissons, ‘Waimana Kaaku’ (doc A24), pp15–19

1302. Cleaver, ‘Matahina’ (doc A63), p15

1303. Tulloch, ‘Heruiwi 1–4’ (doc A1), p14–15

1304. Merata Kawharu and Rapata Wiri, ‘Te Mana Whenua o Ngati Manawa’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C11), pp39–42

1305. Boston and Oliver, ‘Tahora’ (doc A22), p104

1306. *Ibid*, p166

1307. Marr, ‘Crown Impacts on Customary Interests in Land’ (doc A52), p16

1308. See, for example, Kawharu and Wiri’s description of a ‘typical economic cycle of resource use’ in the Heruiwi block: Kawharu and Wiri, ‘Te Mana Whenua o Ngati Manawa’ (doc C11), p40.

1309. Jack Tapui Ohlson, brief of evidence, September 2004 (doc G30), p7

1310. Clayworth, ‘Tuararangaia’ (doc A3), p20; Kawharu and Wiri, ‘Te Mana Whenua o Ngati Manawa’ (doc C11), p40; Merata Kawharu, brief of evidence, 30 July 2004 (doc F10), p8; Murton, ‘The Crown and the Peoples of the Urewera’ (doc H12), p132; Tulloch, ‘Heruiwi 1–4’ (doc A1), p14–15

extensive fernlands on the low hills and the poorer soils on the flats.¹³¹¹ Pikopiko, or fern fronds, was another important resource.¹³¹² Hinau and miro berries were another source of food.¹³¹³

Birding was a crucial economic activity across the blocks. The range of birds caught with snares and traps included kiwi, weka, kakapo, kereru, kaka, and tui – and specific sites were known to communities who monitored and utilised the resource.¹³¹⁴ Alec Ranui named three places in the Matahina block that Ngati Haka Patuheuheu used for birding.¹³¹⁵ Sissons pointed out that Te Urewera hapu and iwi often traded birds with other iwi.¹³¹⁶ As such, they were an important component of both the internal and external economies of Te Urewera peoples. David Potter of Ngati Rangitihiti told us that the alienation of their section of the Matahina block closed off their main source of kereru, 'the greatest delicacy of all'.¹³¹⁷

A variety of fish was obtained from the rivers and lakes of the region. Speaking of the Kuhawaea block, Bright noted that eels and certain species of freshwater fish 'provided one of the few reliable food sources for the hapu who resided nearby'.¹³¹⁸ Alec Ranui told us that Pokairoa was Ngati Haka Patuheuheu's place for eeling in the Matahina block.¹³¹⁹ Similar eeling and fishing places were located elsewhere in the rim blocks, in various rivers and lakes.¹³²⁰ Where access was retained, they remained a critical part of the customary economy in the twentieth century.¹³²¹ Joe Runga drew our attention to the economic effect of this aspect of the Crown's purchases in the Waipaoa block: the blocks awarded to the Crown left 'only a short narrow access way for all the Iwi concerned to access the Waikareiti Lake'. This created an 'inadvertent grid ironing of Lake Waikareiti', which 'nullified the mahinga kai of Ngati Kahungunu and Ruapani peoples' – and the loss of their 'gem', the lake. With its loss, and the inadequate access to such an important resource, it became less important to people to retain the Waipaoa interests at a time when they were indebted and facing substantial Crown pressure to sell.¹³²²

1311. Murton, 'The Crown and the Peoples of the Urewera' (doc H12), pp 121–123

1312. Tulloch, 'Heruiwi 1–4' (doc A1), pp 14–15

1313. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 40; Tulloch, 'Heruiwi 1–4' (doc A1), p 15; Ranui, brief of evidence (doc C14 (a)), p 19

1314. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 40, 42, 92–93, 109; Clayworth, 'Tuararangaia' (doc A3), p 20; Sissons, 'Waimana Kaaku' (doc A24), p 7; Cleaver, 'Matahina' (doc A63), p 15; Boston and Oliver, 'Tahora' (doc A22), pp 63, 104, 326; Stevens, 'Waipaoa' (doc A51), p 18

1315. Ranui, brief of evidence (doc C14(a)), p 20

1316. Sissons, 'Waimana Kaaku' (doc A24), p 7

1317. Potter, brief of evidence (doc C41), p 41

1318. Bright, 'Kuhawaea' (doc A62), p 7

1319. Ranui, brief of evidence (doc C14(a)), p 20

1320. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 93, 109; Stevens, 'Waipaoa' (doc A51), p 18; Sissons, 'Waimana Kaaku' (doc A24), p 8

1321. See, for example, Ohlson, brief of evidence (doc G30), p 11; Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 35.

1322. Joe Runga, brief of evidence, 30 November 2004 (doc I19), pp 8–10

Other resources were gathered or cultivated to use for clothes, housing, and to make tradable items. Tikouka (cabbage trees) were planted in the Heruiwi lands for fibre to make snares.¹³²³ Timber was a key resource that could be obtained from all the blocks. For example, communities felled totara in the Tuararangaia block to build canoes.¹³²⁴ Totara was by no means common throughout the blocks but this example gives an indication of the types of activities in which timber was put to use (we explore below the range of timber types in the blocks). David Potter told us that the alienation of Ngati Rangitihī's portion of the Matahina block put an end to the pit-sawing of tanekaha, and therefore Matata's ship-building industry.¹³²⁵

While there were many resources that were commonly accessible in many of the rim block lands, there were others that could only be found – or grown – in specific places. The Waimana block was exceptional in terms of its quality of land, and many traditional crops were cultivated successfully there. In chapter 4 we explained the importance of the northern Waimana lands to the Tuhoe internal economy, because of the range of crops that could be grown there and rarely elsewhere. The same applied to the southern Waimana lands (those that became the Waimana block). But other places, particularly in the western lands, also allowed traditional crops to be grown – for instance, in portions of the Kuhawaea and Whirinaki blocks. Sissons noted that flax grew in the Waimana Valley, but not further inland.¹³²⁶ Flax was also collected in the Kuhawaea block (along with raupo) – and flax that was gathered was put to use building huts and weaving clothes.¹³²⁷ The Waimana lands were also used for cultivating a number of traditional crops that would not grow in the colder climate of the interior lands. These included kumara, hue (gourd), and taro.¹³²⁸ But kumara could also be cultivated in some areas of the western lands.¹³²⁹

The introduction of new crops and tools brought changes to the customary economy. Potatoes were a critical introduction, one that greatly increased the food supplies of the peoples in Te Urewera. They could be grown in the harshest of environments – as was seen when the Crown's military forces found and destroyed large quantities of potato crops around Lake Waikaremoana in 1870 and 1871 (see chapter 5). Murton argues that the harvesting and processing of fernroot was largely abandoned after the introduction of potatoes, except in seasons when the potato crop failed.¹³³⁰ But Bright notes that even after the introduction of potatoes, people still had to supplement their diet 'with seasonal food supplies.'¹³³¹

1323. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 39; Tulloch, 'Heruiwi 1-4' (doc A1), p 15

1324. Clayworth, 'Tuararangaia' (doc A3), p 20

1325. Potter, brief of evidence (doc C41), p 41

1326. Sissons, 'Waimana Kaaku' (doc A24), p 7

1327. Bright, 'Kuhawaea' (doc A62), p 7

1328. Sissons, 'Waimana Kaaku' (doc A24), pp 7-8; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 121

1329. Arapere, 'Waiohau' (doc A26), p 45; Cleaver, 'Matahina' (doc A63), p 56

1330. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 263

1331. Bright, 'Kuhawaea' (doc A62), p 8

Wild pigs were soon widespread and had become an important food source in the Tuararangaia block by the early nineteenth century, and were also hunted in the Matahina and Kuhawaea blocks.¹³³²

Wheat and corn were other important introductions, but they could only be cultivated in areas with better quality lands. These crops were particularly successful in the Waimana lands. As we noted in chapter 4, these developments were seriously affected by the 1866 confiscation, which took much of the best Waimana land, and forced Tuhoe to focus on their internal economy. But good quality land remained south of the confiscation line, though wheat and maize cultivation did not resume on those lands until the 1870s (mainly at a subsistence level). Although Waimana was the main place in Te Urewera where wheat was grown (alongside Ruatoki, which we do not discuss in this chapter), it was also cultivated in some areas in the Kuhawaea block.¹³³³ We will explore these developments further below. Here we note that the new introductions did not displace customary practices and uses, though the general economic pattern did change.¹³³⁴ Communities were better equipped to feed themselves, so long as they still had sufficient access to other food supplies if the potato crop failed.

Despite many changes in social, cultural, and economic circumstances, the customary economy remained crucial to physical and cultural survival in the first half of the twentieth century. Colin (Pake) Te Pou described how the Waimana people carried out community fundraising during his childhood by holding large hapu dances. Kaumatua placed rahui on hunting and gathering for the period leading up to these events, 'only until it got close to the day, when we would hunt pigs, gather pikopiko, catch eels, and those types of food in the bush.'¹³³⁵ Such activities were still a necessary part of daily survival as well. We note that the Crown was aware of the ongoing importance of traditional economic uses of the land. Seddon and Carroll had both highlighted this for the lands that became the Urewera District Native Reserve in the 1890s (see chapter 9). They knew that every part of the wide interior was needed and used for food production.¹³³⁶

This knowledge was not limited to the lands and peoples of the Urewera District Native Reserve; it was known that all Maori still needed access to such resources. In 1908, for example, surveyor Henry Tai Mitchell was sent to Waiohau to consult with Ngati Haka Patuheuheu about relocating to Te Teko (see chapter 11). Mitchell noted to his superiors that the land he had selected was 'most suitable' for 'Native occupation in every respect': not only could it carry sheep, but kumara could also be cultivated there, and eels trapped in the lake. Mitchell's description of what was

1332. Clayworth, 'Tuararangaia' (doc A3), p20; Cleaver, 'Matahina' (doc A63), p15; Bright, 'Kuhawaea' (doc A62), p8

1333. Bright, 'Kuhawaea' (doc A62), pp 27, 46

1334. Sissons, 'Waimana Kaaku' (doc A24), pp 8, 61-62

1335. Te Pou, brief of evidence (doc C32(a)), p10

1336. Brad Coombes, 'Making "Scenes of Nature and Sport" - Resource and Wildlife Management in Te Urewera, 1895-1954' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A121), pp 61-62

needed is important. It shows how people still depended on customary resources to survive at that time – and that as much was acknowledged by officials.¹³³⁷

The presence of such men as Carroll and later Ngata in the Government ensured that this knowledge continued to exist at the highest level. In the 1930s, Ngata – aware that customary food sources were vital to Maori survival – supported a petition from Ngati Manawa, objecting that the Crown had closed their access across Kuhawaea to traditional pig hunting grounds.¹³³⁸ The Minister of Lands, in reply, recognised that ‘[t]he necessity for the Natives to have access to what to them is evidently a very important food source is fully appreciated’.¹³³⁹ Such knowledge, however, had done little or nothing to stop the Crown’s ongoing drive to acquire every piece of Maori land that it could (see section 10.7), whether it was really suitable for settlement or not, leaving the peoples of Te Urewera with a greatly contracted land base for their wide-ranging economic activities.

The first contraction in the customary economy of Te Urewera occurred in the 1860s. The Crown’s confiscation of land in the Bay of Plenty included half of all of Tuhoe’s good farm land, and severely restricted access to the coast and its resources (see chapter 4). The economy was further circumscribed by the loss of land to the south of Lake Waikaremoana in the 1870s (see chapter 7). A third contraction took place through the activities of the Native Land Court, as we saw in the previous section. While in one sense this was a redistribution, because certain groups became the sole owners of land (and all its resources) at the expense of others, there was certainly a significant loss of access to resources for those groups who did less well in the court.

The subsequent loss of 82 per cent of the land in the rim blocks, we conclude, could only have had further drastic effects on the customary economies of Te Urewera. Those economies depended on use of (sometimes scarce) resources scattered over a very large area, as well as access to particular sites. Without ready access to the wide range of resources these lands offered, the internal economies would have contracted, as well as the ability to trade with other iwi and engage in further community development. Without the ability to use these resources, the economic capability of all the iwi who lost land in breach of the Treaty was diminished. From 1878 to 1930, therefore, there was a gradual reduction of available resources, many of them crucial to the coherence of the customary economies and the ability of communities to feed themselves. Generally, this reduction in economic capability was not compensated in gains elsewhere.

Immediate impacts included loss of the ability to live on or grow crops on land which had passed from its owners. As a 1902 petition from Tamaikoha showed, this kind of loss could force Maori to leave an area, even where they still had access to ‘precipitous broken bush unfit for cultivation’.¹³⁴⁰ Here, too, mobility was

1337. Battersby, ‘Waiohau’ (doc C1), p 78; Arapere, ‘Waiohau’ (doc A26), p 45

1338. Bright, ‘Kuhawaea’ (doc A62), p 67

1339. Ransom to Ngata, [1933] (Bright, ‘Kuhawaea’ (doc A62), p 67)

1340. Boston and Oliver, ‘Tahora’ (doc A22), p 166. In this case, the loss of the flat, arable land was caused by a partition rather than a sale, although the Crown was soon purchasing interests in this land after the court repartitioned it (see section 10.7).

important. A large pool of land was required beyond that in immediate use for cultivation. Customary practices required new crop lands to be broken in every couple of years.¹³⁴¹ The people needed to be able to move, to build new kainga and break in new land as necessary. According to the evidence available to us, Maori lost most of their land suitable (or potentially suitable) for growing crops, except in the Waimana block.¹³⁴² As we have seen, existence was sometimes precarious in Te Urewera; this was a loss that they could ill afford.

Nonetheless, some access for hunting or gathering survived the official alienation of the land for a time. In Kuhawaea, for example, the Troutbecks permitted Ngati Manawa to cross their land for hunting purposes.¹³⁴³ In Waimana, too, Swindley appears to have allowed some use of his land by Tamaikoha's people.¹³⁴⁴ In both cases, these arrangements were overturned after the land passed out of the ownership of Swindley and the Troutbecks, although the Government agreed to issue permits for travel across Kuhawaea to traditional hunting grounds.¹³⁴⁵ The spread of settlement, or the cutting up of the land by the Crown in anticipation of settlement, brought with it new owners and users, fences, and deforestation, gradually restricting access (and the availability of some resources). Large parts of the rim blocks, however, remained Crown land, eventually destined for forestry or reserves (such as the Whirinaki Forest Park). There, too, access and activities were restricted, but not necessarily ended altogether, as we shall see later in this report.¹³⁴⁶

We conclude that the alienation of 82 per cent of the land in the rim blocks by 1930 had a serious effect on the role that those lands could play in the customary economy. In particular, there had been a significant reduction in the land available for kainga and cropping, and in the mobile use of scattered resources. Not only were particular resource sites lost, but access across the region became much more difficult. In some cases, access was stopped altogether. For the forest lands retained by the Crown, however, some access and resource-use was permitted or tolerated. We will return to that point in later chapters. Here, we note a significant reduction in the economic capability of all the peoples of Te Urewera, as a result of the purchase of their land in breach of the Treaty, but that the reduction was not as great as it would have been had all the lands become closely settled. The peoples of Te Urewera also lost their ability to develop these lands in the colonial economy. We now turn to look at this aspect of land loss.

1341. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 180

1342. Moka Apiti, 'Wai 894 – Te Urewera: Inquiry District Overview Map Book, Part 3' (commissioned map book, Wellington: Crown Forestry Rental Trust, 2003) (doc A132), map 25

1343. Bright, 'Kuhawaea' (doc A62), p 67

1344. Sissons, 'Waimana Kaaku' (doc A24), p 59

1345. *Ibid*; Bright, 'Kuhawaea' (doc A62), pp 67, 72

1346. See, for example, Brad Coombes, 'Preserving a "Great National Playing Area" – Conservation Conflicts and Contradictions in Te Urewera, 1954–2003' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A133), pp 457–458

10.10.3.3 *What development opportunities were denied the peoples of Te Urewera as a result of land lost in breach of the Treaty?*

As a result of the loss of 82 per cent of their lands in the rim blocks, in breach of the Treaty, the peoples of Te Urewera were denied a number of development opportunities. In this section, we assess those opportunities in light of the development that actually occurred (to the benefit of others) in the lands that were alienated.

10.10.3.3.1 THE PRECONDITIONS FOR SUCCESSFUL ECONOMIC DEVELOPMENT

Successful economic development of agricultural or pastoral land – at any time, from the nineteenth century to now – is dependent on a range of factors. Foremost among these factors was (and is) the quality of the land: the type of terrain, the altitude, the aspect (whether it faces the sun or not), the fertility, the depth and type of soil, the existing vegetation cover, the rainfall, and the access. These are some of the variables that made land development possible or profitable. Apart from a few select areas, most of the lands in the rim block were (and remain) marginal for agricultural development.¹³⁴⁷ According to the 1962 Land Use Capability Survey, the majority of the rim block lands are ‘non-arable’ lands.¹³⁴⁸ Rugged terrain, high rainfall, high altitude, low fertility soils, soils with low water-holding capacity, and heavy bush cover; these all limited the development potential of the region.

Secondly, successful economic development is dependent on technological innovation, the development of infrastructure, and access to capital. These were all factors in economic development in the wider New Zealand economy from 1890 to 1930.¹³⁴⁹ Roads were crucial for getting services and goods in and produce out, but Te Urewera suffered a relatively slow and limited development of infrastructure, particularly of its roads. Isolation from processing plants and ports in the Bay of Plenty and Hawke’s Bay continued to be a problem into the twentieth century. Infrastructure aside, successful farming enterprises require capital for the purchase of stock, machinery, buildings, fencing, tools, grass seed, fertiliser, and numerous other essentials. Murton points out that pastoral farming became more capital intensive in the 1880s and 1890s, with substantial outlays necessary for fencing and building.¹³⁵⁰

Finally, any enterprise has to be able to function within regional and national economies. If local markets are not thriving, then there is little chance for any kind of development to succeed. The Native Land Court’s investigation of title in the rim blocks coincided with the greatest transformation in the colonial economy, including the success of refrigeration and Government initiatives to encourage agriculture.¹³⁵¹ But this was by no means a steady improvement: the long depression in the 1880s and the depression in the 1930s seriously affected regional

1347. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 176

1348. Apiti, ‘Inquiry District Overview Map Book, Part 3’ (doc A132), map 25

1349. GR Hawke, *The Making of New Zealand: An Economic History* (Cambridge: Cambridge University Press, 1985), pp 85–90

1350. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 250–251

1351. *Ibid.*, pp 440–446

economies as well as New Zealand as a whole. Although growth was slow in the wider Bay of Plenty district into the twentieth century, the eastern Bay of Plenty began to enjoy some success from around 1910 with the increase of dairy farming, and the opening of cheese factories and of a freezing works at Whakatane.¹³⁵² But it is true that the wider economy in the Bay of Plenty developed more slowly than in Hawke's Bay or Manawatu.¹³⁵³ Other opportunities opened up in the twentieth century, the most important of which was forestry.

10.10.3.3.2 FARM DEVELOPMENT

Despite the limitations, it is clear to us that successful economic enterprises did occur in the rim blocks after the land was alienated. The 1962 Land Use Capability Survey shows that there are areas with fertile lands. By far the biggest is in the Waimana block (we remind readers that we do not discuss the Ruatoki block in this chapter). But the Kuhawaea block, along with the southern quarter of Waiohau 1 and the northern end of the Whirinaki block, also contain lands described as having only 'moderate limitations' for intensive arable farming.¹³⁵⁴ According to our calculations, by 1930, the peoples of Te Urewera retained 41 per cent, or 4,100 acres, of their high-quality land (all of which was located in the Waimana block) and only 17 per cent, or 5,000 acres, of the slightly lesser quality land (located in the Galatea Plain). A number of successful developments occurred on the land that was alienated – with the assistance of necessary capital investment and growth of infrastructure. These enterprises suggest what the former Maori owners of this land could have done, given a level playing field with settlers (equality of access to finance, usable titles, and expertise).¹³⁵⁵

Of the rim blocks, Waimana was best suited for development in the colonial economy. In chapter 4, we described the quality of the land that was confiscated by the Crown in the north Waimana Valley in 1866. The Waimana block itself (to the south) was of much the same quality. The terrain and vegetation cover of the Waimana Plain made it an ideal area for development, and the natural fertility of the block's soils meant that crop and pasture production did not decline as rapidly on the bush-cleared hills. On the land use capability map, Waimana stands out as being eminently suited for horticulture, cropping, pastoral production, or forestry.¹³⁵⁶ Being on the edge of the coastal plain, Waimana also had the advantage of easy access to services and processing plants.

The moderate success of settler farming enterprises in the Waimana block demonstrates what was possible on these lands. As we have seen, Swindley began

1352. Ibid, pp 455–456

1353. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 178

1354. Apiti, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 25

1355. For the Crown's responsibility to ensure a level playing field, and equality of opportunity with settlers, see Waitangi Tribunal, *He Maunga Rongo*, vol 3, ch 13 (for overall analysis), ch 14 (for farm development opportunities), chs 15, 16 (for development opportunities in indigenous and exotic forestry).

1356. Apiti, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 25

leasing land in 1874, and eventually built his Waimana holding into a 21,000-acre estate with the purchase of Waimana 1A and blocks from the confiscated lands.¹³⁵⁷ He set out to establish a mixed-farming estate and grazed cattle and sheep, and grew wheat. In 1888, after several years of poor wool and stock prices, Swindley was unable to meet his mortgage repayments to the Bank of New Zealand, which took over the estate. In the 1890s, anywhere from 3,800 to 6,000 sheep were run on the Bank of New Zealand's estate (which we assume was primarily made up of the Swindley estate).¹³⁵⁸ In 1905, the bank decided to subdivide the estate and develop it into a number of dairy farms, and built a cheese-making plant to process the milk.¹³⁵⁹

When the Government purchased the estate from the bank in 1906 it increased the pace of the subdivision, and settlers drew the first ballots for the farm sections in August 1907. The settler community thereafter grew at pace. In the decade from 1906, the Pakeha population of Waimana township increased five-fold, and had settled at 216 by 1926.¹³⁶⁰ According to Sissons, many Pakeha farmers pressured Maori to lease and sell land adjoining their farms from 1907, often successfully.¹³⁶¹ His evidence suggests that the settler farms tended to be on the better quality Waimana land.¹³⁶² They were predominantly dairy farms, supplying milk and cream to nearby cheese factories at Waimana (established in 1905) and Nukuhou North, just north of the confiscation line (established in 1908).¹³⁶³ About half a dozen settler farmers also ran some sheep (from 50 to 2,000 sheep each) on their farms in the period from 1908 to 1930.¹³⁶⁴ With the right conditions and support, successful farming enterprises could occur on the better lands of the rim blocks – so much so that a flourishing community had emerged in the Pakeha settlement of Waimana by the 1920s.

Waimana was not the only part of the rim blocks to sustain farm development. The Kuhawaea block had the most potential for agricultural development outside of Waimana. In addition, there were other significant areas of land suitable for cropping or pastoral farming in the western blocks. By our calculations, large areas of this land had been alienated by 1930: 83 per cent, or 25,000 acres, of land

1357. Miles, *Te Urewera* (doc A11), pp 232–233

1358. AJHR, 1891, H-15A, p 23; AJHR, 1898, H-23, p 27

1359. Sissons, 'Waimana Kaaku' (doc A24) p 67

1360. *Population Census, 1906* (Wellington: Government Printer, 1907), p 46; *Population Census, 1911* (Wellington: Government Printer, 1911), p 54; *Population Census, 1916* (Wellington: Government Printer, 1920), pp 28, 54–55. The Maori population of Waimana was not recorded in the census until 1926: *Population Census, 1926*, vol 1, p 56, vol 17, p 32.

1361. Sissons, 'Waimana Kaaku' (doc A24), pp 67, 83–96; Jeffrey Sissons, *Te Waimana: The Spring of Mana, Tuhoe History and the Colonial Encounter* (Dunedin: University of Otago Press, 1991) (doc B23), p 241

1362. Sissons, *Te Waimana* (doc B23), p 95

1363. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 455–456; Sissons, *Te Waimana* (doc B23), pp 232, 245

1364. AJHR, 1908, H-23, pp 29–30; AJHR, 1909, H-23, p 32; AJHR, 1910, H-23, p 30; AJHR, 1911, H-23, p 18; AJHR, 1912, H-23, pp 18–19; AJHR, 1914, H-23, p 19; AJHR, 1917, H-23, p 22; AJHR, 1920, H-23A, p 24; AJHR, 1923, H-23B, pp 23–24; AJHR, 1925, H-23B, p 23; AJHR, 1926, H-23B, pp 24–25; AJHR, 1928, H-23B, p 26; AJHR, 1930, H-23B, p 35

with moderate limitations (but arable); 82 per cent, or 22,900 acres, of land suitable for pasture (with some arable); and 57 per cent, or 29,600 acres, of land suitable for pasture (but non-arable). The land use capability map shows Kuhawaea as suitable for cultivated crops, pasture, or forestry.¹³⁶⁵ Its biggest advantage is the easy terrain, which made land clearance and land management straightforward. As with all the western rim blocks, the pumice soils were a major limitation on agricultural production, but once the land was ploughed and seeded, it appears that grass could flourish on the Kuhawaea plain. The land did have a cobalt deficiency, but this was uneven. There were pockets of land that could support cattle or sheep farming.¹³⁶⁶ And cobalt deficiency, we note, affected livestock rather than crop cultivation. By the 1890s, settler pastoralists were growing oats and turnips for stock feed on Kuhawaea 1, and Ngati Manawa grew wheat, potatoes, maize, and oats on the comparatively small piece of land that they retained until 1923 (we discuss this further below).¹³⁶⁷

The largest and most successful farm on the Kuhawaea lands was that of Hutton Troutbeck. As we saw in section 10.7, Troutbeck purchased the 21,694-acre Kuhawaea 1 block in 1884.¹³⁶⁸ The Troutbeck family added Kuhawaea 2A and most of 2B, and built their holding into a 33,000-acre station which was run as an extensive sheep and cattle property. They managed the natural pasturage largely through burning and grazing, and also by erecting fencing. The Galatea Station ran about 7,000 to 10,000 sheep in the 1890s and early 1900s.¹³⁶⁹ In 1920, it stocked 15,000 sheep and 1,500 cattle.¹³⁷⁰ Sheep numbers peaked at around 30,000, and when the Government purchased the station in 1932 it grazed 17,500 sheep and 3,500 cattle.¹³⁷¹ At this time, the Government also invested in infrastructure, including the construction of the road to Whakatane. The capital investment included the establishment of an experimental and demonstration farm in 1933 to explore how to develop and manage this difficult country. Research staff found that high fertiliser use, cultivation, and sowing lucerne increased the productivity of the Galatea plain. The Government converted the station from sheep to dairying, and subdivided the property into small units for settlement.¹³⁷²

Smaller yet similar areas existed elsewhere in the western rim blocks, also requiring Government assistance to convert from sheep to dairy farming.¹³⁷³ As with the Galatea scheme, heavy capital investment was needed for fertiliser, fenc-

1365. Apiti, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 25

1366. A A Coates, *The Galatea Story* (Whakatane: Whakatane and District Historical Society Inc, 1980), p 27

1367. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 318; Coates, *The Galatea Story*, p 33

1368. Miles, *Te Urewera* (doc A11), p 226

1369. AJHR, 1891, H-15A, p 23; AJHR, 1898, H-23, p 27; AJHR, 1900, H-23, p 27; AJHR, 1905, H-23, p 27; AJHR, 1910, H-23, p 30

1370. Commissioner of Crown lands, Auckland, to land purchase controller, 'Galatea Estate (Report)', 13 September 1920 (Coates, *The Galatea Story*, p 35)

1371. James W Fox and R G Lister, *The Galatea Basin: A Geographic Reconnaissance*, reprinted *New Zealand Geographer*, vol 5, no 1, April 1949, p 24

1372. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 459

1373. Fox and Lister, *The Galatea Basin*, pp 24-25

Land type	Open land originally held by Maori (acres)	Open land retained (acres)	Percentage retained
Slight to moderate limitations (arable)	10,000	4,100	41
Moderate limitations (arable)	30,000	5,000	17
Suitable for pasture, some arable	28,000	5,100	18
Suitable for some pasture, non-arable	47,000	22,400	48

Table 10.11: Retention by land type in Te Urewera rim blocks. This table assesses land that was open at the time of alienation. However, forested lands could also be cleared and developed successfully for pastoral farming. Thus, potential farmland was not limited to these open lands.

ing, cultivation, lucerne planting, and buildings. It was these Rangitaiki lands that Colenso had called uninhabited, desolate, and sterile.¹³⁷⁴ And though potential for agricultural development was limited in the central part of the Waiohau block because of the broken terrain, the plains near the Rangitaiki River in the north and south of the block had considerable potential for livestock farming.¹³⁷⁵

From these brief studies, we can reach some conclusions about the development opportunities denied the peoples of Te Urewera on the better lands that were acquired from them in breach of the Treaty. As a general principle, we would say that Maori landowners in the rim blocks should have had the opportunity to engage in the new economy where they desired to do so, on a level playing field with settlers. The developments that occurred on the Waimana and Galatea lands demonstrate how, with considerable capital investment and expertise, some of the lands in the rim blocks could be made profitable through farming. The denial of this opportunity to Maori, who had to watch their former lands being developed by others, was one aspect of the prejudice they suffered from the loss of these lands. We address what the Maori owners did with the money they received for land sales, and what they were able to do with the few lands that were left to them, later in this report.

10.10.3.3.3 FORESTRY DEVELOPMENT

A considerable portion of the land in the rim blocks was not suitable for agricultural or pastoral farming. The steep terrain, combined with the harsh environment and soil qualities, meant that this kind of development was impossible in many places. But had the owners retained those lands, they ought to have reaped the benefits of timber extraction – an industry that developed in the region as the twentieth century progressed. By our estimate, around 265,000 acres (70 per cent)

1374. Murton, 'The Crown and the Peoples of the Urewera' (doc H12), p 99

1375. Apati, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 25

Forest type	Forested at time of alienation	Forest retained*	Percentage retained
Softwood podocarp	10,000	0	0
Softwood/hardwood	35,000	1,500	4
Rimu/tawa, tawa	40,000	3,500	9
Beech/beechnodocarp	180,000	28,000	16

* The retained areas consisted of the following: softwood/hardwood – Heruiwi 4F2, parts of Whirinaki 1(4B1B) and 1(4B2); rimu/tawa, tawa – Tahora 2A3B, PT2AD2, 2AE3(2), and 2B2B1; beech/podocarp – Waipaoa 5A2, Waipaoa 5C, Tahora 2G2, and parts of Tahora 2C1(3), 2C2(2), 2C3(2), and 2F2.

Table 10.12: Retention by forest type in Te Urewera rim blocks

of the land at issue in the rim blocks was under forest cover in the period in question. We have made this assessment based on a map of forest types prepared by the Crown Forestry Rental Trust, relying on a 1973 map, and evidence in various research reports about the range of bush cover in the nineteenth century.¹³⁷⁶

Not all of this forested land was of equal commercial value. The most prized areas in monetary terms were those with softwood podocarp trees such as totara, rimu, and matai. Forests with mixed softwood and hardwood podocarps were less valuable, with beech valued least. As an indication of their relative values, royalties paid in the 1950s for Maungapohatu totara fetched 20 shillings per acre – twice as much as matai, rimu, miro, and kahikatea, and over seven times as much as for beech.¹³⁷⁷

Within the rim blocks, there were only small pockets of purely softwood podocarp forest. This amounted to about 10,000 acres in the south-east of Whirinaki, running along the southern boundary of Heruiwi 1 and Heruiwi 4, and in the Matahina D block. By 1907, the Crown had acquired practically all of this land. Another 35,000 acres contained rimu-matai-hardwoods podocarp forest, which was located in the Heruiwi 4 and Whirinaki blocks. Of this, the Crown acquired all but 1,500 acres in Heruiwi 4F2 and Whirinaki 1(4B2). Of the remaining 220,000 acres which would have been under forest, the most valuable land was probably in the Tuararangaia 1, and Tahora 2A1, 2A2, and 2AD blocks, which were covered by a mixture of rimu and tawa. There was also tawa bush across Tahora 2A3 and 2AE. Altogether, there was some 40,000 acres of forest in this category, of which Maori lost 91 per cent. The rest of the forests in the rim blocks were mainly mixed

¹³⁷⁶ Apati, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 27; see also Tulloch, 'Heruiwi 1-4' (doc A1), pp 25-26; Boston and Oliver, 'Tahora' (doc A22), pp 143, 198; Stevens, 'Waipaoa' (doc A51), pp 27, 60, map 13

¹³⁷⁷ Klaus Neumann, "'... That No Timber Whatsoever Be Removed': The Crown and the Reservation of Maori-owned Indigenous Forests in the Urewera, 1889-2000" (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A10), p 156

beech and podocarp forests, or predominantly beech. These covered 180,000 acres, of which Maori lost 84 per cent (see sections 10.4 and 10.7 for land alienation details).¹³⁷⁸

The total amount of forest alienated from the claimants' ownership was 232,000 acres (87.5 per cent of their forests, and 61.5 per cent of their land in the rim blocks). The Crown had acquired almost all of the valuable forest, sometimes with a deliberate eye to its future timber-producing potential.¹³⁷⁹ Had the owners retained these lands, then they would have been in a position to use selected portions of them for development in timber extraction. We do not have comprehensive information on the extent of exotic forestry on the land alienated from our claimants in the rim blocks, but we calculate that some 60,000 acres has been used for that purpose.¹³⁸⁰ Exotic forestry was a further development opportunity denied the claimants.

Later in this report, we address the operation of the Crown's policies in relation to timber extraction from land that Maori did manage to retain. Here, we note that the claimants are very aware of what they have missed out on, as Gladys Campbell explained in her evidence for Ngati Hineuru:

All of that land of Heruiwi had native timber on it, and that timber was cut and sold by the Crown. Was the value of the timber included in the price of that land? That is an issue for all Heruiwi Blocks that were sold.

The Hineuru lands [Heruiwi 4A] were a heaven of its own, it was out in the no man's land, and still had to be developed and created to the benefit of all the people that were living there. That was their country, their home, and although they had occupational rights, the laws did not allow them to utilise their land.¹³⁸¹

10.10.3.3.4 ECONOMIC IMPACTS – CONCLUSIONS

Between 1878 and 1930, a total of 82 per cent of the land awarded to the peoples of Te Urewera in the rim blocks was acquired in breach of the Treaty. This loss of land had notable economic effects. In both the short and long term, the peoples of Te Urewera were denied many of their customary uses of these lands (and their waters). These lands were important for the range of resources they provided – including a variety of birds and plants – and for the relatively rare places suitable for habitation and cropping. The Waimana block and some areas of the western lands provided a much greater range of traditional economic uses for those who exercised rights to that land.

The loss of this land had other long-term effects. The owners were restricted to less than 18 per cent of their former holdings, and denied the ability to develop

1378. Apiti, 'Inquiry District Overview Map Book, Part 3' (doc A132), map 27

1379. See, for example, Tulloch, 'Heruiwi 1-4' (doc A1), p 32

1380. Tulloch, 'Heruiwi 1-4' (doc A1), p 137; Cleaver, 'Matahina' (doc A63), p 138; Tulloch, 'Whirinaki' (doc A9), p 63; Apiti, 'Inquiry District Overview Map Book, Part 3' (doc A132), maps 12, 15, 16, 22; 'Ngati Whare Map Book for Treaty of Waitangi Claim Wai 66' (commissioned map book, Wellington: Crown Forestry Rental Trust, 2004) (doc G33), map 6

1381. Gladys Campbell, brief of evidence, 8 September 2004 (doc G25), p 5

the great majority in the colonial economy. The development potential of the lost lands was limited, compared to some parts of New Zealand. With the exception of the Waimana block and some of the western lands, the range of possible economic activities was circumscribed by the quality of the land, the terrain, and issues of access. Most of the land in the rim blocks, therefore, has not proven suitable for agricultural or pastoral farming development. Exceptions included the Waimana, Kuhawaea, and Waiohau blocks, usually with investment or assistance from the Crown. (Also, as we shall see in chapter 12, the East Coast trust was able to use the capital and infrastructure of a big business to develop farms in southern Tahora 2.) But farming was not the only potential economic activity. Had the owners been able to retain the land acquired from them in breach of the Treaty, they clearly would have been able to take advantage of forestry operations, which had some success in the second half of the twentieth century.

The rim blocks were important to the economies of the peoples of Te Urewera. The loss of more than 82 per cent of this land had significant effects on their customary economy, and on their ability to participate in the developing colonial economy. At the same time, the Crown was purchasing their other lands in the Urewera District Native Reserve (see chapters 14 and 15). Later in our report, having considered alienations in the reserve, we will be in a position to assess the overall impact of land loss on the claimants in our inquiry district. At that point, we will be able to answer the broader question: did they retain sufficient land to sustain themselves, and for development purposes?

CHAPTER 11

TE MAHI TINIHANGA MO NGA WHENUA O WAIOHAU – THE WAIOHAU FRAUD

That they [Ngati Haka Patuheuhehu] have suffered a grievous wrong is, in my opinion, plain. It is doubly hard that this wrong should have resulted from a miscarriage, which certainly ought to have been avoided, in the very Court which was especially charged with the duty of protecting them in such matters.

Justice Edwards, 1905¹

11.1 INTRODUCTION

The Waiohau block was the ancestral home of Ngati Haka Patuheuhehu.² In 1907, they were evicted from that home by its new legal owner, James Grant, after a long period of peaceful resistance to earlier eviction attempts. The people retreated into the mountains for a while, grieving, before finally resettling on their less valuable lands in the northern half of the block. In some ways, the claimants have never recovered from that blow. They feel the effects of it still. In 1905, when their lands were already under threat, they petitioned Parliament that they were ‘dispirited and helpless.’³ We heard the echoes of that sentiment at our Waiohau hearing in 2004. The people still remember and they still grieve.

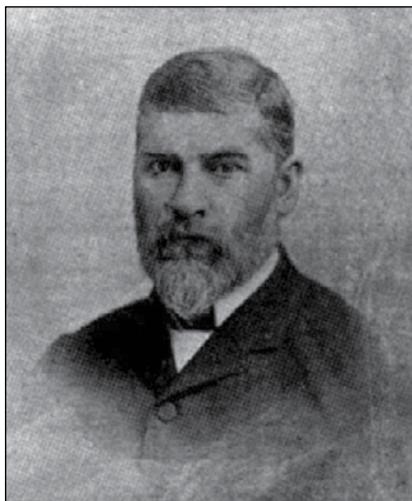
How did James Grant come to get a title recognised by the law to the ancestral land of Ngati Haka Patuheuhehu, while they continued to live there? As Parliament and the courts have long recognised, the tribe lost ownership of their land through fraud. In 1886, local interpreter Harry Burt, who had purchased a minority of individual interests, bribed a handful of Ngati Manawa owners to come with him to the Native Land Court and lie about a voluntary arrangement among the owners. As a result, Judge Clarke partitioned the block, awarding just under half of it to two owners, who immediately sold it to Burt’s financial backer (who then sold it to Mrs Burt). Burt’s fraudulently obtained title was sold to parties who were bona fide (good faith) purchasers without notice of that fraud, and therefore protected under the land transfer system, ending with James Grant in 1907. The Land

1. *Beale v Tihema Te Hau and Attorney-General* (1905) 24 NZLR 883, 891

2. Throughout our report, we use the tribal name in common use by the people today. As to the historical distinction between Patuheuhehu and Ngati Haka, see chapter 2.

3. Mehaka Tokopounamu and others for ‘Patuheuhehu Ngatimanawa and Te Urewera’, petition, August 1905 (John Battersby, comp, supporting papers to ‘A Report on Waiohau 1 Block’, 2 vols, various dates (doc c1(b)), vol 2, section 5, p 95)

Herbert Brabant, resident magistrate at Opotiki and later a Native Land Court judge. In 1887, Brabant was tasked with investigating the sale of the Waiohau I block, ancestral land of Ngati Haka Patuheuhehu. However, his inquiry was cursory and did not uncover crucial facts about the role of private purchaser Harry Burt or the failings of the subsequent Native Land Court process.



Unknown

Transfer Act protected their titles, despite the ‘grievous wrong’ that the Supreme Court found that Ngati Haka Patuheuhehu had suffered in 1886. Thus, of all the many players, Ngati Haka Patuheuhehu were the losers, and the loss was their ancestral land.

In our inquiry, Crown counsel submitted: ‘The Crown accepts the Waiohau fraud is a “very, very, sorry saga in the history of Ngati Haka Patuheuhehu, and is a most painful grievance”.’⁴ On this point, the parties were agreed. Nonetheless, the Crown disclaimed the lion’s share of responsibility, admitting only to some minor failures which, we were told, were not Treaty breaches. The claimants, on the other hand, maintained that the fraud should have been prevented by better protections in the law. Also, they argued that the Crown could and should have provided an effective remedy, as soon as the fraud was discovered. Its failure to do so was a serious breach of its Treaty duty of active protection. The Crown did not deny the harm that Ngati Haka Patuheuhehu have suffered as a result; it simply disclaimed responsibility.

11.2 ISSUES FOR TRIBUNAL DETERMINATION

The Crown and the claimants agreed that a fraud had been committed, but they differed sharply as to the Crown’s liability under the Treaty. While the Crown conceded that it had failed in some minor respects, it argued that the main fault lay with the judges of the Native Land Court, and with what it saw as the claimants’ decision not to take timely action in the Supreme Court. For that, the Crown blamed the claimants’ lawyer, Henry Howorth. In the Crown’s view, its Treaty obligation was met by inquiring into the fraud, and then advising the claimants that

4. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 78

they must take legal action themselves. A legal remedy was available; no special action was therefore required on the part of the Crown. The claimants did not accept this argument. In their view, the fraud was only possible because of systemic flaws in the Native Land Court, and in the fraud prevention laws. As soon as it was exposed, the Crown's Treaty obligation was to provide a remedy. This it failed to do. As they saw it, a serious breach of the Crown's Treaty duty of active protection had taken place. The eventual compensation – 310 acres for the loss of 7,000 – was inadequate. The Crown accepted that it could never fully compensate Ngati Haka Patuheuheu for what they had lost, but argued that its compensation was adequate.

Given the failure of the parties to agree on the interpretation of key events, and the Crown's refusal to acknowledge any Treaty breaches, our analysis will focus on the following issues:

- ▶ How was the Waiohau fraud able to be carried out, and did the Crown provide adequate protection to Ngati Haka Patuheuheu?
- ▶ How and when was the fraud exposed?
- ▶ Did the Crown do enough to provide a remedy while it still could?
- ▶ Did the Crown provide a fair and effective remedy after Ngati Haka Patuheuheu lost in the Supreme Court?

We address these issues before we make our findings.

11.3 KEY FACTS

Many of the key facts are not in dispute between the parties. The Waiohau 1 block, consisting of 14,464 acres, was awarded to Ngati Haka Patuheuheu in 1878. Some rangatira from the wider Tuhoe iwi, and also some prominent Ngati Manawa individuals, were included in the list of owners. In the early 1880s, Ngati Haka Patuheuheu formed a relationship with local interpreter Harry Burt, who was a land purchase agent for private parties. Burt lived with a daughter of the rangatira Wi Patene when he stayed at Te Houhi. The community appear to have been unaware that he also had a Pakeha wife. Burt helped the community interact with officialdom, and he supplied liquor and other goods. It was later a matter of dispute as to how far these supplies were part of the payment for individual interests in land.

The Native Land Act 1873 made the purchase of individual interests void but not illegal. In court, a majority of owners could agree to partition for the purposes of sale, once a majority of interests had been purchased outside the court. From 1882 to 1884, Burt bought up individual shares in Waiohau 1. He did not acquire close to a majority of shares. In 1889, Judge Wilson's inquiry exposed that Burt had acted as interpreter in his own transactions, had bought the interests of minors improperly, had failed to get many of the transactions witnessed properly, and may have paid partly in guns and alcohol. Nonetheless, these transactions were not subject to the scrutiny of a trust commissioner under the Native Lands Frauds Prevention Act, which (as Wilson found) they should have been. A trust commissioner could not have certified some (perhaps any) of Burt's arrangements.

In the mid-1880s, tribal leaders tried to stop the sale of individual interests, and

Caveats under the Land Transfer Act 1885

The Land Transfer Act 1885 empowered the district land registrar to enter a caveat to prohibit any dealings in land, for the 'prevention of any fraud or improper dealing'.¹ Once a caveat was lodged, the registered owner (in this case, Mrs Burt) could not get any sale, lease, mortgage, or any other kind of transfer legally registered under the Land Transfer Act.² Also, the caveat served as notice to any prospective purchasers that Ngati Haka Patuheuheu had an equitable interest in the land.³

1. Land Transfer Act 1885, s175(4)

2. *Ibid*, s 142; see also sch 2, form L

3. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 81

to repudiate the agreements that had already been made. They sought the help of Te Kooti to negotiate with Burt. Mediation was arranged, but Burt refused to accept the 1,200 acres offered to him, and the tribe could not raise the money to repay both the purchase money and his claimed expenses.

In 1886, Burt circumvented this tribal opposition by bribing Ngati Manawa chiefs to appear with him in the Native Land Court. There, they told Judge Clarke that the owners had made a voluntary arrangement to transfer 7,000 acres to Burt in recognition of his purchases. The judge called for objections – there were only seven people in court, including Burt – and (unsurprisingly) there were none. Judge Clarke ordered the partition of Waiohau 1, with the 1B block of 7,000 acres to be vested in Pani Te Hura (Peraniko Ahuriri) and Hira Te Mumuhu of Ngati Manawa. This block contained the main Ngati Haka Patuheuheu kainga, Te Houhi, as well as their cultivations, church, and urupa, and the best farmland. This court order gave the new owners a land transfer title. They immediately sold Waiohau 1B to Burt's financial backer, John Soutter, with Judge Clarke as a witness. This deed of sale was certified by the trust commissioner in 1887. Ngati Haka Patuheuheu applied for a rehearing, but their applications were turned down by Chief Judge Macdonald on the advice of Judge Clarke.

In 1888, Soutter sold Waiohau 1B to Margaret Burt, Harry's wife. She immediately mortgaged half of the block, selling the other half to Henry Piper. The Burts tried to take possession of their part in 1889, sparking a petition from Ngati Haka Patuheuheu to Parliament. The Native Affairs Committee (of which James Carroll was a member) found that the petitioners had been the victims of a 'great injustice'. It recommended a fuller inquiry, with a view to restoring their rights. The Government charged Judge Wilson of the Native Land Court with that inquiry, and he examined papers and witnesses in 1889. In his findings, Wilson could not be sure that Burt had paid for land in guns or liquor, but he found that Burt's

interest could never have amounted to more than 4,128 acres, and that he was not legally entitled to anything. Ngati Haka Patuheuheu were not present in court, and they had not agreed to any voluntary arrangement, hence the court had no power to make the partition.

The Government referred Wilson's report to its solicitor, HD Bell, who thought that Burt's title could be overturned in the Supreme Court. On Bell's recommendation, the Crown wrote to Ngati Haka Patuheuheu in January 1890, promising all the assistance in its power to obtain their rights, and offering Bell's services if they wanted to take the case to the Supreme Court. It also asked the district land registrar to lodge a caveat, which was done for Burt's half of Waiohau 1B (but not Piper's). Ngati Haka Patuheuheu signalled their intention to go to court, but at first preferred to use parliamentarian Hirini Taiwhanga's lawyer, Henry Howorth, instead of Bell. In April 1890, they met with G F Richardson, the Minister of Lands, and asked the Government to take the case for them, which they could not afford. At first, the Government was still willing to help but demurred because the tribe had engaged Howorth. Later in the year, however, it made two policy changes: it would act entirely neutrally between the two sides; and, upon learning that Ngati Haka Patuheuheu did not intend to go to court on their own, it told the district land registrar that the caveat could now be withdrawn. The registrar removed the caveat the same day, although the tribe was never informed.

In 1891, Ngati Haka Patuheuheu approached the new Liberal Government for assistance, but were told that the previous Government's policy could not be changed. Despite further approaches to Seddon and Carroll from 1894 to 1896, the Government neither took the case to court, nor provided assistance to do so. The result was a stalemate: Ngati Haka Patuheuheu could not afford to challenge Burt and Piper in court, but nor were Burt and Piper willing to risk a Supreme Court action themselves. This situation changed in 1903, when the Methodist mission foreclosed on Burt's mortgage. The mission sold Burt's part of Waiohau 1B (which included Te Houhi) in 1904 to Margaret Beale, a speculator who sold it to James Grant for a large profit. The arrangement with Grant was conditional on the removal of the Maori occupants, so the Beales took action in the Supreme Court. The tribe's new lawyer, Frederick Earl, asked for special legislation to prevent a court battle, but the Government turned him down.

Ngati Haka Patuheuheu lost in court in 1905, although the judge was sympathetic and stated that a 'grievous wrong' had been done them. Justice Edwards found that Burt's title had been obtained by fraud, but that the Land Transfer Act 1885 protected Mrs Beale. He 'found on the evidence before him that Beale had not acted fraudulently (and how the Torrens system could be used with the result that a bona fide purchaser for valuable consideration obtained an indefeasible title at the expense of the persons defrauded).'⁵ While Beale was aware that her vendors had never been in possession, she could not be shown to have known that they had acquired their title by fraud, and was therefore a bona fide purchaser.

5. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 83

In the wake of the Supreme Court decision in 1905, Ngati Haka Patuheuheu again petitioned Parliament for help. Carroll decided to buy the land back from Mrs Beale, but his negotiations were fruitless. Neither Beale nor Grant was willing to sell to the Crown, even though it matched Grant's price. In the meantime, Mrs Beale sent in the sheriff and bailiffs, took further court action, and tried to evict the Waiohau community – without success, although at a considerable cost to the people. Carroll switched to compulsion, informing Mrs Beale in February 1906 that her land would be acquired under the Land for Settlements legislation, and lodging a caveat against the title for that purpose. No further action was taken, however, and Mrs Beale completed the sale to Grant a year later, when the caveat expired. In 1907, Grant moved to evict the Waiohau community. This time, he took direct action and destroyed their crops. Final appeals to the Crown met with no response, so Ngati Haka Patuheuheu had to leave their ancestral home. The eviction of Ngati Haka Patuheuheu was a national scandal. Grant refused to let them remove their whareniui, using it as a hay barn until the Government purchased it from him in 1908. Ngati Haka Patuheuheu moved the whare to their new home on Waiohau 1A.

Also in 1908, the Government arranged compensation in the form of a 300-acre block of land at Te Teko. This land was vested in the Waiariki District Maori Land Board, and its beneficial owners were not identified until 1920.

11.4 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

As we noted above, the Crown accepted that ‘the Waiohau fraud is a “very, very, sorry saga in the history of Ngati Haka Patuheuheu, and is a most painful grievance”’.⁶ While agreeing with the claimants on that point, the Crown argued that it had met all of its Treaty and legal obligations to the Waiohau community. In its view, the fraud was brought about by a series of one-off failures in protection mechanisms and the application of the law, as a result of ‘human error’, not faults in the system. The individuals most responsible for the tragic loss of Waiohau lands were Judge Clarke and Chief Judge Macdonald of the Native Land Court. Failures on their part were not actions of the Crown. Once their failures came to light, there was a legal remedy available: placing a caveat on the title, in conjunction with challenging the titles in the Supreme Court. The individual only ‘marginally’ less responsible than the Native Land Court judges was Henry Howorth, the lawyer engaged by Ngati Haka Patuheuheu. On his advice, the claimants rejected the legal remedy available to them. The tragic consequence was their unavoidable eviction in 1907. While the Crown did invite the district land registrar to remove the caveat, it could not direct him to do so; he presumably exercised his independent discretion in doing so.⁷

The Crown conceded that some of its actions made a minor contribution to the loss of Te Houhi. These included its failure to:

6. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 78

7. *Ibid*, pp 78–84

- ▶ inform the Waiohau community that a caveat had not been lodged against the title of the part sold to Piper;
- ▶ find out for itself whether the Waiohau community intended to take legal proceedings before ‘inviting’ the district land registrar to withdraw the caveat;
- ▶ inform the community that the caveat had been withdrawn because of their reported decision not to take their case to the Supreme Court; and
- ▶ meet with the community ‘face to face and discuss with them both the necessary limits on what assistance the Crown could provide and reiterate the soundness of [Crown solicitor] Bell’s advice and set out the potential consequences in failing to take action as recommended by Bell.’⁸

Nonetheless, the Crown’s position was that its Treaty and legal obligations were fulfilled by inquiring into petitions (the Wilson inquiry), seeking its solicitor’s advice on Wilson’s report, and providing that advice to the claimants. The claimants then chose not to take the recommended action. When the eviction could not be avoided, the Crown provided adequate compensation in the form of land at Te Teko, even if such compensation could never remove the prejudice.⁹

The claimants did not accept that the Crown’s concessions of failure were adequate. In their view, the law and its protection mechanisms failed, regardless of which individual was responsible. The fault lay with processes, not human error. In particular, the failure of the trust commissioner’s inquiry was attributable to serious flaws in the system. Nor did they accept that the district land registrar acted on his own discretion. He was clearly instructed by the Crown.¹⁰

The claimants conceded that a large share of responsibility belonged with the Native Land Court judges, and that those judges were not agents of the Crown.¹¹ But, in their view, the Crown was obliged to provide a fair and proper remedy as soon as the court’s failures were exposed. The ‘key grievance’ of Ngati Haka Patuheuheu is that the Crown failed to provide an adequate remedy when its ‘systems failed so spectacularly.’¹² The Crown’s actions were ‘unconscionable’ because it ‘essentially allowed the matter to unfold over a period of around seventeen years with the final consequence that an entire community of people were evicted from their village.’¹³ At some point during that long period, it must have been obvious that special legislation was the only remedy. In the ‘extraordinary circumstances such special legislation was warranted and, given that the land included the eviction of an entire community, there must have been grounds for disrupting the indefeasibility of the land transfer title.’¹⁴ Counsel for Wai 36 Tuhoe commented: ‘The travesty of justice was that the Crown, which had enacted statute after statute

8. Ibid, p79

9. Ibid, pp 83–84

10. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 27–46; counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), pp 29–32

11. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p36

12. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 30

13. Ibid

14. Ibid, p 31

to take Maori land, could not pass the simple legislation required to return the land and remedy the fraud.¹⁵

The grant of a mere 310 acres in compensation, without sufficient consultation and situated outside the tribal rohe, was entirely inadequate.¹⁶

11.5 TRIBUNAL ANALYSIS

11.5.1 How was the Waiohau fraud able to be carried out, and did the Crown provide adequate protection to Ngati Haka Patuheuheu?

SUMMARY ANSWER: In 1886, Harry Burt bribed a handful of Ngati Manawa chiefs to attend a partition hearing for Waiohau 1, and to lie to Judge Clarke about a voluntary agreement among the owners. This alleged voluntary agreement was for 7,000 acres to be cut out of Waiohau 1, in satisfaction of Burt's purchase of individual interests. No such voluntary agreement existed. Only seven people attended the court, of whom three were not owners, yet Judge Clarke accepted the supposed voluntary agreement and partitioned Waiohau 1 accordingly. Ngati Haka Patuheuheu were neither present nor represented. Waiohau 1B, containing their principal kainga (Te Houhi) and best farmland, was awarded to two Ngati Manawa chiefs, who then sold it to Burt's financial backer, Soutter. A year or so later, Soutter sold it to Burt's Pakeha wife, Margaret.

The parties in our inquiry agreed that a fraud was perpetrated in the Native Land Court. They did not agree on who was responsible for allowing for such a thing to happen under the native land laws. According to the Crown, the Waiohau fraud was able to be carried out because of human error on the part of Judge Clarke. The native land laws provided sufficient protections for the prevention of fraud, but his 'unfathomable performance' defeated those protections. In particular, voluntary agreements could not defeat the requirement that a private purchaser acquire a majority of interests before partition (which Burt had not done). Secondly, the fraud should have been uncovered at a rehearing, but the chief judge did not deal properly with the rehearing applications. Again, this was a failure on the part of the chief judge. Neither Judge Clarke nor Chief Judge Macdonald was an agent of the Crown.

The claimants agreed that these judges were not Crown agents, but pointed to systemic failings underpinning their poor performance. We agree.

- ▶ The native land laws did not require mandated tribal leaders or bodies to participate in the court's proceedings, or to decide titles independently of the court. Such a provision would have prevented the fraud. As the Native Affairs Committee found, there was a 'want of security' for the 'proper representation' of Maori owners in the court.
- ▶ The law allowed the trust commissioners to check post-partition transactions, instead of the dealings that resulted in the partition. This was a systemic flaw. Not only had Burt failed to acquire a majority of interests, but,

15. Counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), p 42

16. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 44

as Judge Wilson later found, the circumstances of his individual purchases would have resulted in some (perhaps all) being rejected under the criteria applied by the trust commissioners.

- ▶ Had the legislation required, as it should, that applicants for rehearing were entitled to be heard, then the rehearing applications in this case would have disclosed facts which would have inevitably meant the grant of a rehearing. At the subsequent rehearing, Burt would have had no prospect of success.
- ▶ The legislation provided no right of appeal from either the original decision or from the chief judge's refusal to grant a rehearing to Ngati Haka Patuheuheu. An appeal would likely have resulted in the overturn of the fraud.

The Crown's native land laws did not protect the tino rangatiratanga of Ngati Haka Patuheuheu in respect of their Waiohau lands. Systemic failings allowed the Waiohau fraud to be perpetrated in the first place, and then prevented its timely exposure on appeal.

11.5.1.1 Introduction

The parties agreed that the Native Land Court played a key role in allowing the Waiohau fraud to take place. The Crown blamed 'human error' on the part of Judge Clarke and Chief Judge Macdonald; the claimants blamed poorly designed systems with ineffective protection mechanisms. In any case, the Native Lands Frauds Prevention Acts were a backstop that should have protected the Maori owners from fraudulent dealings. The parties agreed that this legislation failed, but again could not agree on the cause. According to the Crown, it was the judge's fault for making a partition order without checking the underlying transactions, so that the trust commissioner had no choice but to vet the post-partition sale. The claimants identified this as a broader weakness in the law, not limited to a single mistake by a judge. There were two levels of improper dealings: first, the many alleged flaws in Burt's original purchase of individual interests; and, secondly, the fraudulent partition obtained from the Native Land Court, which allowed a new deed to be signed and then certified by the trust commissioner.

11.5.1.2 The purchase of individual interests in Waiohau 1

As we have seen, Waiohau 1 was a block of 14,464 acres, awarded to 158 individuals in 1878. The majority of the owners were Ngati Haka Patuheuheu, although the list also included some chiefs of the wider Tuhoe iwi, and a few of their Ngati Manawa relations. The Ngati Haka Patuheuheu community continued to use the Waiohau lands and resources as before, with their principal kainga and cultivations in the southern part of the block, at Te Houhi. As part of their engagement with the settler world, an alliance was arranged with Harry Burt, a private land purchase agent. He stayed often at Te Houhi, lived with a daughter of Wi Patene when he was there, advanced cash and goods, and helped the tribe to deal with officialdom. Capitalising on this arrangement, Burt began buying up individual interests in Waiohau from 1882. At the same time, another private purchase agent, Alfred Preece, who was also married to a local woman, began to negotiate with individuals to purchase their Waiohau shares. For a while, Burt and Preece

Ngati Haka Patuheuheu's Account of the Waiohau Fraud

ONE DAY there appeared a thieving ghost called Harry Burt. But who is this person? One of his names was Hare Paati. Another of his names was Hare Rauparaha. His main interest in activity here was going in amongst our people to buy shares in land.

'In those early days, according to our people, Harry Burt was extremely friendly with the land surveyors, Preece and Henry Mitchell, and our old people concluded that Harry Burt was engaged in theft (fraud, of our lands) right from the start.

'Even though he was a Pakeha, his common name amongst us was Hare Paati. Many mistook him for Maori. He spoke fluent Maori, he was an interpreter for the Native Land Court. We heard he was a Maori from Ngati Raukawa, but one of his names was Hare Rauparaha and he also said he was from Ngati Toa.

'He also took to wife the daughter of the Chief Wi Patene Tarahanga, but the old women knew it was calculated so he could inveigle himself into her heart and into her thighs, (that is the old people's words).

'However, Ngati Haka-Patuheuheu and other Maoris of this region did not know he was still married to his Pakeha wife, Margaret Burt.

'When he finally acquired Ngati Haka-Patuheuheu land (7,000 acres) he continued to commit theft by transferring through law, this land to his Pakeha wife Margaret Burt – unbeknownst to the Maori.

'So therefore for us, we suffered great pain, huge fury with this ghost – this despicable fraudster Harry Burt.

'He was a liar, deceitful, a thief, a thief of land – a fraudster. He fed our people alcohol in order to take land. He seduced Peraniko and Te Mumuhu with alcohol and money to steal our land.

'We have in our possession the legacy of Te Umutaoroa. The histories were left with our rangatira Hieke Tupu. Out of the discourse on Te Umutaoroa emerges a clear picture of Harry Burt's fraud. Te Umutaoroa grew out of the betrayal by Harry Burt of Te Kooti and the betrayal of Ngati Haka-Patuheuheu.

'Te Kooti left Te Umutaoroa at Te Houhi and it is said that that is the payment of the sins of Harry Burt – that which is contained in Te Umutaoroa – it is said Te Kooti's chosen child will one day come to uncover the hangi of Te Umutaoroa, the earth oven of long cooking.

'When the lands of Waiohau and Te Houhi were taken by Harry Burt, Te Kooti heard of this. He said: "There will come a time when Harry Burt's money will be like a pit of rotting potatoes." Ngati Haka-Patuheuheu began to follow Te Kooti in earnest – this was the end of the relationship between Harry Burt and Te Kooti.

'Later the Law Courts confirmed Harry Burt's fraudulent activities.

'Burt then proceeded to bribe Maori for their shares – when he acquired these he went to the Court and requested partitions under his pseudonym Hare Rauparaha. The Court agreed to put this land under Te Mumuhu and Peraniko, and from them

the land was transferred to Harry Burt's banker Souter. Land was then transferred to Harry Burt's wife, Margaret Burt, who onsold it later to Piper. All of this activity of selling and transfer took place on one day, the day of the Court sitting.

'Now to come back to Te Umutaoroa. According to Hieke Tupe, Te Kooti came to Te Houhi. There was a hui there, a meeting about land. When Te Kooti slept, he dreamt that the Rangitaiki was totally covered with mist. That place where he slept, he named it Te Umutaoroa. He placed eight powerful gifts in this umu, in this hangi – and then he said:

... tao ake nei tao ake nei

'kei te haramai taku tamaiti hai huki i Te Umutaoroa ...

'This oven will cook for a long time but one day my chosen one will come to uncover Te Umutaoroa and the gifts and the powers which lie therein.

'te mauri atua:—(the essence of spirituality, belief in God)

'te mauri whenua:—(the life force of the land)

'te mauri tangata:—(the life force of the people)

'te mauri whakapono:—(the power of belief or faith)

'te mauri whakaora nga iwi:—(the power to heal the people)

'te mauri hohonu:—(the mauri of hidden wealth – minerals, gold, diamonds and oil perhaps underground)

'te mauri arai atu i nga pakanga:—(the power to return war from this land to other countries)

'te mauri whakahoki i nga iwi:—(the power to return people to their land)

'For us Te Umutaoroa is a symbol for all land lost. We wait now for the fulfilment of Te Kooti's dream – that our land may one day be returned.

'These stories we teach to our future generations so that these prophecies of Te Kooti will never die. We try to instill in our grandchildren the truth, to seek the right path, so that our lands are returned and all the resources stolen from us by tauiwi and the Native Land Court and the fraudsters be returned to us.

'It was well after, a Court sitting examined Waiohau lands and the activities of Harry Burt. At that Court Harry Burt conceded that the two Maori he placed on the title of Waiohau 1B (that is, Peraniko and Te Mumuhu) had no authority to be on the title – they had no authority to represent or speak on behalf of the people.

'Later word reached our people from Wellington. One of the parliamentary committees and the Supreme Court said "a great injustice" was inflicted upon Ngati Haka-Patuheuheu.

'Now do you remember Piper and Margaret Burt – Ngati Haka-Patuheuheu continued to occupy Te Houhi even though Harry Burt had purchased it.

'Piper then turned to the law to evict Ngati Haka-Patuheuheu from Te Houhi.

'We still continued to occupy our lands. Our school had been established; our homes as well as our ancestral house, Tama ki Hikurangi. "I ki etahi kaare nga Harry

Burt me nga Pakeha i mahi tinihanga.” Some people maintain that Harry Burt and the Pakehas did not commit fraud.

‘Our ancestors did not agree: they believed all Pakeha concerned were fully aware. Harry Burt, his wife, the farmers of Galatea, Piper, Margaret Beale, and even Preece and Mitchell, the surveyors.

‘To our ancestors the theft was well calculated – the theft of our lands was carefully crafted – they had seen the lands of Kuhawaea and Te Houhi were excellent lands – flat, access to water and food, and animals grew well.

‘In the contemporary context these same lands have farms worth in excess of One Million Dollars – Pakeha farms in Galatea and Te Houhi.

‘So we were evicted. According to the old people, they had to call for the police from Rotorua, soldiers from Auckland. They had guns to sack our ancestors, adults and children alike. It was a time of great fear for Ngati Haka-Patuheuheu.

‘The old people related that many people cried, old women wailed and lamented. The children were frightened – and even men cried as well as the elders, because they knew already they had lost the lands at Kuhawaea, at Matahina, at Tuararangaia, at Kaingaroa, and now Waiohau Te Houhi. It wasn't till much later that we lost Hikurangi/Horomanga.

‘Some of our chiefs and people were imprisoned in Auckland. James Grant (Karati) became the new owner of Te Houhi. He destroyed all our food crops, our gardens. He destroyed our homes, then sacked both animals and people. The Pakeha Grant did not agree to release our ancestral house Tama-ki-hikurangi.

‘He filled it instead with hay and horses until the Maori paid him, before he would allow us to come and fetch our house.

‘Tama-ki-hikurangi was broken down into bits and brought down to Waiohau on carts and floated some pieces down the Rangitaiki River. It was then reconstructed and re-established in Waiohau; that is how we came to stay in this valley.

‘It was some time later that our old people went up to exhume the bones of our ancestors buried at Te Houhi. It was the parents of some of these people sitting here who were involved in that exhumation.

‘The Government had little sympathy for us. They considered buying land for us as compensation for the 7,000 acres lost to the Pakeha. The Government bought 310 acres at Te Teko. Later, the Government conceded that land at Waiohau was taken wrongfully, and the quote there is “wrongfully dispossessed”.

‘Our ancestors didn't really want that land. They didn't want to stay on that land in the territory of Ngati Awa; it was not our land.’

Robert Pouwhare¹

1. Robert Pouwhare, brief of evidence, 14 March 2004 (doc C15(b)), pp 37–42

competed with one another, protected by their respective relationships with the tribes. Some individuals sold to both, but neither of them obtained close to a majority of interests.¹⁷

According to later claims, Burt did not always pay for shares in cash. He advanced goods, including alcohol and firearms. The significance of those claims, of course, was that a trust commissioner could not certify for registration any purchase involving liquor or guns. Burt did not deny providing alcohol to Tuhoe communities. He claimed, however, that it was never used as payment for land, and that the guns were stolen from his whare at Te Houhi. A later inquiry (1889) did not accept Burt's story about the theft. Nonetheless, it could not be proven to Judge Wilson's satisfaction that alcohol and firearms had been part of the purchase price. Ngati Haka Patuheuheu, on the other hand, never departed from their conviction that both had been used in the payment for individual interests.¹⁸

In any case, purchasing of interests stalled in 1884, in the face of tribal opposition. As Burt later testified, no one wanted to own up to having sold their share when faced with a tribal hui.¹⁹ Robert Pouwhare commented: 'In the dealings of the Native Land Court, some of our people sold leases, even land. Some didn't. Those who didn't sell staunchly believed in Te Kooti Arikirangi. Therefore, for those families who sold, they still feel great shame.'²⁰

Tuhoe and Ngati Haka Patuheuheu leaders struggled to prevent any more picking off of individual interests. Wi Patene was still supporting Burt at that stage, and he applied to the Native Land Court for a partition of the shares that had been sold. Other leaders opposed this move. A hui was held in April 1885, at which Mehaka Tokopounamu and other sellers repudiated their arrangements with Burt. The majority of the owners, who had not sold their shares, insisted on this course of action.²¹

Under the Native Land Act 1873, Burt's purchases were void. He had no legal recourse, not having been able to secure a majority of signatures. But the tribe did not want to go back on the word of various individuals (including chiefs such as Wi Patene and Tokopounamu). A mediation was arranged, with a committee consisting of Te Arawa leaders Retireti Tapsell and Aporo Te Tipitipi (independent of both sides), Henry Mitchell representing Burt's interests, and a group of Tuhoe chiefs. The result was an offer of 1,200 acres to Burt, representing what the committee considered his purchases to be worth.²²

17. Judith Binney, 'Encircled Lands, Part 2: A History of the Urewera, 1878-1912' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), pp 46-50; John Battersby, 'A Report on Waiohau 1 Block [1882-1920]' (commissioned research report, Wellington: Crown Law Office, 2004) (doc C1), pp 8-16

18. Binney, 'Encircled Lands, Part 2' (doc A15), pp 57-58, 328; Battersby, 'Waiohau 1' (doc C1), pp 14, 21, 24-44

19. Battersby, 'Waiohau 1' (doc C1), p 33

20. Robert Pouwhare, brief of evidence, 14 March 2004 (doc C15), p 29

21. Binney, 'Encircled Lands, Part 2' (doc A15), p 51

22. *Ibid.*, pp 51-52; Battersby, 'Waiohau 1' (doc C1), pp 41-42

Burt refused to accept this compromise, arguing that his shares amounted to 3,000 acres.²³ A second hui was held at Te Houhi in January 1886, involving almost all the leaders of Tuhoe. The committee sat for a second time, and on this occasion the decision was that Burt's money should be refunded. Shortly afterwards, the people placed Waiohau under the protection of Te Kooti, seeking his help in dealing with Burt. The prospect of a refund of the actual cash he had paid was not attractive to Burt, and he insisted that he be compensated for a variety of expenses as well. The sum of £1,200 was finally agreed but Tuhoe were unable to raise the money, so the committee's decision lapsed. Te Kooti did try to negotiate with Burt. According to Professor Binney, there was hostility between these two men who had once had a friendly relationship. Te Kooti's involvement only made Burt more determined.²⁴

In the face of tribal opposition, Burt filed applications for partition – occasionally under the pseudonym of Hare Rauparaha, but also listing the names of other owners. He forged a new alliance with the leaders of Ngati Manawa, who had been included in the ownership list for Waiohau 1. With their support, he was successful in getting a hearing and partition in September 1886.²⁵

11.5.1.3 *The 1886 hearing: fraud is committed*

In 1886, the Native Land Court partitioned Waiohau 1. A block of 7,000 acres (1B) was awarded to two Ngati Manawa chiefs, who sold it the next day to Burt's financial backer, John Soutter. Mr Soutter then sold Waiohau 1B to Burt's Pakeha wife, Margaret, in 1888. This part of the block included the Ngati Haka Patuheuheu kainga, Te Houhi, as well as their cultivations, their urupa, and the best farmland. A slightly larger block (7,464 acres) was awarded to all the former owners of Waiohau 1, seller and non-seller alike, although the sellers were to have less than a full share each. According to later inquiries by Judge Wilson of the Native Land Court, by a parliamentary select committee, and finally by the Supreme Court, this partition was obtained by fraudulent means. The parties in our inquiry agree that fraud was committed.

First, it is clear that Ngati Haka Patuheuheu were neither present nor represented at this hearing. Earlier attempts to hold a partition hearing had been adjourned in their absence. This time, however, Ngati Manawa chiefs claimed to speak for all the owners, and assured the court that a voluntary arrangement had been reached, giving Burt 7,000 acres as a result of his purchases. Judge Clarke accepted that these leaders represented the owners (both sellers and non-sellers). These chiefs and their tribal affiliations were known to him, and he had (so Burt later testified) a history of relying on their word. There were seven people in court,

23. Battersby, 'Waiohau 1' (doc C1), p 42

24. Binney, 'Encircled Lands, Part 2' (doc A15), pp 52–53, 59–60; Battersby, 'Waiohau 1' (doc C1), p 34

25. *Ibid*, pp 51–54; pp 8–10

including Burt, and only four of the seven were actual owners. There were no members of Ngati Haka Patuheuheu present.²⁶

The fraud is encapsulated in Burt's later description of the hearing:

The principal chiefs and owners of the land did come to the Court and a voluntary arrangement was come to by them which resulted in 7,000 acres being cut off. Judge Clarke having known these natives for 20 years (as he told me) was satisfied with the voluntary arrangement come to.

Harehare the principal chief was there (he being a non-seller) and protected the interests of the non-sellers, and agreed that this portion [Waiohau 1B, including Te Houhi] should be cut off by the Court, to represent the interests of those who sold to me.²⁷

Secondly, it was later proven from their own testimony that the Ngati Manawa chiefs were bribed to attend court and lie to the judge. Harehare Atarea and Te Mumuhu told Judge Wilson that Burt offered them 1,000 acres each, as well as a sum of money. Atarea was at first unwilling to support a claim for 7,000 acres, but the bribe overcame his reluctance. In his own view, he was the leading chief of the district, with authority to make the partition. But – and this is the crucial point – the court was told that a voluntary agreement had been reached among all the owners. Burt contested the evidence of Atarea and Te Mumuhu that he had promised them land and money, although conceded that he had paid their expenses, and that Atarea had at first opposed his claim for a full 7,000 acres.²⁸ Thirdly, giving notice to Ngati Haka Patuheuheu was entrusted to Burt. Apart from the *Kahiti*, which they claimed never to have received, Judge Clarke gave notices to Burt and his Ngati Manawa associates to deliver. Later, Burt and Te Mumuhu claimed to have handed over the Haka Patuheuheu notice to a neutral man named Te Wiremu. This man refused to appear at Judge Wilson's inquiry and give evidence as to whether he had – as Burt claimed – delivered the notice to Te Houhi.²⁹ Binney suspected that Ngati Haka Patuheuheu may have boycotted the hearing, but their own testimony was that they never received notice.³⁰

According to the Crown's witnesses in our inquiry, Dr Battersby and Mr Hayes, this fraudulent partition should have been prevented by protection mechanisms in the native land laws. It was clear to the court that Burt had not (and did not claim to have) purchased a majority of interests. Under the 1873 Act, partition for the purpose of sale required such a majority. The provision for voluntary

26. Battersby, 'Waiohau 1' (doc C1), pp 9–10, 16–17, 45–48; Robert Hayes, 'A Report on Certain Aspects of the History of the Waiohau Block' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L15), pp 9–12

27. HR Burt, statement for Judge Brabant, 10 December 1887 (Battersby, 'Waiohau 1' (doc C1), p16)

28. Battersby, 'Waiohau 1' (doc C1), pp 16, 35–36

29. Ibid, pp 9–12, 20–21, 22–23, 28, 31–32, 34–35, 45

30. Binney, 'Encircled Lands, Part 2' (doc A15), p 53

arrangements was not supposed to allow evasion of this rule. Even if that were not the case, there was in fact no voluntary arrangement among the owners. It was the invention of Burt and his Ngati Manawa allies, and easily proven to have no substance (as Judge Wilson later found).³¹ Also, Judge Clarke did not vet the actual purchase itself, although the law required him to do so, since it was clearly understood to be the cause of the partition.³² Judge Wilson's later inquiry in 1889 uncovered problems with Burt's supposed purchases and receipts. At the most generous estimate, Burt would have been entitled only to 4,128 acres, not 7,000.³³ Under the law, of course, he was strictly entitled to nothing at all, having not obtained a majority of signatures. Finally, the location of Burt's share was decided in the absence of Ngati Haka Patuheuheu. A full inquiry ought to have uncovered that their principal kainga and cultivations were located in the part sold to Mrs Burt (via Soutter).³⁴

11.5.1.4 The immediate aftermath of the fraud: Ngati Haka Patuheuheu apply for a rehearing, and a trust commissioner certifies the sale of Waiohau 1B

The purchase of Waiohau 1B was certified by a trust commissioner in 1887. As with the fraudulent partition, this ought not to have been possible. According to Crown counsel, it was an unavoidable failure. The court had awarded the land to two Ngati Manawa chiefs, who immediately sold it to Soutter. This sale was properly witnessed by Judge Clarke and his registrar. The commissioner had to accept that these were the legal owners, and therefore that this was the transaction he had to check. 'For this reason,' suggested Crown counsel, 'the protection mechanism located in the functions of the Trust Commissioners cannot be said to have failed.'³⁵

Claimant counsel took a broader view. Accepting the premise that the Native Lands Frauds Prevention Acts were supposed to protect Maori from fraud, then they clearly failed to do so. The commissioner did not inquire into the transactions between Burt and the individuals whose interests he claimed to have purchased. Neither did Judge Clarke. Yet these alienations were the basis for the partition that actually took place in 1886. Thus, there was no proper inquiry into the real transactions, some of which were (as Wilson later found) in breach of the Acts. Since none of the criteria provided for in the Acts (see chapter 10) were used to measure Burt's actual transactions, the protection mechanism failed.³⁶

In Te Urewera, we do not have a large number of private transactions by which to measure this failure. As we noted above, the usual process was for purchasers to obtain a trust commissioner's certificate before a partition hearing. The Supreme

31. Hayes, 'Waiohau' (doc L15), pp 4-13

32. *Ibid*, pp 7-8

33. *Ibid*, p 11

34. Battersby, 'Waiohau 1' (doc C1), pp 11, 23-25, 34, 36-37

35. Crown counsel, closing submissions (doc N20), topics 8-12, p 79

36. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 33; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 29

Court had queried this in 1885, suggesting that the commissioners could not certify something that did not legally exist.³⁷ In the case of Waimana in 1885, the same practice had been used as in Waiohau: the court partitioned the land and awarded part of it to the sellers, who then signed a new conveyance to the purchaser, which was the transaction checked by the trust commissioner. As we found above, it is difficult to see how the intent of the Native Lands Frauds Prevention Acts could be carried out in those circumstances.

The official sale of Waiohau 1B took place in court the day after the hearing. Some 12 days later, Ngati Haka Patuheuheu found out about what had happened.³⁸ Hira Te Mumuhu travelled to Te Houhi and showed them a map, explaining that they would have to move out of their homes.³⁹ They at once applied to the chief judge for a rehearing:

We were not aware of the adjudication by Harepati [Hare Pati: Harry Burt] and his people. No intimation of it reached us, nor any notice to inform us that we might know that there was to be an adjudication . . .

Let there be a Rehearing upon that investigation: because our dead, our houses, and our cultivations, are all gone into this division of the block to Harepati.⁴⁰

In addition to this application from Ngahoro Wahawaha (younger brother of Wi Patene), there was another application from Ngati Haka Patuheuheu, led by Hetaraka Te Wakaunua, Wi Patene, and Mehaka Tokopounamu.⁴¹ There was also an application from Harete Peraniko, which Burt protested against because she was one of the owners who had actually been in court.⁴² Harehare Atarea, still working with Burt at this point, sent an objection to any rehearing, claiming that notice had been given to Ngati Haka Patuheuheu, and also that his was the mana to make decisions about the land 'and all the tribes in my district', as Judge Clarke well knew.⁴³ Burt also wrote to object to the applications, denying that there was anything improper in his purchases (as had been alleged). He claimed that the chiefs and 'twenty other of the principal people of the Ngatimanawa and patuheuheu [*sic*] were at the Court all the time the subdivision was going on'. According to him, the rehearing application was a form of blackmail, to get more money out of him.⁴⁴

Chief Judge Macdonald consulted Judge Clarke, who advised:

37. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 455–456

38. Battersby, 'Waiohau 1' (doc C1), p 11

39. Binney, 'Encircled Lands, Part 2' (doc A15), p 56

40. Ngahoro Wahawaha to Chief Judge Macdonald, 23 September 1886 (Battersby, 'Waiohau 1' (doc C1), p 11)

41. Battersby, 'Waiohau 1' (doc C1), p 11; Binney, 'Encircled Lands, Part 2' (doc A15), p 54

42. Battersby, 'Waiohau 1' (doc C1), pp 11–13

43. *Ibid*, pp 11–12

44. Burt to Hammond, 15 December 1886 (Battersby, 'Waiohau 1' (doc C1), p 13)

The notification for the subdivision of the Waiohau Block was in the ‘Panui’ for a long time. Before the case was called on I took particular care that the parties interested should not be taken by surprise. I sent a special notification to the people that the application would be heard on a particular day. I was satisfied that a representative number of the tribe were present, sellers and non-sellers. The assessor and myself were satisfied that we had not the least difficulty arriving at the decision we did. I cannot recommend the application for a rehearing applied for.⁴⁵

Acting under the Native Land Court Act 1880, the chief judge did not give Tuhoe and Ngati Haka Patuheuheu an opportunity to be heard on their applications. Instead, he adopted Judge Clarke’s recommendation and refused a rehearing.⁴⁶ It is startling that the chief judge failed to hear those who sought a rehearing, relying simply on a report from the judge whose decision was impugned. We note that the legislation was later amended in 1888, to require the chief judge to hear applicants for rehearing in open court.⁴⁷ This amendment came too late for Ngati Haka Patuheuheu.

The Supreme Court found that the fraudulent partition would have been overturned at this point in events, if the rehearing had been granted.⁴⁸ It also found that the chief judge had not dealt with these applications in a proper manner. He ought not to have dismissed them without hearing the applicants – and one application he did not seem to have processed at all.⁴⁹ This failing was not limited to Waiohau. As we have seen in chapter 10, the same thing happened in Kuhawaea, where Chief Judge Davy commented that his predecessor had acted illegally in not hearing applicants before dismissing their applications for rehearing.⁵⁰

11.5.1.5 Fixing systemic problems: legislative remedies in 1890 and 1894

As we shall see, the Native Affairs Committee inquired into Ngati Haka Patuheuheu’s grievance in 1889. In its report, the committee identified ‘the want of security there is in Native Land Courts for the proper representation of the Native owners.’⁵¹ In the wake of this report, and of the Wilson inquiry, the Atkinson Government took action to fix the problem. In 1890, it tightened up the rules for voluntary arrangements. Such arrangements now had to be reduced to writing, and signed by everyone concerned. The court could not just accept the document as proof,

45. Judge Clarke, minute, 15 November 1886, on Wahawaha to chief judge, 23 September 1886 (Battersby, ‘Waiohau 1’ (doc C1), p12)

46. Battersby, ‘Waiohau 1’ (doc C1), pp12–14; Hayes, ‘Waiohau’ (doc L15), pp13–14; see also the Native Land Court Act 1880, s47.

47. Native Land Court Act 1886 Amendment Act 1888, s24

48. Binney, ‘Encircled Lands, Part 2’ (doc A15), p336

49. Hayes, ‘Waiohau’ (doc L15), pp13–14

50. Nicola Bright, ‘The Alienation History of the Kuhawaea No 1, No 2A, and No 2B Blocks’ (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc A62), p59

51. Native Affairs Committee, ‘Petition of Mehaka Tokopounamu and 86 Others’, 21 August 1889 (Gwenda Paul, comp, supporting papers to ‘Te Houhi and Waiohau 1B’, 8 vols, various dates (Wai 46 ROI, doc H4(b)), vol 2, p89)

‘It is much to be regretted that the Chief Judge of the Native Land Court did not deal regularly with the applications for a rehearing of the proceedings upon partition. If he had done so, and had made a patient investigation of the matter, the wrong which the Native defendants have undoubtedly suffered must have been established and rectified, as it should have been, by the Native Land Court at the time.’

Justice Edwards¹

1. *Beale v Tihema Te Hau* (1905) 24 NZLR 883 (SC), p 888

but had to check the authenticity of the signatures and satisfy itself as to the ‘bona fides of the arrangement.’⁵² Had this clause been in the law in 1886, the Waiohau fraud could never have happened. While we accept the Crown’s submission (outlined above) that the judge did not do his job properly, we consider that the committee rightly identified a major problem in the law. The Atkinson Government tried to fix it.

Was the 1890 amendment the correct solution? On that issue, we offer no opinion, as we have not been presented with examples of its working.

In 1894, a second systemic problem was addressed. In previous reports, the Tribunal has noted with approval the provision for voluntary arrangements, which allowed Maori a significant degree of control over the court’s decisions.⁵³ As we saw above, it enabled iwi to reach a negotiated agreement over the division and award of Tahora 2. Nonetheless, there were obvious risks involved. The court’s titles were final, and people who were absent might get left out, inadvertently or even by design. The content of applications for rehearing had made the Government aware of this problem for years prior to the Waiohau fraud in 1886.⁵⁴ The Turanga Tribunal concluded:

Thus, while it was reasonable for the court to rely on lists provided by Maori themselves in awarding of title, the dangers of mistake or abuse meant that there had to be a guaranteed right of appeal or rehearing for all who claimed to have been left off by their relatives. The provisions in the Act for rehearing contained no such guarantee. Indeed, it was not until 1894 (30 years after the court was created) that a full right of appeal was introduced.⁵⁵

52. Hayes, ‘Waiohau’ (doc L15), p 12

53. See, for example, Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 451–452; Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 777.

54. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 450–451

55. *Ibid*, pp 451–452

The Native Land Court Act 1894 created the Native Appellate Court, with a guaranteed right of appeal. The need for such an appeal was obvious earlier, yet it came too late to prevent the chief judge from dismissing applications for the rehearing of the Waiohau 1 partition, and thus the earliest and best chance of overturning the Waiohau fraud.

According to Crown counsel, Parliament was entitled to believe that land could not be brought under the Land Transfer Act by means of a court order obtained by fraud. If the court made a mistake, as Judge Clarke did in 1886, then ‘one [meaning legislators] would reasonably expect the mistake to be rectified in the appeal process.’⁵⁶ But there was no proper appeal process at the time, which was one reason why there was a systemic fault in the Native Land Court process.

11.5.1.6 *Who was at fault so far?*

As we have noted, the Crown accepts that the Waiohau fraud was a sorry saga of great grievance and prejudice to Ngati Haka Patuheuheu. Nonetheless, Crown counsel stressed that this Tribunal must focus on the degree to which responsibility lies with the Crown. In their view, the Waiohau fraud was a one-off event that was mainly the result of ‘human error’, not flaws in the legislation or the systems established by it.⁵⁷ In particular, counsel highlighted:

- ▶ the failure of the Native Land Court to ‘properly apply the law’ relating to partitions;
- ▶ the failure of the Native Land Court to ‘properly vet the Burt transaction that clearly underpinned the application for partition’; and
- ▶ the failure of the chief judge to ‘properly process the applications for rehearing.’⁵⁸

Had any one of these protection mechanisms ‘been as effective as they ought to have been and ordinarily were, a different outcome was probable.’⁵⁹ According to the Crown, the fault for this lay with Judge Clarke and Chief Judge Macdonald. The ‘failures of the Native Land Court . . . are not the actions of the Crown’, a point accepted by claimant counsel.⁶⁰

The claimants made two arguments in response. The first was that the laws and protection mechanisms failed to prevent the fraud. No matter which individual was responsible at any one point, the law had not provided effective protection. As we have just seen, two systemic flaws were identified at the time, requiring legislative amendment – these were the failure to provide a means of ensuring proper representation of owners in the court, and the failure to provide a guaranteed right of appeal. Also, in our view, the failure of the trust commissioner’s inquiry was a systemic matter. It resulted from awarding land to sellers who then executed ‘new’ transactions, concealing the nature and effects of the original (real) transactions.

Secondly, the claimants argued that the key issue in Treaty terms was not the

56. Crown counsel, closing submissions (doc N20), topics 8–12, p 83

57. *Ibid*, p 78

58. *Ibid*

59. *Ibid*, p 80

60. *Ibid*; see also counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36.

failings of the court or the personal failings of judges, but the Crown's duty to provide a fair and effective remedy, as soon as the failures were exposed. Counsel for Ngati Haka Patuheuheu suggested that the Crown's actions were 'unconscionable' because it did not remedy the failures of the Native Land Court system, but 'essentially allowed the matter to unfold over a period of around seventeen years with the final consequence that an entire community of people were evicted from their village'.⁶¹ In other words, the key issue for the Tribunal's inquiry is what happened after the fraud was exposed. We turn to that question next.

11.5.2 How and when was the fraud exposed?

SUMMARY ANSWER: The Crown's first departmental inquiry, by Judge Herbert Brabant in 1887, was inadequate. Brabant limited his inquiry to certain papers, and failed to uncover the facts. In particular, he did not check the original minutes for the award of title of Waiohau 1, and thus accepted the mistaken evidence of the court interpreter that Ngati Manawa were the owners of the land. In the meantime, Soutter sold Waiohau 1B back to Mrs Burt, who then sold half to Henry Piper, and took out a mortgage on the other half. In 1889, the Native Affairs Committee investigated a petition from Ngati Haka Patuheuheu. The committee found that a 'great injustice' had been inflicted upon the tribe, and recommended that the Government inquire further with a view to restoring the petitioners' rights. A second departmental inquiry, conducted by Judge Wilson, then exposed the full extent of Burt's problematic original transactions, and of the fraud perpetrated in the Native Land Court in 1886. Thus, a key opportunity for exposing the fraud was lost in 1887, permitting further dealings in the land, but the fraud was finally uncovered in 1889. We agree with the claimants that the key question then became: what remedy would the Crown provide?

11.5.2.1 Introduction

Given the claimants' argument that as soon as the Crown became aware of the 'failures in the processes under Native land legislation, it ought to have ensured a remedy was available to the community',⁶² the question arises: when did the Crown find out? As we noted above, the Chief Judge's improper handling of the rehearing applications was identified much later, by the Supreme Court in 1905. We did not receive evidence as to the extent of this problem in the processing of applications under the 1880 Act. We were told of a similar situation in Kuhawaea, revealed to the Crown in 1897. We are not in a position to say whether the Crown knew enough to have inquired about this problem sooner.

The fraud itself, however, and the 'great injustice' that Ngati Haka Patuheuheu had endured, was revealed much earlier.⁶³ That is the critical point.

61. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 30

62. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36 (Crown counsel, closing submissions (doc N20), topics 8–12, p 80)

63. The Native Affairs Committee came to the conclusion in 1889 that a 'great injustice' had been committed: Native Affairs Committee, 'Petition of Mehaka Tokopounamu and 86 Others', 21 August 1889 (Paul, supporting papers to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(b)), p 89).

11.5.2.2 The Brabant inquiry, 1887: the fraud remains concealed

After the chief judge dismissed the applications for rehearing, the first petition was sent to Parliament in 1887. This did not come, as might have been expected, from the community living at Te Houhi. Akinihi Te Tuhi, the wife of Burt's competitor, Alfred Preece, sent a petition instead. She claimed that Burt had purchased interests using alcohol and 'other illegal considerations', that he had not bought a majority of interests, that he had knowingly re-purchased some shares sold to Preece, and that she had not received notice of the hearing. Land belonging to non-sellers had been wrongly included in 1B, and the non-sellers had not been properly represented in court.⁶⁴

The Government asked a Native Land Court judge, Herbert Brabant, to investigate and report on the petition. This was a very limited inquiry. Brabant obtained a response from Burt, checked the panui and court minutes, and got an account of the hearing from the court interpreter.⁶⁵ Burt denied all the allegations. The key evidence came from the interpreter, who advised that printed notices had been circulated, and that 'the principal people of Ngati Manawa, the owners of the block were present in Court, and they asked for a subdivision.'⁶⁶ Brabant did not check the minutes of the 1878 hearing, and so did not uncover the fact that Ngati Manawa were not the owners of Waiohau 1. Nor did he query the mistaken statement of the interpreter, to the effect that Judge Clarke had 'as Trust Commissioner made the usual inquiries' when he witnessed the sale to Soutter in the foyer of his court.⁶⁷

Judge Brabant found that notice had been duly given, and that the court had done nothing wrong; it had 'only sanctioned a voluntary arrangement come to by the owners.'⁶⁸ It was possible that not all owners were present, but the judge said that he had no way of verifying this – unsurprisingly, on the basis of such a limited inquiry.⁶⁹ As to the allegations about Burt's purchases, Brabant simply found that counter-allegations had been made against Preece, and that it was one man's word against the other's. The judge did not seek additional evidence.⁷⁰

11.5.2.3 The Native Affairs Committee's inquiry, 1889: the fraud is exposed

The Government relied on the findings of Judge Brabant until Ngati Haka Patuheuheu sent a petition to Parliament in 1889.⁷¹ The petition was precipitated by the Burts. In 1888, Soutter sold Waiohau 1B back to Margaret Burt, who then tried to take possession of the land in 1889. Ngati Haka Patuheuheu were charged with trespass, but no information has been found about this case in the

64. Battersby, 'Waiohau 1' (doc c1), p 14

65. Ibid, pp 14–17

66. B Edwards, statement, 10 December 1887 (Battersby, 'Waiohau 1' (doc c1), p 17)

67. Battersby, 'Waiohau 1' (doc c1), pp 17–18

68. Ibid, p 17

69. Ibid, pp 17–18

70. Ibid, p 17

71. Ibid, p 18

Resident Magistrate's Court.⁷² The petition was brought personally to Wellington by Mehaka Tokopounamu. It had been signed by 87 people, including Wi Patene and his brother Ngahoro, and Tuhoë leaders Kereru Te Pukenui, Te Makarini Tamarau, and Te Wharekotua.⁷³ It alleged that Burt had only purchased a minority of shares, and that he had wrongly obtained 7,000 acres (including land belonging to the non-sellers, and with their permanent homes, cultivations, and wahi tapu). Ngati Haka Patuheuheu had not been present or represented when this happened, having received no notice. The tribe also claimed that the purchase money was inadequate, that it sometimes included liquor and guns, and that in some cases it was not paid at all. Signatures had not been properly witnessed. Perhaps most damningly of all, the petitioners alleged that a few Ngati Manawa individuals colluded with Burt to mislead the court, where they 'falsely stated . . . that a voluntary arrangement had been arrived at, and that a division shown on the plan produced should be given effect to'.⁷⁴

Burt sent a written defence of his actions, and also submitted his deeds and receipts for inspection. He accused Te Kooti of being behind the trouble: the tribe had refused to attend the court because Te Kooti 'had been over there and named Waiohau block, "Umu Taoroa" and that it would never be opened by me'.⁷⁵

As well as considering Burt's papers and the material gathered by Brabant, the committee examined Mehaka Tokopounamu and Te Korowhiti Te Maramarama. Tokopounamu gave evidence that Burt had paid partly in alcohol and guns, had failed to get his deeds properly witnessed, had purchased the shares of minors, and had bribed Ngati Manawa chiefs with promises of land and money.⁷⁶ The committee recommended that the Government institute a 'strict and searching inquiry', with a view to restoring the petitioners' rights. It concluded that 'in the main, the allegations made by [the] petitioners are correct, and a great injustice has been inflicted upon them'.⁷⁷ The committee added that 'they do not altogether hold the petitioners blameless in the matter'.⁷⁸ The heaviest censure was reserved for the Native Land Court system, which allowed 'reckless, illegal, and loose' purchases to be validated. The court minutes revealed to the committee that there was nothing to ensure the proper representation of owners, a matter which it urged the Government to correct. Also, the minutes showed how the court 'is frequently, though unwittingly, made the channel through which nefarious transactions are legalised'.⁷⁹

72. Ibid, pp 24–25. Dr Battersby could not discover the details of the resident magistrate's hearing.

73. Binney, 'Encircled Lands, Part 2' (doc A15), p 56

74. Native Affairs Committee, 'Petition of Mehaka Tokopounamu and 86 Others', 21 August 1889 (Paul, supporting papers to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(b)), p 89)

75. Battersby, 'Waiohau 1' (doc C1), p 20

76. Ibid, pp 19–25

77. Native Affairs Committee, 'Petition of Mehaka Tokopounamu and 86 Others', 21 August 1889 (Paul, supporting papers to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(b)), p 89)

78. Ibid

79. Ibid

11.5.2.4 Judge Wilson's inquiry, 1889: the fraud is confirmed

In response to the Native Affairs Committee's report, the Government referred the issue of Waiohau 1 to another Native Land Court judge for a further inquiry. As with Brabant's investigation, this was not an official Native Land Court hearing, but rather a departmental inquiry. Unlike Brabant, however, Wilson conducted a full inquiry and heard evidence from many witnesses. We do not propose to recite that evidence here; it has been summarised in detail in Dr Battersby's report.⁸⁰ We note simply that Wilson examined Burt, the Ngati Haka Patuheuheu petitioners, Harehare Atarea (who admitted that his actions had been secured by promises of land and money) and the Ngati Manawa chiefs, and one of the neutral 1885 mediators, Aporo Te Tipitipi. One witness who did not appear was Te Wiremu, the man supposedly tasked by Burt and Te Mumuhu with taking the notices to Te Houhi.⁸¹

After extensive examination of witnesses and documentation, Wilson made the following findings:

- ▶ While Burt had definitely distributed alcohol, it could not be proven that he had used it as part of the price for purchasing land.
- ▶ Burt's allegation that his guns had been stolen was proven untrue. Nonetheless, it was not possible to say from the conflicting evidence whether he had given the guns to individuals, or had used them as part of his purchase of their interests.
- ▶ Burt had acted as interpreter in his own transactions, which was not permitted under the law.
- ▶ Burt may have purchased interests without payment.
- ▶ Signatures for 17 individual interests were invalid, because they did not comply with legal requirements.
- ▶ Burt had purchased minors' interests, and in two cases had not obtained the approval of a Native Land Court judge, as required by law. There was nothing to prove that he had purchased the interests of deceased owners.
- ▶ Ngati Haka Patuheuheu had not boycotted the court as a result of Te Kooti's influence, since their applications for rehearing (only 11 days after the sitting) showed that they were prepared to use the court. Nonetheless, it could not be established definitely whether or not they had received notice.
- ▶ Ngati Haka Patuheuheu were not present or represented in court.
- ▶ Seven people were present in 1886 (including Burt), of whom only four were owners. Of those four, two had sold to Burt, and two had sold to Preece. These people were Ngati Manawa, when the court at its original hearing had awarded the block to Ngati Haka Patuheuheu. By their own evidence, the people in court had received inducements from Burt, and were under his influence. There was no voluntary arrangement between the owners, and so the court had no legal power to make the partition.
- ▶ Even if the court had had such a power, Burt's transactions were not certified by a trust commissioner, which they should have been. Then, even if a trust

80. Battersby, 'Waiohau 1' (doc c1), pp 25-43

81. *Ibid.*, p 45

commissioner had certified them, there were still only 43 properly attested signatures, which entitled Burt to no more than 4,128 acres at most.

- Finally, the sellers were included improperly in the title for Waiohau 1A, which had the effect of reducing the non-sellers' share even further.⁸²

11.5.3 Did the Crown do enough to provide a remedy while it still could?

SUMMARY ANSWER: The Crown argued that, while it might have communicated better with the Waiohau community, it nonetheless met all its Treaty and legal obligations to them. There were legal remedies available in 1890. Mrs Burt's land transfer title could have been overturned in the Supreme Court. Acting on the advice of its solicitor, the Government informed the Waiohau community that a caveat would be placed on the title, but that they should take action as soon as possible in the Supreme Court. The Native Minister promised every assistance to recover their rights, and offered the services of the Crown solicitor (Bell) in taking the case.

The parties in our inquiry agreed that timely action in the Supreme Court would have solved the problem, at least for Mrs Burt's half of the block. The Crown blamed the claimants' lawyer, Henry Howorth, for bad advice to his clients. According to Crown counsel, Howorth's advice was the reason that Ngati Haka Patuheuheu never took their case to court; and thus they gave up their best opportunity for overturning the fraud. In our view, the historical evidence does not support this interpretation. Rather, it is clear that Ngati Haka Patuheuheu simply could not afford the cost of litigation. They repeatedly asked the Crown to either take the case for them, or to help them pay for it, in 1890, 1891, 1894, 1895, and 1896. In a manner that the Crown's historian (Robert Hayes) found baffling, the Government abandoned its earlier conviction that the claimants had been defrauded and were deserving of help, and assumed a stance of strict neutrality between the tribe and the possessors of land transfer titles to their land. Even so, at times Mitchelson, Seddon, and Carroll all seemed to hold out hope of Crown assistance, only to take no real action.

Also, when it became clear that Ngati Haka Patuheuheu could not afford to take the case without help, the Government advised the district land registrar to withdraw the caveat, which permitted further dealings in Mrs Burt's half of Waiohau 1B. While the registrar had discretion, he clearly acted immediately on the Crown's advice that the caveat 'can now be withdrawn', giving it effect the same day that he received it. When the Methodist mission later foreclosed on Mrs Burt's mortgage, there was nothing to stop the sale of this land to Margaret Beale in 1904. Authorities agree that Supreme Court action became hopeless at that point, since Mrs Beale was a bona fide purchaser for valuable consideration, and thus protected by the Land Transfer Act. We accept Professor Brookfield's evidence that the Land Transfer Act would have protected Ngati Haka Patuheuheu if the land had come under it by registration, instead of by an order of the Native Land Court. Crown counsel submitted that Parliament, when enacting the Land Transfer Act

82. Ibid, pp 43–48; Hayes, 'Waiohau' (doc L15), pp 8–12

1885, was entitled to expect that a fraudulent court order could not be obtained, because it would be exposed on appeal. As we have seen, however, Maori did not have a guaranteed right of appeal, which parliamentarians well knew when passing the land transfer legislation.

Ngati Haka Patuheuheu's request for a special legislative remedy was rejected by the Crown in 1904. As a result, the case went to court and the tribe lost. In our view, the Crown was primarily responsible for this situation, because

- ▶ it knew that Ngati Haka Patuheuheu could not afford to go to the Supreme Court unaided;
- ▶ it refused their repeated requests for assistance over a number of years, despite Mitchelson, Seddon, and Carroll all holding out hope that it would in fact assist;
- ▶ it failed to provide appropriate protection for Maori land in the Land Transfer Act; and
- ▶ it failed to intervene with special legislation in 1904.

11.5.3.1 Introduction

From 1889 to 1904, changes took place in the titles for Waiohau 1B, gradually transferring the land along a chain to those whom the law would later consider bona fide (good faith) purchasers with indefeasible titles. In 1889, after receiving the Wilson report, the Crown solicitor thought that Burt's title could be overturned in the Supreme Court. He suggested that a caveat be lodged against it at once. Mrs Burt, however, had already mortgaged the block, and had sold half of it to Henry Piper. The Burts did not cease to be the owners of their half of Waiohau 1B, however, until 1903, when their mortgagee foreclosed. In 1904, the mortgagee sold the land to Margaret Beale. When the case finally came into the Supreme Court in 1905, it was her title (and not Burt's) that the claimants had to overturn. Their lawyer, Frederick Earl, asked the Crown for special legislation, realising that it was already too late for his clients. In 1905, the Supreme Court found in favour of Mrs Beale against Ngati Haka Patuheuheu. From 1889 to 1903, therefore, a critical window of opportunity existed, in which court action would likely have quashed Burt's title. The question for the Tribunal is: did the Crown do enough to provide a remedy while it still could?

11.5.3.2 The search for a remedy: courts and caveats

On receipt of the Wilson report, the Government's first impulse was to help. Mr Hayes stressed the reaction of the Native Minister:

I feel that the Natives have been defrauded, and although the parties have been clever enough to have several transactions [registered?] so as to make Land Transfer titles tolerably safe, I think it is a case that in the interests of justice the Government should take into the Supreme Court.⁸³

83. Mitchelson to Hislop, 17 December 1889 (Hayes, 'Waiohau' (doc L15), p 14)

SP Andrew Ltd (A TL, Y-019506-G)



Sir Francis Henry Dillon Bell, circa 1914. One of the most prominent New Zealand lawyers of his time, Bell was the Crown's solicitor at the time of Judge Wilson's inquiry, and he advised the Government that Burt's title to the Waiohau block could be successfully challenged.

He sought a legal opinion from the Crown solicitor, Francis Henry Dillon Bell, on whether there was a case to take to the Supreme Court, and whether a caveat should be lodged so as to prevent further dealings.⁸⁴

Bell's opinion was that the title 'can be successfully contested'. Even though title had been awarded to two Maori, who had then sold to Soutter, this was still 'fraudulent and illegal'. Also, his opinion was that the transfer to Soutter was void under the Native Land Administration Act 1886, which was in force at the time of the sale.⁸⁵ The fundamental fraud was the partition itself, which had been 'obtained through fraud and can be upset'. He recommended that the 'Natives who have been defrauded should be advised to apply to the Registrar under section 69 of the Land Transfer Act 1885 for rectification of the register'.⁸⁶ If that failed, then they should take their case to the Supreme Court to get the partition order and subsequent grants cancelled. If the court found that no actual fraud had taken place, it might be possible to get the European owners made 'trustees for the injured persons'.⁸⁷ In the meantime, a caveat should be lodged.⁸⁸

84. Hayes, 'Waiohau' (doc L15), p14

85. *Ibid.*, pp14–16. Battersby and Hayes disagreed as to whether Bell was correct about the effect of the Native Land Administration Act. It was never argued in the Supreme Court, so we have not considered the matter further: see Hayes, 'Waiohau' (doc L15), p16.

86. Hayes, 'Waiohau' (doc L15), p15. According to Professor Brookfield, the registrar would not have had the power to cancel a title in this manner: FM Brookfield, under cross-examination by Crown counsel, Waiohau Marae, Waiohau, 22 March 2004 (transcript 4.4, p20).

87. HD Bell to Under-Secretary, Native Department, 28 December 1889 (Hayes, 'Waiohau' (doc L15), p15)

88. Battersby, 'Waiohau 1' (doc C1), p49

Bell's advice to the Government was a crucial piece of evidence in our inquiry. Much hinged on it. A key part of it was the view that Maori, not the Crown, should take the case to court. As noted by Hayes, the Native Minister had 'contemplated that the Government would take up the case of challenging the validity of the title in the court', but the Native Department gave strong support to Bell's contrary view.⁸⁹ The Minister accepted their advice, and directed the department to 'take the necessary action.'⁹⁰

This action took two forms: first, the department forwarded the relevant papers to the Registrar General of Lands, asking that a caveat be placed on the block; and secondly, the department wrote to the Ngati Haka Patuheuheu petitioners, outlining Bell's opinion and advising them as to what they needed to do next. Both actions were crucial to the parties' view of the Crown's responsibilities.

Dr Battersby located three drafts of the letter sent to Mehaka Tokopounamu, and he was not sure which was the final version. In one version, the Native Minister promised 'all the assistance in his power to obtain their rights.'⁹¹ From the wording of Tokopounamu's petition in 1905, this was the version that was sent.⁹² In another draft, the Native Minister would 'endeavour to render the Natives . . . every assistance in order that they may obtain relief'. A third version stated that the Minister was 'anxious to assist the Maoris . . . and to afford them relief.'⁹³ In all three versions, Bell's opinion was set out, and an offer was made for them to employ Bell to take the case to the Supreme Court. The Government was careful to note that it could not advise on their choice of solicitor, which was a decision they alone could make.⁹⁴

Ngati Haka Patuheuheu responded to this letter in February 1890. After careful consideration, they decided to go to the Supreme Court at once.⁹⁵ They did not, however, accept the offer of Bell's services. According to Dr Battersby, the wording of the Government's letter made it clear that they would have to employ Bell in his private capacity.⁹⁶ The Te Houhi community approached Maori member of Parliament Hirini Taiwhanga instead, seeking to use his lawyer, Howorth.⁹⁷ In Professor Binney's view, this caused a significant change of heart on the part of the Government, which did not like either Taiwhanga or his lawyer. In July 1890, Carroll wrote to Ngati Haka Patuheuheu, warning them privately that the Government would not help them if they stuck with Howorth as their lawyer.⁹⁸

89. Hayes, 'Waiohau' (doc L15), p16

90. *Ibid*, p14

91. Battersby, 'Waiohau 1' (doc C1), p50

92. Mehaka Tokopounamu and others, petition, [August 1905] (Battersby, supporting papers to 'Waiohau 1' (doc C1(b)), section 5, p93)

93. Battersby, 'Waiohau 1' (doc C1), pp50-51

94. *Ibid*

95. *Ibid*, p51; Binney, 'Encircled Lands, Part 2' (doc A15), pp62-63

96. Battersby, 'Waiohau 1' (doc C1), p51

97. Hayes, 'Waiohau' (doc L15), pp18-19

98. Binney, 'Encircled Lands, Part 2' (doc A15), pp63-64

Hirini Taiwhanga and Henry Howorth

Hirini Taiwhanga was a Ngapuhi leader, fluent in English and experienced in Pakeha business, who was unpopular with various Governments right through from the 1870s to 1890. He led a Ngapuhi mission to England in the early 1880s to appeal to Queen Victoria against the New Zealand Government's treatment of Maori. He also promoted a Treaty-based union between tribes, including a covenant between Ngapuhi and the Kingitanga. He was elected a member of Parliament in 1887, and steadfastly promoted Maori management of their own affairs, introducing Bills and stonewalling Government legislation in an effort to empower Maori. His inveterate opposition to the Government gained him the reputation of a 'troublemaker'. Taiwhanga was re-elected to Parliament in 1890 but was already ill, and died in September of that year.¹

Henry Howorth was a Wellington solicitor who worked closely with Taiwhanga for several years, drafted his parliamentary Bills, participated in consultation hui with tribes across the North Island, and promoted his schemes for Maori self-management of their lands.²

Clearly, as Professor Binney noted, consultation with Taiwhanga and Howorth, and the hiring of Howorth as their lawyer, did Ngati Haka Patuheuheu a disservice with the Government, hence Carroll's private warning to them in July 1890.³

1. Judith Binney, 'Encircled Lands, Part 2: A History of the Urewera, 1878–1912' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), pp 63–64, 142; Claudia Orange, 'Hirini Rawiri Taiwhanga', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <http://www.dnzb.govt.nz>, last modified 22 June 2007

2. Commission Appointed to Inquire into the Subject of the Native Land Laws, 'Minutes of Evidence', 14 May 1891, AJHR, 1891, G-1, p 173

3. Binney, 'Encircled Lands' (doc A15), pp 63–64

In the meantime, there had been further developments. In January 1890, the Government redirected its request for a caveat to the district land registrar. He replied that Mrs Burt had sold the northern half of Waiohau 1B to Henry Piper in October 1889. Thus, he had lodged a caveat against Burt's remaining land, but not Piper's, and asked: 'Do you approve of my action[?]'⁹⁹ The department sought Bell's advice. Bell responded that the registrar was right not to put a caveat against Piper's title, and that the 'Natives should be advised if they have any claim against Piper to lodge a caveat themselves.'¹⁰⁰ The department told the Minister that a

99. District land registrar to Native Department, 10 January 1890 (Hayes, 'Waiohau' (doc L15), p 17)

100. Bell to Sheridan, 15 January 1890 (Hayes, 'Waiohau' (doc L15), p 18)

TAKE notice that I, Theophilus Kissling as District Land Registrar for the Provincial District of Auckland claiming estate or interest on behalf of Mehaka Tokopounamu and other members of the Patuheuheu Tribe Rotorua who allege that by reason of the improper action of HR Burt in obtaining from the Native Land Court a partition of a block of land of which Waiohau No 1B containing 7000 acres more or less forms a part they have been deprived of their interests in the said block of land forbid the registration of any Memorandum of Transfer or other instrument affecting the said land in Volume 55 folios [] and 70 of the Register Books at Auckland until this Caveat be by me withdrawn.’

Theophilus Kissling¹

1. Caveat 698, 13 January 1890, South Auckland registry (Robert Hayes, ‘A Report on Certain Aspects of the History of the Waiohau Blocks’ (commissioned research report, Wellington: Crown Law Office, 2005) (doc L15), pp 17–18)

caveat should not be put on Piper’s title, and he agreed. According to Mr Hayes, the Government did not carry out Bell’s recommendation to advise Ngati Haka Patuheuheu to seek a caveat themselves. As far as the documentary record shows, the Government also did not inform Ngati Haka Patuheuheu that the existing caveat only covered Burt’s half of the block.¹⁰¹

In February 1890, Piper tried to take possession of Waiohau 1B and was turned away by the claimants. On Piper’s information, Mehaka Tokopounamu and Te Whaiti Paora were charged with trespass under the Police Offences Act. They did not contest the charges, and were fined a shilling each plus costs (amounting all together to £5).¹⁰² Resident Magistrate Bush warned them that they were liable to further trespass charges, and that they should take their case to the Supreme Court at once. They replied that they were about to do so, on Howorth’s advice, and that they would always remain in occupation.¹⁰³

101. Hayes, ‘Waiohau’ (doc L15), p18. This was Mr Hayes’ conclusion, after reviewing the documentary evidence. Ngati Haka Patuheuheu were informed that the Government had asked for a caveat ‘against any further dealings with the land’: Lewis to Tokopounamu, 8 January 1890 (Gwenda Paul, comp, supporting papers to ‘Te Houhi and Waiohau 1B’, 8 vols, various dates (Wai 46 ROI, doc H4(c)), vol 3, p96). There is, however, no record that they were ever informed that the caveat was not entered against Piper’s half of the block. See, in particular, the account in Ngati Haka Patuheuheu’s 1905 petition: Gwenda Paul, comp, supporting documents to ‘Te Houhi and Waiohau 1B’, 8 vols, various dates (Wai 46 ROI, doc H4(d)), vol 4, pp93–94.

102. Bush to Under-Secretary, Native Department, 27 February 1890 (Paul, supporting papers to ‘Te Houhi and Waiohau 1B’ (Wai 46 ROI, doc H4(c)), pp128–129)

103. Hayes, ‘Waiohau’ (doc L15), p19

Unknown (ATL, General Assembly Library, parliamentary portraits, 35mm-00098-ff)



Hirini Rawiri Taiwhanga, Ngapuhi leader and member of Parliament for Northern Maori, circa 1887. Ngati Haka Patuheuheu approached Taiwhanga in 1890 to seek the services of his lawyer, Henry Howorth, as their representative to the Supreme Court. This move did not endear the claimants to the Government, which had long considered Taiwhanga something of a thorn in their side.

Ngati Haka Patuheuheu then faced a serious dilemma. It is clear from the historical evidence that they could not afford the cost of litigation. Their situation was precarious in the 1890s and the first decade of the twentieth century. There was nothing spare to cope with the effects of a series of natural disasters in these decades. The constable who delivered Supreme Court summonses in 1905 had to deliver emergency donations of seed potatoes at the same time.¹⁰⁴ When they were finally forced into the court at that time, they later had to sell their cattle – to sell ‘everything’ – to pay their lawyer.¹⁰⁵ For this community, the cost of litigation in the superior courts was something that they simply could not afford. As Bush (and others) pointed out, however, nor could they afford not to.

As a result, Ngati Haka Patuheuheu made an important decision in April 1890. If the case was to go to court, then they must get the Government’s help. After all, they had an assurance that the Native Minister would do everything in his power to help them get a remedy. They approached G F Richardson, the Minister of Lands, asking the Government to ‘take the case for them.’¹⁰⁶ They told him that they could not afford to do so themselves. Richardson’s response was confused. He misunderstood Bell’s opinion, and advised them to apply to the chief judge of the

104. Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 349–350

105. Bernadette Arapere, ‘A History of the Waiohau Blocks’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), p 51

106. Hayes, ‘Waiohau’ (doc L15), p 20

Native Land Court first.¹⁰⁷ In the meantime, he suggested to the Native Minister that their request was ‘worth careful consideration’: ‘could not the Govt see its way to pay the costs of a Supreme Court action on behalf of the Natives, being recouped say by land.’¹⁰⁸ Richardson was anxious to avoid trouble if it came to a confrontation between the residents of Te Houhi and the new owners.¹⁰⁹

This suggestion was killed by the Native Department. Lewis advised that the approach to Taiwhanga and Howorth ‘seems to shut out the Govt from assisting them as proposed to bring their case into the Supreme Court as the matter is now between them & the Solicitor whom they have selected’. If Howorth ‘declines the case or takes no action’, then Lewis or Bush could meet with Maori and ‘explain the position to them.’¹¹⁰

Unaware of this, Ngati Haka Patuheuheu applied to the chief judge of the Native Land Court, as they had been advised to do by the Minister of Lands, believing that they were supposed to seek a rehearing of Waiohau 1. The chief judge was confused, since no rehearing was possible for Waiohau.¹¹¹ Having completed this step, Tokopounamu approached the Government a second time, asking if it had taken any action (as requested) over Waiohau.¹¹² This was a crucial point in events. T W Lewis wrote to the Minister: ‘Recommended that the writer be informed that the Govt find it can take no action in the matter.’¹¹³ Mitchelson agreed, and a brief response to that effect was sent to Ngati Haka Patuheuheu.¹¹⁴ Approaches from Piper and Burt, asking the Government to intervene on their behalf, got the same reply.¹¹⁵

Thus, the Government had moved from an initial conviction that Ngati Haka Patuheuheu had been defrauded, and offering ‘every assistance’, to a position of neutrality between private citizens. We also accept that while the Government could not interfere between lawyer and client, this was never explained to the tribe. Nor, in our view, does it suffice to explain the change from a willingness to help, and to consider the possibility of taking the case or at least paying for it, to a stance of determined neutrality. Mr Hayes was puzzled by the Government’s change of heart, commenting: ‘It is difficult to make sense of Lewis’ recommendation, let alone Mitchelson’s approval for that course of action.’¹¹⁶ The Government’s change of policy was summarised by Lewis in October 1890:

107. Hayes, ‘Waiohau’ (doc L15), p 20

108. Richardson to Mitchelson, 24 April 1890 (Hayes, ‘Waiohau’ (doc L15), p 20)

109. Hayes, ‘Waiohau’ (doc L15), p 20

110. Lewis to Mitchelson, 2 May 1890 (Battersby, supporting papers to ‘Waiohau 1’ (doc c1(b)), section 4, pp 134–135)

111. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 63; see also Te Korowhiti Te Maramarama, Wi Patene and others to chief judge, 26 May 1890 (Gwenda Paul, comp, supporting papers to ‘Te Houhi and Waiohau 1B’, 8 vols, various dates (Wai 46 RO1, doc H4(f)), vol 6, pp 106–107)

112. Hayes, ‘Waiohau’ (doc L15), p 21

113. Lewis to Mitchelson, 19 July 1890 (Hayes, ‘Waiohau’ (doc L15), p 21)

114. Hayes, ‘Waiohau’ (doc L15), p 21

115. Battersby, ‘Waiohau 1’ (doc c1), pp 52–53

116. Hayes, ‘Waiohau’ (doc L15), p 21

The Recommended First Step: Applying to the Registrar under Section 69

Section 69 of the Land Transfer Act 1885 provided for the registrar to cancel or correct any 'certificate of title or other instrument' that 'has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained'.¹ The Crown solicitor, HD Bell, thought that Ngati Haka Patuheuheu could apply to the registrar to cancel Burt's title under this section of the Act. He was not aware that half of the block had been sold to Piper.² As far as we are aware, no action was taken on this recommendation. We have no information as to why it was not pursued. We note Professor Brookfield's doubt that the registrar's power applied in the circumstances of Waiohau.³

1. Land Transfer Act 1885, s69

2. Robert Hayes, 'A Report on Certain Aspects of the Waiohau Block' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L15), pp 15–18

3. F M Brookfield, under cross-examination by Crown counsel, Waiohau Marae, Waiohau, 22 March 2004 (transcript 4.4, p20)

It was the intention originally of the Government to assist the Natives in Supreme Court action but they did not act upon the advice then given to them and after careful enquiries subsequently made it was decided by the Native Minister that the Government could not interfere on either side.¹¹⁷

The result was inevitable. Unable to afford Supreme Court litigation, Ngati Haka Patuheuheu faced further trespass charges in September 1890.¹¹⁸ This time, Bush reported that the tribe no longer intended to take a case to the Supreme Court, but to remain in occupation and leave it for Burt or Piper to take action. This was apparently the advice they had received from Howorth.¹¹⁹ As Professor Brookfield noted in cross-examination, this was not good advice.¹²⁰ Bush's report implied that the Government must take action if it wanted to avoid a serious confrontation between the parties.¹²¹

117. Lewis to Morpeth, 27 October 1890 (Battersby, supporting papers to 'Waiohau 1' (doc c1(b)), section 4, p162)

118. The charges were the result of 'further informations . . . laid against natives for trespassing on Waiohau': Bush to Under-Secretary, Native Department, 17 September 1890 (Paul, supporting papers to 'Te Houhi and Waiohau 1B' (Wai 46 RO1, doc H4(c)), p 148)

119. Hayes, 'Waiohau' (doc L15), pp 22–23

120. F M Brookfield, under cross-examination by Crown counsel, Waiohau Marae, Waiohau, 22 March 2004 (transcript 4.4, p 20)

121. Battersby, 'Waiohau 1' (doc c1), p 54

The Government's response to Bush's report was not what he might have expected. Despite its supposed new stance of neutrality, the Government decided that if the tribe would not go to court (knowing that they could not afford to), then there was no point in keeping the caveat on Burt's title. The land should be freed up for use in the market. If fraud was proven later, the Government would simply compensate whichever party lost with money from funds set aside under the Land Transfer Act.¹²² This might have been in keeping with a neutral stance, but it points to a remarkable lack of concern with the fate of Ngati Haka Patuheuheu, should they lose in court. Mitchelson approved Lewis' recommendation to remove the caveat. Lewis then wrote to the registrar, informing him that the 'Government sees no reason to continue the caveat which you were requested to enter against any dealings with Waiohau 1B Block which can now be withdrawn.'¹²³ Dr Battersby interpreted this as an instruction.¹²⁴ The registrar withdrew the caveat the same day that he received the letter.¹²⁵ Ngati Haka Patuheuheu never found out that it had been lifted.¹²⁶

At this point, in November 1890, Ngati Haka Patuheuheu now approached the Crown solicitor in Auckland. Despite the earlier rebuff from the Government, they wrote: 'We give you this case to conduct in the Supreme Court according to its rules.' A quick response was requested.¹²⁷ Their letter was referred to the Native Department, and the Government's response was that it was now too late.¹²⁸ In keeping with its new policy of neutrality, Lewis advised that 'their letter has arrived too late for the Government to give them any assistance.'¹²⁹ Privately, to the Native Minister, Lewis reiterated that the Government should not assist, and would 'only be throwing their money away by taking action in the Supreme Court.'¹³⁰ Howorth, it seems, was no longer the issue.

Ngati Haka Patuheuheu did not give up on seeking Government help. With the change of Government in 1891, the tribe tried again. The Liberals took office in January of that year. In August, Mehaka Tokopounamu and Wi Patene wrote to the new Native Minister, Alfred Cadman, outlining the history so far and asking the Government to 'suppress all difficulties' regarding Waiohau.¹³¹ Lewis' advice appears to have been the key determining factor. He replied to Ngati Haka Patuheuheu: 'Mr Mitchelson's decision was that the Government would not take

122. Battersby, 'Waiohau 1' (doc c1), p 54; Hayes, 'Waiohau' (doc L15), p 23

123. Lewis to district land registrar, 4 November 1890 (Hayes, 'Waiohau' (doc L15), p 23)

124. Battersby, 'Waiohau 1' (doc c1), p 54

125. Hayes, 'Waiohau' (doc L15), p 23

126. Binney, 'Encircled Lands, Part 2' (doc A15), p 340

127. Mehaka Tokopounamu and others to Crown solicitor, 21 October 1890 (Hayes, 'Waiohau' (doc L15), pp 23-24)

128. Hayes, 'Waiohau' (doc L15), p 24; Battersby, 'Waiohau 1' (doc c1), pp 54-55

129. Lewis to Kelly, 4 November 1890 (Battersby, supporting papers to 'Waiohau 1' (doc c1(b)), section 4, p 169)

130. Lewis to Mitchelson, 4 November 1890 (Battersby, 'Waiohau 1' (doc c1), p 55)

131. Battersby, 'Waiohau 1' (doc c1), p 55

any action in the matter and that decision of his cannot be altered.¹³² This was the Government's 'unwavering position' from 1891 to 1905.¹³³ Dr Battersby commented: 'Ngati Haka Patuheuheu were undoubtedly frustrated over government inaction and at the uncertainty continuing in the wake of the non-settlement of the issue.'¹³⁴ At the same time, the Government also refused to help Piper or Burt, who were seeking its assistance.¹³⁵

Ngati Haka Patuheuheu did not give up. As we have seen in chapter 8, the Government's attention in the early 1890s was focused on the Ruatoki survey crisis, and opening Te Urewera for mining. The Waiohau community were not big players in these affairs, although Mehaka Tokopounamu did try to arrange the Governor's visit in 1890. Then, in 1894, Seddon and Carroll visited Te Urewera, followed by negotiations in Wellington in 1895 that resulted in setting up the Urewera District Native Reserve the following year (see chapter 9).

Mehaka Tokopounamu tried to use these opportunities to get the Government's help for Te Houhi. He raised the issue during the Premier's visit to Galatea in 1894. James Carroll, who had been a member of the 1889 select committee, advised Seddon that 'an injustice has been done'. Seddon promised to look into it:

and if, after going carefully through the papers, I find that an injustice has been done, then I say the wrong shall be removed. I believe the wrong done in the first place was not done by Mr Piper, but that you are suffering from the wrong done by others. But all the same, if the land has been wrongfully taken from the proper owners, that wrong should be redressed. I believe the late Government did offer, if you took it to the Supreme Court, to assist you with money to get it through the Court, but you were led to take a course advocated by one of your own race [presumably a reference to Hirini Taiwhanga]. However, I will look into it, and if I can adjust the matter for you, as between the parties, I shall be only too glad to put it right.¹³⁶

Seddon's assurances were not followed by any action. In 1895, Tokopounamu visited Wellington and tried to get 'the question of title to Te Houhi lands settled by the Premier's directions', again without success.¹³⁷ As part of the Urewera delegation of that year, sent to negotiate a wide-ranging settlement with the Government, he did get what appears to have been a promise of help from Seddon. Tokopounamu told the Premier of the 1890 letter, promising Mitchelson's assistance. Piper soon found out that the Government was once again considering

132. Lewis to Tokopounamu, 14 September 1891 (Battersby, supporting papers to 'Waiohau 1' (doc c1(b)), section 4, p 191)

133. Battersby, 'Waiohau 1' (doc c1), p 55

134. *Ibid*

135. *Ibid*, pp 52–53

136. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, p 64 (Battersby, 'Waiohau 1' (doc c1), p 60)

137. Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A119), p 108

funding a case to the Supreme Court. Carroll replied to his query about it, that everything waited on a final decision from Seddon.¹³⁸

Ngati Haka Patuheuheu tried once more in March 1896, when the Governor visited Te Urewera. This time, they met with Carroll (who was effectively Seddon's deputy as Native Minister). A newspaper report of the meeting recorded: 'It was agreed to take the matter into the Supreme Court, if the Government were paid part of the expenses.'¹³⁹ No action followed this agreement, although the Government's school inspector noted soon after that the tribe had 'great hopes, through a recent development' that the problem would finally be settled.¹⁴⁰ Professor Binney suggested that Ngati Haka Patuheuheu might not have been able to raise their share of the costs, or Carroll might not have been able to get his ministry's approval.¹⁴¹ We note, however, that the tribe was now resigned to paying the Government back in land.

Mehaka Tokopounamu wrote to Seddon in December 1896:

We are still waiting on you now with reference to Waiohau. What is your decision with regard to our conversation at Wellington [in 1895]. When I asked you if the Government would assist the Maoris and provide a lawyer, and that the Government should undertake to assist me and my hapu, – In replying you said, 'Yes.' I will look into Mr Seddon's (Sheridan's) [letter] and see what was said. On my return here I looked up that letter of Mr Seddon (Sheridan) dated the 8th of January, 1890, and find that it is as I stated to you at Wellington. I feel that if you had sent me your consent (to that proposition) I would have informed you of the acres that I would give you for your regard to us. Friend, please let me know your word on this matter.¹⁴²

No response to this letter has been found. The Government took no action and, it appears, Ngati Haka Patuheuheu finally gave up on trying to get its help. Without that help, the status quo remained: they could not afford to take a case to the Supreme Court, and neither Burt nor Piper were willing force the issue in litigation.

From 1897 to 1903, nothing changed at Te Houhi. Ngati Haka Patuheuheu remained in possession, Piper and the Burts were unable to go onto the land, and neither side appealed to the courts. There was, however, a significant development

138. Binney, 'Encircled Lands, Part 2' (doc A15), p 328

139. *New Zealand Herald*, 9 March 1896 (Battersby, 'Waiohau 1' (doc c1), p 60)

140. Battersby, 'Waiohau 1' (doc c1), p 61

141. Binney, 'Encircled Lands, Part 2' (doc A15), p 330

142. Tokopounamu to Seddon, 11 December 1896 (Battersby, supporting papers to 'Waiohau 1' (doc c1(b)), sec 4, p 216). The references to Seddon and Sheridan appear to be errors. Tokopounamu referred to 'Seddon'. The Native Department translator corrected this to 'Sheridan'. The file drafts of the 8 January 1890 letter were written by T W Lewis, the Under-Secretary for the Native Department, on behalf of Edwin Mitchelson, the Native Minister at the time. As Dr Battersby noted (see above), we do not have a copy of the final version of this letter. It is possible that it was sent by Sheridan on behalf of Lewis, or the translator may have mistaken Sheridan's position in 1890.

as far as the Government was concerned. In 1902, it passed the Land Titles Protection Act. By the terms of this Act, the Turanga Tribunal stated:

no Crown grant, court order or other instrument relating to Maori land, could be called into question in proceedings in any court if the grant, order, or instrument was more than 10 years old, without the express consent of the Governor in Council. Effectively, that meant Cabinet could veto any litigation by Maori in respect of native land legislation from the 1870s and 1880s – the period during which the law was most confused and least principled.¹⁴³

Ngati Haka Patuheuheu could no longer take their case to court, even if they could afford to, without first getting an Order in Council.

The stalemate over Te Houhi was finally broken in 1904. Burt's land had been mortgaged ever since 1889. In 1903, the mortgagee (the Methodist mission) foreclosed. In 1904, Margaret Beale purchased this half of Waiohau 1B, planning to resell at a profit to a local farmer soon after.¹⁴⁴ Now that the perpetrators of the fraud were no longer owners of the land, the prospect of Ngati Haka Patuheuheu winning in court was greatly reduced, because of the protection that the Land Transfer Act gave to non-fraudulent title holders. Mrs Beale served a notice on the Waiohau community to vacate by the end of June. One of their leaders, Mika Te Tawha, who was also a member of the Mataatua Maori Council, appealed to the Government for help in May 1904. They also engaged a lawyer, Frederick Earl, finally convinced that they would have to divest their community of assets in order to fight it out in court.¹⁴⁵ Te Tawha pointed out that Te Houhi was their principal kainga, that they were a progressive people trying to do what the Government wanted, and had just rebuilt wooden houses to bring them up to Maori Council standards. This was a community, in other words, willing to help itself and deserving, as they claimed, of the Liberal Government's help.¹⁴⁶ Earl followed this appeal with a request that the Government settle the question by remedial legislation instead of a court battle.¹⁴⁷

No help was forthcoming, with one exception. The Government did agree to issue an Order in Council under the 1902 Act, allowing Ngati Haka Patuheuheu to contest the original titles in court. In response, Beale's lawyers objected that 'persons in their position with titles assured by a Land Transfer Title should be put in a position of having to defend those titles against the attacks of impecunious natives.'¹⁴⁸ They asked for the Order in Council to require Ngati Haka Patuheuheu

143. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 467

144. Battersby, 'Waiohau 1' (doc c1), p 62

145. Binney, 'Encircled Lands, Part 2' (doc A15), pp 333-334

146. Mika Te Tawha to Carroll, 19 May 1904 (Battersby, supporting papers to 'Waiohau 1' (doc c1(b)), section 4, p 239)

147. Battersby, 'Waiohau 1' (doc c1), p 63

148. Stafford, Treadwell, and Field to under-secretary for Justice, 2 February 1905 (Battersby, 'Waiohau 1' (doc c1), p 65)

to provide security for the payment of costs. The Government refused, noting that that would simply put justice beyond their reach.¹⁴⁹

The famous case in the Supreme Court of *Beale v Tihema Te Hau* came too late in the chain of titles for Ngati Haka Patuheuheu to win. Had they succeeded in getting Government assistance to challenge the titles while Burt was still an owner, it seems clear that they would have won their case. But Mrs Beale was an innocent party, who knew of the Maori occupation of Waiohau but had not, the court found, known of the fraud behind Burt's title. Thus, the Land Transfer Act protected her in possession of her title. According to Professor Binney, the broader historical evidence suggests that Margaret Beale bought the land knowingly, but there is nothing definite to support this suggestion.¹⁵⁰ Justice Edwards was sympathetic to Ngati Haka Patuheuheu, whom he felt had suffered a 'grievous wrong'. He noted that the original partition and title had been obtained by fraud, and that the applications for rehearing had been improperly dismissed.¹⁵¹ But the law, as it stood, could not protect them. The Land Transfer Acts allowed a bona fide purchaser to obtain an 'indefeasible title at the expense of the persons defrauded.'¹⁵² Ngati Haka Patuheuheu, they were told, had lost everything and would have to get off the land, unless the Government intervened to help them at this very final stage.

11.5.3.3 Who was at fault? The Crown's concessions

It is helpful at this point to reiterate the Crown's concessions, which all related to the period from 1890 to 1905. The Crown's position was that it had failed to:

- ▶ 'adequately implement the advice of Bell', when it failed to inform the Waiohau community that a caveat had not been lodged against the title of the part sold to Piper;
- ▶ find out whether the Waiohau community intended to take legal proceedings to test the validity of the Burt and Piper titles before 'inviting' the district land registrar to withdraw the caveat;
- ▶ tell the community that it had invited the registrar to withdraw the caveat 'because of their reported decision not to institute proceedings,' and that the registrar had done so; and
- ▶ meet with the community 'face to face and discuss with them both the necessary limits on what assistance the Crown could provide and reiterate the soundness of Bell's advice and set out the potential consequences in failing to take action as recommended by Bell.'¹⁵³

In addition, the Crown conceded that it 'took upon itself a role in relation to the community when acting upon Bell's advice. The Crown accepts that it failed to communicate all that it should have to the community.'¹⁵⁴ But the role undertaken

149. Battersby, 'Waiohau 1' (doc c1), p 65

150. Binney, 'Encircled Lands, Part 2' (doc A15), pp 332-339

151. *Beale v Tihema Te Hau* (1905) 24 NZLR 883, 887-891

152. Crown counsel, closing submissions (doc N20), topics 8-12, p 83

153. *Ibid*, p 79

154. *Ibid*, p 80

by the Crown at the time ‘falls short of a fiduciary duty to the community.’¹⁵⁵ Offering ‘every assistance’, as it did in January 1890, created a relationship that required it to keep the community ‘fully informed on its actions and intentions and the reasons for the same’. It did not extend to ‘providing advice on what action should be taken, or which solicitor to retain, or necessarily providing financial assistance. The limits of its assistance were clearly stated.’¹⁵⁶

The Crown argued that it had done enough to carry out its Treaty and legal obligations: the main failures were not its responsibility.¹⁵⁷ In particular, it singled out Howorth’s advice to Ngati Haka Patuheuheu as the overwhelming reason why no court action was taken. It also denied any responsibility for the district registrar’s decision to remove the caveat. According to Crown counsel, the registrar should have carried out his own independent checks as to whether the caveat should be removed.¹⁵⁸

These arguments are central to our evaluation of the claims. We turn next, therefore, to consider who was at fault in the long period between Mitchelson’s offer of assistance in 1890 and the decision in *Beale v Tihema Te Hau and Others* in 1905.

11.5.3.4 Who was at fault? The caveat

The issue of the caveat may be disposed of briefly. We accept that the district land registrar could not be directed by the Crown, and that he should have carried out his own, independent, checks before removing the caveat.¹⁵⁹ The evidence is clear that he did not do so, since he removed it on the same day that he received the Crown’s letter. We cannot say for certain, however, what facts the registrar took into account, other than the Crown’s advice that the ‘caveat can now be withdrawn’¹⁶⁰ because Ngati Haka Patuheuheu were not going to contest the title in court. It is not possible to say how far he exercised any discretion in the matter. We also accept, as Crown counsel pointed out, that Ngati Haka Patuheuheu’s decision not to take the case to court (if they had, in fact, made such a decision) was not a sound reason for removing the caveat.¹⁶¹

Nonetheless, the material facts are that:

- ▶ the caveat was put on Burt’s title at the request of the Crown;
- ▶ at the same time, the district land registrar specifically sought the Crown’s approval for not putting a caveat on Piper’s title;
- ▶ after consulting Bell, the Crown agreed that no caveat should be put on Piper’s title; and
- ▶ the caveat on Burt’s title was removed immediately upon the Crown’s request.

155. Ibid

156. Ibid

157. Ibid, pp 83–84

158. Ibid, pp 79–84

159. Ibid, pp 80–81

160. Lewis to district land registrar, 4 November 1890 (Hayes, ‘Waiohau’ (doc L15), p 23)

161. Crown counsel, closing submissions (doc N20), topics 8–12, pp 80–81

Extract from the 1905 Petition of Ngati Haka Patuheuheu

*F*OLLOWING the said [Wilson] report the Under-secretary for Native Affairs wrote to your petitioners under date 8th January 1890 stating (inter alia) that the Crown Solicitor had advised the partition had been obtained by fraud and could be upset and that the Registrar-General of Land had been instructed to enter a caveat against further dealings[;] also that the Native Minister desired to give the Natives who he considered had been wronged all the assistance in his power to obtain their rights.

A caveat was accordingly entered against the title of the said land but unknown to your petitioners in November of the same year it was withdrawn for what reasons your petitioners know not.

Following the withdrawal of the caveat it now appears although your petitioners were unaware of the fact until lately that several dealings with the title took place and according to the Register the title of the said land is now vested in Mrs Margaret Hilton Beale as to three thousand five hundred acres and one Henry Piper as to the other three thousand five hundred acres . . .¹

1. 'Petition of the Undersigned Members of the Patuheuheu Ngatimanawa and Te Urewera Tribes Resident in Galatea in the Bay of Plenty District', August 1905 (Gwenda Paul, comp, supporting papers to 'Evidence on Te Houhi Village and Waiohau 1B', 8 vols, various dates (Wai 46 001, doc H4(d)), vol 4, pp 93-94)

To say that the Crown was not responsible because it did not actually remove the caveat itself, and to blame the district registrar for carrying out the Crown's request, does not excuse the Crown from having requested its removal in the first place. It was clearly the Crown that prompted this sequence of events. The removal of the caveat had serious consequences. It allowed Margaret Beale to buy Burt's land and disclaim any knowledge of problems with the title. While we accept that the registrar had discretion, he was prompted by the Crown and acted as it had signalled. Meanwhile, Ngati Haka Patuheuheu continued to live at Te Houhi, unaware that they no longer had the protection afforded by the caveat.

11.5.3.5 Who was at fault? The failure to take the case to the Supreme Court in time

According to the Crown, the main responsibility (in this period) for the 'tragic loss' of Ngati Haka Patuheuheu's land lay with Howorth. His actions were only 'marginally' second to the 'unfathomable performance of the Native Land Court'.¹⁶²

162. Crown counsel, closing submissions (doc N20), topics 8-12, pp 81-82

Bell's advice showed that the partition order and resultant title were obtained by fraud, and he was 'properly' confident of upsetting that title by litigation. 'All conveyancing solicitors,' we were told, 'would or should have been aware of a growing body of case law that gave every prospect of upsetting Burt's title.'¹⁶³ The Crown relied on Professor Brookfield's criticism of Howorth's advice, and considered it the key reason why litigation came too late to save Te Houhi.¹⁶⁴ The caveat was not a long-term solution: it had to be combined with speedy action in the courts. 'To do nothing – as Howorth advised – was not merely poor but arguably negligent advice.'¹⁶⁵ Counsel for Ngati Haka Patuheuheu claimed that, as soon as the Crown became aware of the Native Land Court's failures, it was obliged to provide a remedy.¹⁶⁶ The Crown responded that it did not need to do so, because there was already a remedy available – a remedy not taken because of Howorth's advice.¹⁶⁷

While we welcome the Crown's concessions, outlined earlier, they do not go far enough. The historical evidence shows Ngati Haka Patuheuheu's repeated attempts to get the Crown's help in 1890, 1891, 1894, 1895, and 1896. We have just discussed these in some detail. Despite having engaged Howorth, and despite his reported advice that they should not take the case to court, the key factor for the Waiohau community was that they simply could not pay for litigation without divesting themselves of almost everything they owned. It is also clear from the evidence of Professor Binney, Dr Battersby, and Mr Hayes that they did want to get the titles overturned in court. They made repeated approaches to the Government, from 1890 to 1896, asking it to take the case on their behalf, or to pay for it, or to at least help them to pay for it. They were even, by 1896, ready to sacrifice more land to pay a share of the costs. It is simply not credible to argue that the case was not taken to court because of Howorth's negligent advice. It was not taken because the Crown refused to help.

At first, the issue of Howorth (and Hirini Taiwhanga) was a stumbling block for the Government. Even so, it was ready to help as soon as it was clear that Howorth was not going to act. It is not as if the Government was going to Ngati Haka Patuheuheu and telling them to go against the advice of their lawyer. Rather, the tribe was coming to the Government and asking it to take the case to court, or to help them do so. At some point in 1890, however, there was a crucial change of policy. Mr Hayes was puzzled by this change, and could not account for the Government's shift to a stance of absolute neutrality.

Just as puzzling were the actions of the Liberal Government. Carroll clearly knew that an injustice had taken place, and advised Seddon accordingly. Approaches from Ngati Haka Patuheuheu leaders seemed to result in promises of help and redress in the period 1894 to 1896. Yet still nothing happened. We are not surprised that the tribe gave up on the Liberals after 1896, until desperation drove

163. *Ibid*, p 82

164. *Ibid*, pp 81–82

165. *Ibid*, p 81

166. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36

167. Crown counsel, closing submissions (doc N20), topics 8–12, p 80

them to ask for help again in 1904. At this point, only a special legislative remedy could have helped, because the removal of the caveat had allowed an ‘innocent’ party to buy Burt’s title. The Government refused such a remedy, and the case was lost in court. All of this was avoidable, had the Crown acted earlier on Ngati Haka Patuheuheu’s repeated appeals for help. Since they literally asked for nothing more than the Government had offered in early 1890, this outcome is all the more tragic.

11.5.3.6 *Who was at fault? Parliament and the Land Transfer Acts*

According to Professor Brookfield, the main culprit in depriving Ngati Haka Patuheuheu of their land was the Land Transfer Act 1885 itself. In his view, the tribe would still have been protected in 1905 if the Act had been adequate. Howorth assumed (wrongly) that the protections in section 67 of the Act would cover their situation.¹⁶⁸ Crown counsel explored this possibility in cross-examination, querying whether the purpose of section 67 was broader than its actual terms, and so should have been interpreted as protecting Maori freehold land. Professor Brookfield did not accept that proposition.¹⁶⁹ Section 67 protected no land other than that brought under the Act by an ‘applicant proprietor’.¹⁷⁰ This did not include titles such as that for Waiohau 1B, brought under the Land Transfer Act by an order of the Native Land Court, which is what the Supreme Court decided in 1905.¹⁷¹

In the claimants’ view, this was a serious flaw in the Act. Maori freehold land should have been entitled to the same protection as other forms of land when it was brought under the Land Transfer Act 1870 in 1874. This protection was finally granted in 1913 – too late to help the Waiohau community. It ought to have been part of the Act from 1874 onwards.¹⁷² Professor Brookfield commented: ‘In short, had *Beale*’s case occurred after the amendment made in 1913, the defendants would have won it.’¹⁷³ The need for it should have been obvious in 1874.¹⁷⁴

The Crown had ‘some sympathy for the line of argument’, but submitted that ‘perfection is not an attainable standard in legislation establishing a novel and untried regime, as the Torrens [land transfer] system was at 1870.’¹⁷⁵ Section 67 excluded at least two categories of land from its protections: land brought under the law by a court order, and land sold to title-holders by the Crown. In both cases, we were told, fraud ought not to have been possible:

no one would have thought that the Crown would issue a Crown grant of its land to A when B was in possession and had a lawful right to be in possession. Likewise,

168. FM Brookfield, brief of evidence, 20 February 2004 (doc c2)

169. FM Brookfield, under cross-examination by Crown counsel, Waiohau Marae, Waiohau, 22 March 2004 (transcript 4.4, pp 17–18)

170. *Beale v Tihema Te Hau* (1905) 24 NZLR 883, 889–891

171. *Ibid*

172. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 37

173. Brookfield, brief of evidence (doc c2), p 10

174. *Ibid*, p 12

175. Crown counsel, closing submissions (doc N20), topics 8–12, p 82

Section 67 of the Land Transfer Act 1885

67. Certificate void in certain cases—Any certificate of title issued upon the first bringing of land under this Act, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the applicant proprietor, shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land, or any part thereof, at the time when such land was so brought under this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land; but every such certificate of title shall be as valid and effectual against the title of any other person as if such adverse occupation did not exist.

no one would have thought that the Native Land Court, in making a freehold order, would vest that land in A when B was in possession and had a lawful right to be in possession.¹⁷⁶

If, by chance, someone did manage to obtain a fraudulent court order, then ‘one [meaning legislators] would reasonably expect the mistake to be rectified in the appeal process.’¹⁷⁷ Also, from the evidence submitted in this inquiry, no problems were identified in these categories of land, in such a way that the need for protection was obvious when the law was amended and consolidated in 1885. Indeed, there were no successful cases taken after the amendment, between 1913 and 1951.¹⁷⁸ Further, in the Crown’s view, such a protection was not in fact necessary. There were ‘ample other mechanisms available that ought to have protected the community in the possession and retention of their land (even when that land was brought under the Torrens system), and it is extraordinary that all failed.’¹⁷⁹ Clearly, Waiohau was a unique case.

As we see it, the claimant and Crown views are not entirely incompatible. The claimants are correct that the Land Transfer Act did not protect the Waiohau community. The Crown is correct that other protections should have made it unnecessary for it to have done so. If we accept the Crown’s proposition that this fraud was the result of a unique sequence of events, in which all possible protections failed in turn, then that simply increases the onus on the Crown to have provided a unique remedy. We will return to that point below.

Here, we note Professor Brookfield’s evidence that the parliamentary debates do not reveal what was in the minds of the legislators. The question of protecting

176. Ibid

177. Ibid, p 83

178. Ibid, pp 82–83

179. Ibid, p 82

– or not needing to protect – land brought under the Act by a court order was not debated.¹⁸⁰ Yet the 1874 amendment was enacted at a pivotal time. The Native Land Act 1873 was intended to facilitate Maori dealing in their land. Maori land issues were debated extensively in the early 1870s. The provisions that Maori individuals should be able to get a freehold title, and that that title should be brought under the Torrens system, were deliberate actions on the part of the Crown. We find it difficult to accept that the protections of section 67 were deliberately denied such land. It may have been an oversight, reflecting carelessness with Maori interests. In any case, we cannot disagree with Professor Brookfield's conclusion: 'When they needed the protection it was not available to them.'¹⁸¹

Finally, we note that the Crown's argument rests on a faulty foundation. According to Crown counsel, Parliament was entitled to believe that fraudulent orders could not be obtained from a court, because they would be exposed and overturned on appeal. As we have seen, Maori did not have a guaranteed right of appeal from Native Land Court decisions until 1894. In 1874, when court orders could first bring Maori freehold land under the land transfer system, Maori had a right to apply to the Governor in Council for a rehearing. In 1885, when the Land Transfer Act was amended and consolidated, Maori had a right to apply to the chief judge for a rehearing. In neither case were they guaranteed any hearing at a second-tier level. Thus, Parliament was not in fact entitled to any confidence that fraudulent court orders would necessarily be exposed on appeal. Having passed the relevant Native Land Acts in 1873 and 1880, Parliament was well aware that Maori did not have any guaranteed right of appeal. Thus, we cannot accept the Crown's argument that Parliament was justified, in the circumstances of the time, in thinking that section 67 protections did not need to cover Maori land.

11.5.4 Did the Crown provide a fair and effective remedy after Ngati Haka Patuheuheu lost in the Supreme Court?

SUMMARY ANSWER: The Crown intervened to assist Ngati Haka Patuheuheu after they lost in court in 1905. Justice Edwards recommended that the Crown buy the land back for its Maori owners, and that Beale be reasonable in her demands. The Native Minister, James Carroll, tried to buy Beale's half of Waiohau 1B. Negotiations proved fruitless, however, because Beale had entered into a conditional sale to a settler farmer, James Grant. Neither Beale nor Grant was willing to deal. The Government had the option of compulsorily purchasing the land, and compensating Grant if he in fact lost anything by this action. Carroll set a compulsory purchase in train under the Land for Settlements legislation, and lodged a 12-month caveat preventing any other transfer of the land. But this Act did not apply to the circumstances of Waiohau, and the Government failed to pass special legislation before the caveat expired in 1907. In our view, given that Beale was already selling the land, the fairest course of action would have been for the Crown to have conducted a compulsory purchase (as Carroll initially intended), authorised under

180. Brookfield, brief of evidence (doc c2), pp 6–7

181. *Ibid*, p12

special legislation. This did not happen. Ngati Haka Patuheuheu's further pleas for help fell on deaf ears, and the Government allowed the tribe to be evicted in 1907.

The Crown then offered some 300 acres of land in compensation, as well as buying back the tribe's wharenuī (which was being used as a barn) and paying some of Beale's legal expenses (which had been awarded against Ngati Haka Patuheuheu as costs). This compensation was inadequate. Consultation with the tribe was minimal. They may not have agreed to the location of the land (at Te Teko). In any case, the land provided in compensation was much smaller, and worth considerably less, than the land they had lost, and outside their rohe. Subsequent protest also fell on deaf ears.

11.5.4.1 Introduction

The window of opportunity to impugn the Burts' title was foreclosed with their mortgage in 1903. After that, special action was required for the Native Minister to provide Ngati Haka Patuheuheu with 'all the assistance in his power to obtain their rights',¹⁸² as had been promised in 1890. As it was seen at the time, there were two options: to buy the land back from Mrs Beale and restore it to the tribe, if she were willing to deal, or to take the land compulsorily (with compensation) if she were not. Repurchase of the land was urged on the Government by Justice Edwards in 1906, as Ngati Haka Patuheuheu faced the sheriff, bailiffs, and suits for 'forcible detention' of the land. In this section, we consider how the Government dealt with these options, and its eventual switch to compensating Ngati Haka Patuheuheu after they were finally evicted in 1907.

11.5.4.2 The Crown's first attempt at a remedy: to buy or take the land

In 1905, Ngati Haka Patuheuheu lost their case in *Beale v Tihema Te Hau*. They had four months to file an appeal, but – again – the costs deterred them. As they informed the Government, their 'scanty means' had been exhausted in the first case.¹⁸³ Instead, the tribe asked the Government for help. Earl sent an urgent letter, 'warning that the people of Te Houhi would now lose everything: their homes, their school, their meeting-house, their plantations, their church, and their burial ground.'¹⁸⁴ The Justice Department recommended immediate action. The Government should buy Beale's land and 'let the natives have it.'¹⁸⁵

For the next seven months, the Native Minister (Carroll) made determined and praiseworthy attempts to buy this land. Cabinet voted £2,000 for the purpose, well above the official value of £1,600. Mrs Beale had paid £1,025 for it in 1904.¹⁸⁶ It emerged later, however, that there was 'someone in the background who must be reached before anything can be done.'¹⁸⁷ It turned out that the Beales were speculators, who had sold their part of Waiohau 1B to local farmer James Grant a year

182. Battersby, 'Waiohau 1' (doc c1), p 50

183. Binney, 'Encircled Lands, Part 2' (doc A15), pp 339–340

184. *Ibid*, p 337

185. *Ibid*

186. Battersby, 'Waiohau 1' (doc c1), pp 70, 75

187. Carroll to Waldegrave, 10 January 1906 (Battersby, 'Waiohau 1' (doc c1), p 74)

‘YOUR petitioners have exhausted their scanty means in defending the action recently decided against them [Beale v Tihema Te Hau] and are dispirited and helpless. Your petitioners humbly submit that the sympathy and assistance promised them by the Government should now be made manifest and the mistakes and incompetence of the Native Land Court should not be permitted to result in their utter undoing.’

Mehaka Tokopounamu and 63 others¹

1. Mehaka Tokopounamu and 63 others, August 1905 (John Battersby, comp, supporting papers to ‘A Report on Waiohau 1 Block [1882–1920]’, 2 vols, various dates (doc c1(b)), vol 2, sec 5, p95)

after buying it (and just before they took action in the Supreme Court). Although they sold for almost twice what they had paid, the buyer insisted that they guarantee him possession before the sale could take effect. Thus, the sale was not complete and could still be overturned, although Earl considered the agreement legally binding on the Beales.¹⁸⁸

It is not clear, therefore, whether the Beales could have sold to the Government when it matched Grant’s price. What is certain is that neither the Beales nor Grant were willing to sell to Carroll. The Supreme Court had awarded costs to the Beales in 1905, but they now faced expensive legal action to try to evict Ngati Haka Patuheuheu. Despite their loss in court, the tribe refused to leave. Carroll was not unhappy with this situation, hoping it would give him the leverage to get the Beales to agree to sell.¹⁸⁹

The consequences for the Waiohau community were unfortunate. They were put through drawn-out court action, which they had to pay for, and were harassed by the sheriff and bailiffs.¹⁹⁰ In February 1906, the Supreme Court told Ngati Haka Patuheuheu that they would have to leave, even though the Beales lost their case for ‘forcible detainment’ of the land, and resistance to the sheriff.¹⁹¹ The Beales lost because, as Professor Binney noted, all of the Waiohau people’s resistance was peaceful. They simply refused to leave their homes.¹⁹²

Even though the Beales’ case was dismissed, Justice Edwards again commented that Ngati Haka Patuheuheu had suffered ‘grievous wrong at the hands of the Native Land Court, which it was the duty of the colony to rectify.’¹⁹³ He advised

188. Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 337–339; Battersby, ‘Waiohau 1’ (doc c1), p 75

189. Battersby, ‘Waiohau 1’ (doc c1), pp 73–74

190. Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 337–348

191. *Ibid*, pp 343–344

192. *Ibid*, pp 343, 348

193. *New Zealand Herald*, 7 February 1906 (Binney, ‘Encircled Lands, Part 2’ (doc A15), p 344)



J A Beale and sheriff's officers attempting the eviction of the Waiohau community from the Waiohau 18 block, 15 February 1906. The land included Te Houhi, the site of the main Ngati Haka Patuheuheu kainga and their church, urupa, cultivations, and best farmland. They were successfully evicted the following year, and the Crown failed to provide an effective remedy for them.

them to seek Government help and urged the Government to buy the land for them, even though 'perhaps he had no right to say so.'¹⁹⁴ Mrs Beale ought to be 'moderate in her demands, seeing that she bought the land, knowing the natives were living on it, and that it was their ancestral home, and that she should be very well satisfied to get her money back with interest.'¹⁹⁵ Nonetheless, Ngati Haka Patuheuheu had done all that they could within the law to draw attention to their case, and now (he told them) they had to leave.¹⁹⁶

Wharepapa Peita and Wi Patene telegraphed Carroll: 'The words of Judge Edwards today are that you should relieve us but if you fail we must leave the land. We are looking anxiously to you. Act quickly or we may go to prison.'¹⁹⁷

The Government responded that it was still trying to buy the land from the Beales. Earl urged it to negotiate with Grant to 'take his position [and] pay Beale two thousand [pounds, the] amount agreed to by Grant.'¹⁹⁸ The Justice Department found, however, that the 'attitude of Beale does not facilitate settlement.'¹⁹⁹

194. *New Zealand Herald*, 7 February 1906 (Battersby, 'Waiohau 1' (doc c1), p 75)

195. *Ibid*

196. Binney, 'Encircled Lands, Part 2' (doc A15), p 344

197. Wharepapa Peita, Mika Te Tawhao, and Wi Patene to Native Minister, 6 February 1906 (Binney, 'Encircled Lands, Part 2' (doc A15), p 344)

198. Earl to Waldegrave, 8 February 1906 (Battersby, 'Waiohau 1' (doc c1), p 75)

199. Waldegrave to Earl, 14 February 1906 (Battersby, 'Waiohau 1' (doc c1), p 75)

Professor Binney posited that the Beales were waging a vendetta against the Waiohau community, and the evidence is suggestive of that.²⁰⁰ In February 1906, having lost their case in court, they began new eviction proceedings. Carroll gave up on negotiations, noting that ‘the principals refuse to deal’.²⁰¹ His response was to seek a means of acquiring the land compulsorily. In 1905, Earl had urged special legislation, and this option was still open to the Government. Claimant counsel suggested that it was the only fair remedy, given the circumstances.²⁰²

Carroll, however, tried to use existing provisions: the Lands for Settlement legislation. On 17 February, he abandoned negotiations, and on 21 February the Government notified Mrs Beale of its intention to acquire the land under the Land for Settlements Amendment Act 1901. On 22 February, a caveat was placed on the title, preventing the completion of its on-sale to Grant, and showing that ‘the government seriously contemplated the compulsory acquisition of the land’.²⁰³ The problem was that the Act allowed the Government to take land (with compensation) only for the purposes of settlement. As the Justice Department later pointed out, Waiohau did not come under the scope of the Act.²⁰⁴ It may well be that Carroll intended this as a stopgap, enabling a caveat to be lodged, because he had to work within the existing law until Parliament sat later in the year. If so, Carroll did not introduce a special Bill once the session began in June.²⁰⁵ In the meantime, the Beales proceeded with their efforts to evict the tribe, who clung desperately to their land and refused to leave.

As Professor Binney observed, the Lands for Settlement Act only allowed land to be caveated for a year, after which (if the Government had not acquired it) the Government’s claim had to be abandoned.²⁰⁶ It was duly removed in February 1907. Immediately, the Beales completed the sale to Grant, and he moved to evict the Waiohau community himself.²⁰⁷ This time, there was no other help. Numia Kereru, Hetaraka Te Wakaunua, and Nikora Te Ao-o-Te Rangi telegraphed Carroll, asking him to ‘Hasten the reserving (‘te rahui’) of . . . Te Houhi’, lest ‘Patuheuheu’ be driven off.²⁰⁸ But the Government ‘failed to find any legal device or further solution.’²⁰⁹

Grant moved onto the land and destroyed their cultivations, leaving the people with no food and no options. They retreated into the mountains to grieve for a

200. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 339

201. Carroll to Waldegrave, 17 February 1906 (Battersby, ‘Waiohau 1’ (doc C1), p 76)

202. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 30–31

203. Battersby, ‘Waiohau 1’ (doc C1), p 76

204. Justice Department, memorandum, no date (Paul, supporting papers to ‘Te Houhi Village and Waiohau 1B’ (Wai 46 RO1, doc H4(d)), p 191); see also Battersby, ‘Waiohau 1’ (doc C1), p 76; Binney, ‘Encircled Lands, Part 2’ (doc A15), p 345

205. See *Bills Thrown Out*, 1907.

206. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 345; see also Land for Settlements Amendment Act 1901, s 6.

207. Battersby, ‘Waiohau 1’ (doc C1), p 78; Binney, ‘Encircled Lands, Part 2’ (doc A15), pp 345–346

208. Numia Kereru, Hetaraka Te Wakaunua, and Nikora Te Ao-o-Te Rangi to Carroll, telegram, 8 April 1907 (Wai 46 RO1, doc H4, pp 1–2)

209. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 346

time, before moving on to their less fertile land in Waiohau 1A and starting to rebuild.²¹⁰ The Government had had from February 1906 to February 1907 to pass special legislation, empowering it to acquire this land compulsorily, to rectify a wrong done by the colony's courts. Instead, it took no action and a whole community lost their homes, their ancestral land, and their wahi tapu.

The Crown put to us that the enactment of special legislation was unthinkable: 'To have taken this step would have undermined one of the fundamental tenets of the Land Transfer system – indefeasibility. Today, the position would be the same.'²¹¹ The Crown cited a 1995 decision *Registrar General v Marshall*, to the effect that the security of title to real property is the one area of the law where absolute security is required, and that this is a matter of high principle.²¹² Claimant counsel disputed whether a single individual's title should have been weighted higher than that of an entire Maori community, living on their ancestral land, and about to be evicted because of failures in the Crown's Maori land titles system. Surely, he argued, the Treaty did not contemplate such an outcome.²¹³

We agree with claimant counsel, and note another legal principle that was clearly considered at the time. Justice Edwards found that the colony's courts had been at fault, and the colony must rectify the matter. The judge urged the Government to buy the land back and restore it to the claimants. When that course failed, compulsion was the next logical step. It is a long-standing principle of British law that private land can be taken, with compensation, for public purposes. In New Zealand law, the definition of public purposes was very broad and enabled land to be taken for a wide range of purposes. At the time, it included the taking of land in large estates so that it could be broken up and redistributed for 'close settlement'. Surely, the colony's duty to rectify a wrong done by its courts (as Justice Edwards put it) was a public purpose, akin to compensation for wrongful imprisonment. It strains credulity that the taking of Mrs Beale's land would have been seen as unreasonable in the circumstances of the time. Indeed, the Native Minister did plan to take it under the Land for Settlements Act, discovering later that the terms of the Act made it the wrong vehicle. Special legislation was required.

While in one sense, it could be perceived as Parliament overturning the decision of a court, in fact the judge had urged the Crown to buy out Mrs Beale, and had encouraged her to be reasonable in the matter. Mrs Beale had never been upon the land, had never even seen it, and had already contracted to sell it. Indefeasibility was not in fact the issue: rather, it was a question of who should or could buy the land that Mrs Beale was in the process of selling: the Government or Mr Grant. Grant had only a conditional agreement, and the question of whether any injustice or loss was suffered by him could be resolved with money. Ngati Haka Patuheuheu, however, were losing exactly what was guaranteed to them in the Treaty: their ancestral lands. Money was not the answer for them, in either Treaty

210. Ibid

211. Crown counsel, closing submissions (doc N20), topics 8–12, p 84

212. Ibid

213. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 31–32

or legal terms. In all the circumstances, and in the context of the Treaty, we believe that special legislation was justified.

11.5.4.3 *The Crown's second attempt at a remedy: compensation*

After the eviction, the Government began to consider the possibility of providing land to Ngati Haka Patuheuheu as compensation for their loss. James Grant allowed them to remove some of their wooden homes, but he refused to allow the removal of the school building or the wharenuī, using the former to house his shearers and the latter as a hay barn.²¹⁴ Ngati Haka Patuheuheu were, of course, distressed at the use of their wharenuī as a barn.²¹⁵ Buying back the wharenuī became part of the compensation package. In addition, the tribe looked to the Government to help them with legal expenses, since they had to pay Beale's costs as well as their own.

The story of the Government's compensation efforts is a further unhappy episode in Ngati Haka Patuheuheu history. Tai Mitchell was sent to scope possible sites. He recommended that the Government buy the land back from Grant. The commissioner of Crown lands supported this recommendation, but the prospect seems to have been hopeless. Grant was adamant that he would not sell.²¹⁶ The first alternative site considered was Te Teko (300 acres, worth about £1,300, for which the Government paid £1,230).²¹⁷ Mitchell thought it suitable 'if the question at issue was devoid of all sentiment and was purely a question of selection, but as I have already pointed out this is not the case, and in the following report it would be as well that that aspect – consulting the Natives – is not entirely lost sight of.'²¹⁸

When Ngati Haka Patuheuheu were consulted, they preferred a piece of land at nearby Galatea. Mitchell was in the middle of negotiations for this land in August, when he received a letter from Wharepapa Peita, on behalf of Kereru and other owners. Mitchell informed the Government that they now preferred Te Teko to the Galatea site, and wanted the Government to buy it for them. Negotiations with Rupert Wylie, who had an option to buy the land at Galatea, were suspended. Thomas Wylie (Rupert's father), who had been the school teacher at Te Houhi and was close to the people, wrote claiming that Wharepapa had acted without consulting others, who wanted land at Galatea.²¹⁹ Mr McGarvey, on the other hand, who owned the property at Te Teko, assured Carroll that 'Kereru, Wakaunua and party' had inspected his land and found it very good.²²⁰

214. Binney, 'Encircled Lands, Part 2' (doc A15), pp 346–347

215. Pouwhare, brief of evidence (doc C15), pp 42–43

216. Arapere, 'Waiohau' (doc A26), pp 44–45; Battersby, 'Waiohau 1' (doc C1), p 78; Rose, 'A People Dispossessed' (doc A119), pp 117–118

217. Arapere, 'Waiohau' (doc A26), pp 44–47

218. Mitchell to chief surveyor, 11 April 1908 (Arapere, 'Waiohau' (doc A26), pp 44–45)

219. Battersby, 'Waiohau 1' (doc C1), pp 78–80; Arapere, 'Waiohau' (doc A26), pp 45–46; for the relationship between the Wylies and the Waiohau community, see Binney, 'Encircled Lands, Part 2' (doc A15), pp 145, 256–292, 327–350.

220. McGarvey to Carroll, 14 August 1908 (Gwenda Paul, comp, supporting papers to 'Evidence on Te Houhi Village and Waiohau 1B', 8 vols, various dates (Wai 46 RO1, doc H4(e)), vol 5, p18)

Kaa Williams Recalled her Mother's Experience of Eviction from Te Houhi

'MY mother started her schooling at Te Houhi. She was about nine at the time. It was also at the time when problems, arguments, disagreements, squabbling and infighting broke out. She rarely spoke about these times probably because the hurt was down deep inside her, but when she did she spoke about the belittling of her foster parents and elders. She suffered their anguish and their hurt as their homeland was wrested from under their feet and they were physically forced to leave everything behind.

'She and her foster parents were in the group which moved not to Waiohau [1A] but to Painoaiho in Murupara. 'Painoaiho' is a name which means 'it's okay' so I'm not sure if they used this name to console themselves after being forcibly pushed out of Te Houhi. She finished her schooling at the age of thirteen in Murupara. She began looking for work to support her foster parents who were living in poverty with barely enough to eat. All the food they had planted in their gardens, all their eeling places and all their crops were left behind in Te Houhi.'

Kaa Kathleen Williams¹

1. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 35

Neither Dr Battersby nor Ms Arapere found evidence of further consultation with the community.²²¹ Robert Pouwhare told us that Ngati Haka Patuheuheu did not want land at Te Teko: 'Our ancestors didn't really want that land, they didn't want to stay on that land in the territory of Ngati Awa: it was not our land.'²²² In November 1908, Carroll instructed his officials that the land at Te Teko should be purchased and vested in the Waiariki Maori Land Board, so that it could be kept inalienable.²²³

In the meantime, Tai Mitchell had also negotiated with Grant for the removal of the wharenuī from Waiohau 1B. Grant agreed to allow this in return for the sum of £140. It seems clear from these negotiations that the community did not intend to move to Te Teko.²²⁴ They wanted the house moved to their new home on Waiohau 1A, and they wanted to move it themselves: 'It is a work they would not like anyone

221. Battersby, 'Waiohau 1' (doc C1), pp 79–80; Arapere, 'Waiohau' (doc A26), p 46

222. Pouwhare, brief of evidence (doc C15), p 43

223. Memorandum for Under-Secretary, Lands, 17 November 1908 (Paul, supporting papers to 'Te Houhi Village and Waiohau 1B' (Wai 46 RO1, doc H4(e)), p 31)

224. Arapere, 'Waiohau' (doc A26), pp 46–48; Binney, 'Encircled Lands, Part 2' (doc A15), pp 347–348



Robert Pouwhare

Ngati Haka Patuheuheu claimant Robert Marunui Iki Pouwhare. Mr Pouwhare sought findings of Treaty breach in respect of the Waiohau Fraud.

but themselves to do on account of the maori carvings which they would not like a stranger to handle.’²²⁵

In our inquiry, the Crown did not accept the claimants’ view that the land at Te Teko was inadequate compensation for their loss. We agree with the claimants that the compensation was clearly inadequate. We note the following points:

- ▶ It was a much smaller piece of land than what had been lost, and was worth considerably less money: 300 acres for 7,000 acres, and worth a lot less than the value of just Mrs Beale’s half of the 7,000 acres. No compensation was ever received for Piper’s half.
- ▶ It was not in the tribal area of Tuhoe or Ngati Haka Patuheuheu, and the claimants say that they were reluctant to accept it or go there for that reason.
- ▶ The land was vested in the local Maori Land Board and not the owners, who thus had no control over it. There are suggestions that they might have been amenable to farming it, had it been handed over to them in time.²²⁶ The beneficial owners were not actually decided until 1920, after which it became part

225. Grant to commissioner of Crown lands, 6 January 1909 (Battersby, supporting papers to ‘Waiohau 1’ (doc c1(b)), section 8, p31)

226. Arapere, ‘Waiohau’ (doc A26), pp 47–51; Binney, ‘Encircled Lands, Part 2’ (doc A15), p348

of the Ruatoki consolidation scheme.²²⁷ Many other people got into the title as a result, which may well have further contributed to the sense of grievance by the 1940s.²²⁸

- ▶ The Waiohau community did not move to Te Teko, remaining on their (poorer quality) ancestral land at Waiohau 1A. No assistance was given to help them develop this land for farming.
- ▶ The Waiohau community were not satisfied with the outcome. In the mid-1940s, Rikiriki Mehaka Tokopounamu sent petitions to Parliament, objecting that the compensation had been insufficient. These petitions were rejected without inquiry. By the 1940s, the Government considered that it had made a free donation to the tribe, without any obligation to have helped them. It was also wrongly thought that no earlier complaints had been received, ignoring the 1909 request for the balance of the £2,000, and the various complaints in the 1910s about the failure to award title to Te Teko.²²⁹

Local settlers recommended that the compensation money be spent on helping the Waiohau community develop their land. Their advice was not disinterested, as the settler community were anxious about where the tribe might be relocated ('thus bringing hordes of Maori dogs contiguous to the best sheep lands').²³⁰ Nonetheless, we think that they had a valuable point to make, when they suggested that 'the money be devoted to the payment for permanent & reproductive improvements on the land already owned by these natives, thus affording them employment & permanent means of livelihood by the possession of improved lands'.²³¹ If the settler community could see the wisdom of helping Ngati Haka Patuheuheu to develop their lands, then it ought to have been obvious to Carroll and the Government.

In 1909, the Waiohau community petitioned Parliament to pay them £480, which was the amount they believed was left over from the £2,000, after the purchase of Te Teko, the payment to Grant for the wharenuī, and the payment for the cost of moving the meeting house. They were still being hounded to pay legal fees, including those of Margaret Beale. The Government refused, observing that the money was voted to buy land, not as compensation in its own right. In 1911, Ngata arranged for Mrs Beale to be paid £200, which he felt was all she deserved (although she had presented the tribe with a bill for £579).²³²

227. Arapere, 'Waiohau' (doc A26), pp 52–53

228. Under-Secretary to Native Minister, 10 September 1945 (Paul, supporting papers to 'Te Houhi Village and Waiohau 1B' (Wai 46 RO1, doc H4(e)), p132). This memorandum was a response to the 1945 Ngati Haka Patuheuheu petition.

229. Arapere, 'Waiohau' (doc A26), p 53; Paul, supporting papers to 'Te Houhi Village and Waiohau 1B' (Wai 46 RO1, doc H4(e)), pp 126–140

230. R H Abbott to Carroll, 3 June 1908 (Paul, supporting papers to 'Te Houhi Village and Waiohau 1B' (Wai 46 RO1, doc H4(e)), p17)

231. *Ibid*; see also a similar letter from Grant to Carroll, 29 April 1908 (Battersby, 'Waiohau 1' (doc C1), p79).

232. Battersby, 'Waiohau 1' (doc C1), pp 81–84. Beale was not actually paid until 1915.

I am directed to report as follows: That the Committee, after hearing the evidence of Mehaka Tokopounamu and Korowiti, carefully perusing the papers submitted to the Committee by HR Burt, and after looking over the minutes of the proceedings of the Native Land Court, have come to the conclusion that, in the main, the allegations made by the petitioners are correct, and a great injustice has been inflicted upon them, although they do not altogether hold the petitioners blameless in the matter.

Native Affairs Committee of the House of Representatives, 1889

In sum, Cabinet voted £2,000 to buy back Beale's 3,500 acres of Waiohau 1B, which was only half of the land lost by Ngati Haka Patuheuheu. When Carroll's assiduous efforts failed, £1,230 was spent to buy some 300 acres in compensation, 18 kilometres distant from Waiohau and outside their tribal territory. There was some consultation with the owners, but it is not certain that they agreed to take the land at Te Teko. As Ms Arapere noted, there was no consultation with them about the level or adequacy of the compensation.²³³ In addition to the £1,230, sums of money were spent to buy back Ngati Haka Patuheuheu's meeting house, to move it, and to pay off Beale's demands for legal costs. No money was spent to help Ngati Haka Patuheuheu develop their lands for farming, and they did not receive ownership of their compensation land until 1920. Their petition objecting to the inadequacy of the compensation was rejected without much inquiry in 1945 and 1946.

11.6 TREATY ANALYSIS AND FINDINGS

The Crown argued that the primary responsibility for the tragic loss of Waiohau 1B lay with the Native Land Court, and the claimants' decision to follow their lawyer's advice not to challenge the titles in the Supreme Court. The Native Land Court judges were not agents of the Crown, and nor was Howorth. The Crown accepted that it had a relationship with the Waiohau community, that it should have consulted them more, and that some minor failures on its part were contributing factors. Nonetheless, the Crown's view was that it met all of its Treaty and legal obligations. The claimants, on the other hand, maintained that the Crown breached the Treaty principle of active protection for a period of 17 years, to their great cultural, social, and economic harm.

We find that the Crown acted consistently with the Treaty when it:

- ▶ investigated and upheld Ngati Haka Patuheuheu's petition in 1889;
- ▶ conducted the Wilson inquiry and referred the report to its solicitor for a plan of action;

233. Arapere, 'Waiohau' (doc A26), pp 59–60

IT is further stated that the partition of the land made to Burt 7000 acres is unjust ... If the information tendered to me is correct the whole of this charge is strictly true. The information so tendered is chiefly from Burt's side, as the Patuheuheu were not present at Judge Clarke's Court. [Emphasis in original.]

Judge Wilson, 1889

THE Native Minister desires to give the Natives who he considers have been wronged all the assistance in his power to obtain their rights.'

T W Lewis, under-secretary, to Mehaka Tokopounamu, 1890

M^R Carroll tells me that an injustice has been done.'

Premier Richard Seddon, speaking at Galatea, 1894

THAT they have suffered a grievous wrong is, in my opinion, plain. It is doubly hard that this wrong should have resulted from a miscarriage, which certainly ought to have been avoided, in the very Court which was especially charged with the duty of protecting them in such matters.'

Justice Edwards, 1905

AND whereas the Native owners of the land known as Waiohau No 1B Block were wrongfully dispossessed of their said land ...'

Lord Liverpool, Governor-General, Order in Council, 1920

- ▶ promised ‘all the assistance in [the Native Minister’s] power to obtain their rights’ in 1890;²³⁴
- ▶ arranged for a caveat to be lodged against Burt’s title in 1890;
- ▶ made determined efforts to buy Waiohau 1B from the Beales to restore it to the claimants in late 1905 and early 1906; and
- ▶ put a caveat on Beale’s title with the intention of acquiring it compulsorily in 1906.

We have already found the following Treaty breaches:

- ▶ The Crown imposed the Native Land Court system without consent, so that the court decided questions of title and partition instead of Maori themselves. Had Te Whitu Tekau been entrusted with such business, as Tuhoe and Ngati Haka Patuheuheu requested, this fraud could never have happened.
- ▶ The Crown made the purchase of individual interests void instead of illegal. It also failed to provide a mechanism (recognised by the law) for groups of owners to make pre-court decisions about their land, instead of the supposed ‘majority rule’ of deciding to partition in court. If the Crown had made the private purchase of individual interests illegal, or if it had provided for a legal negotiating face for the tribe, this fraud could not have happened.

We find further that the Crown breached the principles of the Treaty by the following actions or failures to act:

- ▶ Having set up the Native Land Court, the Crown failed (as the Native Affairs Committee found) to provide a proper means for ensuring that the people appearing in court represented the owners – again, a legal negotiating face for the tribe was required. Had such a mechanism existed, this fraud could not have happened.
- ▶ The Native Lands Frauds Prevention Acts failed to operate effectively when the commissioner checked post-partition transactions, instead of the real transactions on which the partition rested. This failure in the system allowed fraud to go unchecked.
- ▶ The Crown failed to provide Maori with a guaranteed right of appeal or rehearing. Had such a right existed, this fraud should have been overturned on appeal.
- ▶ After the fraud was exposed in 1889, the Crown failed to provide the promised ‘assistance . . . to obtain their rights.’²³⁵ It refused repeated requests from Ngati Haka Patuheuheu to either take the case to the Supreme Court for them, or to assist them to do so, despite its knowledge that this was their only legal remedy, and that they could not afford to do it on their own. The Crown refused the tribe’s requests in 1890, 1891, 1894, 1895, and 1896.
- ▶ The Crown had the caveat on Burt’s title withdrawn without consulting or informing Ngati Haka Patuheuheu, thus allowing the transfer of that title to a new owner, who gained an indefeasible title under the Land Transfer Act.

234. Battersby, ‘Waiohau 1’ (doc c1), p 50

235. Ibid

- ▶ The Crown refused Ngati Haka Patuheuheu's request for special remedial legislation in 1904, leaving them to fight a court battle that they could not win.
- ▶ The Crown failed to protect Maori freehold land from fraud under the Land Transfer Act 1885, in the manner that other land was protected.
- ▶ After negotiations broke down with the Beales (and Grant), the Crown failed to recover Waiohau 1B for its Maori owners by special legislation.
- ▶ The Crown failed to consult Ngati Haka Patuheuheu about an appropriate level and form of compensation, and failed to provide land of equivalent value, or located inside their tribal rohe.

These actions or inactions of the Crown breached its obligation to respect and give effect to the tino rangatiratanga of Ngati Haka Patuheuheu, more particularly in the mechanisms it established for ascertaining title and administering land. Had it not breached the Treaty in this manner, the subsequent breaches could not have happened. There was also a serious and sustained failure actively to protect Ngati Haka Patuheuheu and their lands, especially from 1886 to 1907. Further, the Crown failed to provide a proper remedy for the wrongs suffered as a result of its own laws and actions, in breach of the principle of redress. Finally, we note the Treaty principle of equity, which requires the Crown to act fairly as between settlers and Maori.²³⁶ As the Central North Island Tribunal observed, 'That principle . . . derives from article 3 of the Treaty guaranteeing Maori the rights of British citizens. In relation to property rights, it is axiomatic that Maori rights should be afforded no less protection than the rights of other citizens.'²³⁷ The inequitable treatment of Maori and general land in the Land Transfer Acts, and the protection of a single settler's land transfer title rather than the ancestral rights of the Waiohau community, were in breach of this principle. Compensation, if required, should have gone to the settler; the land to Ngati Haka Patuheuheu.

These were not minor breaches. Ngati Haka Patuheuheu suffered a 'grievous wrong' that was preventable in the first place, and easily remedied (if the Crown had acted soon enough) in the second place. They suffered serious prejudice in the loss of 7,000 acres of their ancestral land through fraud, and their eviction from Te Houhi and from their sacred sites and places of spiritual connection. It was also their best farmland. As they told the Crown in their 1905 petition, they were reduced to a state of despair and helplessness. We heard the long-term effects of that despair, and of the cultural and economic losses suffered by the tribe, in the claimants' evidence at our Waiohau hearing. Robert Pouwhare told us:

We, who live here, live in abject poverty. We are a landless people and we live under continuing shame and embarrassment. We are ashamed because of the actions of the Crown, and the hideous actions of the Native Land Court of centuries past imposed

236. For a discussion of the principle of equity, see, for example, Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 427–428.

237. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 428

upon us. Since the eviction of Ngati Haka-Patuheuheu from our homelands at Te Houhi, we lived in depression on these lands. We could not get work, we could not get through school, there was no land to sustain us and we had no resources. In the dealings of the Native Land Court, some of our people sold leases, even land. Some didn't. Those who didn't sell staunchly believed in Te Kooti Arikirangi. Therefore, for those families who sold, they still feel great shame. We are embarrassed because we are unable, through poverty, to properly look after and accommodate our visitors. Look at our marae – the toilets are broken, our dining room is near collapse and our youth are unemployed. Having said that, out of adversity, out of poverty a steady resolve has grown, we have grown closer and we love one another and to hark back to our ancestors at the battle of Orakau who went in support of Maniapoto, who said *'Struggle without end – Ka whawhai tonu matau mo ake, ake, ake – Struggle without end. We will fight forever and ever.'*²³⁸

We agree with both parties that 'the Waiohau fraud is a "very, very, sorry saga in the history of Ngati Haka Patuheuheu, and is a most painful grievance"'.²³⁹

238. Robert Pouwhare, brief of evidence, 14 March 2004 (doc C15(b)), pp 27–28

239. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p78

CHAPTER 12

TE RUNANGA KAITIAKI WHENUA O TE TAIRAWHITI – THE EAST COAST TRUST

12.1 INTRODUCTION

This chapter deals with the claims of Te Whanau a Kai, Te Aitanga a Mahaki, Tuhoe, and Ngati Kahungunu, about the lands of southern Tahora 2. At issue is 60,000 acres of land, which was vested in the Carroll–Pere trust in 1896, and then transferred to a board of Pakeha businessmen in 1902. The East Coast Native Trust Lands Board sold 9,590 acres (one-sixth) of the Tahora 2 lands to help pay off the trust's debts. This sale was agreed in advance with the former trustees, and Te Whanau a Kai make no claim about it today. In 1906, the board was replaced with a single commissioner. From 1911 to 1949, the commissioner sold, leased, and managed the trust estate, while the Maori owners had no decision-making powers about their own land. During this period, a further one-sixth of Tahora 2 was sold. The Turanga claimants do object to the alienations in this period, alleging that their land was sold in an improper manner, without their consent, and even actively against their wishes.

Tuhoe and Ngati Kahungunu land was not sold by the trust.

The Tuhoe claim relates to the vesting of their land in the trust without their consent, the long neglect of their land from 1906 to 1958, and the manner in which the Crown then acquired it from them after its return.

Ngati Kahungunu do not quarrel with the administration of their land by the trust, which returned it intact and developed for farming. Their complaint is a very specific one against the Crown, which refused to return land to them after it was discovered that the Crown had obtained more than its fair share of Tahora 2f due to a survey error. We address these various claims in this chapter. The Crown made no concessions of Treaty breach in respect of these claims.

12.2 ISSUES FOR TRIBUNAL DETERMINATION

In this chapter, the claims revolve around issues of authority. The key matter was who had the power to decide what should happen to the Tahora 2 lands. This was so for the vesting of lands in the East Coast Native Trust Lands Board, the sale of lands by that board, the sale of lands by the East Coast commissioner, and the choice of lands worthy of investment for development. Also, once Tahora 2G2 was returned to the owners in 1959, the question was again one of authority: who would decide whether or not that block could be milled and developed, the owners or the Government? The only claim that does not come under this rubric

is that of Ngati Kahungunu, who (unsuccessfully) sought redress from the Crown when it was found to have acquired more than its fair share of Tahora 2F.

The questions that we have posed for further analysis are:

- ▶ How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?
- ▶ How and why was land alienated while vested in the East Coast Trust?
- ▶ Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?
- ▶ Did the Crown keep more than its fair share of Tahora 2F, after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

We begin by setting out a narrative of the key facts that underpin our analysis of the claims.

12.3 KEY FACTS

In 1889, the Native Land Court determined title to Tahora 2, a large area of land in which the interests of Urewera, Wairoa, Opotiki, and Turanga tribes overlapped (see chapter 10). The decision was mainly reached by tribal negotiations out of court. For the blocks which eventually became part of the East Coast Trust, the court awarded title to individuals of the following kin groups:

- ▶ Tahora 2C: Te Whanau a Kai, Ngati Maru, Ngati Hine, and Ngati Rua.
- ▶ Tahora 2F: Ngati Kahungunu.
- ▶ Tahora 2G: Tuhoe.

Because Tahora 2 then became caught up in events centred outside our inquiry district, we need to provide a brief background to them. The origins of the East Coast Trust lie in the efforts of Maori leaders to restore corporate title and control over land that had been individualised by the Native Land Court. These efforts were led by Wi Pere, a tribal leader of Te Whanau a Kai, Te Aitanga a Mahaki, and Rongowhakaata, who also had links with Ngati Kahungunu. Pere forged an alliance with colonial lawyer and politician W L Rees. In the 1870s, they encouraged East Coast tribes to put land into a series of trusts (called the Rees–Pere trusts), but they could not get the Government to pass empowering legislation, and the courts ruled that Maori land could not be placed in trust under the current native land laws. In 1881, Pere and Rees tried an alternative: a joint-stock company. Land was transferred from the Rees–Pere trusts to the New Zealand Native Land Settlement Company. Like the trusts, its goal was to restore Maori community control of land alienation (this time in partnership with Auckland businessmen), enabling strategic sales for the benefit of both settlers and Maori. The company started life with heavy debts, however, because of the need to buy back some of the better Turanga lands from settlers.

The Turanga Tribunal, which considered the history of the company in some detail, found that it failed because of its high debts, some poor business decisions, an international economic downturn in the 1880s, and lack of Government support. In 1888, the Bank of New Zealand forced the company into liquidation. It

was at this point that its history first intersected with that of Tahora 2. Pere later claimed (with support from his people) that the owners of Tahora 2 conveyed their subdivisions to the defunct company soon after title to the block was decided in 1889. A deed was never produced in support of that claim. In 1893, ignoring any claims from the company (or tribal leaders), the Crown began to purchase individual interests in the Tahora 2 blocks (see chapter 10).

In the meantime, in 1891, the Bank of New Zealand had held a mortgagee sale of some of the company's lands. The remainder were transferred to a new trust, with trustees Wi Pere and James Carroll (at this time, an East Coast member of Parliament). The lands were still mortgaged to the bank, and held by its estates company. In the early 1890s, Pere promised the bank that something would be done to add Tahora 2 (and other lands for which the company lacked a completed title) to the securities for the trust's debts. No action was taken, however, until 1895, when Pere tried to use the 1889 agreement to stop the Crown's purchase of individual interests. He did so by means of an application to the Validation Court, for it to validate the company's title to Tahora 2.

The origins of the Validation Court have been traversed in detail by the Turanga Tribunal. In essence, the complexity of the native land laws, and the frequent amendments (some of them u-turns) in the requirements for the legal transfer of land from Maori to settlers, had resulted in many incomplete transactions. In 1893, the Liberal Government set up a special court to validate such transactions, where it could be shown that the transaction would have been valid if conducted between Europeans, and if there had been no fraud or deliberate intent to evade the law. This meant that protections such as the trust commissioners' certification of sales (see chapter 10) were treated as technicalities, and purchases could be validated without them. The 1893 court was the third attempt: the first attempt (1889) consisted of a royal commission, the second attempt (1892) gave the task to the Native Land Court, and this third attempt created a special court with its own jurisdiction, but with Native Land Court judges and staff. The Validation Court sat almost solely on the East Coast. It was this court which heard Wi Pere's Tahora 2 application in 1896.

After the Native Land Court defined the Crown's share of the various Tahora 2 blocks, the Validation Court sat to deal with the residue. At the request of Wi Pere, acting on behalf of the owners, the southern Tahora 2 lands were vested in the Carroll–Pere trust: Tahora 2C1 section 3 (28,305 acres); Tahora 2C2 section 2 (3,843 acres); Tahora 2C3 section 2 (15,330 acres); Tahora 2F2 (11,870 acres); and Tahora 2G2 (1,346 acres).

From 1896 to 1902, the trustees tried to raise money for the development of these lands, and also so that they could be cut up for leasing. Most attempts to secure finance failed, but there was a relatively small loan secured on Tahora 2 by the end of this period. In 1901, the bank began the process of a mortgagee sale of the Carroll–Pere trust lands. In 1902, the Government intervened and passed special legislation to prevent this from happening. The East Coast Native Trust Lands Act provided for the Government to appoint a board of 'three fit persons', who could not be members of Parliament, for the purpose of managing the strategic

Tahora 2 block	Into trust in 1903 (acres)	Sold or taken for public works	Returned to owners
2C1 section 3	28,305	6,178	22,127
2C2 section 2	3,843	56	3,687
2C3 section 2	15,330	13,821	1,509
2F2	11,870	311	11,559
2G2	1,346	0	1,770*
Total	60,694	20,042	40,652

* The difference between the estimated area of Tahora 2G2 in 1903 (1346 acres) and the area returned to the owners in 1959 (1770 acres) was the result of a survey.

Table 12.1: Tahora 2 lands and the East Coast trust

Source: Michael Macky, 'Report of Michael Macky in Respect of Tahora and the East Coast Trust' (commissioned research report, Wellington: Crown Law Office, 2005) (doc 18), p 29, tbl 2

sale of enough land to pay off the trust's substantial debts. At this point, the trust held more than a quarter of a million acres, throughout the whole East Coast region. All of that land, whether it was secured against the bank's mortgages or not, was transferred to the new board. This included the Tahora 2 blocks. Section 12 of the Act specified that the former trustees had to agree terms and conditions with the board before it was allowed to sell any land.

In 1903, the East Coast Native Trust Lands Board and the former trustees signed an agreement permitting the board to sell up to 5,000 acres each of Tahora 2C1 and 2C3. In all, the board sold 9,590 acres of these two blocks for £10,009, although it sold more of 2C1 than had been agreed. No other Tahora 2 lands were sold by the board. By 1905, the board had sold enough land to pay off the trust's debts. At this point, the Government chose to dispense with the board and transfer the trust to a single commissioner, called the East Coast commissioner. The commissioner was given all the powers of the board by section 22 of the Maori Land Claims Adjustment and Laws Amendment Act 1906. Section 11 of the Maori Land Claims Adjustment and Laws Amendment Act the following year gave the commissioner the power to develop the trust lands. In 1911, his powers were extended further. He was no longer bound by the 1903 agreements, and had the sole power to sell land as he chose (section 14 of the Native Land Claims Adjustment Act 1911).

The Maori owners, on the other hand, had no say in the decision-making of the trust until 1935. In response to a 1934 petition from Turi Carroll and other owners, section 18 of the Native Purposes Act 1935 provided an advisory role for block committees. It was not until 1949, however, that the owners were given more than advisory powers. Commissioner Jessep set up a central consultative committee in 1948, which was given a formal role by the Maori Purposes Act 1949. The Act provided for an East Coast Trust Maori Council, consisting of an elected

Section 28(3) of the Native Land Amendment and Native Land Claims Adjustment Act 1922

(3) The power of the Commissioner appointed under section twenty-two of the Maori Land Claims Adjustment and Laws Amendment Act, 1906, to sell lands vested in him as such Commissioner shall be exercised subject to the approval in writing of the Native Minister of any such sale or of the proposal to sell.

member from each of the block committees. The council was given the power to veto any sales or mortgages, any purchases by the trust, and any increase of the trust's overdraft.

In the meantime, further sales had taken place in Tahora 2C3 section 2. In 1920, a new commissioner, Thomas Coleman Junior, offered 6,711 acres to Chapple and Field, clients of his private law firm. Despite protests from the trust's solicitor, James Nolan, and from the owners, this sale went ahead and was completed in October 1920. Coleman then began a sale of a further 3,396 acres (almost the whole of the rest of the block) to the same private buyers. With that sale in train, Coleman resigned in 1921 and was replaced by Judge W Rawson, who was also the Maori Trustee. Commissioner Rawson completed the second sale to Chapple, and also sold 183 acres of 2C3 to the Crown in 1922. In that year, the Government – in light of Coleman's actions – changed the law to take away the commissioner's sole power to sell. Section 28 of the Native Land Amendment and Native Land Claims Adjustment Act 1922 required the written approval of the Native Minister for any sale. After this law change, no more land was sold from the Tahora 2 blocks.

The commissioner's principal task was to pay off the trust's internal debts. The board had sold various blocks, no matter what their particular share of the debts owed to the Bank of New Zealand. As a result, the owners of the surviving blocks owed money to the owners of the blocks that had been sold. In order to pay off these internal debts, the commissioner sought an income by leasing land to settler or Maori farmers, or by developing farms himself. As money came in from leasing (or selling) land, and from farm produce, it was spent on developing more land and settling internal debts. A long balancing exercise resulted, with blocks moving in and out of debt to each other for a number of decades, until the wool boom of the early 1950s enabled the trust to be wound up. On 1 July 1953, the three Tahora 2C blocks were transferred from the East Coast commissioner to incorporations of the owners. In 1955, the owners had a joint meeting and agreed that the last 1,509 acres of 2C3 should be sold to 2C2, so that the land could continue being farmed as part of the Tapere station. This sale took place in 1956.

Tahora 2F2 (Papuni Station) was returned to an incorporation of owners on 1 July 1953. Tahora 2G2, however, remained vested in the East Coast commissioner until 1959. This was partly because the list of owners was decades out of date. In

1957, the Government called a meeting of assembled owners to vote on a resolution to sell the block to the Crown. The meeting rejected the resolution, and in 1958 a second meeting was held to establish an incorporation to receive the land back from the commissioner. The land was duly vested in the new incorporation in 1959. Then, in 1961, Tahora 2G2 was proclaimed under the Soil Conservation and Rivers Control Amendment Act 1959, which allowed the prohibition of milling on land required for catchment protection. In 1973, the owners agreed to exchange Tahora 2G2 for Crown land. Two sections of State Forest 101 were transferred to the incorporation in 1973, along with a payment of \$8,320. The additional payment was necessary because the Crown land being exchanged was worth less than 2G2.

12.4 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

12.4.1 How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?

The Crown and claimants agreed on many of the facts about the East Coast Trust and the sale of land from Tahora 2C in 1905 and the 1920s, although they had different interpretations of some key points. They did not agree about the antecedents of the trust, nor the degree of Crown responsibility for the failure of the Carroll–Pere trust. These matters, as we were told, have been the subject of detailed analysis and findings by the Turanga Tribunal. The Crown challenged some of those findings, and the claimants defended them.¹

In essence, the Tribunal found that the Crown’s native land laws failed to provide an adequate (or any) provision for community management of tribal land. As a result, the peoples of Turanga sold their land to trusts or a corporate body at token prices, to sell it in turn on their behalf, in order to restore the community’s ability to alienate selected land to fund farm development. Neither the trust (the Rees–Pere trust) nor the company (the New Zealand Native Land Settlements Company) worked. According to the Turanga Tribunal, the reasons were mixed: the trustees and company made some poor business decisions and the 1880s depression damaged their interests, but the Crown’s title system also contributed to their failure. The 1890s rescue vehicle – the Carroll–Pere trust – also failed, because it had too much debt and too little Crown assistance, too late. In particular, the Tribunal blamed the constant, expensive litigation in the Validation Court as a key reason for the trust’s failure, again brought about in part by the flaws in the Crown’s title system.²

1. Crown counsel, closing submissions, June 2005 (doc N20), topic 13, pp 2–4; counsel for Te Whanau a Kai, closing submissions, 30 May 2005 (doc N5), pp 36–42; counsel for Te Whanau a Kai, submissions by way of reply, July 2005 (doc N27), pp 11–17. We note that counsel for Te Aitanga a Mahaki supported and agreed with submissions made by counsel for Te Whanau a Kai on these issues.

2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 539–585

William Henshaw Clarke (ATL, General Assembly Library, parliamentary portraits, 35mm-00189-b-f)



Wiremu (Wi) Pere, a prominent Turanga Maori leader and member of Parliament for Eastern Maori from 1884 to 1887 and 1894 to 1905. An opponent of the Native Land Court and Government land purchase regimes, Pere sought to restore Maori community control of their land through various trusts, raising capital through managed alienation to ensure Maori participation in land development and economic growth.

As noted, the Crown challenged these findings and the claimants defended them. We do not intend to take these matters further. We did not receive detailed evidence on the antecedents of the Carroll–Pere and East Coast Trusts. To the extent that the trusts’ origins are relevant to Tahora 2, we see no need to revisit the Turanga Tribunal’s findings. The history of Tahora 2 was different in some ways from the situation described in Turanga. Tahora 2 was never part of the Rees–Pere trusts or the Settlement Company, and it was only ever on the periphery of the Carroll–Pere trust. Some of the issues relevant to that trust are not particularly

relevant to Tahora 2, except in the broadest sense. Tahora 2 did not come before the Validation Court because it was an incomplete purchase. Rather, the court was asked to validate a voluntary arrangement to put parts of Tahora 2 in trust. Also, the reasons for the failure of the Carroll–Pere trust are not central to our inquiry. Tahora 2 came into the trust relatively late, and it was never an integral part of it, nor at risk of mortgagee sale by the Bank of New Zealand, to which the Carroll–Pere trust lands had been mortgaged.

On the main matters of relevance to our inquiry, the parties agreed that Tahora 2 was vested in the Carroll–Pere trust in order to put a stop to Crown purchasing, to secure corporate control of any future alienations, and to fund development. The Crown argued, however, that the owners could have chosen the 1894 incorporation option instead of putting their land in such a risky business as this particular trust. The claimants stressed that they had to do something to escape the Crown’s purchase of individual interests, and this was their only viable option. The parties agreed that the Carroll–Pere trust failed because of its debts, although the Crown did not accept the claimants’ argument that it should have done something positive to assist the trust, and that it should have intervened much earlier than 1902.³

In terms of the 1902 intervention, the parties agreed that it was necessary. The claimants did not agree with each other on one issue: Tuhoe challenged the placing of their land in the East Coast Trust without their consent, when it could have been returned to the owners; whereas Te Whanau a Kai considered the replacement of Carroll and Pere with the 1902 board was necessary.⁴ The Crown suggested that there had been a degree of consultation by the trustees with the owners, but accepted that the owners were expecting their land to be transferred to the Maori Land Council, not a Government-appointed board of Pakeha businessmen on which they had no representation. The Crown noted, however, the Turanga Tribunal’s finding that the form of intervention in 1902 had been a ‘necessary and painful measure.’⁵

12.4.2 How and why was land alienated while vested in the East Coast Trust?

Some Tahora 2C land was sold by the board in 1905. Te Whanau a Kai accepted that they had agreed to the sale, and that it was not for the purpose of settling the Bank of New Zealand mortgages.⁶ Counsel concluded that ‘there are no issues for Te Whanau a Kai relating to that matter.’⁷

3. Crown counsel, closing submissions (doc N20), topic 13, pp 3–6; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 36–42; counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 11–17

4. Counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), pp 79, 81; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 40–42; counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 13–14, 17

5. Crown counsel, closing submissions (doc N20), topic 13, pp 6–7

6. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 13–14, 17

7. *Ibid*, p 17

The claimants did, however, take issue with the creation of the East Coast commissioner in 1906, their exclusion from any role or decision-making about their lands until 1949, and the sale of more of Tahora 2C in the 1920s. Relying on Michael Macky's evidence for the Crown, the claimants were critical of the commissioners' unnecessary sale of almost all of 2C3(2) from 1920 to 1923, which took place without their consent.⁸ The Crown also relied on Macky, and accepted that Commissioner Coleman's actions were questionable when he sold parts of 2C3(2). In the view of Crown counsel, however, the Crown's response was adequate: the Government pointed out to the commissioner that he was acting inappropriately, and it later removed the commissioner's sole power to sell. Also, the Crown suggested that the second round of sales under Commissioner Rawson were carried out with the owners' consent, which was a departure from Macky's evidence.⁹

On the question of consultation with – and decision-making powers for – the owners, the Crown accepted that 'the beneficial owners' capacity to control their lands was severely limited between 1902 and 1949' and that it was 'also likely that Maori were anticipating a greater role in the Trust than they were given.'¹⁰

In the Crown's view, this was acceptable during the emergency period of 1902 to 1906, but as soon as it became clear that the trust regime was going to have a long existence, it became 'problematic.'¹¹ Nonetheless, the Crown stressed the degree of informal consultation that probably took place on the ground, the creation of advisory owner committees in 1935, and the grant of real powers to the East Coast Trust Maori Council in 1949. Also, the owners' lack of control was compensated by the development of their lands, and the return of those lands in the 1950s.¹² The claimants accepted that this outcome 'offset' some of their grievances, but not all of them.¹³

12.4.3 Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?

Tuhoe and Ngati Kahungunu land was vested in the East Coast Trust in 1902, but none of it was sold. For these iwi, the grievances are different. Tuhoe claimed that their piece (2G2) was vested in the Carroll–Pere trust without their consent. This error was compounded, they argued, when the land was revested in the East Coast Trust in 1902, again without their consent. From 1902 to 1958, Tuhoe had no say in the decisions about their land. It was left neglected to accumulate debts, while the commissioner at first tried to sell or exchange it in 1926, and then ignored it for the next 30 years as too isolated for development.¹⁴ The Crown argued that it was

8. Ibid, pp 14, 16–17

9. Crown counsel, closing submissions (doc N20), topic 13, pp 9–10

10. Ibid, p 7

11. Ibid

12. Ibid, pp 7–8, 10

13. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 14

14. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 79–82

in fact too isolated for development, and that it would have been unfair to other blocks if more money was spent on this one than it could repay.¹⁵ The claimants responded that as soon as the commissioner decided that he would not develop the land it should have been returned to Tuhoe instead of being left to accumulate debts. They could then have made their own decision about it. Also, they suggest that the Crown's main argument – that Maori grievances were remedied when their land was saved and returned in a developed form – does not apply to them.¹⁶

Further, Tuhoe argued that the Crown's actions were 'coercive' when the land was actually returned in 1959. Unable to persuade the owners to sell the land to it, the Crown used legislation to prevent them from using it or getting any benefit from it, until they were finally compelled to agree to an exchange.¹⁷ The Crown argued that it had a valid need for this land to protect a river catchment and prevent erosion, and that it made a fair exchange in which the owners got an economic asset in return, about which no complaints were made.¹⁸

12.4.4 Did the Crown keep more than its fair share of Tahora 2F after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

Ngati Kahungunu do not take issue with the fact that Tahora 2F² was returned to them intact in the 1950s, with a developed and working farm. They do, however, protest against their loss of land as a result of survey errors. When 2F was partitioned between Ngati Kahungunu and the Crown in 1896, the block was believed to be larger than it turned out on survey, so that the Crown was awarded 803 acres more than its fair share. This error was discovered during the trust's administration, when the claimants had no say in managing the land. Numerous petitions failed to secure redress.¹⁹ The Crown responded that it received less than its due in Tahora 2C. At the time of the claimants' petitions, the Crown's response was that any compensation should therefore come from the Maori sections of 2C, and not the Crown's part of 2F. Crown counsel accepted that there were few owners in common between the 2C and 2F lands.²⁰

12.5 TRIBUNAL ANALYSIS

12.5.1 How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?

SUMMARY ANSWER: Tahora 2 was drawn into the Carroll–Pere trust in 1896. By 1889, when the New Zealand Land Settlement Company had already failed, Turanga leader Wi Pere was still trying to get Maori land vested in it. His purpose

15. Crown counsel, closing submissions (doc N20), topic 13, pp 12–13

16. Counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), pp 17–18

17. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 81–82

18. Crown counsel, closing submissions (doc N20), topic 13, p 13

19. Counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), pp 8, 68–70, 74; see also Peter Boston and Steven Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 271–282.

20. Crown counsel, closing submissions (doc N20), topics 8–12, p 64

was to restore Maori community control of land alienation, and to raise capital for development by means of leasing and strategic sales. In 1893, the Crown began buying individual interests in Tahora 2, refusing to negotiate with tribal leaders. In an attempt to stop the bleeding of individual shares, Pere and Rees applied to the Validation Court to confirm an alleged transfer of Tahora 2 to the Settlement Company back in 1889. No deed was produced, but in 1896 the court gave effect to a voluntary agreement among the southern Tahora 2 leaders, that their lands should be vested in the Carroll–Pere trust, which had replaced the Settlement Company. One Tuhoe block, Tahora 2G2, was vested in the trust, although its owners were not present in court and did not consent.

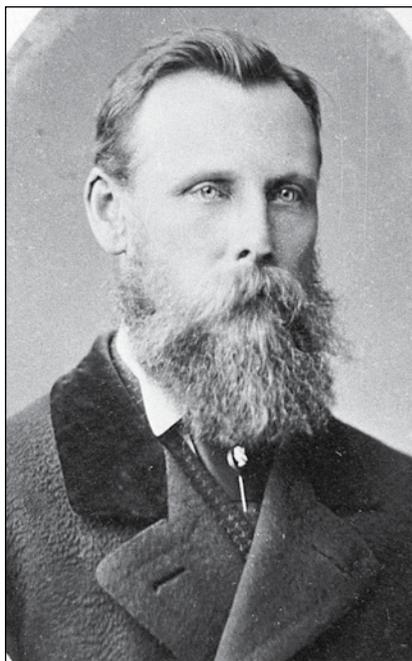
From 1896 to 1902, Tahora 2 was on the periphery of events relating to the Carroll–Pere trust. At first, the trustees were inclined to agree with the Bank of New Zealand that the block should be counted among the securities for the trust's debts, and thus available for mortgagee sale, but the Validation Court (and ultimately the trustees) did not allow this. It was kept separate from the main trust estate. At the same time, it was nearly impossible to raise finance for development, so there was only a minor debt outstanding against Tahora 2 when the bank forced a mortgagee sale in 1901. Legal action forestalled the sale, and the Government was finally persuaded to intervene in 1902, partly to save as much of the Carroll–Pere trust lands as possible, and partly to save the bank itself from a sale that might not even cover the debts.

Carroll consulted leading owners and tried to get the lands transferred to the new Maori Land Council, with its Maori majority and elected Maori representatives. The Government turned down this proposal, as it had turned down earlier proposals for Government financial assistance and for continued Maori governance of the trust. Instead, all the lands vested in Carroll and Pere (including Tahora 2, which was not at risk of mortgagee sale) were transferred to a board of three Pakeha businessmen. The Turanga Tribunal considered this arrangement for professional management to have been a painful but necessary step. We note, however, that Carroll also intended the Council to appoint professionals to manage these lands. Some Maori input was provided in the 1902 scheme: the board could not sell lands to clear the trust's debts without the prior agreement of the former trustees.

12.5.1.1 Legal powers for Maori to protect their own lands: Tahora 2 and the Carroll–Pere trust

As we have seen, the Crown conceded that it failed to provide a mechanism for Maori to manage their lands as communities. The importance of this concession cannot be overstated. From 1878 to 1894, Urewera lands passed through the court and became the property of collections of individuals. The law empowered those individuals to alienate their paper shares at the expense of the customary authority of rangatira and community control. In 1886, the law was changed to allow groups of owners to elect block committees. Significantly, restrictions on alienation were no longer thought necessary for the short period when this law was in force. Restrictions were restored alongside individual dealings in 1888. Finally, in 1894,

William Lee Rees, colonial lawyer and politician, circa 1878. As well as being a member of the commission of inquiry that strongly criticised the existing native land law regime in the early 1890s, Rees was Wi Pere's lawyer. Together, the two men established trusts and a joint-stock company, in partnership with Auckland businessmen, in an attempt to protect and manage Maori land on the East Coast. The economic and political circumstances, however, were not favourable.



William Henshaw Clarke (ATL, General Assembly Library, parliamentary portraits, 35mm-00147-b-f)

the Liberals provided for block owners to form incorporations, with elected management committees.

This reform came too late for Te Urewera. Most of the land left in the rim blocks was already tied up in Crown dealings (or was soon after), which meant that Maori could not form incorporations. In that circumstance, Maori leaders on the eastern side of our inquiry district tried another model with which they were more familiar: a formal, legal trust. The courts had ruled in 1881 that Maori land could not be placed in trust unless it had a freehold (later Land Transfer) title. Memorials of ownership did not qualify.²¹ Nonetheless, Wi Pere and his lawyer, William Rees, had established trusts (and later a joint stock company) on the East Coast. Their aim was to ensure community management and protection of Maori land; judicious sales would fund its development, allow for control of the extent of Pakeha settlement, and for infrastructure. The joint-stock company, called the New Zealand Native Land Settlement Company, was a more ambitious operation with the same objects, designed to attract settler capital, while Maori would invest their land. The company had failed in 1888, a victim of the debts it inherited from the trusts (which had had to buy good land back from settlers), unwise business decisions, a lack of Government support, and the international economic downturn, which saw its sales dry up. The company had substantial debts to the Bank

21. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–489, 490–491, 523–524, 535–536, 552

of New Zealand. A new trust (called the Carroll–Pere trust) was established in its stead in 1892.²²

In 1893, Rees and Pere proposed a scheme for the development of East Coast Maori lands, including Tahora 2. They sought a large loan from the Government to pay off the Settlement Company's old debts, the survey liens on Tahora 2 (and other blocks), and to fund farming development. They also wanted to fund improvements to enable some of the land to be leased. Farming was to be on a large scale and managed by tribal committees. In return, the 3,000 or so Maori owners would sell significant amounts of land to the Crown for settlement, including parts of Tahora 2. The Government, however, rejected this scheme. It was suspicious of Maori abilities to farm on any significant scale, and preferred to buy individual shares in Tahora 2, which it did over the next two and a half years (see chapter 10). In order to put a stop to the bleeding of individual interests, Rees and Pere warned the Crown that they would take a pre-Crown purchase agreement covering the whole of Tahora 2 to the Validation Court for its endorsement. The Government was not deterred, so the application to the court went ahead.²³

There was a brief tussle for jurisdiction. Judge Gudgeon was both Native Land Court and Validation Court judge in this case. The Crown had applied to the Native Land Court for a partition of its interests, but Rees had filed a prior application to the Validation Court regarding an 1889 agreement to vest the whole of Tahora 2 in the Settlement Company. Rees argued that the Validation Court had to decide his application first. For reasons that are unclear, the Native Land Court dealt with the Crown's application first, and awarded it some 130,000 acres of Tahora 2.²⁴ On the same day, Judge Gudgeon sat as the Validation Court to decide whether the 1889 agreement should be validated, which would have resulted in the vesting of the Tahora 2 residue blocks in the Carroll–Pere trust.

The detailed history of the Carroll–Pere trust has already been covered by the Turanga Tribunal.²⁵ Here, we note two points of significance to our inquiry. The first point is that the trust mechanism, which the Turanga Tribunal called recollectivising, was a way of empowering Maori committees and ensuring the management of their lands by community leaders. But, as we have seen, the Rees–Pere trusts and the New Zealand Native Land Settlement Company both failed, and the debts of the company led to a mortgagee sale of a number of its land blocks by the Bank of New Zealand Estates Company. The Carroll–Pere trust was a rather desperate attempt to save the rest of the Settlement Company lands for their Maori owners. Clearly the new, unique, and experimental trust started life with considerable disadvantages. The Crown agreed with Macky that it was established with 'too

22. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 3–4

23. Kathryn Rose, comp, 'Te Aitanga-a-Mahaki and Tahora 2: Extracts from Reports Written for Te Aitanga-a-Mahaki Claims Committee', 2002 (doc A77), pp 41–42; Michael Macky, 'Report – in Respect of Tahora and the East Coast Trust' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L8), pp 6–8

24. Macky, 'Tahora and the East Coast Trust' (doc L8), p 8; Boston and Oliver, 'Tahora' (doc A22), p 131

25. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 539–585

much debt and too little land.²⁶ It lacked access to sufficient cheap finance, and rapidly racked up costs and debts as it funded Maori farming development. The trustees tried to solve its problems with land to which the company had acquired partial title, and which could now be secured through the Validation Court, to bolster the trust's asset base and spread the debt across more land. Tahora 2 was one such block.²⁷

The second point is that the court did not in fact validate the 1889 'agreement', which supposedly vested the whole of Tahora 2 in the Settlement Company. Macky pointed out that an actual deed was never produced in court, and may never have existed.²⁸ The court had no choice but to recognise that the Crown had purchased parts of all of the blocks (as decided in the Native Land Court), and it only vested southern Tahora 2 in the trust, while awarding ownership of the residue of the lands in the north of the block directly to their owners.²⁹ Section 19 of the Native Land (Validation of Titles) Act 1893 gave the court power to approve voluntary arrangements.³⁰ This, in effect, was what happened with Tahora 2. Wi Pere, and the peoples that he represented, claimed their shares of Tahora 2 for the trust, but did not (for the most part) try to obtain the Tuhoē or Whakatohea sections. With the apparent consent of the owners – and no objections in court – the judge gave effect to the voluntary arrangements presented to him in 1896 in satisfaction of the 1889 'agreement'.³¹

We pause here to consider Tuhoē's claim about the vesting of Tahora 2G2 in the trust.³² Unlike the rest of the Tuhoē lands, Pere did claim this block for the trust. Why did he do so? From the evidence available to us, it appears that the answer lies in the original title determination for 2G in 1889. Originally, the 2G lands were part of the Turanga claim (2C). The 2G block was a 1,856-acre piece of land at the 'eastern edge' of Tuhoē's claim in Tahora.³³ Netana Te Rangiihu had claimed land in 2C on behalf of Nga Maihi and Ngai Tamaroki. This claim breached the arrangements made between tribal leaders for the subdivision of Tahora 2 into iwi blocks. Tamaikoha negotiated a new agreement with Pere in March 1889. In return for cutting the 2G block out of 2C for Nga Maihi and Ngai Tamaroki, Netana and Hetaraka Te Wakaunua gave up their wider claims in 2C. Thus, the creation of 2G and its award to Tuhoē had been a compromise between Turanga and Urewera leaders.³⁴ Wi Pere, it seems, was claiming this land back when he sought it for the Carroll–Pere trust in 1896.

26. Crown counsel, closing submissions (doc N20), topic 13, p3; Macky, 'Tahora and the East Coast Trust' (doc L8), p 4

27. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 4–5

28. *Ibid*, pp 5–7

29. Boston and Oliver, 'Tahora' (doc A22), pp 131–140

30. Native Land (Validation of Titles) Act, s 19

31. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 5–9; Boston and Oliver, 'Tahora' (doc A22), pp 129, 139–140

32. Counsel for Wai 36 Tuhoē, closing submissions, pt B (doc N8(a)), pp 79–82

33. Judith Binney, 'Encircled Lands, Part 1: A History of the Urewera, 1878–1912' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), pp 10, 104

34. Boston and Oliver, 'Tahora' (doc A22), pp 62–64

The Native Land Court awarded 510 acres (2G1) to the Crown. The residue (2G2), estimated at 1,345 acres, was vested in the Carroll–Pere trust. Tuhoe claim that there is no record of the owners being present at the hearing, nor that they consented to this vesting, other than a statement in court to that effect by Wi Pere.³⁵ He told the court that ‘Most of the owners belong to Uriwera [*sic*] but some of them are here. They have agreed to appt of Trustees – Carroll, myself and Kaho Anumia [*sic*].’³⁶ Significantly, Pere did not apply for the appointment of a committee to represent the owners, as he did for some of the other blocks.³⁷

It emerged from a later petition in 1903 that Tuhoe had definitely not been present at the 1896 hearing. Tamaikoha sent a petition to Parliament on behalf of Tuhoe and Te Upokorehe, explaining that the 1896 hearing had been too distant (and, presumably, expensive) for the hapu to attend. They sent John Balneavis to look after their interests, and he oversaw matters on their behalf. Instead of acting in their interests, however, Balneavis was believed to have betrayed the hapu. He tried to secure the best land for a small minority by partitioning the residue of 2A.³⁸ Tamaikoha told Parliament:

Balneavis, acting for himself and 25 others, had prevailed upon the Court to cut out of the residue of the Block 2148 acres, to be named Tahora No 2A Section 3, being all the flat, or ground fit to cultivate, leaving us the great majority of the owners 135 only precipitous broken bush unfit for cultivation, also taking all our ancestral burial places and cultivations. Many of us are almost landless, and now living upon and cultivating land belonging to our friends.³⁹

The select committee referred the petition to the Justice Department for comment.⁴⁰ The chief judge inquired into it and discovered that Balneavis had indeed secured this partition without the knowledge of the other owners. He advised that there was some justification for the petitioners’ complaint.⁴¹

We take this as clear evidence that Tuhoe did not attend the 1896 hearing, and that their chosen representative could not be relied upon to protect their interests. Balneavis, it seems, was the only person who might have objected on their behalf to the vesting of 2G2 in the trust, and he did not do so. We accept the Tuhoe claim that they were not present and did not consent to the vesting of 2G2 in the trust.

35. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 79

36. Tairawhiti Validation Court, minute book 4, 17 April 1896, fol 188 (Boston and Oliver, ‘Tahora’ (doc A22), pp 139–140). The name of the third trustee is difficult to read in the minutes, but appears to be Kaho Numia.

37. Boston and Oliver, ‘Tahora’ (doc A22), pp 138–140

38. *Ibid*, p 166

39. Petition No 10, Erueti Tamaikoha and 11 others, 1902 (Boston and Oliver, ‘Tahora’ (doc A22), p 166)

40. The Native Department had been abolished at this time, with its responsibilities divided between Justice and Lands and Survey.

41. Boston and Oliver, ‘Tahora’ (doc A22), pp 166–167

12.5.1.2 The Carroll–Pere trust: Tahora 2 gets into debt

As we have seen, the southern parts of Tahora 2 (some 60,000 acres) were vested in the Carroll–Pere trust in 1896. Of these lands, the Ngati Kahungunu share (2F2) remained intact and was successfully developed for farming. The Tuhoe block (2G2) was also kept intact, although it was not developed. Neither iwi, therefore, has a claim about the trust's alienation of land. Sales were confined to the three Tahora 2C blocks belonging to Te Whanau a Kai and three other hapu.

Overall, the question of land sales became tied up with the need to pay off the trust's debts, more than the need to raise finance for development. The 1892 agreement between Rees, Pere, Carroll, and the Bank of New Zealand's Estates Company required the new trust to trade its way out of debt within five years. The Crown's historian, Michael Macky, argued that this was an impossible task. The debts were too high, and the trust's land base was too low, for it to succeed. Its only chance was to pull in as much extra land as possible, at the risk of this too being sold to pay off the ever-growing interest on (and the principal of) the old debts. The validation legislation of 1892 and 1893 offered the trust a chance to obtain more land at no extra cost, other than high legal fees, if it could convince the new court to validate some of its old, incomplete titles. As early as 1892, Rees and Pere promised the Estates Company that they would complete titles to Tahora 2, to provide more security for the mortgage. They repeated this promise in 1893 but did not carry it out until 1896.⁴² This indicates a hesitancy on the part of both owners and trustees – they did not make good on their promise until virtually forced to do so, as a way of stopping the Crown's purchase of undefined individual interests.

The Tahora 2 lands became vested in a series of trusts, with trustees additional to Carroll and Pere for each of the blocks. Their exact relationship with the rest of the Carroll–Pere trust was undefined, left deliberately by the Validation Court for a future decision.⁴³

Macky suggested that the owners agreed to this arrangement because:

- ▶ they wanted to stop the Crown purchasing of individual shares;
- ▶ they wanted a corporate title and management structure;
- ▶ they wanted to control any future alienations so as to get real profits and capital for development, and they wanted a choice between selling or leasing.⁴⁴

As the 1890s wore on, Carroll spoke for the many Maori who preferred leasing to sales, farming development, and Maori partnership with the Crown in achieving both. This was influential in shaping the direction of the trust, and also the alternatives proposed as to the manner of the Crown's intervention in 1902. We will return to that below. Here, we note that the trustees tried to raise money on Tahora 2 for a variety of purposes, although they neither leased nor sold any of it.

As early as November 1896, Rees applied to the Validation Court for the removal of restrictions to permit the land to be leased, and to enable the trustees to borrow

42. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 3–8

43. Ibid, pp 9–10, 14–15; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 45–48

44. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 10–12

money for the payment of costs, charges, and expenses, including past and future survey costs. The trust wanted to survey (and provide road access to) distinct parcels for leasing. The court granted the application, authorising the trust to apply to the Government. These ‘restrictions’ were not restrictions on alienation, recorded on the title, but restrictions imposed by the Crown’s right of pre-emption under the 1894 Act. Special permission was required for Maori land to be leased or mortgaged to anyone other than the Crown, and this included the Tahora 2 lands held by the trustees.⁴⁵ Further applications to the court followed, because it proved almost impossible to get loans. The Government and its lending institutions were, in Rees’ words, ‘absolutely afraid to touch Maori lands.’⁴⁶ They were seen as risky partly because incomplete private purchases had left titles shaky. This was an outcome of the Crown’s title system and purchase policies for Maori land.

In the late 1890s, the Carroll–Pere trust was in serious financial strife, as legal fees and interest on debts ballooned. The Tahora 2 lands were in lesser financial difficulties, but finding it hard to raise money for development. The trustees tried fruitlessly to secure loans on Tahora 2. In 1897, the trust did get a more general loan of £8,500 from the Bank of New Zealand, of which £568 was used to pay Rees’ legal fees in connection with Tahora 2. This sum would have to be repaid whenever the block generated any income. In 1900, the trust applied to the court to approve a £3,500 loan on Tahora 2. The 2C and 2F owners met with the trustees and asked for the loan to be increased by £2,000, to provide development capital for their reserves at Te Papuni (2F2) and Te Houpapa (2C2). The judge approved the application but the trustees returned to court in 1901, seeking fresh approval of a reduced loan at the less ambitious sum of £2,500. This was supposed to fund surveys so that some of the land could be cut up for leasing or sales. But the loan fell through and the trust had to take the money from a private individual at an exorbitant interest rate, to the alarm of the Validation Court.⁴⁷

Despite some misgivings on the part of Judge Batham, the Validation Court had assumed a monitoring and supervisory role over the trust’s administration of land vested in it through that court. In overseeing these various applications, the judge stressed that Tahora 2 was not to be made responsible for the Bank of New Zealand mortgages. The bank (which was also in trouble) was looking hopefully at Tahora 2. In the past, the trustees had sometimes treated the land as though it was part and parcel of the Carroll–Pere trust and its obligations, but the court reminded the trustees (and the bank) that this was not so. By 1901, as the crisis intensified and the deadline approached for another mortgagee sale, the bank was trying to ensure that Tahora 2 would be considered part of the assets available to it. The trustees and the court both opposed the bank, and insisted that Tahora 2

45. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 44; Tairawhiti Validation Court, minute book 5, 19 November 1896, fols 378–379; Native Land Court Act 1894, s 117; Native Land Laws Amendment Act 1895, s 4

46. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 43

47. *Ibid*, pp 43–54

consisted of separate trusts.⁴⁸ Rees proposed that Tahora should ‘not be treated as an integral part of the Trust estate’. Judge Batham agreed:

I am not aware that I have ever looked upon Tahora as forming part of the general Trust Estate[;] until the question as to whether Tahora is part of the general Trust Estate is decided, it should be treated as a separate estate. That question has never been brought before the Court in a proper manner.⁴⁹

In 1905, when the Tahora 2 debt was paid off, it amounted to £2,742 8s 4d.⁵⁰ The Carroll–Pere trust’s debts, on the other hand, had risen from £58,000 in 1892 to £156,383 by 1902. This increase was almost entirely the result of legal fees and interest.⁵¹ From time to time, the trustees and the Maori communities of the East Coast sought the aid of the Government. The Liberals rejected all appeals for Government finance to assist the trust. This was despite a recommendation from the Validation Court, which had suggested that a political solution was necessary to the trust’s problem: the Government needed to advance money in return for a ‘certain measure of control’.⁵² Petitions to the Native Affairs Committee resulted in several reports to the Government in favour of helping to resolve the growing crisis. Its failure to do so would have considerable ramifications for Tahora 2. In 1895, the bank had extended the Carroll–Pere trust’s deadline for a mortgagee sale to 1901. From 1896 onwards, Bills were introduced to Parliament to rescue the land (and the bank) before it came to that. All of them lapsed. There was, as the Turanga Tribunal put it, no ‘political will’ to negotiate and push through a solution.⁵³

Part of the problem lay in the distance between Maori and Government views of the remedy. The trust’s platform for rescue packages usually involved continued Maori control, a prominent role for leasing, and a Government loan to pay off the bank and help development. The Government, on the other hand, tended to prefer a board of Pakeha businessmen, the strategic sale of enough land to pay off the debt, and an ongoing management regime independent of the owners. Increasingly, it fell to Carroll to mediate these two quite different approaches, due to his role as trustee and (from 1899) as Native Minister.⁵⁴

48. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), pp 45–48; Macky, ‘Tahora and the East Coast Trust’ (doc L8), pp 9–10, 14–17

49. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 46

50. East Coast Native Trust Lands Board, ‘Schedules of Lands Vested in the Board, and a Statement of the Board’s Transactions in Regard to the Said Blocks to the 31st July, 1905’, AJHR, 1905, G-9, p 5

51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 561

52. Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), p 43

53. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 560–563; Macky, ‘Tahora and the East Coast Trust’ (doc L8), pp 13–19; Rose, ‘Te Aitanga-a-Mahaki and Tahora 2’ (doc A77), pp 43–54

54. The 1902 Bill was drafted by the bank’s and the trust’s lawyers (Bell and Rees), and was influenced by Carroll. He did not, however, introduce the Bill in Parliament, as that would have been a conflict of interest. The Bill was introduced by Sir Joseph Ward instead. Due to the extreme haste (the Bill had its first reading on 22 August, one week before the date for the mortgagee sale), the details of the Bill were settled by a special parliamentary committee.

12.5.1.3 Crown intervention in 1902

The political will for successful intervention in 1902 came from the precarious situation of the Bank of New Zealand. It had been in trouble for some time by 1902, despite a large Government bailout in 1894. Court action on the part of the owners had failed to do more than delay the proposed mortgagee sale, but there was a very real concern, on the part of the bank as well as the owners, that a forced sale would result in low prices and might not even cover the mortgages. Also, there was the threat of further litigation from the trustees, and – as the bank's chairman explained to Sir Joseph Ward, the acting Premier – it did not want to be seen to force the sale of Maori land. The bank appealed to the Government for a solution in 1902, and the Government obliged.⁵⁵ According to the Turanga Tribunal, the Government could and should have intervened earlier. Had it done so, it would have prevented the escalation of debt and the greater land loss necessary to pay for it.⁵⁶ We agree.

Carroll's first effort at a solution in 1902 was a compromise between the Government and Maori proposals. In our view, his scheme was a critical opportunity for the Government to have ensured that Maori retained decision-making powers in the vehicle chosen to replace their trustees. Carroll wanted to vest control of the land in the new Tairawhiti Maori Land Council, which had just been set up under his 1900 legislation (discussed in chapter 10). This would have allowed Maori a say in what happened, through their elected representatives on the Council, and might well have resulted in an emphasis on leasing, which was the Council's main business. Carroll claimed that he and Pere had consulted the 'principal owners,' who supported this solution. (He had not, he conceded, consulted the majority of owners.)⁵⁷ Carroll's compromise was rejected by the Government, which insisted on a board of three Pakeha businessmen, with the skills to sell the land in such a manner as to pay off the debt but rescue most of it for the owners.⁵⁸ Hone Heke, the member for Northern Maori who was a strong advocate for Maori rights, pressed for the retention of control by the owners, and a rescue in the form of a Government loan.⁵⁹

The option finally chosen by Parliament was enacted in the form of the East Coast Native Trust Lands Act 1902. Both the Maori Land Council and a Government loan were firmly rejected. According to Rees, Carroll had to accept this defeat because the mortgagee sale was only days away, but he was determined to revisit it and transfer control to the council in the next parliamentary session,

55. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 563; Katherine Orr-Nimmo, 'Report for the Crown Forestry Rental Trust on the East Coast Maori Trust' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A54), p 149

56. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 568

57. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 138–140

58. In response to criticism on this point, Carroll responded that the Council could appoint a professional manager to carry out the business side of things, but that the decisions should be made by the Council and not the manager.

59. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 151–152; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 52–53

after his main political ally (Premier Seddon) returned.⁶⁰ If this is correct, Carroll was not able to effect such a change in 1903.

Instead of the council, the Act provided for the Government to appoint a board of three businessmen to sell land and settle the debts. The current trustees – Carroll and Pere – were ruled out by a clause that specified that members of Parliament could not sit on the board.⁶¹ But they were given a significant degree of control in the form of mandating what the board could – and could not – sell. Section 12 provided that the ‘terms and conditions of management, and of selling, leasing, mortgaging, improving, or otherwise dealing with the said lands’ had to be agreed in advance between the ‘trustees or beneficiaries and the Board by deed’.⁶² There was a further stipulation for land such as Tahora 2, which had been vested in the trust by the Validation Court: the chief judge had to approve the terms of the deed.⁶³

In our view, this gave a significant degree of control to the trustees and (if they consulted properly) the Maori owners. It will be recalled that the Validation Court had agreed to Pere’s proposals, wherever he had sought the appointment of an owners’ committee to represent the owners in their dealings with the trustees. These committees may have met with Carroll and Pere to agree the terms to be put to the board, although we have no evidence of that. The eventual deed was signed by a handful of owners, in addition to the trustees. Nevertheless, Macky noted that the 1890s’ Bills had all provided for Maori representation on the decision-making trust body. It was likely, he concluded, that ‘Maori were anticipating a greater role in the Trust than they were given.’⁶⁴ We agree, and we note further that this option was deliberately rejected by Parliament.

In the next section, we will consider what the inclusion of the owners’ trustees was ultimately worth in terms of the agreements negotiated between them and the board. We will also review the board’s sale of Tahora 2 lands, the continuation of a non-Maori trust after the board resolved the immediate crisis, and the further sale of Tahora 2 lands by the new East Coast commissioner.

12.5.2 How and why was land alienated while vested in the East Coast Trust?

SUMMARY ANSWER: In 1903, the former trustees of the Tahora 2 blocks negotiated an agreement with the East Coast Native Trust Lands Board. Some ‘representative owners’ also signed this agreement. The board was mandated to sell up to 5,000 acres of two of the Tahora 2C blocks. While it did not exceed the overall cap of 10,000 acres, the board sold more of Tahora 2C1(3) than was provided for in the agreement. The claimants do not take issue with this sale.

Having cleared the external debts (but exacerbated the internal debts), the board’s task was finished. In 1906, control of the trust was vested in a Pakeha

60. Orr-Nimmo, ‘Report on the East Coast Maori Trust’ (doc A54), p 152

61. East Coast Native Trust Lands Act, s 3

62. *Ibid*, s 12

63. *Ibid*

64. Macky, ‘Tahora and the East Coast Trust’ (doc L8), p 21

Section 12 of the East Coast Native Trust Lands Act 1902

12. Terms and conditions of management, selling &c—The terms and conditions of management, and of selling, leasing, mortgaging, improving, or otherwise dealing with the said lands, and of all properties by this Act vested or hereafter to be vested in the Board, shall be agreed upon between the trustees or beneficiaries and the Board by deed; but, so far as relates to securities and lands vested in the trustees, either alone or with others, by decrees of the Validation Court, they shall have no force or effect until approved by the Chief Judge of the Native Land Court:

Provided that the bank shall retain the control and management of any lands, stock, and properties heretofore controlled and managed by the bank.

commissioner. While the expedient of removing the owners from control of their lands had not been envisaged as a long-term measure, it now proved to be so. Worse, in 1911 Parliament freed the commissioner from the constraints imposed by the 1903 agreements, giving him unfettered powers to sell trust lands. In the early 1920s, Commissioner Coleman initiated two sales of Tahora 2C lands to a client of his private law firm. James Carroll, for the owners, and James Nolan, the trust's solicitor, protested to the Government. The sale of this land did not fit the usual pattern of alienations from the trust, which appear to have been for the off-loading of unprofitable land burdened with accumulating debts. Nolan alleged that the commissioner was 'in the hands of' the private buyer, and Carroll advised that the owners opposed the sale.

The Government intervened too little and too late: first, it did not suspend Coleman or investigate further, taking no action other than to advise Coleman that his actions were inappropriate; and, secondly, it removed the unfettered powers of the commissioner to sell in 1922, after the event. Even then, approval for sales was vested in the Native Minister alone, with no requirement for the owners to be consulted or to consent. Coleman's successor, W Rawson, had to complete the second sale, regardless of the wishes of the owners. Also, he sold a small piece of land to the Crown, described by historians Boston and Oliver as a 'mindless' purchase by the Crown because it did not really need this land. By these means, 9,894 acres was sold, representing almost the whole of 2C3(2) block (and around 20 per cent of the Tahora 2 land remaining in the estate).

The owners remained excluded from the trust's decision-making until the eve of its dissolution in the 1950s. Nonetheless, the claimants and Crown agree that where Tahora 2 lands were returned intact, with developed farms, this offset the grievance in that respect. Not so for the alienation of Tahora 2C lands in the 1920s, which were unnecessary in the trust's terms, and carried out not merely without the owners' consent, but in the face of their known opposition. While the owners were paid for their land, many years later, that did not compensate for the loss.

12.5.2.1 The East Coast Native Trust Lands Board sells parts of Tahora 2c

In 1903, a series of agreements were concluded between the East Coast Native Trust Lands Board and the former trustees. The position of Tahora 2, before it entered the new arrangements, was as follows:

- ▶ the Tahora 2 lands had not been burdened with the debts to the Bank of New Zealand by 1902, so were not in danger of being sold as part of the mortgagee sale;
- ▶ the Tahora 2 lands were nonetheless vested in the board under the 1902 Act, along with all other lands held in trust by Carroll and Pere (whether in common with other trustees or not); and
- ▶ the Tahora 2 lands were not included among the principal or specific security blocks, so they could not be sold by the new board to pay off the general estate's mortgages to the bank, but they were considered part of the wider trust and available for settlement of other debts.⁶⁵

In theory, therefore, it was possible that none (or very little) of Tahora 2 would be sold by the board. At first, Carroll opposed the sale of any part of it, along with any other land that had not been mortgaged to the bank. But there was a private mortgage over Tahora 2, and the land still needed to be developed to the point where it could be farmed or cut up for leasing (or both). It was producing no income. As a result, the Tahora 2 trustees agreed that up to 5,000 acres of the 15,330-acre 2C3(2) block and up to 5,000 acres of the 28,305-acre 2C1(3) block could be sold by the board. They also mandated the board to begin leasing and developing the land.⁶⁶ The chief judge approved the deed of agreement between the owners, trustees, and board in December 1903.⁶⁷

In addition to Carroll and Pere, who were trustees for all of the blocks, the deed was signed by Peka Kerekere (trustee for the three 2C sections), Hukanui (trustee for 2C1(3)), and Hawea Tipuna (trustee for 2F2). In addition, although none of the 1896 committee members signed the deed, there were several owners who did so: Te Haenga, Winiata Te Rito, Hori Niania, Tamati Hake, Hohepa Napihi, and Maike Taruke.⁶⁸ Kathryn Rose called this a group of 'representative owners.'⁶⁹ We note, however, that the trustee for 2G2, and the beneficial owners of 2G2, were not included in this agreement. We have no information on how widely the owners were consulted in making these arrangements.

Thus mandated, the board sold 9,590 acres of Tahora 2 for £10,009. It reported to Parliament that this sale was 'to pay old liabilities contracted by the Trustees,

65. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 19–20, 22–23. The principal and specific security blocks were both liable to be sold at a mortgagee sale. The difference was that the principal security blocks, which had perfect titles, were transferred directly from the Settlement Company to the Carroll–Pere trust, while the specific security blocks had to have their titles completed in the Validation Court before being vested in the trust. Tahora 2 was not held to be a specific security block for the mortgages to the Bank of New Zealand.

66. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20–22

67. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53

68. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 9, 20

69. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53

Summary of the Board's Sales for Tahora 2

The trustees (and some representative owners) mandated the board to sell:

- From Tahora 2C1(3): up to 5000 acres (the board sold 6244 acres).
- From Tahora 2C3(2): up to 5000 acres (the board sold 3326 acres).

and to assist in redeeming mortgages in the Mangapoike and Tahora Blocks: the latter (£2,742 8s 4d) has been paid off.⁷⁰ There are two issues to note about this sale. According to Macky, the 'old liabilities' amounted to £20,600, as distinct from the mortgages to the Bank of New Zealand. Most of these debts came from legal expenses, but they also included the general expenses of running the trust. Thus, a large sum of money from this sale was 'applied to expenses that were not specific to Tahora.'⁷¹

The second point is that the board did not carry out the exact terms of the 1903 agreement. It had sold 6,244 acres of 2C1(3), and 3,326 acres of 2C3(2). It had thus exceeded the 5,000-acre cap in one block, but had balanced that by selling less of the other block. In its report, the board noted that it had permission to sell 10,000 acres of Tahora 2.⁷² It is unclear whether this represents a creative (and incorrect) interpretation of the 1903 agreement, or whether the board had approached the trustees and owners to vary the agreement.

Nonetheless, the claimants accept that their land was not sold to pay off the Bank of New Zealand mortgage. As a result, and presumably in light of the agreement between the trustees and the board, the claimants say that they take no issue with this sale.⁷³ We therefore turn to the sequel of this first sale and the setting up of the board: the exclusion of the owners from any more say in the management of their land, and the sale of additional lands from the 2C blocks without their permission.

12.5.2.2 *The board is replaced by an East Coast commissioner with unrestricted powers to sell land*

By March 1905, the East Coast Native Trust Lands Board had repaid the mortgage to the Bank of New Zealand through 'judicious sales.'⁷⁴ As we have noted, one-sixth of the trust's Tahora 2 lands were sold to pay off the mortgage on that block, and to assist with the trust's other expenses. Although the board did not undertake

70. East Coast Native Trust Lands Board, 'Report by the East Coast Native Trust Lands Boards', 24 August 1905 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 22)

71. Macky, 'Tahora and the East Coast Trust' (doc L8), p 22

72. Ibid; see also East Coast Native Trust Lands Board, 'Report by the East Coast Native Trust Lands Boards', 24 August 1905, AJHR, 1905, G-9, p 2.

73. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 17

74. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 22-23

any farming development during its short tenure, it did succeed in finally leasing parts of Tahora 2 and securing the beginnings of a rental income. Under earlier arrangements with the Validation Court, 22,045 acres had been reserved for Maori use. The board set up leases for another 18,259 acres, for an annual rent of £432 in 1905. That left 10,800 acres of land still available for leasing.⁷⁵

The question was: who would succeed the board? In one sense, the board had done its job quickly and well. It had made strategic alienations, after a hard year of negotiations with the trustees and owners, and it had completely paid off the debts that had so bedevilled the former trust. But though the board had cleared the external debts, it had not been able to clear the internal debts of the Carroll–Pere trust blocks. Its actions had in fact created a new, intractable set of internal debts. In selling land, the board had no regard to how much of the debt was secured against the particular pieces that it sold. As a result, the owners of the land that remained now owed a lot of money to the owners of the land that had been sold. The nightmare prospect existed of a further round of sales, to pay off those who had borne more than their share of the old debts.⁷⁶

The Government decided not to take either of those paths, but to set up a further trust arrangement, until income from rents and farming could be used gradually to settle the internal debts. What was not anticipated, perhaps, was that this would create a cycle of further debts. As money was raised to develop some lands (but not others), this became part of the juggling of credit and debt, so that blocks moved in and out of debt to each other for decades.⁷⁷

Since the new arrangement would prove to be a lengthy one, a lot was riding on its exact shape. The political climate was not as favourable to Maori authority in 1906 as it had been in 1902 (which, in turn, was not as positive as it had been in 1900). Carroll had won real gains for Maori as a result of the Government's need to come to terms with the Kotahitanga movement in the late 1890s. But almost all of his gains were in the process of being dismantled in 1905 and 1906. Originally, Carroll had wanted to bring the trust lands under his Maori Land Councils, with their elected component and provision for Maori input to decisions. The 1902 compromise had involved a Pakeha board, but the degree of Maori say in its decisions had been critical. The former trustees – and, to the extent that the trustees involved them, the owners – specified which and how much land could be sold. They also asked the board to help develop the remaining land, but that had not been its priority at that point. By the time the board had completed its task in 1905, the tide was running strongly against Maori inclusion in decision-making. The Maori Land Councils were replaced by appointed, Pakeha-dominated boards in

75. East Coast Native Trust Lands Board, 'Schedules of Lands vested in the Board, and a Statement of the Board's Transactions in regard to the said Blocks to the 31st July, 1905', AJHR, 1905, G-9, p 5

76. Macky, 'Tahora and the East Coast Trust' (doc L8), p 23; Michael Macky, 'Trust and Company Management by Wi Pere and William Rees (Issues 20 and 21) [Gisborne]' (commissioned research report, Wellington: Crown Law Office, 2002) (doc A72), pp 273–274; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 548–549, 565–566, 570, 584–585

77. Macky, 'Tahora and the East Coast Trust' (doc L8), p 23; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 548–549, 565–566, 570, 584–585

that year. The policy of leasing-only was set aside, and the moratorium on Crown purchases was lifted in most districts. It was in this less favourable environment that the Liberal Government moved to replace the East Coast Trust board.

There were two critical components to the new regime, as far as the claimants in our inquiry are concerned. First, the board was replaced by a single, Government-appointed commissioner. Maori were given no role in the commissioner's decision-making, not even in an advisory capacity. (Maori membership of the land boards was also dropped soon after.) The Turanga Tribunal found that the exclusion of Maori owners from the 1902 board, to allow business experts to do their work, had been a painful but necessary step. Putting the exclusion of the owners on a more comprehensive and longer-term footing from 1906, however, was neither necessary nor appropriate.⁷⁸ Secondly, the restrictions placed on the commissioner's powers to sell land by the 1903 agreements were cancelled in 1911. In that year, Parliament gave the commissioner the authority to sell, lease, or mortgage any lands, backdated to the time of his appointment.⁷⁹ Macky commented that 'It is not clear what, if any, consultation took place with Maori over this step.'⁸⁰ As far as the evidence shows, there was none.

By these two actions, the Crown removed any and all say on the part of the owners in the decision-making about their land. These were the preconditions for the sale of another 9,894 acres of the 2C blocks in the 1920s. This represented almost 20 per cent of the Tahora 2 land remaining in the estate, after the sale of 1905.

At first, Maori responded with some enthusiasm to the appointment of the commissioner. As Macky has noted, they wanted his assistance to develop their lands for farming.⁸¹ The Tahora 2C and 2F owners were felling bush by 1908, and sought financial help for fencing, farm buildings, and the purchase of stock.⁸² Arani Kunaiti of Ngati Kahungunu led representations by these owners to the first commissioner, John Harding. The commissioner felt that he needed specific legislative authority to use (and raise) money for farming, despite the 1903 agreements between the former trustees and the board. In response, Parliament gave the commissioner specific powers for this purpose in 1907. Development work was soon under way in the 1910s and 1920s, focused on creating four farms in the 2C and 2F blocks.⁸³

With a large land base and access to cheap finance, the East Coast commissioner succeeded where the earlier trusts had failed. Using economies of scale, the ability to apply finance strategically to the best lands, and the financial clout of such a large enterprise, the commissioner shows what iwi corporations or the Maori Land Councils could have achieved, given the same advantages and the

78. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 567–568

79. Macky, 'Tahora and the East Coast Trust' (doc L8), p 26

80. Ibid

81. Ibid, p 24

82. Boston and Oliver, 'Tahora' (doc A22), p 253

83. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20, 24, 32; Boston and Oliver, 'Tahora' (doc A22), pp 253–254

opportunity to operate on a similar scale. The claimants do not contest the fact that significant farm development took place, and that they benefited ultimately from the commissioners' absolute control of their lands. They do, however, take issue with their exclusion from all decision-making – and, in particular, the decision to sell parts of their land.

We have not carried out a detailed inquiry into how and why the commissioners sold land from the trust's estate, as that is a matter for other Tribunals. From the evidence of Katherine Orr-Nimmo and Michael Macky, it appears that land was mostly sold by the commissioners because it was unlikely to ever produce revenue, yet was taxable and accumulating rates arrears. Such land was considered a 'drag' on the trust and its more accessible, developable lands, while its sale produced money for farming (and, at some point, for distribution to individual owners). In general, however, the trust aimed to preserve the land for the Maori owners. Mortgages and other kinds of debts were not likely to lead to the sale of productive land; the trust preferred the slower route of rents and the sale of farm produce to repay debt, so as to keep the land for the Maori owners.⁸⁴ The sales of Tahora 2 land in the 1920s, which we discuss below, were not made for the usual reasons.

12.5.2.3 *East Coast commissioners sell Tahora 2c lands: private sales in the 1920s*

In the 1910s, Commissioner Thomas Coleman began development work on the 2C and 2F farms, and tried to lease the remaining unreserved land (some 10,000 acres).⁸⁵ There was no talk of selling Tahora land until 1920, when his son (also called Thomas Coleman) took over the trust after Coleman senior's death. The new commissioner was a member of the private law practice responsible for some of the commissioner's affairs, and for which he continued to work while discharging his new responsibilities. What followed in mid-1920 was a sale of leased Tahora 2C land to one of the law firm's other clients, Chapple and Field (who were business partners).⁸⁶

Macky commented: 'The reasons for Coleman commencing these negotiations are unclear.'⁸⁷ But, in the view of the trust's solicitor, James Nolan, the reason was very clear: 'At present Commissioner appears to be in hands of Chapple,' he telegraphed the Native Minister in May 1920.⁸⁸ Nolan called for Coleman's immediate suspension: 'suggest suspension to prevent unlimited sale of lands under sec 14 of 1911 [Act;] sole power should be yours [the Native Minister's]'.⁸⁹ James Carroll,

84. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 203–207; Macky, 'Trust and Company Management by Wi Pere and William Rees' (doc A72), pp 317–325

85. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20, 24, 26, 32 (Noting on page 26 a correction to his earlier report, in which he thought this land had been offered for sale instead of lease.)

86. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 189–190; Macky, 'Tahora and the East Coast Trust' (doc L8), pp 26–27

87. Macky, 'Tahora and the East Coast Trust' (doc L8), p 26

88. Nolan to Native Minister, 28 May 1920 (Macky, 'Trust and Company Management by Wi Pere and William Rees' (doc A72), p 322)

89. *Ibid*

Section 14(1) of the Native Land Claims Adjustment Act 1911

Section 14(1) of the Native Land Claims Adjustment Act 1911 reads:

The Commissioner shall have and be deemed to have always had, in addition to the powers conferred by the Act of 1907, full power and discretion to sell, lease, or mortgage any lands vested in him as such Commissioner, including lands so vested pursuant to section eleven of the Act of 1902, or otherwise; and the provisions of this paragraph shall be deemed to be incorporated in any deed or agreement executed pursuant to section twelve of the Act of 1902.

Under section 11 of the 1902 Act, the Tahora 2 lands were vested in the board (and then the commissioner). Under section 12 of the 1902 Act, the deed signed with the Tahora 2 trustees and 'representative owners' only allowed the board to sell up to 5000 acres each of 2C1 and 2C3. The commissioner was not permitted to sell any other parts of the Tahora 2 blocks until this Act in 1911 deemed such a power to have been incorporated in the section 12 deeds, and to have been vested in the commissioner all along.

who was actually leasing part or all of this land, also appealed to the Minister to intervene. Carroll complained that the commissioner 'has full power to sell under Section 14 Native Land Adjustment Act, 1911, and defy everybody'.⁹⁰ He joined Nolan in requesting the suspension of the commissioner. Macky concluded that Coleman had not sought the approval of the owners, who clearly did not agree to the sale.⁹¹

Serious allegations had been made against the commissioner. At the very least, we would have expected the Government to inquire into the matter to determine whether the allegations were well founded. Was the commissioner selling land improperly? Was the proposed sale in the best interests of the trust and of the block's owners? Did it have the consent of the owners? These questions ought to have been asked, in light of the representations made to the Government by Carroll and Nolan. The Native Department did intervene, but only to the extent of warning Coleman that it was inappropriate for him to act as the purchaser's solicitor.⁹² The department did not inquire further, or act on the recommendation to suspend Coleman so as to prevent the sale.

90. Carroll to Native Minister, 28 May 1920 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 27)

91. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27

92. Ibid

Macky noted that the law was changed in 1922 in response to Coleman's Tahora 2 sales, along the lines suggested by Nolan. The commissioner was no longer allowed to sell land without the direct approval of the Native Minister.⁹³ In our view, it was appropriate for the Minister to carry out a protective supervision of alienations, but it should have been for the owners to have the final say in whether their land would be sold. Instead, the 1911 and now the 1922 legislation gave them no say whatsoever. (A council of owners was not given a veto over sales until 1949.⁹⁴)

In any case, the 1922 law change was too late to prevent Coleman's sales of land in Tahora 2. Nolan and Carroll had appealed for Government intervention in May 1920. When that was not forthcoming, Coleman completed the sale of 6,711 acres of Tahora 2C3(2) in October 1920, for the sum of £27,730. Macky noted that Field also purchased Carroll's lease, so the latter may have ended his opposition. There was, however, no evidence that Carroll or any of the owners were involved in the negotiations or consented to the sale. Coleman was allowed, as Carroll had put it, to 'defy everybody'.⁹⁵

Nor was the commissioner deterred by the Native Department's rebuke about his conflict of interest. Instead, he gave Chapple a mortgage for the land that he and his partner had just bought, and also offered them another 3,396 acres of land (the rest of the 2C3(2) block). This new negotiation was incomplete when Coleman resigned his position in 1921.⁹⁶ He told the Native Department that he did not have time to do the job properly, and suggested that it be taken over by the new office of the Native Trustee.⁹⁷ The Government agreed: the trust was brought under the Native Trustee, which meant the direct control of the Native Department.⁹⁸ Also, the law was changed in 1922 to prevent further sales without the consent of the Minister.⁹⁹

The question of the 2C3 mortgage was resolved when Chapple paid the money back and got a new mortgage from the Public Trust.¹⁰⁰ But the new commissioner, Judge W Rawson (the Native Trustee), still had to deal with the incomplete sale of the remainder of 2C3(2). Although the law had not yet been changed, Rawson acted in anticipation of it, writing to the Minister: 'I suggest that as the price offered seems a fair one that I be authorised to discuss the matter with the beneficial owners and, if they, or a large majority of them, consent that the sale be approved by you.'¹⁰¹

93. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27

94. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 567

95. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27

96. *Ibid*, pp 27–28

97. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 194

98. Crown counsel, closing submissions (doc N20), topic 13, p 9; see also Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 566.

99. Native Land Amendment and Native Land Claims Adjustment Act 1922, s 28

100. Boston and Oliver, 'Tahora' (doc A22), p 255

101. Rawson to Native Minister, 8 November 1921 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 28)

The danger, as Rawson saw it, was that Chapple and Field had threatened legal action if the trust did not complete the sale. Win or lose, the trust could not afford to fight this in court. A delay of some months followed, but the sale of 3,000 acres for £12,851 was finalised at some point before the end of March 1923.¹⁰² There is virtually no evidence about how this negotiation was concluded. Macky commented: 'It is not clear from the evidence that I have seen whether this sale was forced on the Trust by court action, or if the Trust and Maori ultimately consented to it.'¹⁰³ In his view, the delay might have been explained by Maori opposition.¹⁰⁴ There is no evidence that the owners ever consented, and – perhaps most importantly – their consent was not required in any case.

12.5.2.4 *The Crown tries to buy Tahora 2C lands in the 1920s*

At the same time that Chapple and Field were trying to buy land in Tahora 2C3, the Crown was also seeking to buy part of it. In 1919, the Crown surveyed its 1890s purchases in 2C, preparing to cut the blocks up for settlement. The surveyor recommended that the Government buy 600 acres of 2C3(2) to 'greatly improve at least two of the roughest sections of the Crown Block.'¹⁰⁵ The Government approached the commissioner (Coleman senior), who said that he preferred not to sell because the land was reserved for farming by its owners, but was in fact willing to do so. At that point, the land was not leased but the trust had borrowed £6,000 against it.¹⁰⁶

In 1920, the Government changed its mind, deciding that it only needed 200 acres to get better fencing lines for its blocks. The Crown offered £1 15s an acre, which was well below the unimproved value (£4 an acre). The matter lapsed, possibly because of Coleman senior's death, and the Crown raised it again with the new commissioner in 1921. The Crown's new offer of £1 10s reflected what it considered to be the value of the particular piece it wanted. Coleman refused to sell, noting that Chapple had offered £4 an acre for the whole block. The Government compromised at £3, but the commissioner refused to budge. As we have seen, he had offered the whole of this land to Chapple. The Crown refused to increase its price, arguing that Maori as well as the Crown would benefit from a better fencing line.¹⁰⁷

This was where matters stood when Rawson took over. He immediately accepted the Crown's price, although the purchase was delayed by the absence of the Native Minister, Herries.¹⁰⁸ Finally, in January 1922, the commissioner sold 183 acres to the Crown. Boston and Oliver were critical of this purchase. They noted that the Crown already knew the cost of roading was prohibitive for opening up small sections in its 2C blocks, which ended up as State forest:

102. Macky, 'Tahora and the East Coast Trust' (doc 18), p 28

103. Ibid

104. Ibid

105. Cagney to chief surveyor, no date [1919] (Boston and Oliver, 'Tahora' (doc A22), p 256)

106. Boston and Oliver, 'Tahora' (doc A22), pp 256–257

107. Ibid, pp 257–259

108. Ibid, p 259

The alienation was a particularly mindless act. The Maori owners lost a portion of land, which had the Crown shown more foresight in its planning and selection procedures, would have remained under the East Coast Native Trust, land that would have later found its way back into the hands of the beneficial owners.¹⁰⁹

This may be so, but this land would probably have been sold to Chapple and Field if it had not been sold to the Crown, although at a higher price.

In 1924, now planning to develop forestry on its Tahora lands, the Crown tried to buy 2,298 acres of 2C3(2) and 2C2(2) for the adjoining State Forest 22. Commissioner Rawson was slightly less obliging this time. He replied that the land was valuable for pastoral farming, and could be 'easily leased for a good figure'.¹¹⁰ Nonetheless, he agreed to sell it for £3 10s per acre, so long as the Government also paid £8,000 for the timber, and so long as the owners agreed.¹¹¹ The sale did not go ahead. The Forest Service thought the price too high, and suggested that the trust use part VI of the Forests Act 1921–22, which allowed timber to be milled by the commissioner of State Forests, with the owners getting the benefit.¹¹² As far as we are aware, this arrangement did not happen either.

12.5.2.5 Were the owners paid?

By 1924, Commissioners Coleman and Rawson had sold 9,894 acres of 2C3(2), the great majority of it to Chapple and Field as a result of questionable arrangements on the part of Commissioner Coleman. It is not easy, however, to determine exactly how the purchase money was spent. The commissioner had netted £41,130 for these three sales. None of this money was paid to the owners until 1927, when they received a payment of £7,880. In 1929, they got a further £15,760.¹¹³ We have no information on when the remaining purchase money was paid out, although we presume it was part of distributions to the owners between 1937 and 1950 (see below). According to Michael Macky, the owners of Tahora 2C3(2) received a total of £53,223. We conclude that they received the full purchase price for their land.

12.5.2.6 The owners petition the Crown in 1924 and 1929

The owners of the 2C blocks were very much in the dark about what was happening to their land. In 1924, Hune Hukanui (the former trustee for 2C1(3)) and 87 other owners sent a petition to Parliament, seeking the return of 2C1 and 2F to their control. The Native Affairs Committee made no recommendation on this petition.¹¹⁴ In 1929, they sent a second petition, this time complaining about 2C1, 2C2, and 2F.¹¹⁵ They protested against the 1905 sale, because it had mainly been

109. Boston and Oliver, 'Tahora' (doc A22), p 260, see also p 258

110. Ibid, p 261

111. Ibid

112. Ibid

113. Macky, 'Tahora and the East Coast Trust' (doc L8), p 34

114. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 209

115. Ibid, pp 209–211

used to pay off debts on other land. They also objected to the fact that they had not been able to get the accounts for their land from 1907 to 1924, and that ‘we the owners of this land have not received any benefit from the lands thereof.’¹¹⁶ Nonetheless, they believed that income from these blocks had been used to assist returned servicemen and to pay for Wairoa memorials to James Carroll: ‘We, the home folk, object to this being done because we have not yet received any benefit from this land.’¹¹⁷ The petition did not mention the 1920s sales of land in 2C3, of which they may not have been aware.

Chief Judge Jones, as Under-Secretary for the Native Department, advised the Native Affairs Committee that this land could not be returned to the owners yet. Although there was provision for reversion, it could not happen until all of the debtor and creditor blocks in the trust were reconciled. This, in turn, could not happen straight away unless more land was sold.¹¹⁸ The committee made no recommendation on this petition, and the Government took no action.¹¹⁹

12.5.2.7 Developed Tahora 2 lands are handed back: enough to offset the losses?

It is not clear how far the owners were actually employed on the farms that were being developed on their best land. Steven Oliver noted that some owners were employed on Te Papuni Farm (on 2F2), and that others ‘probably’ worked on the 2C farms.¹²⁰ In 1934, however, following on from the petitions of 1924 and 1929, Turi Carroll and 102 others petitioned Parliament about their alienation from their lands (including Tahora 2F2 and 2C1(3)):

We . . . consider that the Development of the lands concerned in a commercial sense is not more important than the development of the people interested in the land. It is our wish and prayer that the owners of the land and their descendants should be assisted and developed side by side with their land by giving them work to be carried out thereon and by ultimately settling suitable owners thereon . . . A very large part of the income from the land is expended in labour costs and supervision. Up to now the Native owners have had only a very small part of the work. They are losing their identity with their land which can be retained only if they are permitted to have a share in the work and farming carried on thereon . . .¹²¹

We do not have detailed evidence on the administration of the Tahora 2 blocks. There were no further sales after 1923, and four farms were successfully developed

116. Petition no 297/1929 (Katherine Orr-Nimmo, comp, supporting papers to ‘Report for the Crown Forestry Rental Trust on the East Coast Maori Trust’, various dates (Wai 814 ROI, doc A4(a), section D), p 422)

117. *Ibid*, p 423

118. RN Jones to Chairman, Native Affairs Committee, 12 October 1929 (Orr-Nimmo, supporting papers to ‘Report on the East Coast Maori Trust’ (Wai 814 ROI, doc A4(a)), sec D, p 412)

119. Orr-Nimmo, ‘Report on the East Coast Maori Trust’ (doc A54), p 211

120. Steven Oliver, presentation summary and response to issues for the Tahora No 2 block report, November 2004 (doc 18), p 12

121. Petition 149/1934 (Orr-Nimmo, ‘Report on the East Coast Maori Trust’ (doc A54), p 214)

in the 1920s and 1930s. According to Michael Macky, the commissioners spent £131,736 on improvements for the four blocks, as well as £79,305 to buy stock and machinery; a total of £211,041. Also, between 1926 and 1950, the owners received occasional distributions from the trust, amounting to £93,178. The majority of this amount (£53,223) was paid to the owners of 2C3(2). This was mostly the 1920s' purchase money, and partly for the settlement of internal debts, but we lack specific details. Finally, in 1953, the farms were returned to owner incorporations in good working order. The wool boom of the early 1950s had helped settle accounts between the creditor and debtor blocks, enabling the winding up of the trust.¹²²

This successful outcome was not only at the expense of some land loss, as we have seen. The owners were totally excluded from the decisions that were made about their land. Crown counsel emphasised the steps that were taken to rectify this omission. In 1935, the Native Purposes Act formalised block committees for the trust lands, in response to Turi Carroll's petition the previous year (discussed above).¹²³ The committees were accorded an advisory role only – 'the advice did not have to be followed'.¹²⁴ As Macky noted, this 'did not satisfy Maori'.¹²⁵ In 1944, the Ngati Kahungunu owners of 2F2 petitioned Parliament, seeking the establishment of a three-person board to run the trust, with one Government appointee and two representatives of the owners. They also wanted to replace the commissioner. An inquiry dismissed their dissatisfaction with Commissioner Jessep. It was not until 1948, in the context of the Maori war effort organisations and the growing recognition of tribal committees, that the East Coast Maori Trust Council was set up. The block committees elected one representative each to the council. In 1949, legislation was passed requiring the commissioner to consult the council, and giving it a power of veto over sales, purchases, mortgages, and any increase to the trust's overdraft.¹²⁶ Macky noted that 'Maori did not acquire any capacity to control important aspects of the Trust's administration of their land until 1949'.¹²⁷ This was, of course, on the eve of its dissolution.

The Crown argued:

The loss of control of the Tahora owners between 1902 and 1949 needs to be set against the economic gains the Trust provided for Maori in the long term . . . The overall benefit or prejudice caused to Maori by the Crown actions concerning Tahora 2 will need to be carefully weighed by the Tribunal.¹²⁸

David Hawea, in his evidence for Te Whanau a Kai, told us: 'In 1953 the Te Whanau a Kai portion of No 2 was incorporated as Tapere Station. The new

122. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 30–34

123. Crown counsel, closing submissions (doc N20), topic 13, pp 8, 10

124. Macky, 'Tahora and the East Coast Trust' (doc L8), p 25

125. Ibid

126. Ibid

127. Ibid, p 35

128. Crown counsel, closing submissions (doc N20), topic 13, p 11

incorporation included a small part of 2C1, sec 3, and 2C3, sec 2 as well as 2C2 sec 2. Today Tapere Station is a very profitably run Incorporation.¹²⁹

The claimants accept that their exclusion from control of the trust, and the alienation of parts of their land, were offset by 'the undoubted improvements made to the lands before their return to owners.'¹³⁰ Overall, some two-thirds of the Tahora 2 lands were returned to Maori. As a result of the 1920s sales, however, the burden of loss fell much more heavily on the owners of 2C3(2), Te Whanau a Kai and Ngati Hine, who lost 90 per cent of this land. In 1955, they agreed to transfer the last 1,509 acres to their neighbours (and relations), the owners of 2C2, so that it could continue to be farmed rationally as part of Tapere Station.¹³¹

We note the claimants' position that, as the 1905 sale was agreed between the trustees and the board, and did not involve payment of the old debts to the Bank of New Zealand, they do not take issue with that sale. They do, however, endorse Macky's 'fair' analysis and criticisms of the 1920s sales.¹³² In our view, the sale of 9,711 acres of Tahora 2C3(2) to Chapple and Field was highly questionable. Serious allegations were made, but no inquiry or action followed, other than the delayed law change in 1922, removing the commissioner's sole power to sell. We accept the Crown's argument that the return of two-thirds of the land, developed as farm stations, largely offset the exclusion of the owners from control of their lands. In part, this was because the claimants' evidence and submissions do not quarrel with how the lands were developed, or, in effect, with the decisions that were made. We note the owners' concern in 1934, that their alienation from their land went further than its control – that they were excluded from the actual farming of (and a meaningful relationship with) their ancestral land. This, too, could be remedied by the return of that land to them as working farms in the 1950s.

In many ways, therefore, the return of the Tahora stations in 1953 was a remedy for the grievances experienced by the owners from 1902 to 1949. There is one exception. The 1920s' sales were not for the purposes of benefiting the trust. They do not fit what we believe to be the usual pattern, which was alienation for the purpose of offloading unproductive land. Such land was incapable of (or prohibitively expensive for) farm development, yet was costing the trust money in terms of taxes and rates. The Tahora 2C alienations were not for that purpose, nor for paying off debt or raising development capital. Macky argued that the reason for the sales is unknown, although the allegation at the time was that the commissioner was 'in [the] hands' of his law firm's client, the purchaser. While the owners were eventually paid, this could not compensate them for the loss of their ancestral land, sold without their consent (or any involvement in what parts would be sold, for what price, and on what conditions).

From the evidence available to us, the sales to Chapple and Field showed questionable judgement on the part of the commissioner. James Carroll and the trust's

129. David Hawea, brief of evidence, 24 November 2004 (doc 137), p24

130. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p14

131. Boston and Oliver, 'Tahora' (doc A22), pp 263–266

132. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp13–17

solicitor both appealed to the Government to suspend the commissioner and put a halt to the sale. Instead, the Government did nothing more than warn Coleman that his actions were improper. It did remove the commissioners' unchecked power to sell in 1922, as a direct result of these events, but too late to be of any use for Tahora 2c. Further, Coleman then entered into a second questionable sale, which his successor carried through rather than risk litigation. Much of the proceeds of the 1905 sale had gone to pay the trust's legal costs. It seems unfair that the owners of 2c3(2) should have suffered from the trust's later unwillingness to defend them in court.

Both of the 1920s' sales were unnecessary as far as the trust's purposes were concerned, and the evidence seems clear that the owners did not consent to them. Indeed, Carroll reported that the sales were taking place in defiance of the owners' wishes. Yet the owners had no legal power to prevent sales until some 28 years later.

Finally, Commissioner Rawson agreed to sell a small amount of this same block to the Crown at its own price, which was less than what Chapple and Field were willing to pay. Although the quantity of land was small, it indicates the Crown's carelessness with the owners' interests. The sale was 'mindless', in Boston and Oliver's view, because the Crown did not really need the land.

We conclude that the return of two-thirds of Tahora 2 as working farms in 1953 offset some of the claimants' grievances, but not the unnecessary, improper sale of land from 2c3(2). If the Crown had carried out its duty of active protection, it would have acted to prevent the 1920s' sale, and the Tahora 2 owners would have received a larger, more valuable estate in 1954. The hapu with interests in Tahora 2c3(2) would not have lost 90 per cent of that land.

12.5.3 Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?

SUMMARY ANSWER: The owners of Tahora 2G2 had no voice in the vesting of their land in the Carroll–Pere trust in 1896, and nor did they consent to its transfer to the East Coast Trust in 1902. In 1926, the commissioner tried to sell this land to the Crown, because it was accumulating debts and he saw little hope of developing it. The Crown refused to buy it (or exchange other land for it), but did prevent any further rates charges. We agree with the claimants that it was convenient for the Crown to see this land sit undeveloped in the trust, because it was useful for catchment protection. The commissioners took no further action; to all intents and purposes, it was 'forgotten' until the trust was wound up in the 1950s. At that point, the Crown tried to buy Tahora 2G2, calling a meeting of assembled owners for the purpose, even though the ownership list had not been updated and many of the owners were deceased. The Tuhoe owners rejected the Crown's offer, preferring to incorporate with the intention of milling and developing 2G2 for farming. The Government then had the land proclaimed under the water and soil conservation legislation, so that it could not be milled. Even so, the Forest Service thought that the Government might yet fell the timber itself, once it had been acquired for

the Crown. With the land thus locked up, the owners finally agreed to exchange it with the Crown for other forest land in 1973. The claimants have not raised any issues about the land that they received in this exchange.

As we have seen, Tuhoe did not consent to their piece of land in southern Tahora (2G2) being placed in the trust in 1896. This was the beginning of their long alienation from that land. In 1902, it was vested in the East Coast Trust board by legislation. Owners were not consulted directly about that action, although Carroll advised that the ‘principal’ Tahora 2 owners supported the transfer of their lands from the Carroll–Pere trust to the Maori Land Council.¹³³ The Validation Court had not been asked to appoint a committee of owners in 1896, but Pere had nominated a third trustee to serve alongside him and Carroll. This person’s name appears (from the rather illegible minutes) to be ‘Kaho Numia.’¹³⁴ The claimants have not identified this person for us. When agreements were negotiated in 1903 between the trustees and the board, as required by the 1902 Act, no agreement was made for Tahora 2G2.¹³⁵ This was symptomatic of the neglect that followed for the next 40 years of trust administration.

Tahora 2G2 consisted of isolated, rugged, forested land. It was surrounded on three sides by undeveloped, unroaded Crown land. On the western side, it bounded the Urewera District Native Reserve.¹³⁶ In 1926, Commissioner Rawson described it as completely isolated. Although it had millable timber, the lack of access was such that any kind of development would cost more than it would realise in returns. Macky noted the commissioner’s view that the expense of developing 2G2 would have been an ‘unreasonable burden on the other blocks in the Trust.’¹³⁷ While some remote land was leased as part of large-scale pastoral farming, 2G2 (surrounded by unused Crown land) could not be leased either. In the meantime, it had a survey lien that had gathered interest for a set period, and ever-growing rates arrears. For some other lands in the trust, this was a formula for their sale.¹³⁸

In 1926, Commissioner Rawson proposed to sell 2G2 to the Crown. In his view, it was valuable only to the Crown for wider forestry or conservation purposes. The Government did not want to buy this land, so Rawson suggested an exchange instead. Rawson, it will be recalled, had come into the trust with the view that owners should be consulted before any alienation. With that perhaps in mind, he asked the Native Land Court to determine the beneficial owners of 2G2. There had been no update to the list since 1896. There is no evidence, however, that the owners were in fact consulted about either of these proposals. Rawson wanted to swap 2G2 for Crown land in 2C1(2), so as to allow a better fencing line for the Maori owners of 2C1(3). This was some distance from 2G2, and – while useful for the trust – involved benefitting a different set of tribal owners altogether. The

133. Orr-Nimmo, ‘Report on the East Coast Maori Trust’ (doc A54), pp 138–140

134. Tairawhiti Validation Court, minute book 4, 17 April 1896, fol 188

135. Macky, ‘Tahora and the East Coast Trust’ (doc L8), p 33

136. Boston and Oliver, ‘Tahora’ (doc A22), p 302

137. Macky, ‘Tahora and the East Coast Trust’ (doc L8), p 33

138. *Ibid*; Boston and Oliver, ‘Tahora’ (doc A22), p 303

commissioner of Crown lands agreed to the exchange, conditional on the Crown surveying its own land – but, it seems, this was the end of the matter. The proposal lapsed, and 2G2 continued to accumulate interest on its debts. From 1926, however, the Government gave 2G2 a special exemption from any new rates charges, which kept the debts much lower than they would otherwise have been.¹³⁹

According to Boston and Oliver, the Crown did not bother to acquire this land (or carry out an exchange beneficial to the owners) because it knew that the commissioner could not develop it. The Government wanted this land preserved to prevent erosion, and was satisfied that leaving it in the trust would secure that end without costing it a penny.¹⁴⁰ This comfortable situation changed in the 1950s, when the trust was wound up. With the reintroduction of the Tuhoe owners into the picture, fresh attempts might be made to mill the timber and farm the land. For that reason, the Government now took the initiative and tried to buy or exchange 2G2. This caused a delay in the transfer of the land from the commissioner to the owners, which was exacerbated by the fact that successions had not taken place, and the title had not been updated since 1926.¹⁴¹

Before the ownership lists were updated or an incorporation formed, the Crown exercised its power to summon a meeting of assembled owners. Under the Maori Affairs Act 1953, the Crown could instruct the registrar to summon such a meeting, and the quorum requirements were now set at just three owners.¹⁴² At first, the commissioner had proposed another exchange (forest for forest) but the Lands Department preferred to buy the land outright for water and soil conservation. The Maori Land Court made an effort to locate owners in 1956, based on the out-of-date ownership list (more than half of the owners were known to be dead), and a meeting was called at Waimana in March 1957. Nine of the 111 owners attended the meeting, holding less than four of the 85 shares in 2G2. In addition to the official owners, there were 51 more people, some of them likely successors to the 63 deceased owners.¹⁴³

The meeting was faced with a choice. It had been called to vote on the Crown's offer to buy the land for £8,200. There was a debt of around £1,167 on the land, because it had never produced any income to pay it off. The debt was mostly rates arrears and old survey charges, as well as administrative costs and a fee for appraising the block's timber. It would have to be paid before the land could be sold to the Crown. The commissioner of Crown lands advised that the block was too isolated for the timber to be milled, yet it was needed in its undeveloped state to protect the Waioweka River and prevent erosion. The handful of legal owners present simply did not believe that the Crown would not mill the timber later for its own profit. They voted unanimously against the Crown's offer, and decided instead to

139. Boston and Oliver, 'Tahora' (doc A22), pp 303–305

140. *Ibid*, p 314

141. *Ibid*, pp 305–310, 314

142. Maori Affairs Act 1953, ss 307, 309

143. Boston and Oliver, 'Tahora' (doc A22), pp 305–310

pay off the debt and develop the land themselves. The Maori Affairs Department advised the Lands Department not to try to overturn this unanimous decision. The owners, it was clear, wanted to keep their land.¹⁴⁴

Following this meeting, the Tuhoe owners set in train the business of appointing successors and getting an updated list, so that an incorporation could be formed to resume ownership of 2G2. This happened in 1958, when a meeting of owners appointed a management committee and borrowed money from their neighbours (the owners of the successful farm on 2C1(3)) to pay their debts. The land was transferred to them in 1959. The Government acted to prevent this new incorporation from developing the land. In 1961, it proclaimed the block under the Soil Conservation and Rivers Control Amendment Act 1959, which allowed the local catchment board to prohibit milling. With the land tied up again, the Government once more considered acquiring it permanently. By 1970, the owners saw no alternative but to agree. They proposed the addition of the land to the Urewera National Park or a state forest, in return for Crown land that they could use. This seemed to fit well with Te Manawa o Tuhoe Trust's proposals to lease land to forestry companies – the Forest Service believed that land could be exchanged to enable the 2G2 owners to be part of that enterprise. Two sections of State Forest 101 were transferred to the incorporation in 1973, along with a payment of \$8,320. The additional payment was necessary because the Crown land being exchanged was worth less than 2G2.¹⁴⁵

The Maori Land Court was responsible for ensuring that the exchange was properly carried out, including that the Crown met its obligation to provide access to the new forest land. It took almost 10 years for all the conditions to be met. The owners wanted to turn their incorporation into a section 438 trust, but this did not happen until 1982. The Tuhoe-Waikaremoana Maori Trust Board became the responsible trustee, and undertook to manage the land for its owners.¹⁴⁶

In our inquiry, Tuhoe were very concerned at the length of time that 2G2 land was tied up in the East Coast Trust but left undeveloped, all without their consent. In their view, the Crown's argument that there was gradual inclusion of owners' representatives in the trust's decision-making, and that at least the owners got developed land back, did not apply to 2G2.¹⁴⁷ In the claimants' view: 'The Crown's submission contains no explanation or evidence to justify the clear breach of the Article 11 rights of those Tuhoe individuals who lost control of Tahora 2G2 in the period 1902–1959.'¹⁴⁸ Further, the decision not to develop 2G2 was taken as early

144. Ibid, pp 306–309

145. Ibid, pp 309–312

146. Ibid, pp 312–313. With the official introduction of Maori owners as 'advisory trustees' in 1974, the term 'responsible trustee' was used for the trustee in whom the property was legally vested, and who was responsible to the beneficial owners for carrying out the trust. See Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 784–785.

147. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 79–82; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 17–18

148. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 18

as 1926, so why did the trust keep the land for another 33 years, while it accumulated unpaid debts? The claimants argued that, despite the access problems, they would have found a way to mill this land and use it for farming. Also, the claimants argued that the 2G2 incorporation was virtually forced to exchange their land with the Crown in the 1970s. They still had to pay off the mortgage (taken out to cover the debts accumulated when the land was in the trust), yet the Crown had put a proclamation over their land that prevented them from using it.¹⁴⁹

The Crown argued that 2G2 was ‘forgotten’ because it was too remote and expensive to develop, rather than deliberately kept undeveloped. Counsel also suggested that there were no objections at the time to the exchange, while accepting that its proclamation did prevent the owners from making any use of the land.¹⁵⁰

In our view, most of the claimants’ concerns are justified. They did not consent to the inclusion of their land in either the Carroll–Pere trust or the East Coast Trust. They had no say in the fact that their land was considered impossible to develop from at least 1926 until its return in the late 1950s. Macky considered that the management of this block had been, as the claimants noted, ‘thoroughly bad’.¹⁵¹ It was returned burdened with debts, although we note that those debts would have been much higher if the Crown had not exempted 2G2 from further rates charges in 1926. Then, the block could not actually be returned for some years, because the trust had not maintained an up-to-date ownership list, and because the Crown wanted to buy it.

Finally, we agree that the 1973 exchange was carried out in an unfortunate set of circumstances: the mortgage (resulting from the old debts) still had to be paid, but the Crown had used the law to prevent the owners from making any use of their land. While we accept that the Crown’s powers to protect catchments and prevent erosion were sometimes necessary, it is by no means certain that their use was in good faith in this instance. In 1971, 10 years after the proclamation, the Forest Service considered it ‘likely’ that the land was needed for a conservation forest, but also thought it possible that the Crown could mill the timber if it acquired the land, if it was economically viable to do so.¹⁵² In those circumstances, it is difficult to see the Crown’s actions as defensible, let alone the exchange as a truly willing one.

We note, however, that the claimants have not criticised the practical outcome. They do not think the exchange unfair, in terms of what they got in return for one of their last links to Tahora 2. From a practical standpoint, they were willing to exchange land with the Crown in the 1970s in order to develop forestry on lands that they could actually use.¹⁵³

149. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 79–82

150. Crown counsel, closing submissions (doc N20), topic 13, pp 12–13

151. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 81

152. Boston and Oliver, ‘Tahora’ (doc A22), p 311

153. Tama Nikora, brief of evidence for 7th hearing week, 3 September 2004 (doc G8), pp 3–8

12.5.4 Did the Crown keep more than its fair share of Tahora 2F, after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

SUMMARY ANSWER: Upon survey, Ngati Kahungunu's share of Tahora 2F was found to be 2,591 acres smaller than had been estimated when the block was divided with the Crown in 1896. Baker's secret survey, which had never been properly finished, was partly to blame. A proportionate reduction of the Crown's share of Tahora 2F would have seen the return of 803 acres to the Maori owners of 2F2, who sent frequent complaints and petitions between 1919 and 1943. The Government refused to return any land, despite some support for the petitioners from the Native Department and the Native Affairs Committee.

Ngati Kahungunu's share of Tahora 2, which was awarded to Ngati Hinaanga and Ngati Wahanga, was divided between the Crown (2F1) and the Maori owners (2F2) in 1896, with the owners' share being vested in the Carroll–Pere trust. After its transfer to the East Coast Trust in 1902, a successful farm (called Te Papuni) was developed on 2F2 from the 1910s onwards. None of this land was sold, and it was returned to an incorporation of the owners in 1953. Ngati Kahungunu do not quarrel with the administration of the trust, or the fact that their land was returned to them with a working farm. Their main concern is the discovery during the trust regime that 2F2 was 2,591 acres smaller than it should have been. Richard Niania told us that 'The survey discrepancy in 2F2 has meant in the eyes of Kahungunu owners then that the Crown has acquired 803 acres more than its entitlement.'¹⁵⁴ A series of petitions and complaints were made to the Crown from 1919 to the 1940s, trying to find out how this had happened, and seeking the return of 803 acres of Tahora 2F1 – the amount of excess land taken by the Crown for its share of 2F.¹⁵⁵

Despite some support for these appeals from the Native Department and the Native Affairs Committee, the Government persisted in the view that it too had been shortchanged but in the 2C blocks, which had turned out to be bigger than thought (and so Maori had been awarded more than their share of those blocks in 1896). The Native Department insisted that the owners of the 2F and 2C blocks were different tribes, and that there were few owners in common (a point accepted in our inquiry by Crown counsel).¹⁵⁶ The owners of 2F thus could not be compensated by taking land from 2C. The Government did not accept this advice and insisted that any compensation must come from the Maori-owned 2C sections. In theory, it wanted to keep 2F1 intact to prevent erosion, although it was in fact willing to lease parts of it for farming. In 1943, the Government made its final decision not to compensate or return land to Ngati Kahungunu.¹⁵⁷

There appear to be two reasons for these discrepancies in the estimated area of the Tahora blocks. First, and most significantly, Baker's survey was not very

154. Richard Niania, brief of evidence, 22 November 2004 (doc 138), p 52

155. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 8, 68–70, 74; Boston and Oliver, 'Tahora' (doc A22), pp 271–282

156. Crown counsel, closing submissions (doc N20), topics 8–12, p 64

157. Boston and Oliver, 'Tahora' (doc A22), pp 274–282

reliable, and the whole block was smaller than his survey showed it to be. Secondly, the Native Land Court and the Validation Court had estimated the area of the partitioned blocks without the benefit of subdivisional surveys, and so there were errors as between the estimated and surveyed area of each block.¹⁵⁸

The question of whether the Crown or Maori benefited overall from the discrepancies is not relevant to Ngati Kahungunu. We accept that they have a strongly demonstrated historical grievance about the disappearance of a significant part of their land in 2F2.

12.6 TREATY ANALYSIS AND FINDINGS

As we have said, the antecedents of the Carroll–Pere and East Coast Trusts were the subject of detailed analysis and findings by the Turanga Tribunal. We see no need to depart from those findings, on the basis of our more limited inquiry into the trusts’ origins. For our purposes, the first key matter was the inclusion of parts of Tahora 2 in the Carroll–Pere trust in 1896. We accept that the 2C and 2F blocks were included in the trust by the wish of their owners, in order to stop the bleeding of interests to the Crown through its purchase of individual interests. Te Whanau a Kai and Ngati Kahungunu had no other option. As we noted in chapter 10, under the provisions of the Native Land Court Act 1894 they could not form an incorporation while the Crown was picking off individual interests in their land. While the Carroll–Pere trust was a risky venture, the price seemed worth paying to stop the bleeding off of interests, and regain some corporate control over whether land would be alienated, and, if so, on what terms. The parties agreed, however, that the trust was doomed from the start. It had too little land, too many debts, and no Government assistance. In those circumstances, the owners of Tahora 2 were fortunate that the Validation Court – and, eventually, the trustees – successfully resisted the Bank of New Zealand’s efforts to make their land liable for a share of its mortgages over other Carroll–Pere trust lands.

This very success meant that Tahora 2 was not in danger of mortgagee sale in 1902, when the Government took emergency action to help save the land and the bank. Nonetheless, it was swept up with all the other lands held by Carroll and Pere (with others) in trust, and vested in a new board of three Pakeha businessmen appointed solely by the Government. The Crown accepted in our inquiry that if there was any consultation with owners, it was on the basis that their land would be transferred to the local Maori Land Council, with its elected Maori leaders. When this initiative was defeated, there was no fresh consultation. Indeed, there was no time for it – the mortgagee sale was only days away. We agree with the Turanga Tribunal that the placing of the land in the hands of professional managers was a ‘necessary and painful measure.’¹⁵⁹ We note, however, Carroll’s plan that the council too would appoint a professional manager. It was not necessary to remove Maori from decision-making to achieve the object of strategic sales to pay

158. Boston and Oliver, ‘Tahora’ (doc A22), pp 271–282

159. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 567

off the mortgages. We note, too, the Government's rejection of a proposed loan to save all of the land, not just some, and give time for leasing and farm development to pay the debts.

The claimants do not take issue with the board's sale of 9,590 acres of Tahora 2C in 1905, since it was mandated to do so by the trustees (and what Rose called 'representative owners'¹⁶⁰), and because the sale was not to pay off the mortgages to the Bank of New Zealand. There were some irregularities in this sale. The board did not carry out the agreed terms exactly (it sold more of one of the 2C blocks than had been authorised), and the money was mostly used to pay off debts associated with litigation rather than the relatively small private mortgage on Tahora 2. Nonetheless, the claimants have no issue with them.

The 1902 rescue package transferred land held by trustees chosen by the owners, and advised by owners' committees, to a Government-appointed board. This was done without the consent of the owners. Nonetheless, it was expected to be a temporary measure, to get rid of the mortgages. The board was tightly controlled in respect of what the former trustees had agreed it could do with the land. This situation was changed for the worse in 1906 and 1911. First, the Crown appointed a sole commissioner to replace the board in 1906. Again, the owners were not consulted and did not consent, although there was now no time constraint. Secondly, the Crown set aside the deeds of agreement in 1911 and authorised the commissioner to sell or lease land as he saw fit. This removed the last check on the commissioner from the owners and their former trustees. From 1911 to 1949, the owners had no control over what happened to their lands. They had no say at all until 1935, and then it was limited to advice on particular blocks. The commissioner did not have to take their advice. The Crown has accepted that this situation was 'problematic'. We agree.

The transfer of Tahora 2 from the owners' trustees to a Government-appointed board, without their consent, and in the face of their known preference for the Maori Land Council, was in breach of their Treaty right to retain their land for so long as they wished to do so. We accept that the imminence of the mortgagee sale made it impossible to consult the owners directly. Nonetheless, the owners' wishes were made known to the Government by their trustees. Those wishes were ignored. This was in breach of the plain meaning of article 2 of the Treaty. Any prejudice to the claimants could have been prevented if the Government body had carried out its mandated tasks, as set forth in the deeds of agreement, followed by consultation with the owners as to what should happen next. Instead, the Government decided to make the East Coast Trust a longer-term solution, until the internal debts were settled. The initial change was to replace the board with a single commissioner. While the trust model was clearly one which these groups of owners had supported in the past, we note that they had previously chosen the trustees themselves. To have their lands more permanently tied up in this new trust without their consent was in breach of the Treaty, compounding the initial breach in 1902.

160. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53

The total exclusion of the owners from any meaningful say in the trust's decisions about their land, from 1911 to 1949, was an obvious Treaty breach. It was inconsistent with the principle of partnership, and with the tino rangatiratanga of the owners with respect to their ancestral land. To be 'beneficial owners', with no say in how the land was managed, whether it was developed, whether it was leased or even sold, and how the proceeds from the land should be spent, was not consistent with Treaty principles. Maori complaint on this head was ignored until 1935, when, as we have seen, the inadequate device of advisory committees, with no powers, was set up. Macky noted Maori dissatisfaction, and the Crown has agreed that the owners' 'capacity to control their lands was severely limited'.¹⁶¹

The parties seem to have reached a tentative agreement, however, that the effects of this Treaty breach were offset by the fact that the trust saved the land for its owners, and returned developed farms to them in the 1950s. There was an important exception to this. A significant part of Tahora 2c was sold in the 1920s. In our view, these sales were entirely inappropriate. They did not fit the usual mould of sales to offload unproductive land that was costing the trust money but could not be developed. Nor were the sales for the purpose of paying debts or raising capital. Allegations were made that the real reason for these sales was that the new commissioner was 'in [the] hands' of the purchaser, one of his law firm's clients. The Crown did not deal appropriately with these allegations. It did not hold an inquiry, yet it ignored calls for the suspension of the commissioner, and the removal of his sole power to sell land. It also ignored Carroll's appeal that the proposed sales were in defiance of the owners' wishes. The Government took two actions: it warned the commissioner that he should not sell land to his clients, and it passed legislation (some two years later) giving the Native Minister power to approve all sales.

The Crown's actions were inadequate to meet its Treaty obligations. First, its warning to Coleman was simply ignored. He proceeded to complete the first sale a few months later, to accept a mortgage on that land, and to offer the remainder of 2c3(2) to the same buyers. His replacement, Commissioner Rawson, felt bound to complete this second sale, because he was unwilling to risk expensive litigation. While Rawson acted from the time of his appointment as if the Minister had the power to approve sales, it was not in fact the case until 1922. The owners had no legal power to say 'yes' or 'no' to these sales, either before or after 1922. We accept that the Minister's new power was potentially for the protection of Maori interests, but the owners ought also to have had a say in whether their land could be sold. We find the Crown in breach of the Treaty principle of active protection, for failing to investigate the allegations against Coleman properly, and for failing to prevent the sales until their propriety was clear and the wishes of the owners were known. We also find that the Crown breached the Maori owners' Treaty-guaranteed tino rangatiratanga, by setting up a trust in which their land could be alienated permanently without their consent. As we have seen, this was an innovation in 1911 – even the 1902 Act did not go so far.

161. Crown counsel, closing submissions (doc N20), topic 13, p 7

These findings also apply to the Crown's purchase of part of 2C3(2). This sale was at the initiative of the Crown and for its purposes, not those of the trust. While we cannot agree entirely with Boston and Oliver that the sale was 'mindless',¹⁶² it was unnecessary. The Crown did not really need this land, but it was sold by the new commissioner anyway and at the Crown's price, which was lower than Chapple and Field paid for the rest of the block. Had this 183 acres been sold from a different block, we might assess it as being relatively minor – but here, it increased the loss of land for Tahora 2C3(2) owners, again without their consent.

The Crown suggested that the owners did consent to Rawson's sales (183 acres to the Crown, and the completion of the second sale to Chapple). This was on the presumption that Rawson carried out his stated intention to consult the owners and seek their agreement. We applaud Commissioner Rawson's view that the owners ought to have the right to veto or consent to sales, even if the law did not accord them that right. Macky, however, notes that there is no evidence that they consented to these sales. He also suggested that the long delay in finalising the second sale to Chapple may have been due to their opposition. We note too the evidence of Carroll that the owners were all opposed to the sale of 2C land to Chapple. Finally, the owners had no legal rights in the matter. Putting this evidence together, we conclude that the owners cannot be shown to have consented to Rawson's two sales, and probably did not do so. They definitely did not consent to Coleman's sale.

We find the Crown in breach of the plain meaning of article 2 of the Treaty, for allowing the permanent alienation of this land without the consent of its owners. We also find the Crown in breach of its obligation actively to protect the interests of the Maori owners, given that it had vested their land in this trust without their consent, had cancelled their 1903 restrictions on what could be done with the land, and now allowed its permanent alienation against their known wishes. The sad fact is that Commissioner Rawson would have agreed with Carroll that this land should not be sold against its owners' wishes, yet the system permitted it nonetheless. We also find that the return of other Tahora 2C land to its owners as developed farms did not remove the prejudicial effects of these Treaty breaches, which were confined to the owners of Tahora 2C2(3). The success of the trust in developing and returning land might have offset legitimate sales for the trust's purposes, but not these sales (which, as we have seen, were not for the trust's purposes at all). The fact that the owners were paid was no true compensation for the loss of their ancestral land without their consent.

12.6.1 Tuhoe's claim about Tahora 2G2

We accept the claimants' evidence that 2G2 was included in the Carroll–Pere trust without their knowledge or consent. The opportunity to rectify this mistake came in 1902, when the trust was wound up. Instead, the land was vested unnecessarily in the East Coast Trust, again without its owners' consent. What followed was a long history of neglect, in which (as the Crown put it) the block was 'forgotten'

162. Boston and Oliver, 'Tahora' (doc A22), p 260

because it was of no use to the trust. We accept the claimants' view that the trust ought to have returned the land to them if it had no intention of developing it, or paying off its growing debts. They might have had some success in developing it themselves, or – if they chose – pursuing an exchange of land with the Crown, in a more vigorous manner than the East Coast Trust. We also note, however, that the commissioner did act to stop fresh rates demands from 1926.

The 'forgotten' block had a completely out-of-date ownership in the 1950s, with more than half of the owners being deceased. It was unlikely, therefore, that Tuhoe had profited from a block committee or membership on the East Coast Trust Maori Council. They had had absolutely no say, even in an advisory capacity, on what happened to their land while it was held in trust against their will. They tested the thesis that 2G2 was incapable of development as soon as it was returned to their control in the late 1950s. Despite the low quorum requirements and the out-of-date ownership list, the Crown could not get agreement to its proposal to buy this 'useless' land in 1958. The surviving owners insisted on forming an incorporation, paying off the debt, and trying to mill (and then farm) the land.

The Crown, on the other hand, wanted 2G2 for river protection and to prevent erosion. The owners were suspicious of this, as we have seen, guessing that the Crown just wanted to mill the timber itself. There was some justification for their suspicion, since the Forest Service would not rule out the possibility as late as 1971. In the meantime, however, the Crown proclaimed 2G2 under the water and soil conservation legislation, so as to prevent the owners from milling it. Stymied in their ability to do anything other than transfer the land to the Crown, the Tuhoe owners finally agreed to an exchange in 1973.

We are not confident that the Crown was acting in good faith in its dealing with the Maori owners of 2G2. We agree with Boston and Oliver that it was convenient for the Crown to see the land sit undeveloped in the trust. It did not complete Rawson's 1926 proposal for an exchange. But as soon as the land looked set to return to its owners, the Crown moved to acquire it. The Maori Affairs Department prevented repeated approaches to the owners after the Crown lost at the 1958 meeting, but the Lands Department nonetheless used the law to stop the owners from getting any benefit from their land. While we accept that the Crown sometimes needs to prevent deforestation and erosion in the best interests of all, we are not convinced that this was the Crown's only motive in the 1960s. The Forest Service thought it 'likely' that the Crown would use the land for that purpose, but also contemplated milling it when it became economic to do so.

We find that the Crown breached the owners' Treaty rights when it vested Tahora 2G2 in the East Coast Trust without their consent in 1902. We also find that it breached its obligations of active protection, when it provided no means for owners of blocks such as 2G2 to retrieve their land from a trust that clearly did not want it. Unable to sell or exchange it in 1926, the commissioners simply left it for 30 years to accumulate debt. The Crown breached the Treaty by not allowing these owners any say in the decisions about their land until 1958. That breach was not offset, as it was for some claimants, by the return of developed land in the 1950s. In our view, the Maori Affairs Department acted consistently with the Treaty

when it prevented further pressure on the owners after 1958, giving them scope to form an incorporation and try to develop their land. But, by the same token, the Government's proclamation of the land under the water and soil conservation legislation in 1961, when there was not agreement within the Crown that the land was truly needed for this purpose, was in breach of the Crown's Treaty obligation to act scrupulously and with the utmost good faith towards the Maori owners. The proclamation limited their choices to either selling or exchanging with the Crown. We find that the 1973 exchange was carried out in circumstances that were thus inconsistent with the Treaty.

We are unable to say whether the claimants have been prejudiced by these Treaty breaches. Clearly, there was a long period (from 1902 to 1973) when they were effectively alienated from their land, and prevented from making any use of it, or obtaining any benefit from it. As the Crown has pointed out, however, the claimants have not expressed dissatisfaction with the land they received in exchange for 2G2 in 1973.

12.6.2 Ngati Kahungunu's claim about Tahora 2F2

Ngati Kahungunu owners lost 2,591 acres of their share of Tahora 2F when the block proved to be smaller than the court's estimate. This loss was borne by them alone, as the Crown's share of the block was not adjusted downwards to compensate them. This was a strong grievance for Ngati Kahungunu in the first half of the twentieth century, resulting in several petitions. The Government refused to hand over the requested 803 acres of 2F1, arguing that it, too, had been shortchanged in the 2C blocks. This does not appear to us to have been a fair or justifiable approach to have taken to Ngati Kahungunu's protests. We note that the East Coast Trust did save 2F2 for its owners and returned it to them with developed land and a successful farm in 1953. Nonetheless, the Crown was not entitled to profit from a mistake or sidewind at the expense of its Treaty partner. Its failure to return the 803 acres was in breach of the Treaty. The claimants were prejudiced by the loss of the opportunity to have profited from this extra land, to which they were fully entitled.

12.6.3 Prejudice

The whole sequence of events from 1902 to 1973 is redolent with continuing and compounding Treaty breaches. We have identified the following specific prejudice above:

- ▶ The loss of 9,894 acres of land from Tahora 2C, which fell unfairly on the owners of Tahora 2C3(2). The land was sold without the owners' consent – indeed, against their wishes – but they were paid out over an extended period. It is not suggested that the price was inadequate, but it could never have compensated for this loss of taonga tuku iho.
- ▶ The long period (from 1896 to 1973) in which Tuhoe could obtain no access to or benefit from Tahora 2G2. The commission's stewardship was misguided and produced no benefit whatsoever to the owners.
- ▶ Ngati Kahungunu's loss of 803 acres, for which they were never compensated, from the farmland of Tahora 2F2.

