

THE
NGAI TAHU REPORT
1991

THREE VOLUMES • VOLUME TWO

WAI 27

WAITANGI TRIBUNAL REPORT 1991



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

A Waitangi Tribunal report
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List of Abbreviations

AJHR	Appendices to the Journals of the House of Representatives
ATL	Alexander Turnbull Library
BPP/CNZ (IUP)	British Parliamentary Papers/Colonies New Zealand (Irish University Press)
<i>Compendium</i>	<i>A Mackay A Compendium of Official Documents Relating to Native Affairs in the South Island (Nelson, 1872)</i>
DOSLI	Department of Survey and land Information
JPS	Journal of the Polynesian Society
MAFFish	Ministry of Agriculture and Fisheries, Fisheries Division
NA	National Archives
NZC	New Zealand Company
NZLR	New Zealand Law Reports
NZFIA	New Zealand Fishing Industry Association
NZFIB	New Zealand Fishing Industry Board
NZPD	New Zealand Parliamentary Debates
NZS	New Zealand Statutes

References in brackets refer to documents produced in evidence during the hearing of the claim, eg (C1:12) refers to page 12 of document C1.

A complete record of documents is set out in appendix 6.

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Chapter 3

Ngai Tahu before the Treaty

3.1. Ngai Tahu Iwi

The descendants of Tahupotiki

- 3.1.1 Ngai Tahu take their name from Tahupotiki, a descendant of Paikea and a close relation of Porourangi, the ancestor from whom Ngati Porou has descended. Tahupotiki lived his life in the North Island on the east coast around the area now known as Poverty Bay–Hawkes Bay. Sometime in the seventeenth century his descendants gradually migrated south, travelling first to the Wellington coast and then crossing Raukawamoana (Cook Strait) in several waves to Te Wai Pounamu. Over a number of generations they spread over the large expanse of the island and on to Rakiura (Stewart Island). These heke occurred in comparatively recent times, but by intermarriage with those peoples who already inhabited the islands Ngai Tahu were able to forge links with the islands' more ancient history and resources. As Ngai Tahu moved south they sometimes fought and defeated, and sometimes intermingled with other tribes. In doing so they absorbed these peoples' older knowledge and experience of the land and its resources. This process of fusing Ngai Tahu with earlier communities was still continuing when Europeans first arrived on the islands in the eighteenth century.

Ngati Mamoe

- 3.1.2 While Ngai Tahu occupied Wairau and Kaikoura, interaction linked Ngai Tahu by whakapapa to many of the tribes which still inhabit the northern South Island, including Rangitane. However, Ngai Tahu's strongest rivals for control of the island's resources as a whole were Ngati Mamoe. Like Ngai Tahu, Ngati Mamoe were recent immigrants from the east coast of the North Island. A century before Ngai Tahu's arrival they had moved south, gradually shifting from their bases on the south coast of the North Island to Wairau and then further south. When Ngai Tahu arrived Ngati Mamoe were strong in the Kaikoura area. For a time there was peaceful coexistence. Then followed a series of clashes which resulted in Ngati Mamoe being driven further south and Ngai Tahu replacing them as the dominant tribe on the northern east coast of the South Island. Over the next century this process continued down the island. Ngai Tahu married Ngati Mamoe

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but the rivalries continued. By the time Europeans arrived Ngai Tahu had clearly established their dominance on the east coast while at the same time being heavily interlinked with Ngati Mamoe by whakapapa. In the far south of the island there were still those who regarded themselves as Ngati Mamoe first and as the tribunal moved around the island it was clear that southern Maori still think of themselves as Ngai Tahu–Ngati Mamoe, a synthesis of the two tribal groups.

Waitaha

3.1.3 Older iwi still occupied the island before the southern migrations of Ngai Tahu and Ngati Mamoe. These people are collectively known to Ngai Tahu as Waitaha. Like Ngati Mamoe, their whakapapa and their traditions are linked with the history of Ngai Tahu. Waitaha were both a people and a collection of peoples. The name refers to all those who were there prior to the Ngati Mamoe and Ngai Tahu migrations. These peoples recorded their long and eventful occupation of the island in its most ancient names, names which were readily inherited by Ngai Tahu. Known by European scholars as Moa Hunters, the culture associated with the hunting of the moa had already gone with the passing of these flightless birds when Ngai Tahu first crossed Cook Strait. Although the collective name for a group of people, Waitaha also describes a people who traced their history back to Rakaihautu and his son Rokohuia who first landed the Uruao waka on the island many centuries ago. In Ngai Tau tradition it was Rakaihautu who travelled down the island beating the land with his ko and leaving the inland lakes. Ngai Tahu also have their own creation stories about the formation of the island looking to the Southern Alps as Te Waka a Aoraki, the canoe of Aoraki, with its paddlers making up the main peaks of the Southern Alps.

3.1.4 Mr Tipene O'Regan has outlined something of this history in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* from which the following excerpt is taken:

It is hard to put a date on the Waitaha arrivals. The whakapapa (genealogy) takes root from the voyaging ancestor Rakaihautu, his son Rokohuia, and their canoe Uruao. Rakaihautu is present in traditions of Taitokerau (northern North Island of New Zealand), and in those of Rarotonga in Eastern Polynesia. The name of his canoe is also that of a star constellation and one of the ancient 'star pathways' of Polynesian navigation. The names and the whakapapa are treasures of our antiquity to be lovingly recalled in debate and speculated on and intermeshed with archaeology and anthropology when it suits. What is important to our people is that Waitaha are the first people in our island and that, in his travels, Rakaihautu and his tribe named the land and the coast which borders it. These are the names we associate with the earliest archaeological evidence.

Ngai Tahu before the Treaty

While these ancient Waitaha tribes were establishing their southern world, other tribes were building similar worlds in the north. There it was warmer and they were more numerous. Their kumara, yam, and taro were sustained with less difficulty and they could grow hue (gourds) for containers. While their numbers were increasing and they were beginning to contest the most favoured areas amongst themselves, the southerners were still expanding into more open and less contested land and resources. On the eastern North Island coasts, a tribal group grew up around the ancestor Whatua Mamoe and established substantial fortified pa in the region of the modern city of Napier. Just to the north, in what is now the Gisborne area, other groups formed which shared descent from the Cook Island ancestor Paikea and his brother Irakaiputahi. Roughly half-way between Gisborne and Napier lies the Mahia Peninsula; here a third group associated with the Kurahaupo canoe was forming. By the early sixteenth century elements of these tribes were establishing themselves down the eastern North Island coast, to the edges of Raukawamoana (Cook Strait).

The descendants of Whatua Mamoe from the Heretaunga (Napier) region became known as Ngati Mamoe. In the mid-sixteenth century a small section of them settled on the Cook Strait coast near Wellington and shortly afterwards crossed the strait and imposed themselves on the Waitaha communities living in the Wairau district near modern Blenheim. According to our traditions, the Ngati Mamoe were drawn south by the abundant bird, eel, and fish resources of the Wairau estuaries and lagoons. Over time they came to dominate Waitaha, more by strategic marriages than by war, and the old southern tribal communities began to be known by their name, Ngati Mamoe, over the length of Te Waipounamu.

Meanwhile, back in the eastern North Island another more substantial tide of tribal movement was building. The mosaic of tribes was shifting southwards after a round of retributive fighting, sparked by the murder of a child. The movement had far more general causes than the historic incident which sparked it, and there began a steady migration of groups from within the eastern North Island tribes that was to continue into the seventeenth century.

Several of those groups migrated, over a span of about two generations across Cook Strait and into Te Waipounamu. Over time, they formed the principal southern tribe and became known as Ngai Tahu through their linking ancestry to Tahupotiki of the East Coast, North Island, whence their southwards migration had begun. However, they had a rich mixture of North Island tribal descent flowing in them, and the bonding into a reasonably unitary tribe did not take place until they had been in Te Waipounamu for nearly a century. The story of that century is one of conflict, of peacemaking, and intermarriage, both with the Ngati Mamoe and amongst themselves. It was during that time that 'classic' Maori culture was implanted in the South Island, to be modified by the rigours of the colder environment and a very different economy.¹

Te Heke o Ngati Kuri

- 3.1.5 Ngai Tahu's moves south brought the tribe progressively into the various areas occupied by them at the time of the Treaty. The first heke, or migration, was that of Ngati Kuri. Kuri lived several genera-

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tions after Tahupotiki, and it was his grandson and great-grandson, Puraho and Mako, who first took the tribe across Raukawamoana (Cook Strait), following a battle with Ngati Ira at Puharakeke (near Seaview, Lower Hutt). At Kura te Au (Tory Channel) where they settled, they soon came into conflict with Ngai Tara, whom they successfully defeated. In the Wairau they campaigned against Rangitane, and eventually a Ngati Kuri chief, Maru, moved south to Waipapa, on the Kaikoura coast. Mr Wiremu Solomon, a kaumatua from Kaikoura explained the events that then took place:

. . . Kati Kuri came and lived at Kaikoura and the tribes . . . living there gave over the Kaikoura lands to Maru . . . There were many hapu, or clans, living at Kaikoura even Kati Mamoe. These were the ones who wanted to live peacefully, who did not want fighting . . . Kai Tahu's battles were not murderous ones, they did not just fight for fighting's sake. They did not kill without end. It was not like that. They fought their battles and when it was over that was the end of it. They did not chase their enemies all over the country nor did they kill treacherously. Kati Kuri was not like that. Now, at the time that Kaikoura was given over to Maru a poha (food storage container) named '*Tobu Raumati*' was given also. This poha was fashioned with a bird in front and a human figure on top and the food in it was never eaten by man . . . although food was preserved in it each year. The first foods of the year were preserved in that poha. It was a sacred poha imbued with the sacred rituals and mana of the Maori. The giving of that poha was symbolic of the giving of the land. (H7:22)

Ngati Mamoe then settled at Pariwhakatau (Conway River) from which they were eventually expelled as far as Murihiku.

Mr O'Regan identified the Irakehu people as the next major heke south, bringing Ngai Tahu to Horomaka (Banks Peninsula) (A27:9).

Te Heke o Tuhaitara

- 3.1.6 Another great migration which led to Ngai Tahu occupation of most of what is now Canterbury is identified as Te Heke o Tuhaitara (J10:7). The heke is associated with Moki and Turakautahi. According to Mr O'Regan, Tuahuriri came into conflict with his brother-in-law Tutekawa who killed two of Tuahuriri's wives before fleeing to Wairewa (Lake Forsyth). Tuahuriri drowned and it was his two sons, Moki and Turakautahi, who travelled south to Wairewa, where Tutekawa was killed. Moki was himself killed by maketu at Wairewa soon after. From the members of this heke come the major hapu of Canterbury and Banks Peninsula. Mr O'Regan commented that:

The heke divided the new areas between them with Turakautahi coming here to Kaiapohia, Mako to Wairewa, Te Ruahikihiki to Taumutu and Te Rakiwhakaputa to Rapaki and so on. (A27:11)

- 3.1.7 Mr Rakihia Tau's account stressed not utu but the value of trade and the richness of the resources of the new territory.

Ngai Tahu before the Treaty

Having mingled with their kinsmen Ngati Kuri, Waitai and some of his kinsmen left their kaianga nohonga near the Wairau River called o Te Kauae. This was on account of Maru their kinsman showing clemency to certain Ngati Mamoe people. These people were also closely related. Waitai and his forces travelled southwards as far as Murihiku or Southland In time Moki's brothers-in-law who were with Waitai's forces desired to return to the Wairau, hence Kaiapu and Te Makino journeyed overland and returned to the Wairau. On their return they reported to Moki and the various chiefs their discoveries, the abundance of mahinga kai within this Island. This was the reason for the building of Kaiapohai [sic] Pa. The importance of the site came from the fact that it was the base for a *network of Kaianga nohonga* throughout the South Island. (J10:8) (emphasis in original)

Further disputes continued with Ngati Mamoe throughout the southern parts of Te Wai Pounamu until a final peace was agreed to at Poupoutunoa (near Clinton). The peace was arranged by Te Hautapuniotu of Ngai Tahu and Te Rakiihia of Ngati Mamoe. Although at times precarious, Mr O'Regan stated that the "union of the two tribes . . . has held from that time". (A27:12)

- 3.1.8 The last of these Waitaha peoples to be incorporated into Ngai Tahu were Ngati Wairangi. Ngati Wairangi held control of the west coast including the valuable pounamu of Arahura. They are presumed to have been a pre-Aotea people who originally came from the Taranaki area. Like the other tribes of the South Island they were already connected by marriage to Ngai Tahu prior to their eventual defeat in the late eighteenth century by Tuhuru at the battle of Lake Mahinapua, south of Hokitika.

Ngai Tahu's relationship with other tribes by 1840

- 3.1.9 We have explained that at the first hearing of the claim certain northern South Island tribes from the Nelson and Marlborough district appeared before the tribunal and claimed interest in the proceedings (1.6.12). The claim lodged by these tribes raised a dispute as to the tribal boundaries of the various iwi which led to a formal hearing before the Maori Appellate Court. The court gave its decision on 15 November 1990. The full text of that decision is appended to this report (appendix 4). Generally the dispute concerned the position of the north eastern and north western boundaries of Ngai Tahu.

Ngai Tahu claimed rights on the east coast up to the respective rohe shown in the Kaikoura and Arahura purchase deeds being respectively Parinui o Whiti on the east coast and Kahurangi on the west coast. These rights were challenged by three parties in the Maori Appellate Court representing ten northern tribes. On the eastern boundary Ngati Toa and Rangitane opposed Ngai Tahu's claim up to Parinui o Whiti and on the west coast Ngai Tahu rights were disputed by Ngati

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Toa, Ngati Rarua, Ngati Tama, Rangitane, Te Atiawa, and to a certain extent by Ngati Apa.

We do not propose to review the court's decision which examined the customary *take* such as ancestry (take tupuna), conquest (take raupatu), gift (take tuku) and the important question of actual occupation (ahi kaa) which must accompany a *take*.

On the eastern coast the court rejected claims by Rangitane that prior to the Ngati Toa incursion led by Te Rauparaha in 1828, Rangitane had occupied and held title to the land north of the Waiau Toa (Clarence River)

The court also found that although it was clear Ngati Toa had effectively conquered the east coast as far as Kaiapoi and possibly Akaroa, they did not follow up this military success by exercising ahi kaa over any territory south of Parinui o Whiti. The court decided that Ngai Tahu, in 1840 and in 1859 when the Kaikoura deed was signed, exercised rangatiratanga over the eastern coast up to Parinui o Whiti.

The court in looking at the various claims to the west coast came to the conclusion that Ngai Tahu held customary title to Tai Poutini lands for a considerable time before 1827 when Ngati Tama and Ngati Rarua arrived with their chiefs Niho and Takerei respectively. However the Maori Appellate Court also found that any rights these two tribes had were extinguished with the defeat of Te Puoho at Tutarau and the retirement of Niho and Takerei north of Kahurangi Point just prior to the Treaty. Claims made by Ngati Toa, Rangitane, Te Atiawa and Ngati Apa were also examined by the court and rejected. The Maori Appellate Court found that rights of ownership of the land comprised in the Arahura deed were vested in Ngai Tahu.

A little later in this chapter we again look at the invasion of Ngai Tahu territory by the northern tribes and its effect on the tribe.

The iwi

- 3.1.10 By the time of the Treaty then, Ngai Tahu were in control of a vast territory, but like all iwi they existed in hapu and whanau communities, with different genealogies, often reflecting the mixed origins of the tribe. Mr O'Regan described this in the case of Arowhenua.

Perhaps our Kati Huirapa people centred on Arowhenua best typify the three primary streams of whakapapa that go to make us – they are the centre of our Waitaha tradition, they have significant Mamoe descent and they carry the name of Huirapa, one of our most important founding tupuna from the southeastern North Island roots of Kai Tahu. Our tupuna tied us together in a kupeka, or net, of whakapapa . . . (A27:12)

Ngai Tahu before the Treaty

Professor Atholl Anderson, himself of Ngai Tahu descent, presented the relationship between the different parts of the tribe to us in scholarly terms:

If I have understood this matter correctly then it can be inferred that the land and its resources was perceived in three ways: as a tribal territory, that is, the area for which the tribe would fight; as land in common ownership excepting those tenured pieces, or rights of access to resources, which were inherited through hapu and could be located at any point in the tribal territory; and as a series of annual ranges (weakly combined into districts), which were the areas customarily ranged over by the members of the residential communities in the course of their yearly economic activities.

This amounts, in turn, to an economic system in which common ownership was not congruent with management. The tribe owned the land in common but did not manage it economically. Hapu owned property or access rights but did not manage them at hapu level. Communities owned neither land nor resources but, were, nevertheless, the operationally-effective economic managers through their organisation of activity schedules and labour. (H1:73)

Professor Ward also commented on the way Ngai Tahu may have perceived their rights in line with his experience of other Polynesian cultures.

The question of just which sections of Ngai Tahu owned or controlled what rights is a matter of some complexity – a complexity that had grown up over many generations of travel and dispersal over and through Te Wai Pounamu. It is clear that some rights, like mutton-birding in the Titi Islands, were exercised far from the group's residential bases, and that mobility between residences (e.g. Taumutu, Otakou, Ruapuke) gave access to rights in various hinterlands and waters to people who resided from time to time in those settlements. (T1:9)

The Crown's witness, Mr Bathgate, further developed the same theme, and like Professor Ward, based much of his argument on the work of Professor Crocombe of the University of the South Pacific.

While the Ngai Tahu tribe was an entity in itself, it was comprised of many *hapu* which were the major units of social organisation above the *wbanau* or family at the local level. The tribe as a corporate unit was more evident in relation to warfare, when the resources of the various [sic] *hapu* in the South Island under the control of chiefs of differing rank might be combined to take collective action against others, such as Te Rauparaha and his invaders in the 19th Century. (S2:236)

- 3.1.11 We have not lingered on the stories associated with the wars and migrations that peopled this island. Each of these stories has many versions and to try and isolate which events occurred where and in what order has the danger of turning the rich and varied traditions of the tribe into a fixed and sterile narrative. The tribunal's task is not to unravel these complicated traditions. To attempt to produce a standard or authorised edition would only undermine the very com-

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plexity on which traditional history was based. Our task is to examine Ngai Tahu's claim in connection with the Crown's obligations under the Treaty. It is clear to us that Ngai Tahu existed in 1840. It is just as clear that in 1990 Ngai Tahu continue to exist. As Mr O'Regan suggested:

Despite a little regional turbulence within us from time to time Kai Tahu Whanau [sic] are one people and it is as one people that we stand before the Tribunal today. (A27:12)

That the tribe has survived through adversity will be made clear by the story of the events which follows. That they have survived at all is a tribute to their identity as an iwi.

We now turn to examine Ngai Tahu's relationship with its lands and other resources in the period prior to the Treaty being brought to Te Wai Pounamu by Major Bunbury in 1840.

3.2. **The Tribe and its Resources**

How large was the tribe?

- 3.2.1 Professor Atholl Anderson, associate professor of anthropology at the University of Otago, provided extensive information on the size and location of the Ngai Tahu population in his evidence on mahinga kai (H1-3). The Crown too submitted considerable evidence about the Ngai Tahu population at the time of the land sales. In a comprehensive report produced by Mr Tony Walzl and audited by Professor Ian Pool of the University of Waikato, nineteenth-century censuses of population were tabulated and aggregated for the whole of the tribal area (O14-O16, O43). Although this evidence only covers from the mid-1840s onwards, the conclusions about the Maori population at the time of the Treaty were consistent with those of Professor Anderson. Both Claimant and Crown witnesses based their evidence on similar records. Although the study they provided was a valuable insight into Ngai Tahu demography from mid-century, estimates of how many Ngai Tahu there may have been at the time of initial contact with Europeans are much harder to evaluate because of the very limited source material.

Professor Anderson, Professor Pool and Mr Walzl make it clear that the accuracy of the various censuses that were taken of Ngai Tahu in the mid-nineteenth century is questionable. Reasons for this include the tendency of some enumerators to count only those who had no European ancestry while others include those of mixed parentage. As early as the 1840s there were Ngai Tahu who would have been regarded as quarter caste Maori or even possibly eighth caste Maori (H1:15). Ngai Tahu's continual movement about the island meant that the size of individual communities could rise and fall rapidly, depend-

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ing on what time of year the population was recorded. Despite these reservations, the wide variety of observations and their relative consistency mean that it is still possible to come to a conclusion about the size of the Ngai Tahu population and its distribution at the time of the Treaty.

- 3.2.2 Professor Anderson suggested that the South Island had never supported a Ngai Tahu population much over 3000. He based his figures on a large number of different recorded observations of the populations of specific Maori communities. These figures were mostly taken during the middle decades of the nineteenth century, but some extend back as far as the 1810s. The evidence was divided into different regions. For the Foveaux Strait area he concluded that the Maori population was increasing during the period 1810–1828 to around 1000, with new settlements at Ruapuke and Centre Island. This increase was probably due to the new found ability to grow potatoes and to the economic potential created by European visitors.

The sealing industry collapsed in the 1820s, leading to declining European interest in the area until the establishment of shore whaling ventures in the late 1830s. Professor Anderson maintained that there was a uniform decline in the population from 1000 in 1828 to 400 in 1868, making the population at 1840 around 700. He attributed this decline largely to epidemic diseases. The situation in other areas was similar. The estimated population for East Otago was given as 700 in 1820, declining by about half two decades later (H3: fig 13). For North Otago the population was estimated at no more than 200 in 1840, and for mid-Canterbury about 500. The Kaikoura and Arahura populations were given as unlikely to have exceeded 100 each. In total, these figures would mean an 1840 population of between two and three thousand.

Seasonal migration, a confusion over whether or not to count Maori with European ancestry and migratory changes for defensive and economic reasons were acknowledged by some in the nineteenth century as throwing doubt on official figures. Alexander Mackay suggested that as many as 843 people may have been missed by Mantell in his 1848 census of the population within the area of the Kemp purchase (A9:11).² Although there is no other evidence to support so large an error in Mantell's figures, some Ngai Tahu were certainly missed because they were not present in the communities at the time the land commissioner visited them (O15:18).

- 3.2.3 The size of the population at the time of first European contact is open to even greater speculation. Mr Tipene O'Regan argued that at the end of the eighteenth century the tribe was considerably larger than the few thousand suggested by Professor Anderson. He at-

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tributed the rapid decline of the population on the wars with the northern tribes and on measles epidemics in the 1830s. Professor Anderson's evidence shows that Ngai Tahu numbers as recorded in the 1820s were only moderately higher than those of the 1840s, and were certainly not in the order of tens of thousands. If the population had declined from this high figure, then this must have occurred at least before 1820, and probably a good deal earlier. This would rule out the Kaihuanga feud, the northern invasions and recorded epidemics as the main reasons for population decline. All of these befell the tribe after the mid-1820s. So dramatic a decline in numbers could have occurred in the later decades of the eighteenth century, but there was no traditional, archaeological or historical evidence before the tribunal to support that contention. On this matter we would prefer to accept the conclusions of Professor Anderson. However, in doing so, we must acknowledge that we may not have heard the last word on the size of the Ngai Tahu population.

How did the tribe occupy its territory?

- 3.2.4 The question was often asked, how was it that so small a group of people were able to occupy so large a territory, with its mountainous ranges, turbulent rivers, dense forests and cold winter climate? Europeans in the nineteenth century often dismissed Ngai Tahu's claims to ownership of this vast region of apparent wilderness as being without any foundation. In fact, the tribunal was given substantial evidence that Ngai Tahu were familiar not only with the coast line of the island, where most of the permanent settlements were based, but also with the inland plains, mountains and lakes. The interior and mountain passes were crossed by a network of trails. Inland resources were an integral part of the tribe's subsistence and of their trade both internally and with other tribes. This evidence was presented by members of the tribe themselves as well as by expert historical and archaeological witnesses for the claimants, the Crown and the tribunal.

Archaeological remains

- 3.2.5 One of Professor Anderson's most striking exhibits was a map of the South Island made up entirely of the locations of 3919 known archaeological sites (H1 fig 1). This map is reproduced below. Almost the complete coast line can be seen, with locations densely clustered around Kaikoura, Canterbury and Banks Peninsula, the Otago peninsula and Foveaux Strait. The inland regions of Canterbury, Otago and even Fiordland are included: regions where the lack of agricultural activity has made the discovery of such sites less likely. Many of these sites pre-date Ngai Tahu's arrival in the South Island. But, as Mr O'Regan explained (A27), in absorbing the Waitaha and Ngati Mamoe

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iwi who preceded them, Ngai Tahu inherited many of their traditions. These included, in some measure, earlier names for the features and resources of the island, as well as the economic activities, traditions and whakapapa associated with them.



Figure 3.1: The distribution of 3919 archaeological sites in the South Island, Department of Conservation.

Many of the interior sites recorded the hunting of the moa, a resource which had been exterminated prior to the Ngai Tahu migration. These sites are generally between 400 and 800 years old. But the

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archaeological record shows other uses of the interior continuing into European times. In addition to the quarrying of pounamu, South Island Maori had developed considerable expertise in fashioning a wide range of tools from other minerals. These included silcrete, a form of bonded quartz sandstone and porcellanite, a mudstone. During its visit to the Canterbury Museum the tribunal was shown the museum's extensive collection of South Island stone tools. Working these materials into tools that could be of a considerable size required substantial skill and organisation.

Pounamu (nephrite or greenstone) was prized above all minerals for its durability, its strength and its beauty. Nephrite is found in a number of different forms from Nelson in the north, down the west coast to Wakatipu and Milford Sound. The pounamu from the Milford region, known as tangiwai, is bowenite rather than nephrite. The working of the stone could take place far away from its source. Kaiapoi pa became a renowned trading centre for the stone, where it was fashioned into articles ranging from intricate jewellery to robust mere pounamu.

Umu-ti, oven sites for the cooking of the roots of the ti, are also common in many parts of the South Island. Ti was also known as kauru. Remains of these ovens are liberally distributed throughout the South Canterbury and Otago area. On the downs between the Waitaki and Opihi valleys as many as 88 probable umu-ti sites have been recorded (H1:4). The cooking of kauru remained an essential part of the Ngai Tahu economy at least until the 1840s.

Rock drawings were also an indicator of Maori use of the interior. There are about 400 such sites in the South Island. About half of these are in Canterbury and the rest in North Canterbury and North Otago. Carbon dating of the debris found with these suggest their origin in the moa hunting period, 450–850 years ago. However the art did not die out with the passing of the moa. Maori continued to produce such art into the European era, with some paintings depicting sailing ships and other items of European material culture.

The land is named

- 3.2.6 Maori traditional knowledge, some of it from Waitaha and some of more recent origin, included names of all the most prominent features of the island, mountains, lakes, and rivers. All these features were known and their names often represented the deeds of the first explorers of this land. European names, which have in many cases displaced the Maori in official usage, celebrate the deeds of nineteenth-century explorers, Heaphy, Brunner, von Haast and others who traversed the island. These later adventurers were not the

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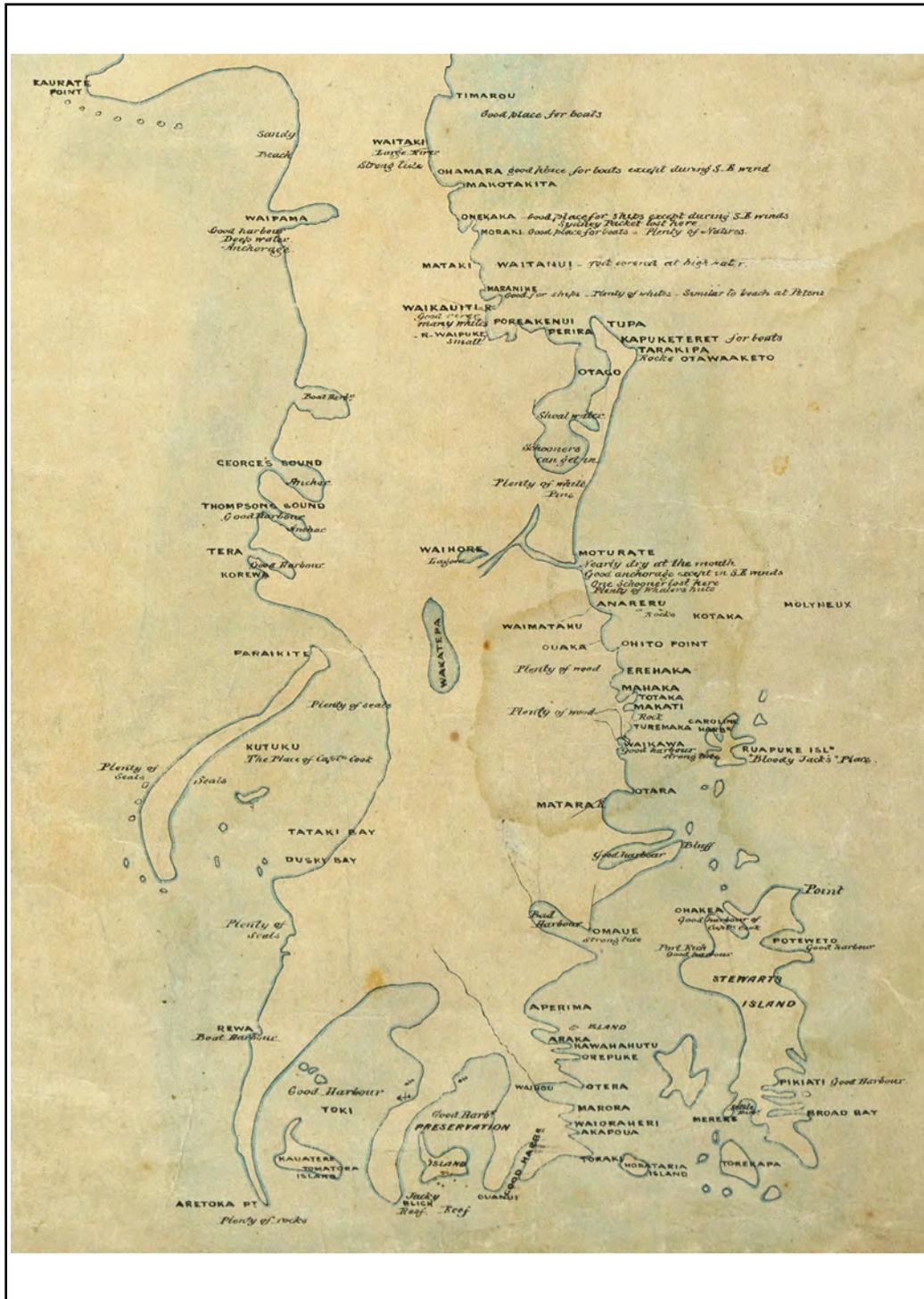


Figure 3.2: Southern portion of a Maori map of the South Island made for Edward Halswell in the early 1840s, by permission of the Alexander Turnbull Library, Wellington, New Zealand (MapColl-834ap/[1841-2?]/Acc.527).

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first, neither were the paths they took untrodden. Maori guides often accompanied such men, using trails with landmarks long familiar to them and places named after their ancestors.

Walter Mantell, whose role in purchasing land from Ngai Tahu will later be discussed in great detail, was given a long list of the important places up the Waitaki river from his guide Te Wharekorari. This memory map gives the names in sequence of the tributaries, camping places and ancient settlements from the sea to Lakes Tekapo, Pukaki and Ohau (H3:fig 26).³ The detailed names including the places where different foods could be obtained were held in memory, like whakapapa, where the sequence and significance of every name had its own place.

A survey of the journals of many of these early European explorers clearly shows how their knowledge of the landscape was provided by Ngai Tahu informants. Maps made during these encounters gave Europeans sufficient information to recognise major features of the interior long before seeing them for themselves. A good deal of this evidence was presented to the tribunal by Professor Anderson and Mr Barry Brailsford for the claimants, but such accounts were scattered throughout much of the evidence. Edward Halswell, a protector of aborigines, produced a map in the early 1840s drawn up from information given him by Maori. It clearly depicts the coastline from Timaru down past Otago on through Foveaux Strait and around to Dusky Sound and the west coast (J18:145). The map is a dramatic illustration of how Ngai Tahu saw their island landscape. Although the entire island is easily recognised, the size of areas most used by Ngai Tahu are shown as considerably larger than the remainder. During Edward Shortland's 1844 travels around the island, he was given several maps from the Ngai Tahu chiefs, Huruhuru and Tuhawaiki. The map he produced of the east coast and the interior clearly identifies Lakes Hawea, Wanaka, Wakatipu and Te Anau.⁴

While many of these names have been lost in the century and a half since the Treaty, many are still known and remembered. The tribunal was given a map of the Kaikoura coast from Parinui o Whiti (White Bluffs) to just south of Kaikoura. On it were over 200 Maori names of places along the coast (H28).

South Island trails

- 3.2.7 Barry Brailsford gave evidence on the elaborate system of trails in the South Island. These linked the various Ngai Tahu settlements into the social and economic life of the tribe and tied them into networks of trade which extended well beyond the South Island. As a result of this, some knowledge of the geography of Te Wai Pounamu can be

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found in distant North Island locations. In 1793 Tuki, a resident of Oruru in Doubtless Bay in the far north, produced a map of both islands for Governor King in Norfolk Island. A river on the west coast of the South Island is clearly marked as a source of pounamu. A lake (probably Wakatipu) is also shown as the place where pounamu was taken for making axes. Tuki had never ventured there himself.⁵

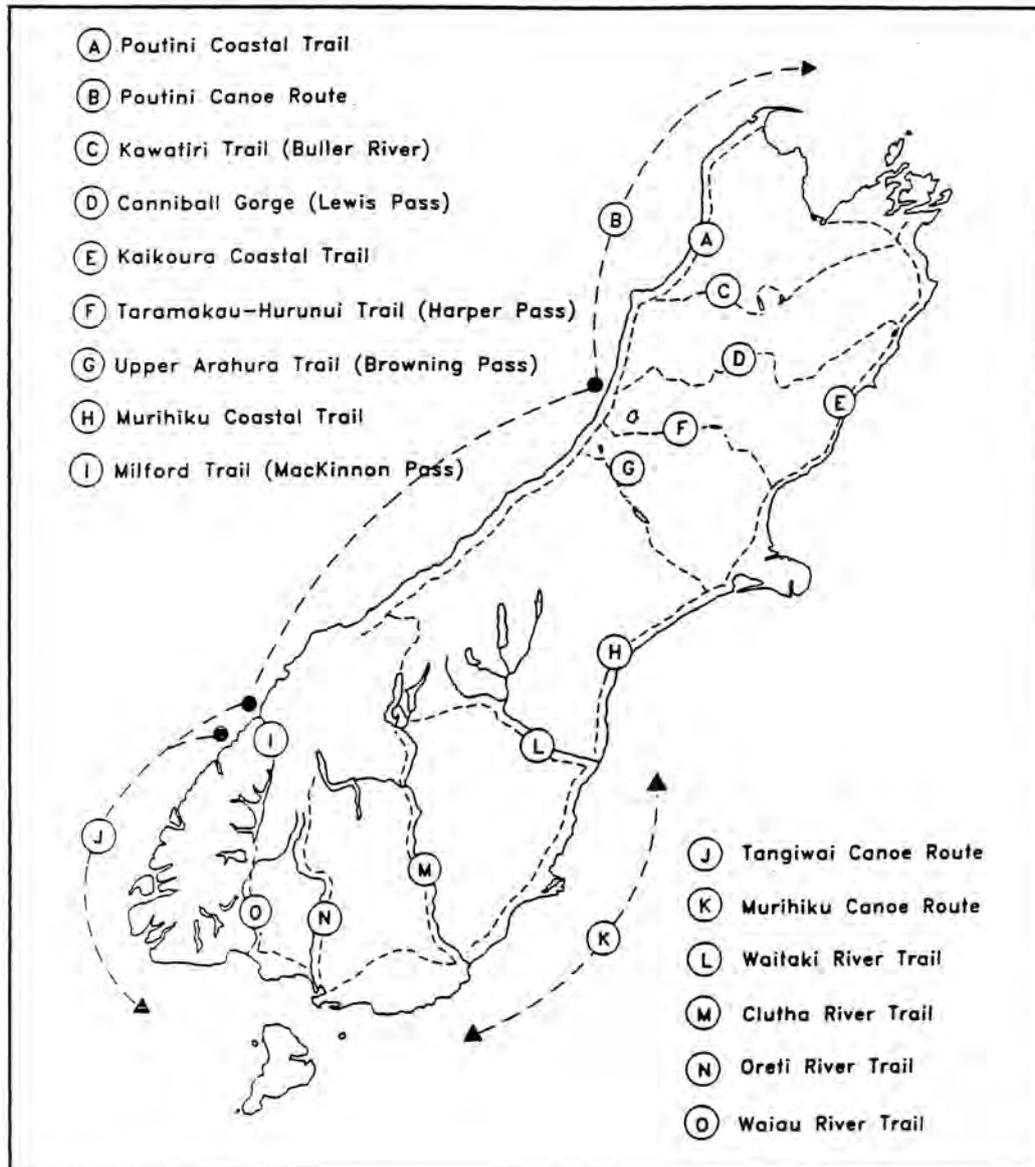


Figure 3.3: Major South Island trails as identified by Barry Brailsford *Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington, 1984) (J18)

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We have reproduced one of Mr Brailsford's maps showing a complex network of trails across and up and down the island. The title of his book, *Greenstone Trails*, highlights the use of these trails in the trade in precious pounamu. But the trails had a wider significance. They were routes into the various resources of the interior. In another map of the Canterbury plains area (J17), we were shown the way Ngai Tahu travelled inland in search of weka and to lakes such as Coleridge,

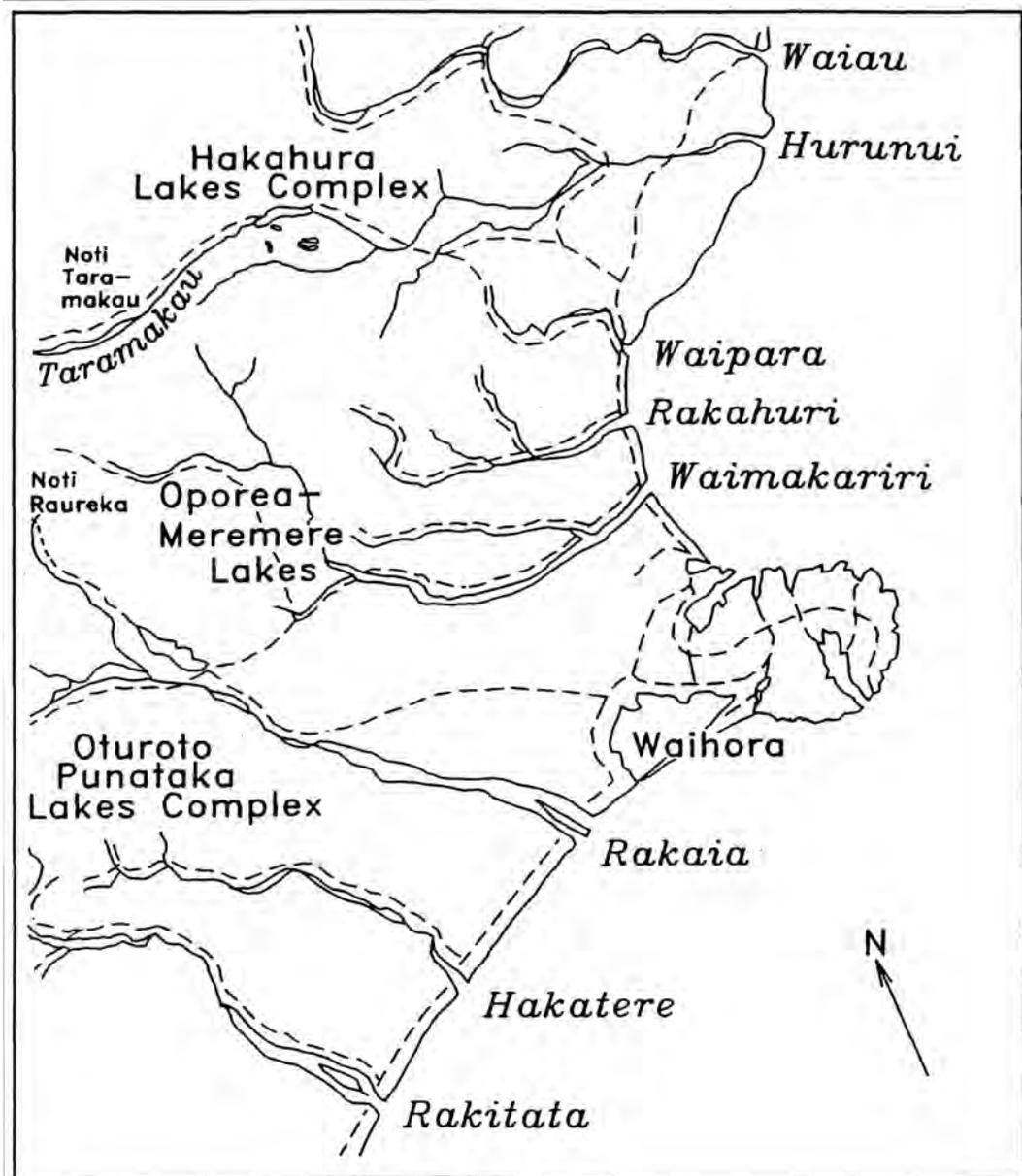


Figure 3.4: Canterbury trails between the coast and inland lakes as identified by Barry Brailsford *Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington, 1984) (J17)

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Pearson, Lyndon and Howden for eeling. Trails also connected the various Ngai Tahu communities, acting as a social and cultural link between hapu. Long distance travel allowed Ngai Tahu to trade amongst themselves and to keep their rights to distant resources alive. These trails were not just easy routes across a harsh terrain: they had to follow food resources. While a war party could cover these large distances in very short periods of time, the usual pace was more leisurely. Preserved food, such as dried fish, could sustain travellers in a hurry, but families travelled at a slower pace, stopping for different periods of time at places where eels were plentiful, weka easily caught, or some other food obtainable. Knowledge of the route included knowledge of where all these foods could be taken.

Not all the trails were necessarily known by everyone, but neither were they used only occasionally. The historical record for the 1840s and 1850s shows just how far and how frequently Ngai Tahu travelled, sometimes across the land and at other times by sea. By the 1840s many Ngai Tahu rangatira had extended their experience of travel to the wider world, with many of them having been to New South Wales, and a number having travelled to the northern hemisphere on whale ships or with other traders.

- 3.2.8 Travel in and around the island was tied to the tribe's seasonal existence. Although Ngai Tahu were located largely along the sea coast in permanent settlements, Professor Anderson has shown that they ranged inland on a regular seasonal basis. Sometimes inland kainga could be occupied for several years at a stretch. Lakes such as Hawea and Wanaka show evidence of both longer term occupancy and of summer use. It was at Hawea that the Ngati Tama raider, Te Puoho, encountered Ngai Tahu whanau on his way south in 1836 (H1:32,58).⁶

The most persistent and obvious form of seasonal travel was the annual heke to the Titi Islands to take titi. This heke was highly structured. Ngai Tahu came south from as far north as Kaikoura and the birds were taken as nestlings from late summer to winter.

The location of settlements also varied with economic needs. According to Professor Anderson, prior to European contact, settlements were mainly located at the mouths of the large rivers. The rivers provided access to the foods of the interior as well as those of the sea. With the advent of sealers and whalers harbour locations became favoured. New sealing and whaling boats made sea travel more attractive and harbours offered the opportunities of extensive trade with Europeans. Settlements coalesced around new whaling stations at Moeraki, the Otakou Heads, the various harbours of Banks Peninsula and Foveaux Strait. Island locations such as Ruapuke and

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Raratoka, in Foveaux Strait, also became favoured, especially when the threat of invasion from the north became pronounced in the 1830s. The Kaihuanga feud of 1826 also led to some redistribution of population and the destruction of some settlements (H1:33). Matiaha Tiramorehu explained how the war had led Ngai Tahu to abandon temporarily some of their kaika around Moeraki (Z10:33).⁷

What resources did the tribe use and how?

- 3.2.9 Only Europeans who had extensive relations with Ngai Tahu were able to appreciate in any depth the extent to which Ngai Tahu interacted with the resources of the island as a whole. For new arrivals, familiar with a countryside transformed and tamed by centuries of intensive agriculture, the landscape was an empty, untouched wilderness. Ngai Tahu's place in this environment was judged entirely on the slight modifications which could be readily noticed by European eyes. These consisted of little more than villages and potato patches. To most Europeans this landscape was unused in terms of European notions. It was easy for them to conclude that the land was not owned in any sense that they would recognise.

In the period before the Treaty, those Europeans who came into Ngai Tahu's territory learnt very quickly that such assumptions were far from the truth. Early whalers and sealers soon found that the apparently unnamed landscape was known in detail, and that the tribe used different resources over the territory as a whole. They were also to discover and generally accept that Ngai Tahu's claims to rights over the island were extensive and were based not just on historic association or knowledge but on the use of the island's resources throughout the tribe's territory (5.3.5).

Evidence of the Ngai Tahu economy and resources

- 3.2.10 The tribunal received considerable evidence on the Ngai Tahu economy and its resources from tangata whenua and from the expert witnesses commissioned by the claimants, the Crown, the NZFIA and the NZFIB and by the tribunal itself. It was our impression that there was an overwhelming consistency in the evidence, and that despite the occasional clash between the experts, the vast bulk of the evidence presented to the tribunal showed a remarkable degree of consensus. Differences, when they did occur, sometimes appeared to us to be the result of professional rivalries between the experts.

An archaeologist may have found fault with the evidence of a historian or a fisheries scientist may have questioned an archaeologist's understanding of the ecology of a certain fish species. The tribes of modern experts defended their professional territories with a zeal Ngai Tahu would appreciate. Where these conflicts are relevant to

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the discussion of Ngai Tahu's mahinga kai rights under the Treaty we have discussed them.

We will not be concerned here with the evidence of sea fishing, the area where more substantial differences emerged between the parties. We are very conscious of the problems of dividing the sea fisheries from the land and fresh water based resources of the tribe. Ngai Tahu did not make such arbitrary distinctions between the land and the sea as those forced on us by the size of this inquiry.

We proceed to examine some of this evidence, although it was not contentious, because it portrays the Ngai Tahu economy in a way that should dispel the myth that Ngai Tahu were but a scattered group of hunters and gatherers who eked out a limited existence on a vast island scavenging foods as they found them. As the evidence suggests the truth was very different.

The archaeological record

- 3.2.11 We have already discussed the use of some resources, including the cooking of ti, and various stone for manufacturing tools. Professor Anderson, Dr Bathgate, Professor Leach and Mr Hooker presented considerable archaeological evidence based on a wide range of professional studies of midden remains. These studies are ongoing and have been carried out at various levels since the nineteenth century. However much of the midden evidence concerns Ngai Tahu's use of sea resources and so will be discussed in our later report on these matters.

Factors leading to deficiencies in aspects of the archaeological evidence were often pointed out. Professor Anderson, the claimants' archaeologist, and Dr Bathgate, the Crown's archaeological witness, both stressed the simple fact that some kinds of evidence survive better than others. This qualifies the accuracy of the information presented. For example, the absence of remains of fish structure made of cartilage rather than bone may not in fact indicate that such fish were not used. Because cartilage does not survive as long in the ground as bone, it will either be underrepresented or not represented at all in midden remains. Cultural practices, such as beheading the fish elsewhere than on site, or preserving fish and taking it away, may also influence what is found archaeologically. Dr Habib, too, was critical of a dependence on the archaeological record (T4). However, this does not imply that archaeological evidence has not been helpful or indicative of the lifestyle of those who lived in the times before written records. It merely means that just as there are missing pieces in the early historical jigsaw, so too are pieces of the archaeological puzzle missing.

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Differing opinions were expressed as to the relative reliability of either contemporary European recorders or the “archaeological record” – the bones, artifacts, structures, and any other remains associated with human activity that occurred more than one hundred years ago. One witness suggested that the archaeological record showed the true economic pattern of the tribe, unbiased by factors such as social significance of the resource or lack of accurate identification of resources by the recorder (S2:155–6). However while this is a debatable point, witnesses agreed that the various components of the archaeological record (the bones, artifacts, structures etc) should never be looked at in isolation from each other, nor should they be isolated from historically recorded events, or from traditional accounts. No one type of evidence should be taken as being solely definitive.

A regionally based economy

- 3.2.12 Archaeologists presenting evidence to the tribunal looked at the archaeological record of the South Island in total, from the time of the first recorded settlement to the nineteenth century. This enabled us to see the sequence of resource use as it unravelled over time. Temporal change was not the only variation which was evident. The main archaeological-early historical evidence presented for the claimants by Professor Anderson, and for the Crown by Dr Bathgate, showed that past Ngai Tahu use of resources was very much on a regional basis. It was apparent that each particular community had its own special areas for collecting different foods throughout their region in various seasons. The foods available in each region differed in abundance and ease of acquisition. Regions had their specialties.

For example, in communities around the Otago harbour, it is evident in both the archaeological and historical record that maka (barracouta) was an important resource. Ngai Tahu fished for maka by lure. The maka lure was comprised of a wooden shank with a bone point or seal tooth inserted in it (S2:48). These were trolled through the water, mimicking the small fish which darted to and fro trying to escape as maka drove them into schools to feed on them. Even when the lure was modified, the expertise in catching barracouta in this region was frequently noted by early observers (S2:52).⁸ In the early 1800s Maori were supplying European ships with fish, potatoes, pigs and flax. By the mid-1830s Maori potato cultivation was clearly extensive. Taiaroa and Karetai, who owned whaleboats, would bring potatoes from Maori settlements as far afield as Taieri and Moeraki to be sold at Otakou (H1:21–22). Potatoes were exported from Otakou to Sydney in the 1830s by the Weller brothers, as was pork, mutton

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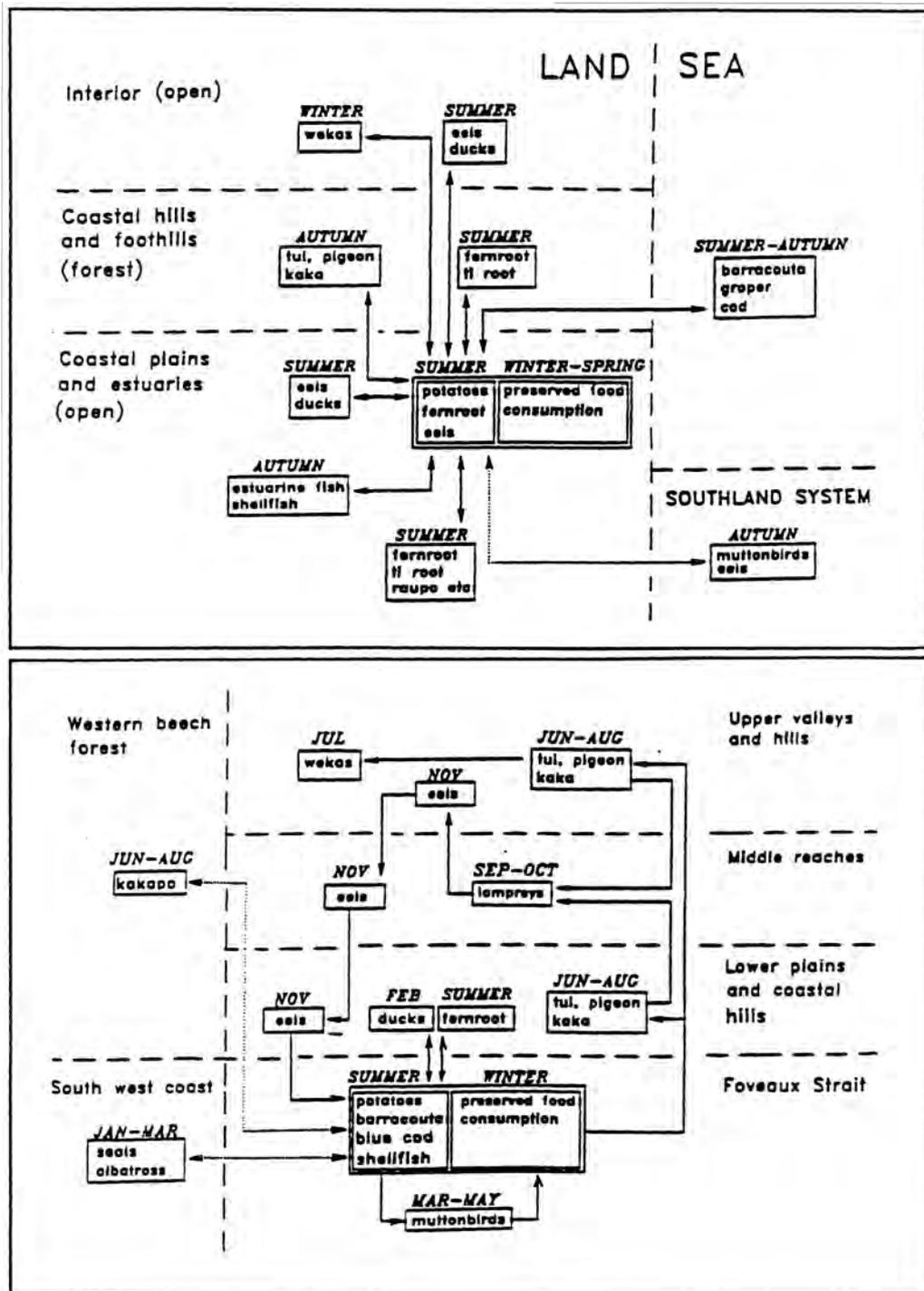


Figure 3.5: Professor Anderson provided these diagrams showing how the resource use of two Ngai Tahu communities, Waikouaiti (top) and Ruapeke (bottom), was governed by seasonal foraging across an extensive terrain (H3:figure 33)

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bird and dried and salted fish. Maori involvement in the whaling industry was particularly notable around Otakou in the thirties.

Foveaux Strait, on the other hand, was renowned for the abundance of titi. These were caught from autumn to winter and many accounts were given of the importance of this resource to Ngai Tahu as a whole. Professor Anderson referred in one instance to an account of “stacks of preserved birds” lying beside the houses in Ruapuke in the winter of 1823, most of the people still absent muttonbirding on Stewart and the Titi Islands (H1:9). Ngai Tahu even came from as far as Kaikoura for titi. However, while this appears to have been the region’s autumn and winter activity, those who lived around the Foveaux Strait in the early 1800s lived on a selection of foods, including potatoes, cabbage and other vegetables, fernroot, albatross and other wildfowl, seals, rats, eels, fish, shellfish and tutu juice year round (H1:9–11). Professor Anderson referred to an account that Maori of the Foveaux Strait “sometimes make excursions to the Snowy mountains and catch 300 woodhens per night” (H1:12).⁹ In North Otago and South Canterbury there are records of eeling, digging fernroot, gathering raupo and eating tutu berries and tutu juice (H1:29). The route from the coast up the Waitaki river to the central lakes brought Huruhuru and his people access to weka grounds and eels. There was even time for the preparation of luxuries. Scent made from taramea was highly prized and used for barter and as koha between rangatira. Cooking kauru or ti was also a regular occurrence in this area. At Wainono lagoon wild ducks and eels were obtained by locals and by travellers alike. Berries could be collected from inland forests.

At Taumutu on the shores of Waihora (Lake Ellesmere) kumara could be grown. From the lake came a whole variety of foods: eels, patiki, several varieties of ducks. Fernroot, here as elsewhere, was one of the staples of the Maori diet before the coming of European foods. Although it is recorded in accounts up to the 1840s, its use was clearly declining by that time. The quantities of eels and flounder which could be taken were enormous. Mantell recorded seeing the trenches which were dug to obtain the eels as they migrated across Kaitorete spit from lake to sea, commenting that one trench could provide “some hundreds of eels . . . in a day” (H1:37)¹⁰. Flounder were available in the same bounty.

Even up to 1855, the Maoris of Taumutu, who only used flax nets, could manage a take of one cwt. of patiki at each haul. The flounders came in from the sea when the lake was opened, spread themselves over it, and ascended the several streams debouching into the lake. (S2:166)¹¹

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Dried fish, particularly shark, was noted in the early historic accounts of mid Canterbury as a valued resource of the region. Kumara, potatoes, pigs, flax, ti, fernroot, maize and karaka berries were noted resources. Pounamu was traded with Ngai Tahu of the Poutini coast, who in the 1840s were recorded as living on eels, whitebait, grayling, dogfish, mussels, weka, kakapo, potatoes, fernroot, mamaku, tutu berries and ti (H1:41–47).

If the lake and the swamps which surrounded it provided prized fresh water fish and other resources, Ngai Tuahuriri looked to the hills beyond the plains for their kai manu and kiore, their birds and their rats.

The contrast between the resources of the mountains and those of the sea is aptly expressed in a waiata given to us by Mr Rawiri Te Maire Tau, who gave evidence of Ngai Tuahuriri's use of mahinga kai.

Ka huri mai to hau, ko te hau tena
 Ki tua koroko e keo nei ana nga manu
 ko te tau o te ora haere, kia kite nei
 Te kaha o te uri o Tane
 Te kaha o te uri o Tangaroa
 Ka ki nga kete o te iwi e . . .
 Ko te matahi o te tau e . . .
 Te putanga o te hinu e tama

The wind changes direction towards me
 It is the wind that blows from the back of Mount Koroko
 I can hear the birds calling in the wind
 It is the year of the journey
 To see and harvest the multitude of the children of Tane
 And the children of Tangaroa
 That the kits of my people be filled-in the high summer
 When everything is fat, filled with oil.(H6:12–13)

Mr Tau gave evidence of the use and importance of birding and the trapping of native rats to Ngai Tuahuriri. Both these activities were carried out in the mountains that overlooked Kaiapoi and in the ranges beyond them. Between April & July rats could be taken around Te Kuratawhiti (Mount Torlesse), Te Rakau (Birch Hill), Tatawahia, Ko Mamaha, Te Ara Tire, Takapu o Hinehou, Tawera (Mount Oxford) and O Kiore (Lower Loburn). A similar range of mountainous and inland locations was given for the taking of weka in the months between March and August. Kakapo were caught with weka on Mount Torlesse and Mount Otarama; Kereru at Tawera (Oxford) and Okuku (H6:38–39).

Seasons were extremely important: both birds and rats were harvested when they were fattest from gorging themselves on the berries

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on which they lived. Rats were plumpest and sweetest from April to July when they had overfed on the tawai berry. The native rat was the kiore, a short rat, coloured brown on the back and greyish white on the underside. It lived on berries and tree fruits and was particularly plentiful in the beech forests of the South Island, until the introduction of European rats led to its near extinction. Of all foods, the rat was the most prized. Rat runs were strictly divided into wakawaka among different whanau and hapu and their ownership was fiercely defended against poaching. The activity of rat catching was tapu and overseen by a tohunga. The demise of the kiore was possibly one of the first traditional and highly valued foods to become a casualty of introduced species of plants and animals.

Inhabiting a narrow strip of land between the mountains and the sea, Ngati Kuri of Kaikoura were clearly very dependent on the sea. They had on their doorstep koura, paua, hapuku and a wealth of other seafoods. Despite this, the evidence given on their behalf by Mr Wiremu Solomon showed just how important other resources were to the tribe (H7). These resources are still valued by Ngati Kuri and in giving evidence, they wished to keep the locations confidential. On a map depicting kai roto, or inland foods and resources, there are listed various plants used by the tribe. These included harakeke, raupo, taramea, kiekie, pingao, tikumu, as well as tree fruits such as karaka, manuka, ngaio, koromiko, raureka, ake ake, kowhai, karamu, hinau and mahoe (J11). Their fresh water fish included tuna, inanga, pakihi, kokopu and koura (H32). Kai manu included a very wide range of birds: kereru, titi, weka, kuku, kaka, kiwi, tui, koko, tarapunga, torea, takapu, kawau, pateke, korimako, karoro, toroa, parera, putakitaki and tata.

On the west coast, Poutini Ngai Tahu took fish, processed fernroot and caught eels and weka. Brunner recorded that on his visit to Okarito in 1847:

these places abound with eels I had full proof during my visit here the diet being nothing else, and was served out in liberal quantities, to dogs as well as Christians, three times a day (H1:43–44).¹²

Mahinga kai lists

- 3.2.13 Many of the above accounts can be attributed to European observers, but Ngai Tahu themselves collected and recorded information about their use of natural resources at a time when the informants could still remember back to the period before 1840.

In 1879 and 1880, Ngai Tahu kaumatua set about trying to record the names of the places where they had taken various natural resources. These are collectively known as the “mahinga kai lists”, and were discussed by Professor Anderson and Dr Habib (H1, T4(b)). As part

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of the project, a large map of the South Island was marked with the names of hundreds of these places, generally within the boundaries of the Kemp deed map, and excluding the Arahura purchase (H2 fig 27). At the time, the Smith–Nairn commission was hearing evidence from Ngai Tahu about the early Crown purchases, and Ngai Tahu were preparing evidence for their claim that their mahinga kai, or as they defined it, the places where they obtained their natural food resources, had been reserved to them as part of the Kemp purchase agreement. We will be discussing this claim later in the report.

The lists were prepared to record both place names and the foods associated with them, although they were never completed and some lists gave less detail about resources than others. Professor Anderson commented that it is impossible to know if the information in these lists came from the direct knowledge of the informants or had been passed down from earlier generations (H1:63). The range of foods discussed goes beyond those usually observed by Europeans. Professor Anderson noted 62 resources, 57 of them foods:

Mahinga Kai for eels, fernroot and ti are most frequently listed but there is also a strong emphasis on a group of riverine or estuarine fish (waharoa, pipiki, patete, paraki, panako, grayling, smelt, whitebait and minnows) together with native trout (kokopu and koukoupapa which Beattie calls “mountain trout”). Tutu, raupo root and flax honey were important plant foods, and weka, tui and rat are also quite prominent. (H1:63)

The foods included varieties introduced since European contact such as potato, showing how Ngai Tahu had adopted new crops but also adapted them to their traditional seasonal food gathering.

Dr Habib, who made a special study of the lists, was particularly impressed with the wide variety of Maori names and the ways these linked into the economic layout of the Ngai Tahu landscape. Although there were over a thousand names in the lists, many of these referred to places where a variety of different foods could be harvested.

For example, Kaitorohu was a food production site on the southern banks of the Waimakariri River in the Canterbury Province. It yielded tuna (eel), mata (a species of herring), inaka (whitebait), paraki (smelt), kokopu, patiki (flounder), parera (grey duck), putakitaki (paradise duck), raepo (species of duck), tataa (species of plant), potato, turnip, kumara and rushes (reeds) (R30:40). (T4(b):10)

In Dr Habib’s opinion these lists represented only a sampling of the full lists of places with which Ngai Tahu identified, and to which they turned to provide themselves with food (T4(b) 12). Professor Anderson had a similar view. By comparing the density of these wahi mahinga kai from areas where lists were supplied, to the rest of the

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South Island he argued that a full 1880 list could have contained as many as 3000 places.

- 3.2.14 There is further evidence to support this contention. From the later part of the nineteenth century a number of writers collected Ngai Tahu's traditions and place names. The most prominent of these was Herries Beattie, who published a number of books and pamphlets on Ngai Tahu in the mid 1800s. His collection of manuscript material survives in the Hocken Library in Dunedin and runs to over a thousand pages. Beattie's informants were made up of elderly Maori, largely from Otakou and South Canterbury, who were recording personal information from memories extending back into the period of the land sales themselves. A number of Beattie's books simply record the Maori place names of different parts of the island, running into thousands of different names. His notes record much information about resources and the techniques used for taking them.

Elsdon Best, too, used Ngai Tahu material in his surveys of different aspects of the Maori economy, such as in *Fishing methods and devices of the Maori* (1929) and *Forest Lore of the Maori* (1942). These included discussion of the harvesting and preparation of kauru, tutu hoki, of tuna caught in drains and traps, netting patiki in Waihora, catching inanga in channels, and hapuku. Birds like paradise duck, grey duck, brown duck, grey teal, blue duck and scaup were caught from canoes while they were moulting. Weka were taken in January. Pigeon, kaka, tui and bellbird were taken in snares. Rat runs were particularly prized possessions.

The range of resource

- 3.2.15 Overall, it is clear that Ngai Tahu's exploitation of the South Island was extensive, and that it included the use of a wide range of land and marine environments. The resources noted above are only some of those recorded in early written sources. Others noted to have been sought by Ngai Tahu at the time of European contact included:

aruhe (fernroot), ti (cabbage tree), mamaku, katote, kiekie, raupo root, korau (wild turnip) leaves, arore (fungus), sea anemone, seaweed, harakeke (flax) honey, and berries of the tutu, karaka, konini and makomako. Other plant resources included flax and ti leaves (for paraerae), birch and totara bark (roofing and patua), kelp (for poha) and taramea (a scent). Fish resources included kanakana, eels, crayfish, native trout and grayling, sprats, sole and other small estuarine and riverine species, whitebait, dogfish, red cod, blue cod, wrasses, bar-racouta, ling and hapuku. Mussels, paua, cockles, pipi, limpets, and seals were taken on the shore. And rats, titi, weka, albatross, ducks, penguins, kiwis, kakapo and kokako, pigeon, tui, bellbird and gull eggs from the land, were caught for consumption. Dogs were husbanded and eaten also. (T1:35)¹³

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We will probably never know from the archaeological, written or traditional sources all of the varied resources used by Maori during the long period of occupancy of Te Wai Pounamu.

Food preservation

- 3.2.16 Perhaps the most striking aspect of the preparation of the varied and rich Ngai Tahu foods were the methods of preservation of the season's surplus food supplies. This was an essential part of Ngai Tahu existence. Poha, which are bags made of kelp and sealed with fat, were frequently used to preserve foods at the times of the year they were most abundant. Titi, bush birds and fish were preserved in this manner during autumn, winter and summer respectively. Seals were smoked whole before the flesh was preserved in poha (S2:188). Fish were dried on mats, or else split and dried and either hung on strings of flax or placed on racks in the sun. Sometimes they were cooked in an umu prior to drying. These resources were used for exchange and gifts, in feasts catering for guests, to feed dogs, for eating on journeys and in times of less abundance.

Economic change

- 3.2.17 Ngai Tahu adapted their economy to the resources available to them. Maori life in Te Wai Pounamu was never static, and was always subject to the ebb and flow of the seasons, to changes in climate and the availability of resources. Like all living cultures the society adapted to meet new needs. It found new resources when old ones were depleted and shifted from one location to another through necessity or desire. Mr Richard Noel Holdaway presented evidence to the tribunal on behalf of the NZFIB and the NZFIA. He argued that Maori, like all Polynesian peoples, had "no more or no less claim to have lived in harmony with their environment or conservation awareness, than do the Europeans who followed them" (S17:2). Mr Holdaway pointed to recent archaeological investigations which indicated that Maori had overexploited resources such as seals, marine crayfish and birds of several varieties. Moa in particular were exploited to extinction in the South Island. Deforestation was also pointed to as an indication that environmental concern had its limits in pre-European Maori society. While accepting that species were depleted by overuse or by accident in the period before the arrival of the European, the scale of this was still minor compared with the extensive environmental damage which has occurred since 1840. We shall be discussing these issues further in chapter 17 on the mahinga kai claim.

As a result of species depletion, the declining ability to hunt large birds and sea mammals, the Maori diet was changing over time. From the fifteenth century there was a diversification of fish species caught and an increase in the use of shellfish. This was associated with the

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disappearance or decrease in use of former protein sources, the moa and the fur seal, and a general climatic deterioration.

3.3. **The Consequences of European Contact**

A tradition of interaction

- 3.3.1 Whatever the extent of change in the Ngai Tahu world from the time of their arrival in Te Wai Pounamu to the middle of the eighteenth century, it was overshadowed by changes which ensued from the arrival of Europeans.

European impact on Ngai Tahu life occurred early compared with most other tribes and led to a relationship that was several generations old before Major Bunbury brought the Treaty south in the autumn of 1840. Unlike European contact with Maori in the far north, there was little or no missionary presence. As a consequence, there are no missionary records to draw on to explore this period in the tribe's history. Europeans came to Te Wai Pounamu not to save souls but to exploit the natural resources of the southern islands. They provided an exotic market for Ngai Tahu's traditional resources and gave a new value to resources which Ngai Tahu used more rarely or not at all. Ngai Tahu had always used whales and seals for a variety of purposes (S2:73). From the late eighteenth century, seals were taken in large numbers by European sealing gangs in Foveaux Strait, from off-shore islands and elsewhere in Ngai Tahu territory (H1:8-12; S6(a):3-8 and U2(a)). Mr McAloon described some of the difficulties which occurred when these gangs came into conflict with Ngai Tahu (J39), and these incidents were also discussed by Mr Molloy for the fishing industry (U2(a)).

It would appear that few of these sealers established permanent homes ashore, but through intermarriage many Ngai Tahu must be descended from these first visitors. Sealers brought the first trade goods, iron tools, blankets and new technology such as sealing boats with oars and European rigging. They also brought new crops which were rapidly taken up by Ngai Tahu who saw the opportunity of providing potatoes and onions and other vegetables to shore parties and to ships' crews wanting provisions (T1:45).¹⁴ Ngai Tahu themselves acquired a taste for these new foods. Potatoes greatly extended the geographical limits of Ngai Tahu's agriculture, previously confined to the more temperate areas around and north of Taumutu.

- 3.3.2 The visitors' vessels carried an invisible and more sinister cargo, European diseases. Ngai Tahu, for so many centuries isolated from the rest of the world, were confronted with illnesses previously unheard of. Without the natural resistance which came from an inherited experience of quite common illnesses, the mildest infection

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could prove fatal to large numbers of Maori (T1:48–50). We cannot be sure how many Ngai Tahu died in the period from 1769 to 1840 but the numbers were clearly considerable. We have isolated accounts of actual epidemics and their effect on the tribe. Around 1836, for instance, there was an epidemic of measles which killed many (T1:49).¹⁵ But epidemics were only part of the story. Chronic diseases such as tuberculosis become major killers of Maori. By 1840 it was generally accepted that Maori numbers were declining, and that the prognosis for Ngai Tahu was far from good. European fears that Maori would die out had been at the heart of the humanitarian belief that colonisation should not take place. It would not be until the 1890s that there was a general recognition that Maori could survive at all. However, by this time Ngai Tahu had not only survived, they were beginning to significantly increase in numbers. The Crown's witnesses, Professor Pool and Mr Walzl, demonstrated that Ngai Tahu numbers were beginning to improve as early as the 1860s (O16–O18). If this was so, Ngai Tahu may have been one of the first tribes to turn the demographic corner.

3.3.3 The sealers began to decline in numbers shortly after the first decade of the nineteenth century. They had ravaged the resource, returns were declining and changes in European fashion had reduced the demand for seal skins. Shore whalers then came and set themselves up on Ngai Tahu's coastlines. Whale ships which pursued whales at sea and processed them on board ship did not need shore stations; they entered Ngai Tahu's ports only when they required provisions. Shore whaling was cheaper allowing whales to be caught from small boats and not requiring investment in large factory ships and their crews (U2(b)).

3.3.4 Contact with the European world also brought social change to the tribe. Professor Anderson has shown how Ngai Tahu migrated to new localities to indulge in new trading opportunities, to have access to the new agriculture and to participate in new industries, such as whaling (H1). Perhaps the most visible "tool" adopted from the beginning by Ngai Tahu was the whaleboat. In 1844 it was noted that:

whaling and sealing boats have superceded canoes, in the management of which they show great skill and boldness; they have become expert whalers, and obtain employment at the fisheries often on the same terms as Europeans (T1:45).¹⁶

In 1842 pigs were purchased from Ngai Tahu in exchange for a boat and in 1843 a sealboat cost 41 pigs and 700 baskets of potatoes (T1:46).¹⁷ Some of the boats were used to freight goods and transport passengers for profit.

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- 3.3.5 Initially Europeans and Ngai Tahu made oral agreements over the use of resources, formalised in the Maori way without any written deed or agreement. However, as the prospect of colonisation came closer and it became likely that New Zealand could come under the British Crown, more and more Europeans came with deeds supposedly to purchase land. Some of these Europeans were known to the tribe, involved in trade, settled in Maori communities and married to Maori women. Others were simply speculators who arrived on the beach with a blank form, printed in Sydney. They offered trade goods, blankets, guns, powder, alcohol, agricultural implements and even boats, in return for Maori signatures (T1:54–58).

The question of the status of these pre-1840 purchases was raised primarily in relation to the question of fishing rights. Evidence was presented by Mr McAloon on behalf of the claimants which suggested that Ngai Tahu exercised control over the whale and seal fisheries by granting Europeans limited leases to fish for these mammals (J39). Mr Kevin Molloy, who presented evidence for the NZFIA and the NZFIB, maintained that Ngai Tahu had actually alienated rights to the fishery prior to the signing of the Treaty (U2(b)). These arguments will be dealt with in a subsequent report on sea fisheries aspects of the claims.

The newcomers came to understand that in order to use the resources of the island they needed to negotiate with those that had rights to the lands concerned. While new immigrants were forced to come to grips with these rights and to negotiate with Maori in order to use these resources, there was the opportunity for Ngai Tahu to assert control in a traditional Maori way. Europeans wanting to lease land or use resources had to accept Maori concepts of ownership and control. European perceptions about property rights were of necessity modified to accommodate Maori concerns. However, once the tide of settlers became a flood, overwhelming the tribe in the two decades of land purchasing that followed the Otakou purchase in 1844, Europeans no longer had to modify their views. Whether Ngai Tahu had rights to anything at all ceased to be a question settlers had to face. Yet it is clear from the evidence presented to this tribunal that Ngai Tahu's economy involved a use of the island that was extensive, rather than intensive, and that it involved sophisticated use of a wide range of resources in an integrated economy. This economy rested on an equally elaborate system of ownership, based on complexities of whakapapa, seasonal migrations and trade.

Civil war and invasion from the north

- 3.3.6 Between the late eighteenth century and the time of the Treaty, Ngai Tahu became embroiled in a series of conflicts. Accounts of these

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conflicts vary and we have distilled a narrative of these events from the claimants' evidence, in particular that of Mr O'Regan and Mr Tau, and from a number of other well known written accounts. These sources include, Professor Anderson's *Te Puoho's Last Raid*,¹⁸ and James Stack's Kaiapohia, *The Story of a Seige*.¹⁹ Various discussions of this part of the tribe's history appeared in the evidence of Dr Loveridge for the Crown (N2) and in the Ward report (T1).

To some extent these conflicts were part of the traditional competition between tribes over the mana whenua of Te Wai Pounamu. Ngai Tahu continued to extend their dominion over the island through battles with Ngati Wairangi at the end of the eighteenth century. Tuhuru led a party of Tuahuriri which defeated Ngati Wairangi at the battle of Mahinapua, and consequently extended Ngai Tahu control over much of the west coast during the early decades of the nineteenth century. The Kaihuanga feud split the tribe asunder in the late 1820s. Major battles were fought around the southern reaches of Banks Peninsula between southern and northern Ngai Tahu hapu. The feud led to many deaths and greatly weakened the tribe's ability to deal with later external threats. Mr Tau said of this low period in the tribe's history:

all those dark and negative forces [which] lay within Ngai Tahu and all mankind [were] released. The utter stupidity and the pure petty jealousy by the local feuding Hapu paved the way for Te Rauparaha to raze [Kaiapo] Pa site to the ground. (A17:2)

Like the conquest of the west coast, the explanation for this conflict appears traditional. The warfare was the consequence of a breach of tapu, involving a cloak belonging to Te Maiharanui, the senior rangatira of the day.

- 3.3.7 However, a more serious threat to the future of Ngai Tahu followed very soon after. From the north came a calamity which came near to destroying Ngai Tahu's control over much of their territory. Te Rauparaha and his Taranaki and Ngati Raukawa allies had shifted south to the Cook Strait region in the early 1820s. Their migration was a direct consequence of the social and military dislocation which European technology brought to the Maori world. Muskets and potato and the trade in flax and other commodities made subtle changes in the balance of power between tribes. Te Rauparaha and his allies were able to exploit the new situation. Taking advantage of the new techniques in warfare, they achieved control of much of the southern North Island and a good deal of the northern South Island. By the end of the 1820s their attention was turning toward Ngai Tahu.

Te Rauparaha and Te Pehi took utu against Ngati Kuri of Kaikoura for an insult carelessly made. At Omih, Ngati Kuri were expecting

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visitors and mistook Te Rauparaha's taua for their relations. The pa fell easily to the northerners' muskets. The taua moved on to Kaiapoi where Ngai Tuahuriri were unaware of the destruction of Omihi. The visitors were warily welcomed inside the pa, but their intentions were not too difficult to determine. Ngai Tahu chose to make the first move, and Te Pehi was killed inside the pa, along with a number of other northern chiefs. The raiders retreated to Kapiti, but their vengeance was not long in coming. The next year, Te Rauparaha engaged a European trader, Captain Stewart, to carry a troop of fighters to Akaroa, hidden beneath the decks. Once Te Maiharanui had been lured aboard, the trap was set and he was taken prisoner and returned to Kapiti. There he was killed by Te Pehi's grieving widow.

The unscrupulous behaviour of Captain Stewart brought considerable discredit to the English in New Zealand and contributed to a belief in Britain and the Australian colonies that British law should protect Maori from the worst elements of British society. For Ngai Tahu of Banks Peninsula, the event provided a reason to welcome Britain's traditional enemy, the French, into their world as prospective colonists. Stewart's conduct was so deeply associated with his English origins that some on the peninsula continued to believe that Stewart's brig, the *Elizabeth*, was in fact a British frigate. This was not the case.

Te Rauparaha then laid siege to Kaiapoi itself. The pa was solidly built and surrounded by swamp. Its defenders did not give way easily. The invaders built up brush around the palisades intending to fire the pa. With the wind blowing away from the walls, the defenders set fire to the brush themselves. All went well for a time, but then the wind changed and the palisades caught alight, allowing the pa to be taken. Taiaroa escaped as did a number of others, but many were killed, and the pa was destroyed. The invaders then attacked Onawe, a strong pa in Akaroa Harbour. This too fell. Many of the defenders were killed and eaten and many others taken prisoner to Kapiti.

- 3.3.8 Ngai Tahu's control over the Te Tai Poutini in the west of the island was also threatened. Te Niho of Ngati Tama swept down the coast as far as Okarito, capturing Huruhuru and holding him prisoner. Te Niho married Huruhuru's daughter and settled at Hokitika. The pounamu coast had fallen.

The sacking of Onawe and the taking of Okarito marked the southern limits of the northerners' success. In 1836 Te Puoho led a Ngati Tama raiding party south down the west coast towards the remaining Ngai Tahu strongholds in Foveaux Strait. He boasted that he was going to skin the eel from head to tail. Travelling inland, he encountered some

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Ngai Tahu at Lake Hawea and elsewhere on his way through to the Matura. Some escaped and were able to warn Ngai Tahu at Ruapuke. A defensive party swept north to Tutarau, Te Puoho was killed and his party taken prisoner. Fearing further vengeance from Ngai Tahu, Te Niho withdrew from Hokitika to Whanganui, and Poutini Ngai Tahu were able to reassert their rangatiratanga over their territory on the west coast.



Figure 3.6: Te Puoho's route from the west coast to Tutarau, where he met his death at the hands of a Ngai Tahu taua from Ruapuke in 1836, Atholl Anderson, *Te Puoho's Last Raid: The march from Golden Bay to Southland in 1836 and defeat at Tutarau* (Otago Heritage Books, Dunedin, 1986) pp 21, 31.

- 3.3.9 Secure on their island fortress of Ruapuke, Ngai Tahu's leading chiefs were able to plan the reassertion of their mana over the areas abandoned after Te Rauparaha's triumphs at Omihi, Kaiapoi and Onawe. Well armed and travelling by canoe and sealing and

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whaleboats, the Ngai Tahu taua was able to make its way north and surprise Te Rauparaha, while he was taking ducks at Te Kapara Te Hau (Lake Grassmere). Te Rauparaha was lucky to escape, and the story goes that Tuhawaiki had him by the cloak before he struggled free. A further raiding party the following year failed to locate the Kapiti chief or his troops.

Eventually an uneasy peace was achieved and the Ngai Tahu prisoners returned to their homes. Despite the truce, the memory of the bloodshed wreaked upon the tribe would overshadow many of the events which occurred in the 1840s and 1850s. While the peace was maintained, Ngai Tahu would remain defensively grouped at Ruapuke and at Port Levy for most of the 1840s, never entirely sure that their northern boundaries were safe from further incursion.

Many of the tribe's leaders appeared to be well aware of the power of the British and the French and they were concerned to ally themselves with these powers. Hence they sought various treaties with the French and with the British. In early 1840, while northern chiefs were at the Bay of Islands considering the Treaty offered by Captain Hobson, Ngai Tahu rangatira were off to Port Jackson, New South Wales, where they considered the terms of another Treaty with Governor Gipps.

Ngai Tahu's ability to control and contain all that the European world would bring to their islands should not be over estimated. Although the tribe was more or less at peace with itself and with its northern neighbours by the end of the 1830s, the decade of war had greatly weakened them. Many rangatira had been killed and the threat of further violence had not been completely eliminated. Ngai Tahu were still a small iwi, lacking the numbers of many North Island tribes, and widely distributed over their vast territory. They had managed to contain the small numbers of Europeans who had ventured amongst them, but this was but a small test for what was to come. After the Treaty, planned colonisation would bring settlers by their thousands. For protection in this new environment, Ngai Tahu would have to rely more on the Crown than on their own resources.

Abandonment of resources

- 3.3.10 Mrs Kenderdine, in her final submissions for the Crown, made a number of points on mahinga kai that concern the period before the Treaty. While the Crown acknowledged that the Treaty guaranteed Ngai Tahu "the full exclusive and undisturbed possession" of their resources, she argued that the phrase following was also important: "so long as it is their wish and desire to retain the same in their possession".

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The term ‘resources’ must be seen in relative terms. What was important for Ngai Tahu for their subsistence had already changed and would continue to do so. Some European foodstuffs had been adopted and some traditional foodstuffs had been or were being abandoned. It is this point which the claimants have neglected to consider. The only resources which the Crown had an obligation to preserve and protect for Ngai Tahu were those that they had used in the years immediately prior to the purchases *and which they wished to continue using*; ie those which they did not wish to abandon and which they would use in the future. (X3:43) (emphasis in original)

She argued that Ngai Tahu could not contend that if any resources were used at some time by the tribe, then the Crown had a duty to preserve and protect them. Such an approach would deny “the dynamics of history and the subtleties of human interaction” (X3:44). Each party to the later purchases would have made decisions based on the reality of their comparative situations at the time.

Using Professor Anderson’s evidence, counsel for the Crown submitted that the observations made by Europeans of the Ngai Tahu economy in the 1840s were insufficient to argue that there was a “huge wide-ranging traditional economy” (X3:47). In her submission, these accounts demonstrated the extent to which the traditional economy had been eroded and abandoned through European contact. She maintained that Ngai Tahu were no longer making seasonal visits to the interior to take foods: and instead were involved in whaling and new agricultural pursuits, raising pigs and growing newly introduced crops. Only on the west coast and in the North Otago-South Canterbury region did she see the pre-European economy remaining relatively intact.

Mrs Kenderdine was also critical of Professor Ward’s report for not developing these issues and not dealing with the relative use of resources. To merely list the resources used, or claimed to have been used by the tribe, tended, she submitted, to give a picture that exaggerated Ngai Tahu’s relationship with a number of food resources.

- 3.3.11 Had Ngai Tahu, then, abandoned a large part of their traditional economy by 1840? It is very clear, as Mrs Kenderdine pointed out, that Ngai Tahu’s use of its pre-European range of foodstuffs must have declined towards the 1840s. Professor Anderson’s evidence shows how extensively and successfully Ngai Tahu engaged in agricultural and whaling activities. In Foveaux Strait, for instance, there are numerous accounts of both activities. Gardening and the raising of pigs were both non-traditional pursuits in the area, it being impossible to grow kumara or other pre-contact crops there. Population decline

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must also have lessened the amount of traditional food gathering, while war and pestilence interrupted the seasonal foraging.

However does all this add up to an abandonment of the pre-contact economy? Europeans observed the adoption of introduced foods and industries based on new trading opportunities. But they also saw much evidence that Ngai Tahu continued to gather foods in the traditional manner.

To answer this question it is necessary to consider the extent of use of many of the resources identified by the claimants and by Professor Anderson as playing a part in the overall economy of the tribe. While it is possible to list a wide range of individual resources, the taking of some particular foods stand out as being of major significance to the tribe as well as being communal activities easily observed by Europeans.

- The annual harvest of titi involved large numbers of Ngai Tahu and a set annual routine, for both taking the birds and preserving them for trade.
- Eels were among the most cherished resources of almost all sections of the tribe. Their taking was often recorded, and the use of drains owned by hapu and whanau in lagoons and lakes such as Waihora and Wairewa made the fishery a large scale community activity. Almost all Europeans visiting Ngai Tahu's territory before the purchases noted the importance of eeling.
- The taking of barracouta was also a significant and easily observable activity in the Otakou area, which like eeling and the titi harvest, continued up to and beyond the time of the Otakou purchase.
- Kauru, for which there is evidence going back many hundreds of years, was also harvested and cooked well into the 1840s.
- Weka was hunted for food throughout the period of early contact and land purchase.

These were all specialised aspects of the Ngai Tahu economy, many of which involved large numbers of Ngai Tahu exploiting the resource as whanau or even as hapu. These were the activities which were most readily observed by even the least inquiring of European visitors. In all cases, though the scale may have diminished, the activity continued, despite the fact that a number of these resources were only harvested with great effort and even at some risk. These resources were also carefully preserved for later use and for trade. It would have been much easier to abandon them completely and take up a diet of pork and potato, without venturing beyond the immediate environs of the kaika. However, these activities were continued because they were an essential part of the social life of the tribe and

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participation in them allowed rights to be kept active and traditional tribal politics to continue.

- 3.3.12 Alongside these major endeavours was the utilization of a large number of other resources. These activities included birding, the extraction of tutu juice, berry picking, rapping, taking shellfish and other sea fisheries, as well as the use of various timbers and flaxes. All these were less likely to be noticed by Europeans, but noticed they were, and in the very period when Ngai Tahu were adjusting to the newly introduced foods and technologies.

Ngai Tahu's use of fernroot, aruhe, is particularly interesting. Fernroot was one of the staples of the pre-contact Maori diet. It was also one of the first foods to be substantially displaced by new agricultural crops. However accounts of Ngai Tahu's use of fernroot continue in the evidence, even up to the 1840s. Shortland recorded:

The natives consider that there is no better food than this for the traveller, as it both appeased the cravings of hunger for a longer period than other ordinary food, and renders the body less sensible to the fatigue of the long march. (H6:16)²⁰

Mr Te Maire Tau provided the following waiata, also recorded by Shortland, on the pleasures of eating aruhe.

He aha, he aha,
He Kai ma tau
He pipi – he aruhe –
Ko te aka o Tuwhenua
Ko te kai e ora ai, te tangata
Matoetoe ana te arero
I te mitikanga,
Me he arero kuri anu.

So what of it, Why?
It can be food for us
Pipi and fernroot
It is the vine of Tu Whenua
It is the food to sustain the people
The mouth waters from eating
like that of the salivating dog (H6:15)

Although fernroot could well have been abandoned completely by 1844 in preference to newer foods, it continued to be processed and eaten, if in reduced quantities. Von Haast described how even at end of the 1840s, Poutini Ngai Tahu killed their newly acquired pigs because they were threatening their fernroot (H1:43).

- 3.3.13 Ngai Tahu had to make choices in adopting new activities and using their resources in ways impossible prior to contact with the European world. That their pre-contact economy was greatly modified is clear.

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However it is altogether another thing to say that these long tested and much treasured foods and the time honoured methods of procuring them were abandoned. It would be more accurate to say that the new commodities were simply incorporated into the traditional economy, as the 1880 mahinga kai lists suggest. Mahinga kai came to include places where potato and onions were grown as well as where fernroot and ti could be harvested (T4(b):10).

To argue that a decline in the use of pre-contact foods continued uniformly from the 1830s until the time of the purchases may also be simplistic. Some portions of the tribe were still living in pre-European style, little affected by the technological change which had found its way to Foveaux Strait and Otakou. Those who did participate in the new trading economy were subject to the boom and bust cycles which were an inescapable part of dependency on overseas markets. Whaling activity slumped in the 1840s and with its decline the opportunities for trade fell accordingly. One of the Crown's historical witnesses, Professor Gordon Parsonson, examined the impact on Otakou Ngai Tahu of this economic downturn (P4:appendix A:1-5). He argued that the whalers left widespread poverty and hardship in their wake. Such a situation would have strengthened the hunting and gathering economy. The decline in private land purchase following pre-emption and the reduction in trade goods that accompanied this would have had a similar impact. The French colony at Akaroa was not wealthy enough to provide extensive opportunities for trade and it engaged in its own subsistence agriculture. Only with the arrival of the Otago settlers in 1848 were prospects for trade increased. For a brief period between the late 1840s and the mid-1850s, east coast Ngai Tahu did have the chance of returning to the trading and entrepreneurial activities which had emerged in the 1830s. However, these opportunities were shortlived, and they were only there to be exploited by a limited section of the tribe.

As we shall see in our examination of the Kemp purchase in particular, Ngai Tahu did wish to preserve very substantial areas for traditional foods, especially for eeling, for kauru and for weka.

If Ngai Tahu's determination to participate and thrive in the new world was to continue into the period of Crown purchase and substantial settlement, then compromises would have been necessary. Ngai Tahu may well have been prepared to give up the use of particular resources in return for new benefits and a continuing stake in the new economy. This would have been a matter of choice, to be negotiated between the Crown and the tribe as land was made available to the Crown through sale. Whether these compromises

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were made fairly will be discussed when we move on to consider the actual purchases themselves.

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Chapter 4

The Treaty and Treaty Principles

4.1. Introduction

Before discussing the Treaty and its application to the various claims of the Ngai Tahu people, we should first see how Ngai Tahu came to be a party to the Treaty. This is important because Ngai Tahu's adherence to the Treaty has been obscured by Lieutenant-Governor Hobson's action in issuing two proclamations on 21 May 1840. The first proclaimed the Queen's sovereignty over the North Island by right of cession under the Treaty. Hobson, however, was anxious over perceived disloyal activity by New Zealand Company settlers in Wellington and decided to take immediate action to claim the whole of New Zealand for the British Crown. Thus a second proclamation, of the same date, asserted the sovereign rights of the Queen over the South Island and Stewart Island by right of discovery and confirmed the cession of the North Island (A9:2/1).¹ These two proclamations were officially gazetted in London on 2 October 1840. Not surprisingly Ngai Tahu, whose Maori predecessors have occupied Te Wai Pounamu for upwards of one thousand years, take umbrage at the notion that the British discovered New Zealand, and in particular the South Island. Had Hobson not acted precipitately, his proper course would have been to proclaim sovereignty over the South Island also on the grounds of cession.

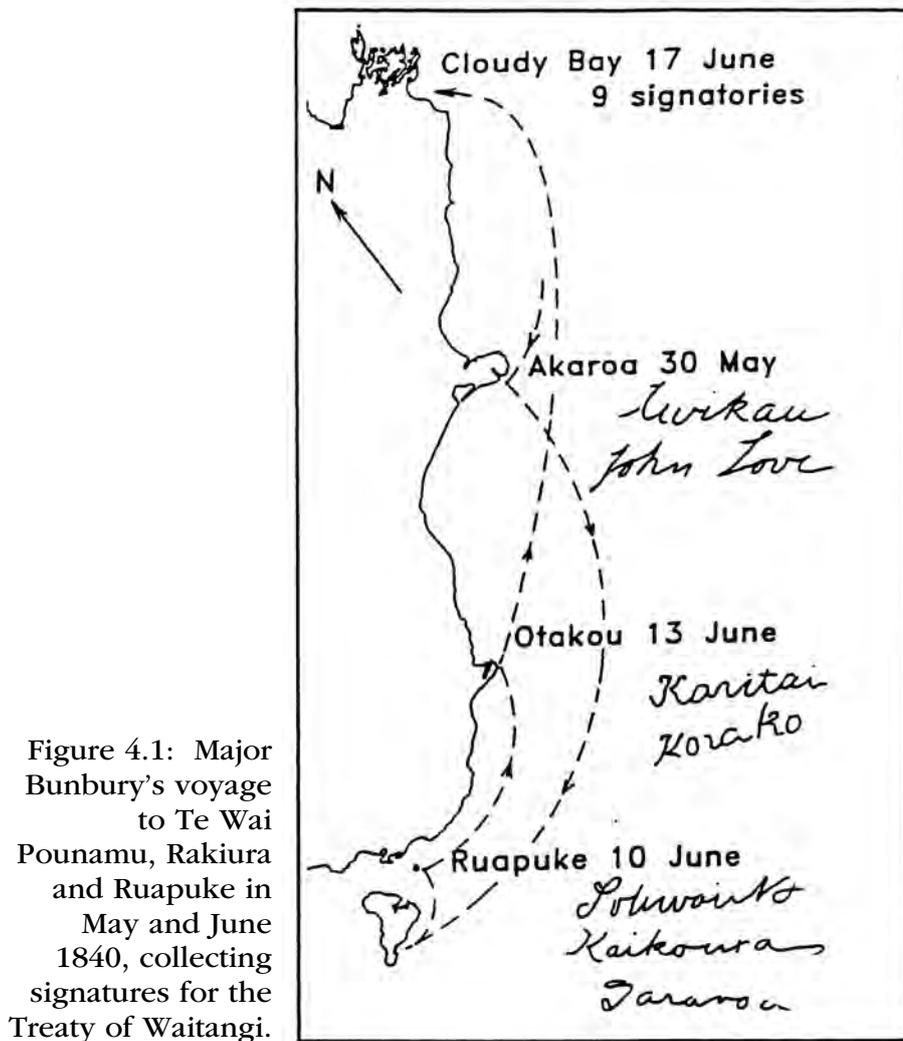
4.2. Ngai Tahu Accession to the Treaty

4.2.1 Hobson had previously visited New Zealand in the 1830s. When he received his instructions of 14 August 1839 from Lord Normanby, the colonial secretary, requiring him to negotiate with Maori as a sovereign and independent state, he immediately sought further directions. In his letter to the Colonial Office he expressed the view that the development of the inhabitants of the North and South Islands was "essentially different" and that "with the wild savages in the Southern Islands, it appears scarcely possible to observe even the form of a Treaty". He suggested that he might be permitted to claim the south by right of discovery (A8:1).² Lord Normanby, in his reply of 15 August 1839, said that if, as Hobson supposed, South Island Maori were incapable "from their ignorance of entering intelligently

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into any Treaty with the Crown” then he might assert sovereignty on the grounds of discovery (A8:1).³ This, as we have seen, he duly did on 21 May. But, as Major Bunbury was to find, Hobson’s preconceptions were wide of the mark. Ngai Tahu leaders were quite capable of making a meaningful adherence to the Treaty.

- 4.2.2 Hobson, who became seriously incapacitated in March 1840, sent a number of emissaries throughout the North Island to obtain further signatures to the Treaty. Governor Gipps of New South Wales, hearing of Hobson’s illness sent Major Thomas Bunbury to the Bay of Islands in April 1840. Gipps urged that prompt steps be taken to extend Crown authority over the South Island. Accordingly, Hobson on 28 April 1840, ordered Bunbury to sail in the *Herald* to negotiate with some North Island chiefs and to then proceed to the southern islands.⁴ He was accompanied by Edward Williams, the son of Henry Williams, as his interpreter. At Akaroa on 30 May 1840, Bunbury secured the signatures of John Tikao and Iwikau, a brother of Tamaiharanui who was the paramount chief captured by Te Rauparaha. Later, finding no one at Stewart Island (although he failed to visit the Ngai Tahu settlement at Paterson Inlet) Bunbury and Nias, the captain of the *Herald*, made a declaration of sovereignty over the island basing the claim on James Cook’s discovery. From there they proceeded to Ruapuke Island where on 10 June 1840 the leading chief Tuhawaiki signed the Treaty. Tuhawaiki was an enterprising Ngai Tahu leader, highly intelligent and with a reasonable knowledge of the English language. He had travelled several times to Sydney and was engaged in the whaling industry on his own account. Two other Ngai Tahu chiefs also signed at Ruapuke Island – Kaikoura (the principal chief from the northern area of that name) and Taiaroa, but there is doubt about the identity of the latter.⁵ He was certainly not the leading Ngai Tahu chief Matenga Taiaroa. Bunbury had been anxious to obtain Matenga Taiaroa’s signature but the chief was away at Moeraki. At the Otago harbour entrance Bunbury on 13 June further gained the adherence of the Ngai Tahu chiefs Koroko and Karetai. Bunbury then sailed north and at Cloudy Bay on 17 June 1840 some nine chiefs signed, including one Kaikoura. It is thought this was a lesser chief than the Kaikoura who had signed at Ruapuke. There followed a formal ceremony at which Bunbury read a proclamation of sovereignty after which the Royal salute of 21 guns was fired. It is apparent from Major Bunbury’s report of 28 June 1840 to Governor Hobson that he was very favourably impressed by the South Island Maori whom he had met, many of whom he found to have some facility with English. It is clear that Hobson had been seriously misinformed about the capacity and understanding of southern Maori.

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Ngai Tahu understandably reject the notion that Te Wai Pounamu was “discovered” and that the Crown’s claim to sovereignty over the island can legitimately rest upon such a ground. On the contrary, Ngai Tahu place great reliance on the fact that a number of their leading chiefs readily signed the Treaty of Waitangi. Not surprisingly, they reject suggestions, which even today are adduced, that the Treaty was of no significance in the South Island.

French interest in New Zealand

- 4.2.3 In the event, Major Bunbury’s initiative in securing the adherence of influential Ngai Tahu and other South Island chiefs to the Treaty, and his subsequent public proclamation of sovereignty at Cloudy Bay, played a critical role in forestalling an attempt by the French to obtain sovereignty over Banks Peninsula and possibly much of the South

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Island. On 11 July 1840 the French corvette *L'Aube* of 22 guns and 160 men arrived at the Bay of Islands on its way to support a party of French immigrants shortly to arrive at Akaroa to establish a colony. Captain Lavaud, who called on Hobson soon after his arrival, refused to recognise Hobson's status as lieutenant-governor, or indeed British sovereignty over New Zealand. A stalemate ensued. On 23 July 1840, Hobson despatched Captain Stanley on the *Herald* to proceed without delay to Akaroa. Accompanying Captain Stanley's instructions from the lieutenant-governor was a copy of Major Bunbury's South Island Cloudy Bay proclamation. Hobson instructed Stanley that independently of the assumption of sovereignty of the South Island by his proclamation of 21 May, the principal chiefs had ceded their rights to the Queen. Because of Bunbury's proclamation, Hobson said, no further proceedings by Stanley would be necessary. As an added measure, Hobson arranged for two magistrates to accompany Stanley and on their arrival they were to hold a court at each port as an act of civil authority.

The day following Captain Stanley's departure to Akaroa Captain Lavaud, in ignorance of Bunbury's proclamation, wrote to the French colonial and maritime minister urging negotiations with the British to repudiate Hobson's May proclamation claiming sovereignty of the South Island on the grounds of discovery. Further, he advised that if the British government had not yet obtained the signatures of the Banks Peninsula chiefs recognising British sovereignty, he would attempt to persuade them to retain their sovereignty under the patronage of the French nation and its government.

Captain Stanley arrived in Akaroa on the *Herald* shortly before Lavaud and formally took possession. The magistrates duly held formal court hearings. It is clear that Bunbury's action in obtaining the adherence of Ngai Tahu and other South Island chiefs and his proclamation of sovereignty effectively forestalled Lavaud's initiatives and provided Hobson with a persuasive answer to incipient French claims.

4.3. **The Status of the Treaty**

4.3.1 In the *Orakei Report* (1987) 127, the tribunal left open the precise legal status of the Treaty of Waitangi under either international or New Zealand domestic law. We detect in current thinking and discussion, a significant shift from the firmly held earlier view that the Treaty lacked real status either internationally or domestically.

An international treaty of cession

4.3.2 Recent writing by well-qualified New Zealand lawyers has enriched our understanding of the status of the Treaty as an international treaty of cession.⁶ Kingsbury asserts that the Treaty was a valid international

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treaty of cession and that the parties in 1840 were recognised as having the necessary legal capacity to enter into such a treaty. In support of this he relies on British policy towards indigenous peoples in the 1830s and 1840s, on British government instructions to Captain Hobson (appointed consul and lieutenant-governor designate), the response of France and the United States as the third-party states principally concerned and on later international arbitral decisions.⁷

Normanby's instructions to Hobson

- 4.3.3 Lord Normanby made it clear that Hobson was to negotiate with Maori as a sovereign and independent state. In his detailed instructions of 14 August 1839 he referred to the Maori as “a numerous and inoffensive people, whose title to the soil and to the Sovereignty of New Zealand is indisputable” (A8:I:13–17).⁸ His instructions went on to say:

I have already stated that we acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor, disclaims for herself and for her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.(A8:I:14)⁹

Russell's instructions to Hobson

- 4.3.4 Lord Normanby's successor at the Colonial Office, Lord John Russell, in a despatch to Governor Hobson of 9 December 1840 clearly recognised that the Maori chiefs, on behalf of Maori generally, had effected an act of cession:

[the Maori tribes] are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress; . . . In addition to this, they have been formerly recognised by Great Britain as an independent State; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests.¹⁰

Kingsbury concludes that the mass of evidence, including the public documents which he cites, indicate a clear British intention to enter formally into an effectual treaty of cession. The British statement alone he argues “may now be seen as having constituted internationally binding unilateral undertakings . . .”¹¹

*The Ngai Tabu Report 1991****The French response***

- 4.3.5 What was the attitude of other interested nations at the time or shortly thereafter? France was anxious to establish a colony at Banks Peninsula and entertained hopes of enlarging its colonising venture to cover other parts, if not the whole, of the South Island. However by 1844, after some initial uncertainty, the French government accepted that Britain had obtained sovereignty over New Zealand by a treaty of cession. Kingsbury succinctly recounts the debate in the French Chamber of Deputies in 1844 in this way:

Guizot noted that over the period 1815–1838 the British Government consistently refused to assert sovereignty over New Zealand on the basis of ‘discovery’, and on the contrary that the British had ‘by several public acts, by several acts of government, formerly recognised the independence of New Zealand as forming a State under its native chiefs’. By Guizot’s account, Hobson was sent to New Zealand charged with the duty of negotiating with the native chiefs for the cession of their sovereignty. He first obtained the cession of sovereignty by North Island chiefs through adherences to the Treaty of Waitangi. According to Guizot, Hobson subsequently obtained sovereignty over the South Island by securing the same from a number of chiefs there. When pressed by Messrs Bilaut and Berryer, Guizot indicated that the French Recognition of British Rights in the South Island was necessitated by the Proclamations of 21 May and 17 June. He placed particular emphasis on the latter, which itself rested on South Island Maori signatures to the Treaty of Waitangi secured by Major Bunbury.¹²

International arbitral decisions

- 4.3.6 Kingsbury very properly points out that Guizot’s views are not entirely consistent with the discussion of Mr Justice Richardson in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 671 (CA) of Hobson’s two proclamations of 21 May 1840. Mr Justice Richardson concluded that:

It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.

There may, however, be force in Kingsbury’s observation that following the approach of Chief Justice Marshall in *Johnson v McIntosh* (1823) 8 Wheat 54 it is possible to view the proclamation of 21 May 1840 (claiming the South Island on the grounds of discovery) as:

an assertion of rights based on ‘discovery’ as against other European powers, with the subsequent [Bunbury] Proclamation enunciating Maori consent to the extension of British sovereignty to the South Island in terms set out in the Treaty.¹³

Kingsbury cites from the US memorial in the well-known Webster claim and refers to the decisions of two international arbitral tribunals

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which indicate that the Treaty of Waitangi was a valid and effectual international treaty of cession.¹⁴ He also relies on opinions of jurists, that promises in a treaty such as the Treaty of Waitangi point to their being cognizable in international law in mid-nineteenth century even if no forum actually existed in which they could be enforced. However, Kingsbury points to the absence of any precedent for a party to a purely bilateral treaty of cession, which has thereby lost its sovereign status, being competent to secure the international enforceability of treaty promises.¹⁵

The tribunal's view

- 4.3.7 Notwithstanding that there may be formidable obstacles, at least in the present state of international law, to a party to a treaty of cession which cedes its sovereignty to the other party, seeking to enforce that treaty in an international forum, we believe the foregoing discussion lends credible and persuasive support to the view that the Treaty of Waitangi was a valid treaty under international law. This reinforces the view the tribunal expressed in the *Orakei Report* (1987), that, given the intention of the British government to treat with the Maori people as a sovereign independent nation, it is surely reasonable to apply to the interpretation of the Treaty, general principles of treaty interpretation as applicable under municipal law. We reiterate the tribunal's view that "Whatever its strictly legal standing, good faith and the honour of the Crown call for such an approach".¹⁶

4.4. Rules of Treaty Interpretation

- 4.4.1 The tribunal has considered this topic on various occasions. In the *Orakei Report* (1987) 128–129, we restated and developed views expressed in earlier reports (eg *Te Atiawa Report* (1983) and *Manukau Report* (1985) 64–65). Since then the *Muriwhenua Report* (1988) 188 has considered the approach to be made in that case with particular reference to sea fisheries. Given the magnitude and diversity of the present claims it is appropriate that we should at least briefly state our approach to the interpretation of the Treaty in this case.

At the outset we must stress that while we speak of "the Treaty" there were in fact two versions of the Treaty, one in the Maori language and the other in English. However, the Maori version of the Treaty was not written by Maori. Until the early missionaries, with the help of a Cambridge professor, reduced the Maori language to written form in the early 1820s, the language was a purely oral one. It was a missionary, the Reverend Henry Williams, who composed the Maori version of the Treaty with some help from his son Edward.¹⁷ They had only the evening of 4 February 1840 to do this. There are

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significant differences in the two versions occasioned, in part at least, by the presence of some English concepts such as sovereignty, for which there was no Maori counterpart and, conversely, some Maori concepts such as rangatiratanga, for which there was no English counterpart. It may be more accurate to describe Henry Williams' "translation" of the English text of the Treaty (largely the work of Hobson and Busby) as an "interpretation" in Maori intended to express the spirit and tenor of the English version as nearly as possible.

Some of the rules of interpretation which we will discuss derive from the decisions of the United States and Canadian courts. These courts have been concerned with treaties with Indian nations or bands which are in one language only, English. Most international law rules of treaty interpretation, when concerned with treaties in more than one language, are directed at developed western languages, the respective versions of which have been drafted by persons long competent in their own written language. We, on the other hand, are required to give meaning to two versions of a treaty written by members of only one nation party to that Treaty. Few Maori, the other party, were in 1840 fluent in written Maori. They listened to the Treaty being read out in Maori and to explanations given in Maori by English missionaries and others competent in varying degrees in spoken Maori.

- 4.4.2 Section 5(2) of the Treaty of Waitangi Act 1975 requires the tribunal to have regard to the two texts of the Treaty (as set out in the first schedule of the Act, as amended, see appendix 1). For the purposes of the Act, the tribunal has exclusive authority both to determine the meaning and effect of the Treaty as embodied in the two texts, and to decide issues raised by the differences between them. Two points in particular should be noted. First, while there are two texts there is only one Treaty. Secondly, the legislature recognises that differences do exist between the two texts. The tribunal's mandate is to reconcile or harmonize these differences.

In attempting this we should have regard to various considerations including the following.

Principles of the Treaty

- 4.4.3 Our principal function is to inquire into claims brought under section 6. These fall to be assessed against the "principles of the Treaty" not just the literal terms (s6). We are not confined to the strict legalities. There are good reasons for this. The Treaty itself is a remarkably brief, almost spare, document. It was not intended merely to regulate relations at the time of its signing by the Crown and the Maori, but

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rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop. As we have said elsewhere (*Orakei Report* (1987) 137), the broad and general nature of its language indicates that it was not intended as a finite contract but rather as a blueprint for the future. As Sir Robin Cooke has said, “What matters is the spirit”.¹⁸

It follows that in ascertaining the principles of the Treaty relevant to the Ngai Tahu claims it is necessary to look not only at the language of both texts of the Treaty but also to the surrounding circumstances including the Maori perception at the time of what the Treaty meant.

International law of treaty interpretation

4.4.4 In the *Orakei Report* (1987) 128–129 the tribunal attempted to bring together certain rules of Treaty interpretation, as laid down by the leading international lawyer, Lord McNair, and certain United States, Canadian and British cases. In the later *Muriwhenua Report* (1988) 188 there is some amplification of the discussion in the *Orakei Report*. We do not propose to repeat the discussion in these two reports but will briefly recall the principal points which emerge.

(a) At international law when the meaning of a treaty is clear it is simply applied, not interpreted. Where, however, in the case of bilingual treaties, they are susceptible of different meanings, interpretation is necessary. It is acknowledged that the two texts of the Treaty of Waitangi differ in material respects.

(b) In relation to bilingual treaties, McNair says that neither text is superior and that it is permissible to interpret one by reference to the other. We believe this rule has primary reference to treaties between states of like power and common origin, for example, bilingual treaties between European nations. In the case of the Treaty of Waitangi, with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori. This is consistent with the *contra proferentum* rule that where an ambiguity exists, the provision should be construed against the party which drafted or proposed the provision, in this case the Crown.¹⁹

(c) Regard should be had to the principle that treaties are to be interpreted in the spirit in which they were drawn, taking into account surrounding circumstances and any declared or apparent objects and purposes.²⁰ In extrapolating principles from intentions and expectations, equal regard should be had to the hopes and aspirations of both parties, as represented in their respective texts.

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This approach enables the tribunal to blend the texts, as appears to be contemplated by section 5. Such an approach accords with the spirit of the Treaty, that sought to harmonize the interests of two peoples of different cultures in a new enterprise.²¹

(d) We believe that the Treaty of Waitangi should be seen as a basic constitutional document. As such, it is appropriate that the legislature has directed us to assess claims against the Treaty's principles and not merely its terms. In the same way, Lord Wilberforce in delivering the opinion of the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319, on a provision in the Bermuda constitution, found that it called for a generous interpretation which avoided "the austerity of tabulated legalism". In seeking to ascertain and give effect to the spirit of the Treaty as the nation's founding document, we must interpret each text in a generous, ample and ultimately compatible fashion. No less is owed to the Treaty partners. This approach is reinforced by the following statement of Mr Justice Richardson in the *New Zealand Maori Council* case:

Perhaps too much has at times been made of some of the differences and too little emphasis given to the positive and enduring role of the Treaty. Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaption to new and changing circumstances as they arise.²²

4.5. **The Constitutional Status of the Treaty**

4.5.1 In the preceding paragraph we suggested the Treaty should be seen as a basic constitutional document. In the course of his closing address, Mr Temm, counsel for the claimants, submitted that there is a new development taking place in our constitutional law. This, he suggested, has been triggered in large measure by the passing of the Treaty of Waitangi Act 1975. Mr Temm went on to suggest that if this development leads to a conclusion that the power of Parliament is subject to the terms of the Treaty, and that, contrary to the orthodox views, Parliament cannot do whatever it likes, then a startling result comes into force. In such an event, Mr Temm submitted, the absolute power of Parliament will be curbed by its obligations to respect the terms of the Treaty. While it is evident that the passage of the Treaty of Waitangi Act 1975 and its subsequent amendments, along with other statutes discussed below, have greatly enhanced the status of the Treaty, there would appear to be formidable difficulties in reaching the conclusion postulated by Mr Temm in the absence of further legislative action.

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The constitutional status of the Treaty is currently undergoing close scrutiny by the New Zealand courts and by scholars. This is not the place for a detailed consideration of the growing literature.²³ The present position is very briefly summarised by the tribunal, principally in reliance on Sir Kenneth Keith's recent article noted above.

- 4.5.2 A convenient starting point on the status of treaties in municipal law is a recent statement by the House of Lords in *J H Rayner Ltd v Department of Trade* [1989] 3 WLR 969, 980:

The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a Treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a Treaty or to award damages against a sovereign state for breach of a Treaty or to invent laws or misconstrue legislation in order to enforce a Treaty.

A Treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A Treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A Treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a Treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce Treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

In this passage the House of Lords has reaffirmed the proposition laid down in respect to the Treaty of Waitangi in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590, 596–597, where the Privy Council said:

It is well settled that any rights purporting to be conferred by such a Treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.

- 4.5.3 But, as Sir Kenneth Keith has noted, that is not the end of the matter. The Treaty may be relevant in at least two broad ways. First, where legislation does incorporate the promises of the Treaty in some way. Secondly, in the interpretation of certain legislation.²⁴ Examples of incorporation are the Treaty of Waitangi Act 1975 and its amendments, and the State-Owned Enterprises Act 1986, section 9 of which provides that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. As Mr Justice Richardson noted in the *New Zealand Maori Council* case, the Treaty resides “in the domestic constitutional field” under the Treaty of Waitangi Act and the State-Owned Enterprises Act.²⁵

Other recent legislation requires or permits decision-makers to have regard to the Treaty. As Sir Kenneth Keith observes, such legislation

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does not in general provide for the direct judicial recognition or enforcement of rights of Maori arising from the Treaty. Rather, it requires or allows those exercising the powers conferred by the particular statute to have regard to the Treaty or some particular aspect of it. Examples given by Sir Kenneth Keith are the long title of the Environment Act 1986, which requires that in the management of natural resources full and balanced account is taken of the principles of the Treaty of Waitangi along with four other matters, no one of which is given priority over the other. By contrast, section 4 of the Conservation Act 1987 expressly provides that the Act is to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.²⁶

What if a statute makes no reference to the Treaty? In a valuable decision by Mr Justice Chilwell in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210, the judge ruled that:

There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

In that case Mr Justice Chilwell ruled that in considering an application for a water right under the Water and Soil Conservation Act 1967 the court could resort to extrinsic aids, including the Treaty. We conclude with Sir Kenneth Keith's comments following a discussion of the *Huakina* case:

The case is a striking example of the changing attitude of courts, counsel and the wider public to Treaty of Waitangi issues. It reflects as well changing methods of statutory interpretation, with an increased willingness to read legislation in its wider context. The case emphasises in addition the width of choice of technique available to courts interpreting legislation. So it is possible to argue that the Water Act is clear in its own terms; what is the reason to go outside it especially to *require* reference to Maori values? Parliament has included Treaty and other references in many other statutes and done that progressively, but not in this one; is not that silence significant? The case appears to reflect a general public perception of the Treaty; what if that changes markedly? What is the application of the proposition in this case that the law is always speaking? And in the end is not the Treaty being enforced – are not rights and duties being recognised – contrary to the general principles about treaties and to particular decisions on the Treaty over many years?²⁷

How far this trend will go and how wide its scope will be are necessarily matters of conjecture. This tribunal senses that the central importance of the Treaty in our constitutional arrangements is likely to receive growing recognition by the courts, the legislature and the executive in the foreseeable future.

*The Treaty and Treaty Principles*4.6. **The Treaty Provisions**

- 4.6.1 There are various copies of the Treaty in both Maori and English, some of which have slightly different texts.²⁸ The tribunal is concerned only with the two texts printed in the Treaty of Waitangi Act 1975, which for our purposes constitute the “official” texts. It is our function to ascertain the meaning and effect of the Treaty as embodied in these texts and to settle issues raised by differences between them. That there are significant differences between the two versions of the Treaty is generally acknowledged. Two questions in particular have been the subject of much discussion by the tribunal and the wider interested public. These centre around first, the cession in article 1 of the Maori text of “Kawanatanga” to the Crown while the English version refers to “all rights and powers of Sovereignty”. The second question is whether the grant or recognition to Maori in the Maori text of “tino Rangatiratanga” of their lands, homes (or those places where their fires burn) and all things prized (or all those things important to them) in article 2 of the Maori text, was wider in scope than the “full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties” guaranteed in article 2 of the English text. (The words “so long as they wished to retain the same” do not appear in the Maori version but this would appear to be a necessary implication).

These concepts have been discussed by the tribunal in considerable depth in relation to land claims, most recently in the *Orakei Report* (1987) and more recently in respect of sea fisheries in the *Muriwhenua Report* (1988). We do not propose here to rehearse all that was said in those reports. Rather we will draw on them in an attempt to crystallize the principal issues and state our conclusions on them.

Kawanatanga and sovereignty in article 1

- 4.6.2 We consider articles 1 and 2 in turn, but would emphasize from the outset that the two articles are necessarily related one to the other. Neither can be considered in isolation. Thus, if sovereignty was not ceded by the Maori in article 1, is this because rangatiratanga was preserved to the Maori in article 2? We set out here the English and Maori texts of article 1:

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.²⁹

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KO TE TUATAHI

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.³⁰

The Maori text of article 1 has been rendered in English as follows:

The First

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.³¹

The Crown perspective on articles 1 and 2

4.6.3 Sovereignty is a complex concept, the meaning of which has changed over time. In contemporary Westminster systems of constitutional government it is generally seen to reside in the notion of parliamentary sovereignty or parliamentary supremacy. Thus, in the New Zealand context, the Queen in Parliament is said to be competent to make or unmake any law. But this assumes there is no written constitution. In many Commonwealth countries, however, whose constitutional arrangements are based on the Westminster parliamentary system, the power of the legislature is in fact legally constrained by the provisions of a written constitution – just as it is thought ours would be were we to adopt an entrenched Bill of Rights, as recently proposed. In New Zealand, the concept of parliamentary sovereignty is still generally accepted as the basis of our largely unwritten constitution, although there have been some recent judicial hints that the New Zealand courts might, in extreme circumstances, seek to qualify that apparent unlimited power.³²

4.6.4 In our consideration of this matter we are indebted to a recent discussion by Dr P G McHugh of sovereignty and rangatiratanga as legal sovereignty, in relation to Maori claims.³³ Dr McHugh considers whether or not rangatiratanga, as protected by article 2, can be a form of legal sovereignty alongside the legal sovereignty of the Crown.

After pointing out that “[l]egal sovereignty is the constitutional authority vested in the Crown in its executive, legislative, and through its erection of courts and appointment of judges, judicial capacities”³⁴ Dr McHugh proceeds to consider rangatiratanga as legal sovereignty. He makes the following points:

- that inherent in legal sovereignty under British (and New Zealand) constitutional law, is the power to make and enforce commands, that is, to make and enforce law which comes from a political superior subject to no other body;
- that English law has long recognised that the Crown’s sovereignty over its territory is exclusive and exhaustive; and

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- that the Crown’s title to its territory is indivisible – it shares its sovereignty with no-one.

Dr McHugh concludes from these propositions that “rangatiratanga cannot be a form of legal sovereignty apart from that of the Crown”.³⁵

Interestingly, Dr McHugh distinguishes the position of the indigenous peoples of Australia, New Zealand and Canada – where the exclusiveness of the Crown’s sovereignty excludes the possibility of any residual legal sovereignty being vested in those people – from the American position, where the tribes are described “as domestic dependent nations” retaining an inherent, residual legal sovereignty over and amongst their own people (where not ceded to the United States). He explains that this was because the Crown’s charters for the New World did not claim sovereignty over the Indian tribes, having been issued before the English doctrine of territorial sovereignty, as exclusive and exhaustive, had developed. By 1840, however, the doctrine was in place.

- 4.6.5 We should also make it clear that the Crown’s legal sovereignty over New Zealand does not, as a matter of strict law, derive directly from the Treaty, but from Captain Hobson’s two proclamations of 21 May 1840 and their subsequent gazetting by the Crown in London. In the *New Zealand Maori Council* case Mr Justice Somers referred to the difference between the two texts of article 1 and to the assumption of sovereignty of New Zealand by the British Crown:

Where the word “Sovereignty” is used in the English text the word “Kawanatanga” is used in the Maori version. This has the connotation of government or governance. The concept of sovereignty as understood in English law was unknown to the Maori.

We were referred to a number of valuable commentaries on this part of the Treaty and to the several determinations of the Waitangi Tribunal. They provide grounds for thinking that there were important differences between the understanding of the signatories as to the true intent and meaning of article 1 of the Treaty. But notwithstanding that feature I am of opinion that the question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the “full sovereignty of the Queen over the whole of the North Island” by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. These proclamations were approved in London and published in the London Gazette of 2 October 1840. The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.³⁶

By the English text of article 2 the Crown “confirms and guarantees” to the Maori:

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the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession . . .

It should be noted that the Crown “*confirms and guarantees*” the possession of the Maori people in their land and other property. The Crown, we believe, could give such a guarantee only if by article 1 it assumed full powers of governance, including the right to make and administer laws, to keep the peace (by force if necessary), to create courts for the resolution of disputes and to enforce the law. In short, if it assumed sovereignty over New Zealand and all its inhabitants. This indeed appears to be contemplated in the preamble to the English text, which refers to the anxiety of the Queen to protect the just rights and property of the Maori, to secure them peace and good order and, given the presence of a considerable number of British subjects already in New Zealand and the rapid increase in numbers to take place, to establish a settled form of civil government.

The Maori perspective on articles 1 and 2

4.6.6 The Maori text of article 1 used the word *kawanatanga* in contrast to sovereignty in the English text. *Kawanatanga* has been interpreted to mean “complete government”³⁷ and “all the government”.³⁸ Article 2 of the Maori text protects *te tino rangatiratanga* of Maori in their land and other property. *Te tino rangatiratanga* has been rendered as “the unqualified exercise of their chieftainship”.³⁹ In the *Orakei Report* (1987) 134, after a lengthy and detailed discussion the tribunal concluded that the term was best rendered as “full authority”, and to give it a Maori form the tribunal used “*mana*”. Among the conclusions which the tribunal came to in that report are the following:

- The Maori text conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a phrase, that they would retain their *mana* Maori. That of course is wider than the English text which guaranteed the full, exclusive and undisturbed possession of lands, estates, forests, fisheries and other properties: so long as the Maori wished to retain them. The Maori text gave that and more.
- *Kawanatanga* was given to the Crown in the Maori text, not *mana*, for as the tribunal noted in the *Manukau Report* (1985) the missionaries knew well enough no Maori would cede that. *Kawanatanga* was another missionary coined word and, for reasons given in the above report, probably meant to Maori the right to make laws for peace and good order and to protect their *mana*. On the face of it, that is less than the supreme sovereignty of the English text and does not carry the English cultural assumptions that go

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with it, the unfettered authority of Parliament or the principles of common law administered by the Queen's judges in the Queen's name. But nor does the Maori text invalidate the proclamation of sovereignty that followed the Treaty. Contemporary statements show well enough that Maori accepted the Crown's higher authority and saw themselves as subjects, be it with the substantial rights reserved to them under the Treaty.

- It is the concept of partnership and the special relationship between the Maori and the Crown, as described by the Court of Appeal in the *New Zealand Maori Council* case that overreaches the two texts. For now, the tribunal need look only at the application of both texts to particular cases and concerns.
- The present case is concerned with land. It is plain that land, which is expressly referred to in both texts, is covered by the Treaty. The real question is the nature and extent of the interest in the land secured to the Maori. In the *Te Atiawa Report* (1983) the tribunal stressed that rangatiratanga and mana are inextricably related, and that rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner. The tribunal thought the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the Te Atiawa claim), but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences. Clearly the same understanding would have been held in relation to land. We continue to believe that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing this view, and because the English text, referring to "full exclusive and undisturbed possession" also permits it.
- The acknowledgement in the Maori text, of their tino rangatiratanga over their lands necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group, with the consent of its chiefs, could alienate land.
- In recognising tino rangatiratanga over their lands the Queen was acknowledging the right of Maori for as long as they wished, to hold their lands in accordance with longstanding custom, on a tribal and communal basis.⁴⁰ In the *Muriwhenua Report* (1988) 174 the tribunal confirmed its preference for interpreting tino

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rangatiratanga as meaning “full authority” rather than the literal “full chieftainship”. When discussing the Treaty, Maori often substitute mana, which includes authority but also has a more powerful meaning as discussed in the *Orakei Report* (1987).

4.6.7 We subscribe to the following propositions articulated in the *Muriwhenua Report* (1988) which, although primarily concerned with sea fisheries, are of equal application to land and associated claims:

- It does not follow that tino rangatiratanga in the Maori text is the tino rangatiratanga of pre-Treaty times, which was held in olden days only for as long as the tribe could maintain it against the ambitions of others. The Queen promised peace and the Treaty would guarantee the status of the tribes without the need for war. It was obvious that to do that, the Queen’s authority had to be supreme.
- The concept of a national controlling authority with kawanatanga (literally governorship), or the power to govern or make laws, was new to Maori, divided as they were to their respective tribes. But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Maori interest (preamble, articles 2 and 3) had performed an overriding power.
- Sovereignty, in law, is not dependent on the Treaty but on the proclamations that followed the signings at Waitangi. It is nonetheless important to consider whether sovereignty was founded in consensus.
- The tribunal considered above that Maori understood the cession of sovereignty in terms of some distal relationship. Subsequent conduct suggests that the authority Maori saw themselves as retaining was not in conflict with that. In the early years there was much resentment among the chiefs when the governor and his magistrates sought to bring Maori within the scope of the new laws—an important consideration, for instance, in Heke’s revolt in the north. Nevertheless, in the tribunal’s view the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts, which is seen later in the King movement and other Maori organisations. This sort of demand for independent Maori control over Maori resources and people runs right through subsequent history. Article 2 has always loomed large in Maori consciousness as a result, even above article 3, but Maori did not regard their rights and privileges as British subjects – in matters of the franchise for instance – as unimportant. In more recent times the classic restatement of the Maori position was exemplified in the 28th Maori

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Battalion during World War II. It reminds us that it is possible to have a separate Maori institution still bound in loyalty to the Crown.

- From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown.
- In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government.
- Upon reading both texts the tribunal concludes that they are not so much contradictory as complementary of one another. In the English text the Crown guaranteed Maori their just rights and properties. Just rights include the maintenance of their own customs and institutions. Their properties they could own and possess for so long as they wished to retain them. In the Maori text the Crown assumed [sic for assured] the full authority of the tribes over their important possessions. It is not a case of choosing between a British concept of ownership or a Maori form of control. Both were guaranteed for so long as Maori wished to keep them.⁴¹

These views are consistent with, but more fully developed than, the earlier propositions cited from the *Orakei Report* (1987). Together, they will underlie both our consideration of the Treaty principles relevant to the claim before us and the application of those principles to the claims.

4.7. **The Principles of the Treaty**

Surrounding circumstances

- 4.7.1 The genesis of the Treaty lies in the instructions Hobson received from the colonial secretary, Lord Normanby. The circumstances giving rise to the reluctant decision of the British government to send an emissary and governor-designate to treat with the Maori are related in the *Orakei Report* (1987) 137–140 and need not be repeated here. By 1839 the British government felt compelled to intervene and the colonial secretary in his instructions to Hobson explained why.⁴² The Maori people, he said, were “a numerous and inoffensive people whose title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government”. He expressed concern that “many persons of bad or doubtful character” were included among the 2000 or so British subjects already in New Zealand, and said extensive land purchases

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from the Maori had already taken place and several hundred colonists had recently left Britain for New Zealand. Normanby expressed the fear that unless Britain intervened to put in place “necessary Laws and Institutions” the Maori population was likely to be greatly harmed by war and other adverse consequences of European settlement and might even disappear as a race. To avert these disasters and indeed to protect the British immigrants themselves from a lawless state of society, he considered it desirable to take appropriate steps to establish a settled form of civil government. This, Hobson was told, was the principal object of his mission.

To achieve this objective, Hobson was required to negotiate with Maori for the recognition of British sovereignty over the whole or such parts of New Zealand as they were willing to cede. He was to “frankly and unreservedly explain to the Natives or their chiefs” the reasons why they should agree to the cession. Especially, he was to warn them of the dangers of having settlers among them not bound to any system of law, and the impossibility of Crown intervention regarding these settlers, without an acknowledgement of British sovereignty. Not only was Hobson to obtain the sovereignty of New Zealand for the Crown, he was to obtain Maori agreement not to sell the land to anyone except the Crown. To further this he was directed, immediately on his arrival in New Zealand, to issue a proclamation to all British subjects that the Crown would not acknowledge as valid any title to land not derived from or confirmed by a Crown grant. This he did.

In his dealing with Maori Hobson was obliged to obtain “by fair and equal contracts” such lands as might be progressively required to facilitate settlement by immigrants. “All such contracts should be made by yourself, through the intervention of an Officer expressly appointed to watch over the interests of the Aborigines as their Protector”. Finally, the Maori were not to be permitted to enter into any contracts for the sale of land to the Crown which might be injurious to them and no land was to be bought from them which it was essential or highly conducive to their own comfort, safety or subsistence they should retain.⁴³

Running through these instructions to Hobson is the concern that Maori should be protected from the likely adverse effects of British settlement. This would be achieved by the Queen assuming sovereignty. Furthermore, no land should be bought from Maori which was needed for their comfort, safety or subsistence. To ensure this a protector was to be appointed to watch over their interests. The common thread is one of protection. It was reflected in the Treaty which Hobson prepared for the signature of Maori chiefs and

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is the opening theme of the Treaty preamble, which refers to the anxiety of the Queen to protect the just rights and property of Maori chiefs and tribes, and to secure to them the enjoyment of peace and good order. There was a further desire to establish a settled form of civil government in the interest of the Maori and British subjects alike.

- 4.7.2 So, in article 1 of the English text sovereignty was ceded to the Crown and in article 2 the Queen confirmed and guaranteed to the chiefs, tribes, families and individuals “the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties . . .” while Maori yielded to the Queen the exclusive right of pre-emption over such lands as they wished to sell. By article 3 the Queen extended to Maori her “Royal Protection” and conferred on them all the rights and privileges of British subjects. In the Maori text of article 2 rangatiratanga is more extensive than in the English text. While it covers all the matters guaranteed to Maori in the English version, it also upholds tribal authority, which is wider than ownership and includes control over persons in the kinship group and their access to resources.
- 4.7.3 How well then did Hobson comply with his instructions from the Colonial Office? The preamble stresses the Queen’s concern to afford protection of Maori just rights and property. Article 1, while constituting a major concession by the Maori, was obtained in part at least to enable the Queen, as sovereign authority to carry out her desire to afford protection to the Maori. Article 2, especially the Maori text, offers perhaps the highest possible degree of protection of Maori interests as is consistent with the cession of sovereignty. Article 3 confirms the Queen’s Royal protection and confers the rights and privileges of British subjects to Maori. Protection of Maori and their interests can thus be seen as a recurrent theme of the Treaty provisions. In exchange for this, Britain obtained immensely valuable concessions by way of sovereignty over the whole country and the right of pre-emption of Maori land.
- 4.7.4 How well did the Maori chiefs who signed the Treaty understand its terms? This question necessarily turns on the understanding the chiefs gained from hearing the Maori text read aloud and on the explanations given by Hobson or his emissaries at the time of signing. The most recent authoritative account we have of the discussions and debates which surrounded the signing of the Treaty by the more than 500 chiefs is in Claudia Orange’s *Treaty of Waitangi*.⁴⁴ Here we draw on the resumé, in the tribunal’s *Muriwhenua Report* (1988) of Orange’s detailed account.⁴⁵ The following salient points emerge:
- Hobson and his representatives placed considerable emphasis on the Crown protection afforded by the Treaty and the maintenance

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of peace and good order – protection both from foreigners (especially the French), and the unruly Pakeha element.

- There is evidence that Maori, on the other hand, may have placed greater reliance on the Queen affording protection or support to Maori against each other, whether over land disputes or intertribal fighting.
- The Crown representatives emphasised that Maori would be protected against land sales and that the Crown would ensure they kept such land as they needed or wished to retain.
- These assurances as to the protection and retention of their land weighed heavily with many Maori. It seems clear that the theme of protection in its various forms was uppermost in the minds of both Crown representatives and Maori during the months that signatures to the Treaty were obtained in various parts of New Zealand.

It is to be expected that there were markedly different levels of understanding on the part of individual chiefs. Different aspects interested or concerned different chiefs. Significant numbers were influenced by the favourable attitude of missionaries to signing. Some categorically refused to sign. Others, for various reasons, did not have an opportunity to sign had they so wished. We bear in mind all the foregoing factors in stating, as we now do, the Treaty principles which appear to us relevant to our consideration of the Ngai Tahu claims.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

- 4.7.5 This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.

Each party to the Treaty gained, but not without each making a major concession to the other. While, as we have seen, legal sovereignty is exclusive and exhaustive, this is not to say it is absolute. It is clear that cession of sovereignty to the Crown by the Maori was conditional. It was qualified by the retention of tino rangatiratanga. As Mr Justice Casey said in the *New Zealand Maori Council* case, “the whole thrust of article 2 was the protection of Maori land and the uses and privileges associated with it”.⁴⁶ It should, of course, be noted that rangatiratanga embraced protection not only of Maori land but much more. We need to remember that rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies

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or limits the authority of the Crown to govern. In exercising its sovereignty it must respect, indeed guarantee, Maori rangatiratanga – mana Maori – in terms of article 2. As Orange notes “. . . Maori fear that the mana of the land might pass from them if they signed the Treaty was eased by the Treaty’s guarantee of rangatiratanga”.⁴⁷

- 4.7.6 The Crown in obtaining the cession of sovereignty, obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired under the Treaty was a qualified right. This was recognised by Sir Robin Cooke in the *New Zealand Maori Council* case:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation.⁴⁸

In this passage the president of the Court of Appeal recognises that the principles of the Treaty do place some reasonable restrictions on the right of government to follow its chosen policy but it must not be unreasonably shackled.

- 4.7.7 The tribunal has recognised that in reconciling the concepts of sovereignty and rangatiratanga some compromises will need to be made by both Treaty partners. In the *Muriwhenua Report* (1988) 195 the tribunal commented:

neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.

The *Mangonui Report* (1988) 60 developed this concept:

It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori lands or particular fisheries for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases however, it is a careful balancing of interests that is required. It was inherent in the Treaty’s terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for, and where necessary, reconciled.

The Crown right of pre-emption imposed reciprocal duties

- 4.7.8 Under article 2 of the Treaty the Crown obtained the valuable monopoly right to purchase land from Maori to the exclusion of all others. This raises the question of whether the granting of this right by Maori imposed any reciprocal obligation or duty on the Crown.

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To determine this, the Orakei tribunal considered in detail the circumstances surrounding the preparation of the Treaty by Captain Hobson and in particular the instructions he received from Lord Normanby, the British colonial secretary. Here we simply reiterate the Orakei tribunal's summary of the parameters and limitations imposed by Lord Normanby on the Crown when exercising its pre-emptive right to purchase Maori land:

- All dealings with Maori were to be conducted on the basis of sincerity, justice and good faith just as were negotiations for the recognition of the Queen's sovereignty over New Zealand.
- Maori were to be prevented from entering into contracts which would be injurious to their interests. By way of example, Lord Normanby stipulated that the agents of the Crown were not to purchase from the Maori any land "the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence".
- Lord Normanby further emphasised this point when he next stipulated that the acquisition of land by the Crown for the future settlement of British immigrants was to be confined to such districts as the Maori could alienate "without distress or serious inconvenience to themselves".
- Lastly, an official protector was to be appointed to ensure that this stipulation was complied with.⁴⁹

The tribunal found it to be abundantly clear from these instructions, read in the light of the instructions as a whole, that no land was to be purchased by the Crown which was needed for the comfort and subsistence of the Maori people. In short, they were to be left with a sufficient endowment for their own needs – both present and future. An official protector was to ensure this. The right of pre-emption was to be a limited right. It was not to extend to land needed by the Maori.

- 4.7.9 The tribunal was reinforced in this view by Lord Normanby's instruction that the land was to be bought extremely cheaply from the Maori – this would facilitate development and assist in bringing out more settlers. The spin-off for Maori was that the land they retained would, over time, increase greatly in value, although, of course, this would occur only if the Crown ensured that they left Maori with sufficient land. For this and other reasons which are summarised in the *Orakei Report* (1987) 147 the tribunal has concluded that the two parts of article 2 of the Treaty must be read together and construed in the light of the surrounding circumstances, including the fact that, had the Maori chiefs not been assured that possession of their lands would be protected, they would not have signed the Treaty. In the light of these considerations the tribunal has found that

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article 2, read as a whole, imposed on the Crown a duty first to ensure that the Maori people in fact wished to sell; and secondly that each tribe maintained a sufficient endowment for its foreseeable needs.

What then might constitute a sufficient endowment for the tribes' foreseeable needs? There can be no single answer to this question for much might depend upon a wide range of demographic factors including the size of the tribal population; the land they were then occupying or over which various members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering. In short, their dependence upon the many forms of mahinga kai.

The importance of these various elements could vary depending upon the date at which the Crown sought to acquire tribal land. The major Ngai Tahu purchases, as we will see, took place well in advance of organised British settlement. While Ngai Tahu were aware that the Crown was purchasing land to facilitate settlement and for the most part welcomed this prospect, they probably had only a shadowy notion of the likely magnitude and rate of settlement. In fairness to the Crown, it should be observed that the governors of the day would also have lacked precise knowledge of the timing, scale and momentum of future settlement. Much of this was for a time under the control of the New Zealand Company.

- 4.7.10 In negotiating with the Ngai Tahu chiefs, the Crown was obliged to have regard as best it reasonably could to the range of demographic factors we have mentioned. Its duty was to ensure that Ngai Tahu were left with sufficient land for their present and future needs. Present needs would almost certainly differ from future needs, when settlers arrived in their midst and the land was subdivided. While it might be contemplated that over time Ngai Tahu would become increasingly involved in the new economy, it should have been apparent that this would occur only gradually and over a relatively lengthy time-span. In the meantime, generous provision of land and guaranteed possession of eel-weirs and other sources of mahinga kai would be needed. Since it was the Crown's intention to acquire Ngai Tahu land as cheaply as possible, there was a correlative duty to ensure that adequate land of good quality was left in their possession so that they would, as Lord Normanby contemplated, later enjoy the added-value accruing from British settlement. Sufficient land would need to be left with Ngai Tahu to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.

Although by the 1840s Ngai Tahu were relatively thinly dispersed over a vast area of land, Crown officials in New Zealand (in contrast

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to their Colonial Office masters) for the most part accepted that the territory belonged to Ngai Tahu. They were also aware that the various hapu maintained a system of shifting cultivation and engaged in seasonal foraging and hunting pursuits in different parts of the interior where they settled intermittently and for a relatively brief period. It was incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over the tribal territory, as well as their more permanent kainga. This would ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs, including various forms of farming.

The Crown obligation actively to protect Maori Treaty rights

- 4.7.11 Article 2 of the Treaty “confirms and guarantees” to Maori their property and other rights. Likewise, the preamble expresses the Queen’s anxiety to protect the just rights and property of Maori. Article 3 extends the Queen’s Royal protection and bestows all the rights and privileges of British subjects on the Maori people. The tribunal in various reports has stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The tribunal’s views have been endorsed by the Court of Appeal and in particular by the president, Sir Robin Cooke, in the following passage:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal’s Te Atiawa, Manukau and Te Reo Maori reports that support that proposition and are undoubtedly well founded.⁵⁰

The duty of protection imposed on the Crown extends not only to the use of their lands and waters, as noted by Sir Robin Cooke, but to the exercise by the Crown of its Treaty right of pre-emption. In his instructions of 14 August 1839, Lord Normanby directed Hobson that all contracts for the purchase of land from the Maori were to be made by the governor through an officer “expressly appointed to watch over the interests of the Aborigines as their Protector”. Evident in the colonial secretary’s instructions is the concern that Maori be dealt with fairly and honestly and in a way that ensured their Treaty rights were recognised and protected. To facilitate this, the appointment of an official protector was contemplated.

- 4.7.12 In exercising its right of pre-emption, the Crown was obliged to protect Ngai Tahu interests in various ways. First, it should acquire only such land as Ngai Tahu were willing to sell. To be satisfied that the land was being sold with the owners consent it was necessary to

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ascertain who the owners were. Professor Ward, in his report to us on the historical evidence on these claims, has pointed out that the question of which Ngai Tahu units owned or controlled what rights was a matter of some complexity (T1:8–12). He referred to various individuals, whanau and hapu of Ngai Tahu exercising rights over a great variety of food resources and other resources from land and sea. These included garden lands close to their villages and weka grounds or ti tree stands far afield. Some rights, such as mutton birding in the Titi Islands were exercised far from the groups' main residential bases. Many of these rights were specific to particular groups, families and even individuals.

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

- 4.7.13 Although in the early years of land purchase by the Crown it would have been unrealistic to expect the boundaries of a proposed purchase to be fixed by survey, it is implicit in the notion of consent that the Maori owners knew with reasonable certainty the area of land they were being asked to sell. The onus unquestionably lay on the Crown to ensure this. The duty of active protection required no less.

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

Lord Normanby contemplated that an official protector would be appointed to safeguard Maori interests on Crown purchases of their land. But he appears to have envisaged that the same official would act for the Crown in conducting the negotiations for the purchase. It soon became evident that this would involve the official in a conflict of interest. Ultimately it was for the governor to decide how the Crown's Treaty obligation of protecting Maori Treaty rights should be effected; the important point for our purposes is that the Crown was obliged to ensure this happened.

*The Ngai Tabu Report 1991****The tribal right of self-regulation***

4.7.14 This concept was developed in the *Muriwhenua Report* (1988). It is an important element of tino rangatiratanga. The Muriwhenua tribunal put it this way:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.⁵¹

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources; and
- the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control, resource protection being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not disregard or diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2. It follows that Treaty fishing interests should not be qualified except to the extent necessary to conserve the resource.⁵²

In its *Mangonui Report* (1988) the tribunal emphasised a duty on the Crown to recognise tribal rangatiratanga. The Treaty was made with tribes and it was understood at the time that traditional mechanisms for tribal controls would continue to be respected and maintained.⁵³ But, as the *Orakei Report* (1987) demonstrated, policies were introduced over a century ago to put an end to these tribal powers. In the *Mangonui Report* (1988) the tribunal also adverted to the failure of the Crown to recognise the tribal position and, in particular, to provide a legal foundation and appropriate resources for tribes to contribute more fully to local affairs and to enable them to take necessary steps for the protection of tribal interests.⁵⁴ This defect has now been remedied by the passage of the Runanga Iwi Act 1990.

The principle of partnership

4.7.15 The Treaty signifies a partnership and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith. This proposition was independently agreed on by all five members of the Court of Appeal in the *New Zealand Maori Council* case. Several of the judges emphasised the importance of the "honour of the Crown". Mr Justice Casey saw the concept as underlying all the Crown's Treaty relationships.⁵⁵ Sir Ivor Richardson, who referred to the Treaty as a "compact", commented in this way:

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Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.⁵⁶

Sir Robin Cooke also emphasised the reciprocal nature of the obligation to act reasonably and in the utmost good faith. “For their part”, he said, “the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation”.⁵⁷

4.7.16 This tribunal adopts the following statement by the Muriwhenua tribunal as to the basis for the concept of a partnership:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty’s terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.⁵⁸

The right of redress for past breaches

4.7.17 In the *New Zealand Maori Council* case, Mr Justice Somers recognised this right as a Treaty principle:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s9. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.⁵⁹

Sir Robin Cooke also accepted that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at least some form of redress, unless grounds existed justifying a reasonable partner in withholding it – which he thought “would be

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only in very special circumstances, if ever".⁶⁰ It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown.

The duty to consult

4.7.18 While rangatiratanga is revealed in the words and actions of individuals, it is nevertheless the very antithesis of individualism. As trustees the credibility of rangatira and hence their mandate have depended on accountability to their beneficiaries and always on a willingness to confer with them. An individual without his or her people is powerless and rangatiratanga meaningless. Accordingly, if this were so for the Maori, a Maori perspective of article 2 of the Treaty would presume a similar willingness on the part of the Crown to confer with the Maori, insofar as the Crown guaranteed, trustee-like, to protect rangatiratanga.

By the same token the question of whether there was a duty on the Crown to consult with its Treaty partner was considered by the Court of Appeal in the *New Zealand Maori Council* case. Counsel for the New Zealand Maori Council submitted that an obligation to consult the other Treaty partner and the correlative right to be consulted was itself an implied principle of the Treaty stemming from the obligation of good faith and, on the Crown's part, from the protective guarantees of Maori interests which come under the Treaty.

Sir Ivor Richardson, along with other members of the Court of Appeal, rejected this submission in its absolute form. He explained why:

There are difficulties with that submission when expressed in that way as an absolute duty of universal application superimposed on the consultation which takes place as part of the ordinary political and governmental processes. What matters affecting Maoris are within the scope of the duty and how is the line to be drawn in the conduct of government? With whom is the consultation to occur? The undertakings in article 2 relate to "the chiefs and subtribes" in the Maori text and to "the chiefs, tribes, families and individuals" in the English text. And inasmuch as any Maori may apply to the Waitangi Tribunal, it is not obvious that a tribal affiliation or other Maori organisation could necessarily speak for all Maoris interested. There is, too, the further question as to the form and content of the consultation. In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to

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the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.⁶¹

It follows from Sir Ivor Richardson's discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.

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Chapter 5

The Background to the Purchases: Crown Policy and Settlement

5.1. Introduction

Just four years after the signing of the Treaty of Waitangi the Crown embarked on a policy of land purchase from Ngai Tahu which over twenty years made available tens of millions of acres for European settlement. The Crown's actions in acquiring title to what is the vast majority of land in the South Island is at the heart of this claim. The areas of the individual purchases were huge, ranging from tens of thousands of acres up to around twenty million acres. Few land purchases from Maori in the North Island exceeded the smallest Ngai Tahu blocks. The grievances associated with these purchases make up eight of the "Nine Tall Trees" which comprise the major claim. This section of the report deals with each of these heads of claim separately in order of purchase.

It is necessary to examine the circumstances of each purchase in some detail. The tribunal has been taken through each of these on more than one occasion, first by the claimants, then by the Crown and finally by Professor Ward and Dr Tremewan. The actions of the Crown in allowing the New Zealand Company to purchase land from Ngai Tahu or in purchasing land directly from the tribe can only be adequately examined if there is a clear understanding of what occurred in the negotiation of each individual deed. On much of this material the witnesses for the Crown and the claimants were agreed. But there were still many major areas where there was a clear difference of view as to how the details should be interpreted. For this reason the tribunal has found it necessary to explore in depth the circumstances of each sale.

Before embarking on a discussion of these complex transactions we will review the general development of Crown policy as it related to Ngai Tahu during this period. The Crown's policies towards Maori fluctuated over the two decades during which the purchases took place. Dramatic changes in the settlement and government of the country occurred; governors were replaced, colonial secretaries succeeded colonial secretaries and a succession of Crown agents were

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dispatched to the South Island to purchase land. In 1844 when the Otakou purchase took place, Europeans were heavily outnumbered and almost all the country was still in Maori ownership and control. Settler government did not exist and the Colonial Office dealt with Maori issues directly through its man on the spot, the governor. Battles between British troops and Maori tribes were taking place in the far north and in Wellington. Understaffed, without adequate financial support and at a serious military disadvantage, the governor was unable to assert his authority over Maori. In 1864, when Rakiura (Stewart Island) was purchased, the scenario had changed almost beyond recognition. All of the South Island and a good deal of the North had been acquired by the Crown. The demographic and military balance had changed in the Europeans' favour. Another series of wars were being fought across the centre of the North Island and the frontier of Crown influence had extended into the Waikato, Bay of Plenty and Taranaki. Settler politicians were planning the confiscation of huge areas of Maori lands. The British government had passed most of its powers to control the internal affairs of the colony to a locally elected, settler government in which there was no Maori voice whatsoever.

5.2. **The Governors : the Crown in New Zealand.**

- 5.2.1 New Zealand did not have its own constitutional government until 1853, when the Imperial Parliament's New Zealand Constitution Act 1852 was implemented. Until that time, New Zealand was a Crown colony. The power vested in the Crown by the various Acts of Parliament relating to New Zealand was in turn vested in the governor. The colonial secretary issued him with instructions as to how this authority was to be exercised. In a colony with only one governor, none of the executive powers were delegated. He could take advice from subordinates but nothing could be done without his authority. In theory once lieutenant-governors were appointed, as in New Zealand after 1846, they would conduct the administration of their provinces, and certain executive powers would be delegated to them under the supervision of the governor-in-chief.

New Zealand was initially under the administration of the New South Wales governor, Sir George Gipps. On 3 May 1841 the country became a Crown colony in its own right and Hobson was elevated from lieutenant-governor to governor. Hobson died on 10 September 1842 after a series of illnesses which left many of his duties to his few officials. His replacement was Captain Robert FitzRoy, governor from 26 December 1843 until 17 November 1845. It was during his term of office that the Otakou purchase was negotiated. The Hobson and FitzRoy administrations were periods of considerable economic and

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political difficulty. Government was severely under-resourced and under-funded. Tensions between Maori and settlers, and between both races and the Crown remained unresolved. With the appointment of Captain George Grey, backed by Imperial troops and much stronger financial support, the Crown was able to take the initiative.

- 5.2.2 For the purpose of this claim, Sir George Grey is the most important figure among those who acted vice-regally in New Zealand. His term of eight years, from 18 November 1845 to 31 December 1853, far exceeded those of his predecessors. Autocratic by nature, Grey kept tight control over the parliamentary grant and made sure that his lieutenant-governors' powers were more formal than real. Grey was a most effective politician, undermining the authority of any group, Maori or Pakeha, which could threaten his control over government. One of the first casualties of his administration was the Protectorate Department, set up to look after Maori interest and under the independent control of the chief protector, George Clarke Sr.

Apart from the obvious duty of governing, the most important obligation of the governor was to keep the Colonial Office informed about events in New Zealand and the measures taken to deal with them. While general guidelines were laid down 12,000 miles away, much had to be left to the judgement of the governor about the precise manner in which government would be carried out. Here again, Grey's personal qualities were important. His acumen as a despatch writer gave him even greater freedom of action.

On Grey's departure, the dominating influence in land purchasing became that of Donald McLean. Already established as the leading official dealing with land buying from Maori, McLean gave continuity to the management of this area of government for the remainder of the 1850s.

Although the Crown was directly represented in New Zealand, the lines of communication were long and difficult. It took many months for British officials to get responses from their governors in New Zealand. Distance gave the initiative to the governors, but in their actions they were always responsible to the Imperial government. We turn to examine how this relationship between the British government and the governors in New Zealand influenced the ongoing recognition of Maori rights as promised in the Treaty of Waitangi over the period when the Ngai Tahu purchases took place.

5.3. **The Challenge to Treaty Guarantees in the 1840s**

- 5.3.1 We have discussed in some detail Lord Normanby's instructions to Hobson which dictated the terms of the Treaty offered to Maori

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(4.7.1). As we have seen, they contained an unequivocal recognition of Maori tribal ownership and control of their land and other resources in New Zealand. We have found that this would clearly have been the way Maori signing the Treaty would have interpreted the promise of “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”. In New Zealand few intelligent Europeans with any experience of the country and familiar with Maori views on the rights of land ownership would have seen this promise in any other terms. However in Great Britain, Normanby’s instructions were not the final word in the Crown’s recognition of Maori property rights to the whole of the country. They were little more than the opening round in a debate which extended throughout much of the 1840s over whether Maori did own lands beyond their villages and cultivations, and whether the guarantees of article 2 of the Treaty extended beyond these very limited classes of property. The ebb and flow of this debate coloured the instructions which the Colonial Office sent to the Crown’s agents in New Zealand throughout the decade.

The whole weight of European cultural assumptions was against acknowledging the ownership of land beyond what was cultivated or held under a recognisable legal title. Most British politicians held on to the narrow interpretation of the land guarantee. It is hard to exaggerate the importance placed on the meaning of this guarantee coupled with a second argument, that of the transfer of sovereignty. If you believed, as the New Zealand Company and its supporters believed, that Maori owned only the relatively small amount of land which they cultivated and the Crown owned all the rest by virtue of sovereignty, then buying land from Maori was a matter of little significance. If, on the other hand, Maori land ownership was co-extensive with the whole of New Zealand, and to be respected in the way in which private, rather than public, land ownership was respected in the European tradition, the implications changed dramatically. The process of acquiring an estate for the Crown to dispose of for settlement would be difficult, time-consuming and a drain on those funds which, according to the supporters of systematic colonization, ought to go into emigration and the development of the new settlement.

- 5.3.2 Normanby’s views had been greatly influenced by the permanent under-secretary of state, James Stephen, an advocate of the aboriginal rights of indigenous peoples. The instructions to Hobson were largely drafted by Stephen himself.¹ Stephen too had close ties with Dandeson Coates, the lay secretary of the Church Missionary Society. The society was opposed to the intentions of the New Zealand Company and represented a missionary view of the affairs of New Zealand to the Colonial Office. Also influential was the 1837 Commons Commit-

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tee on Aborigines in British Settlements and the lobbying of the Aborigines Protection Society.² The committee had a particularly gloomy view of the impact of British settlement on indigenous communities. The Aborigines Protection Society was founded by members of the 1837 Commons committee. Unlike Coates and the Church Missionary Society however, the society believed that colonisation could take place if adequate protection was provided for indigenous peoples. Such protection included an unconditional property guarantee.

As permanent under-secretary, Stephen was however only the civil servant, and it was his political masters, the colonial secretaries, who made final decisions and established policy. Lord Glenelg (1835–1839) Lord Normanby (1839) and Lord John Russell (1839–1841) all relied heavily on Colonial Office advice, but the most important of their successors, Viscount Stanley (1841–1845) and Earl Grey (1846–1852) were more independently minded. The views of a number of these colonial secretaries differed substantially with Stephen's on this very question of Maori ownership of the soil. Peter Adams, in his study of the British government's reluctant moves to intervene in New Zealand, points out that in 1840 during a debate in the House of Lords, Russell argued that the Crown's policies in New Zealand had been in accord with the ideas of Emerich Vattel.³ Vattel's arguments, as expressed in his *The Law of Nations*, first published in an English edition in 1760, were commonly referred to in debates over indigenous rights during the nineteenth century and had been taken up by Dr Thomas Arnold, the famous headmaster of Rugby School. According to Vattel and Arnold, indigenous societies could only claim ownership to land they had cultivated. Rights to the ownership of land could only be maintained by "civilised" societies who were able to cultivate them. The argument was a clear denial of Maori ownership of land not occupied by dwellings or gardens. Governor Gipps, who was Hobson's immediate superior from 1840 until 3 May 1841, certainly did not espouse an all-embracing view of Maori property rights. In introducing legislation to examine pre-1840 purchases in New Zealand, he expressed views of Maori ownership that were far more limited. After stating that the Bill was founded on three general principles, which he regarded as "political axioms", Gipps defined the first of these as:

that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it.⁴

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The other principles were that the right of pre-emption was held exclusively by civilised power and thirdly, that a colony could not be established by private individuals without Crown assent.

- 5.3.3 In the minds of officials and ministers the question of Maori ownership rights under article 2 of the Treaty remained confused and abstract until the whole issue of the New Zealand Company's ownership of land was examined by William Spain in 1842. The New Zealand Company initially had every reason to acknowledge extensive Maori rights to land because its titles had been based on deeds of transfer from Maori tribes. However, an agreement between the Crown and the company in late 1840 obliged the Crown to provide four acres for every pound spent by the company, not just that spent on land purchase (C2:4:1-4).⁵ When Spain's investigation showed the Cook Strait deeds to be virtually worthless, the company tried vainly to argue that the Crown had promised it a grant of around one million acres and that any further responsibility to extinguish Maori title lay with the Crown. The Crown maintained its position that any grant had been promised on the assumption that Maori title had been extinguished. Eventually on 12 May 1843 Stanley accepted an offer proposed by the company to provide additional funds to extinguish whatever remaining title was found to exist within the lands to be granted to it (P3:180).⁶ This turn of events reinforced the view of the company and its supporters in Britain that Maori did not in fact have title to "waste lands", although this was in clear contradiction to the recognition of Maori ownership implied in the deeds of purchase negotiated with Maori only three years earlier (C1:13-14). The company's views were bluntly put:

If an interest in the land, never yet recognised by any Christian nation, as possessed by savages, is to be attributed to the natives of New Zealand; – if the aborigines are to be regarded as being . . . proprietors of the whole surface of New Zealand, ninety-nine hundredths of which are probably covered with the primeval forest; then, doubtless, the claims of the natives would be co-extensive with those of the Company; . . . But the only interest in land which our law has ever recognised as possessed by savages, is that of "actual occupation or enjoyment"; . . . If the claims of the natives be limited to such lands, . . . the question can, at the utmost, be one only of a few patches of potato-ground, and rude dwelling-places, and can involve no matter of greater moment than some few hundred of acres.⁷

- 5.3.4 Under pressure from the company, a parliamentary select committee was established in 1844 to look into the whole question of the colonisation of New Zealand. A draft report was prepared for Lord Stanley which stated his view that Maori rights to land ownership could not be determined in England but would have to be established in New Zealand according to local Maori custom. Although Stanley,

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like others in England, doubted that these rights would add up to the whole of the country's lands, the draft argued that Maori had their own complex system of property rights and that this would probably apply in New Zealand. The committee was told by several witnesses that Maori did in fact claim ownership to every acre of New Zealand.

The Colonial Office draft was rejected by the committee in favour of Lord Howick's alternative, which condemned the Treaty of Waitangi as "injudicious", rejected the concept that "wild lands" were owned by Maori and recommended that the Crown take steps to assert ownership of all land in New Zealand not in the actual occupation of Maori. There can be little doubt that actual occupation was limited to European notions of cultivations and dwellings. Although the committee's report was a victory for the New Zealand Company, Lord Stanley chose largely to ignore its findings and recommendations. To implement such a course of action, Stanley argued, was contrary to "justice, good faith, humanity, or policy".⁸ Stanley was well aware from the reports he was receiving from New Zealand that implementing such a narrow interpretation of the Treaty would cause insurmountable difficulties for his agents there. But he also believed that the rights of indigenous peoples could not in justice be denied.

- 5.3.5 The Normanby instructions to Hobson in 1839 had assumed that the Crown's estate in New Zealand would be comprised of lands purchased from Maori. It is also likely that the Colonial Office believed that once an examination of land titles derived from purchases of land prior to the Treaty had been completed, there would be a large surplus of land between that granted to European purchasers and that where aboriginal title had been extinguished. This land, it was assumed, would belong to the Crown. Even those, like Stanley, who believed that Maori could assert title to what was seen in European eyes as wilderness lands, still felt that there must be substantial lands somewhere in New Zealand unowned by Maori or claimed by Europeans, which could only be the property of the Crown. In the corridors of Downing Street it was still inconceivable that a 100,000 "uncivilized" Maori could own all the lands of New Zealand.

Once in New Zealand, these ideas did not match the reality of Maori title. All the country was claimed and owned under Maori concepts of ownership, which were in many ways quite different from those of British custom. Perceptive Europeans who dealt directly with Ngai Tahu and who learned the Maori language often came to accept that the tribe did hold title to the large areas of land which to European eyes consisted of untouched wilderness. Edward Shortland, who had considerable contact with Ngai Tahu while acting as interpreter for the land claims commission in the South Island, provides an example.

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After fulfilling his responsibilities with the commission, he travelled as far south as Aparima (Jacob's River), visiting whaling stations and taking a census of Maori population, and then walked the 200 miles of coast from Waikouaiti back to Akaroa. Material from his journal, kept during the six months spent in the South Island, was later published.⁹ Humane and educated, Shortland stands out as the most perceptive and enlightened European recorder of Ngai Tahu of the period.

In Shortland's eyes, Ngai Tahu dominated their territory, though whether they filled the whole vast area was less certain to him. When he wrote the introduction to *The Southern Districts of New Zealand* back in England several years later, he was ready to think that because of the small Maori population, the southern region might accommodate the system of colonization as carried out by companies:

For it is indispensable to the success of this system, to have at command a continuous and extensive block of land, unembarrassed by the claims of native proprietors; which requisite is not to be obtained in the North Island.¹⁰

His text and notes however, show that he was more aware of the Maori viewpoint. As protector he dealt with complaints against Europeans who had begun to arrive with cattle and sheep which they spread over the country while refusing to make any payment to the inhabitants, on the ground that all the land belonged to the Queen of England. Shortland encountered one such new arrival who declared that he understood it was illegal to pay anything to the Maori for land:

The doctrine which Mr G[reenwood] advocated was, I had before remarked, a very favourite one among new comers, who landed full of the idea that there were large spaces of what they termed waste and unreclaimed land, on which their cattle and flocks might roam at pleasure, and to which they had a better right than those whose ancestors had lived there, fished there, and hunted there; and had, moreover, long ago given names to every stream, hill, and valley of the neighbourhood.¹¹

Although Europeans in New Zealand did not necessarily equate Maori ownership of land with that of a British land title, they did realise that Maori could assert title to land very widely on the basis of traditional use and occupation.

It was in the midst of the 1844 Common's inquiry that the first Crown purchase from Ngai Tahu took place. The Crown waived pre-emption in allowing the New Zealand Company to enter into a purchase for the New Edinburgh settlement at Otakou. However these negotiations were little influenced by the deliberations of the Commons committee; local conditions prevailed. In the wake of the Wairau affair, Governor FitzRoy was determined that the purchase should be

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carried out as smoothly as possible, fearful that if the negotiations went awry, further violence could result. There appears to have been no open suggestion that the block of over 500,000 acres purchased from Ngai Tahu on 31 July 1844 was not in every sense owned by Ngai Tahu.

5.3.6 On 13 June 1845 Stanley issued instructions to Captain George Grey calling for strict attention to the provisions of the Treaty of Waitangi:

I repudiate, with the utmost possible earnestness, the doctrine maintained by some, that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny that any Treaty entered into and ratified by Her Majesty's command, was or could have been made in a spirit thus disingenuous, or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.¹²

Later in the despatch Stanley lamented that in his view the failure to identify and register Maori land had been one of the chief reasons for the colony's numerous problems under FitzRoy:

If Lord John Russell's instructions of the 28th January 1841, to define on the maps of the colony the lands of the aborigines, and my own for a registration of such lands, had been carried into effect, much of this difficulty would have been surmounted.¹³

A fortnight later Stanley returned to the issue of the registration of Maori lands and the Crown's right to "waste land":

It would appear to follow as a natural consequence of the Treaty of Waitangi, which recognises the title of the native tribes to their lands, that the limits of those lands should be distinctly recognised and set forth under the sanction of the sovereign authority.¹⁴

Stanley suggested to Grey that a two or three year period be given to allow tribes to register their lands, however Grey was given considerable discretion in carrying out these instructions. After the registration had been completed, Stanley went on to suggest that it would then be possible to judge:

what portion of the unoccupied surface of New Zealand can justly, and, without violation of previous engagements, be considered as at the disposal of the Crown . . .¹⁵

It is clear from the reference to the Treaty, that Stanley saw no contradiction in the instructions to register land and to uphold the Treaty, particularly as we have seen that he was prepared to acknowledge Maori customary ownership.

Stanley was moving towards a view that the Treaty could be interpreted in terms of the system of rights and ownership of Maori themselves. Stanley argued as much before the House of Lords in

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1845. Peter Adams saw his reasoning as a significant recognition that the issue of ownership could not be imposed on Maori, it only had meaning in terms of Maori customary rights:

It had taken five years after the signing of the Treaty of Waitangi for the Colonial Office to recognise clearly and firmly that the correct interpretation of the land guarantee could only be decided by reference to Maori custom. Lord Stanley had at last created the possibility that the Treaty of Waitangi would be interpreted according to the sense in which the signatories understood it.¹⁶

- 5.3.7 The possibility was shortlived. In December of that year, Stanley was replaced by W E Gladstone, who after a six month period was followed by the man whose report had been adopted by the 1844 committee on New Zealand, and who had since been elevated to the title of Earl Grey. As colonial secretary, Earl Grey immediately set about to implement the tenor of the committee's report. He sent further instructions to Grey, which reiterated Stanley's intentions of 1845. His despatch of 23 December 1846 leaves little doubt as to his views on Maori land ownership:

The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts or of the habits of civilized life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. (K2:12:67-68)¹⁷

It was a principle he firmly rejected and after citing Arnold at length he continued:

To contend that under such circumstances civilized men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded. (K2:12:68)¹⁸

Unlike Stanley he went on further to deny any tribal right whatsoever. Tribal property was public property and on cession, public property was transferred to the Crown. In laying down these general principles Earl Grey made only passing reference to the Treaty, and then only to find added support for the policy of pre-emption.

- 5.3.8 Debates in England as to whether to recognise the Maori ownership of the soil of New Zealand were little more than academic. Even strongly worded instructions were of little value if they could not be implemented. The reality was that government in New Zealand could not be carried out without an overall recognition of Maori property rights. Governors were then posed with a very real dilemma. They

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were instructed to locate a vast Crown domain, which they either believed did not exist or, even if they shared the views of Earl Grey and the New Zealand Company, knew could not be enforced. The prospect of registering Maori land ownership, proposed by Stanley and Earl Grey as the solution to the problem, was also unrealistic. When the Native Land Court was eventually established to do the same thing in the 1860s it proved a difficult, drawn-out and expensive process. This was not the quick and easy solution to identifying Maori rights to lands which colonial secretaries envisaged in the 1840s.

Governor Grey's response was to ignore the instruction and provide Earl Grey with a carefully worded justification. After a long introduction during which the governor skirted around the issue by suggesting that strict compliance with the instructions would possibly have put the Crown in a position where it would be acting in a "manner opposed to the principles of equity and justice", Grey suggested that a middle way could be found on the issue:

Indeed there was an evident necessity for considering the principles enunciated by your Lordship, in reference to the peculiar state of New Zealand; for even if those principles were admitted to be abstractly true, they related to the rights of two parties, one of which parties it would have been impossible to have induced to assent to them; and as this party was a very powerful one, and composed for the most part of very loyal subjects, who were disposed to make very great concessions to meet the views of the Government, the question which would always arise would really be, Would it [be] better to endeavour at all hazards to enforce a strict principle of law, or to endeavour to find out some nearly allied principle which should be cheerfully assented to by both parties, and which would fully secure the interests and advantages of both. (A9:3:2)¹⁹

Grey's "allied principle" lay in pre-emption, and after blaming a good deal of the ills of the colony at the time of his arrival on the abolition of pre-emption, he explained how the objectives of Lord Stanley's instructions – the identification of a sufficient estate of Crown land to allow settlement – could be achieved by strict adherence to the principle of pre-emption:

As far, therefore, as I can understand the position of this country in reference to the lands of the natives it is this – that the native population would, to the best of their ability, resist the enforcement of the broad principles which were maintained by Dr Arnold; but that they will cheerfully recognize the Crown's right of pre-emption, and that they will in nearly all – if not in all – instances dispose, for a merely nominal consideration, of those lands which they do not actually require for their own subsistence. Even further than this: in many cases if Her Majesty requires land, not for the purposes of an absentee proprietary but for the *bonâ fide* purposes of immediately placing settlers upon, the native chiefs would cheerfully give such land up to the Government without any payment, if the compliment is only paid them of requesting their

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acquiescence in the occupation of these lands by European settlers. (A9:3:2)²⁰

Grey was not willing to assert that all New Zealand was owned by Maori and set his position clearly against what he described as the “opinions which have been so generally expressed to your Lordship by such high authorities in the northern part of this island” that there was no such thing as waste land within the colony unowned by Maori. He informed Lord Grey that such land existed even in the densely populated areas of the North Island:

there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right; and that when these tracts of country come to be occupied by Europeans, the natives will cheerfully relinquish their conflicting and invalid claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation shall be reserved for each tribe. An instance of this kind has recently occurred, in which an extensive and valuable tract of country has been in this manner ceded to the Government. (A9:3:3)²¹

Grey went on to inform the colonial secretary that he would deal with the whole problem by strictly maintaining pre-emption and by modifying the thirteenth chapter of the royal instructions headed “On the Settlement of the Waste Lands of the Crown”. Grey proposed that the registration of Maori land be a gradual process, and that it be achieved through purchase:

I have therefore deemed it inexpedient to disturb the present tranquillity of the country by calling upon the natives generally to register their claims to land; but I have taken care, in as far as possible, to keep the land purchases of the Government so far in advance of the wants of the European settlers as to be able to purchase the lands required by the Government for a trifling consideration. What has then been done was, to extinguish absolutely the native title to the tract purchased, but to reserve an adequate portion for the future wants of the natives, which reserves were registered as the only admitted claims of the natives in that district, and they have been furnished with plans of these reserves, and with certified statements that they were reserved for their use, which documents are somewhat in the nature of a Crown title to the lands specified in them, are much esteemed by the natives, and accustom them to hold land under the Crown, which is an extremely desirable object to attain. This mode of proceeding also renders the labour of registration very trifling – secures the perfectly accurate registration of all such claims as are entered, and gives to the act of registration the appearance of a boon conferred by the Government, instead of clothing it with a compulsory character. I have also no doubt that, in process of time, when the Europeans require the more distant districts of the country, the natives will have wholly forgotten, and have abandoned many invalid claims to tracts of country which would now be urged. (A9:3:4)²²

As long as the Crown was able to purchase land in advance of settlement, then the prices paid would only need to be nominal:

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the real payment which they receive for their waste lands is not the sum given to them by the Government, but the security which is afforded, that themselves and their children shall for ever occupy the reserves assured to them, to which a great value is given by the vicinity of a dense European population. They are also gradually becoming aware that the Government spend all the money realized by the sale of lands in introducing Europeans into the country, or in the execution of public works, which give employment to the natives, and a value to their property, whilst the payment they receive for their land enables them to purchase stock and agricultural implements. (A9:3:4)²³

Grey's plan was ingenious. Nominal title would be recognised so that Maori, and the missionary and aboriginal protection lobbies would be kept happy. Nominal sums would be paid for this land so the exchequer would be satisfied. But the areas of land acquired to meet the needs of the Crown and settlers would be far from nominal. The whole test of the policy would be, could the Crown purchase lands from Maori in sufficient quantity? The timing of Grey's proposition is highly significant to the claim before us. In May 1848, H T Kemp had just been sent to the South Island to purchase from Ngai Tahu all their rights to land between the Wairau and Otakou purchases, on the basis of an agreement Grey had negotiated with a number of the tribe's rangatira the previous February. In 1847 Grey had negotiated with Ngati Toa a deed of purchase for very substantial areas of the northern South Island. On the basis of this purchase he was about to issue a Crown grant for a block which would eventually comprise much of Marlborough and a good deal of Nelson provinces. Although Grey had a tendency to overstate his control of the situation and to prophesy the assured success of his policies, in this case he can be seen to have had some cause for optimism.

5.3.9 The South Island was the ground on which these policies of extinguishing Maori title and defining reserves was tested. The Wairau and Kemp purchases were tendered by Grey to the Colonial Office as clear evidence that the messy business of extinguishing Maori title was once and for all under control. Following the Wairau purchase he reported confidently:

Every land claim but one, in the southward of the Colony, which is likely to occasion any future discussion or disturbance, has now been disposed of. (A8:I:202)²⁴

After the Kemp purchase had been negotiated but even before the reserves had been finalised he wrote to Earl Grey:

I think, therefore, that Her Majesty's Government may, for all practical purposes, regard all Native claims to land in the Middle Island as now conclusively set at rest, with the exception of the portion of the Island in the immediate neighbourhood of Foveaux Straits, and I do not apprehend that any difficulties will arise in respect to that portion of the country. (A8:I:208)²⁵

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Following the completion of the Murihiku purchase in August 1853, the Crown claimed title to almost all of the South Island, with the exception of the southern portion of Banks Peninsula including Akaroa Harbour, the Marlborough Sounds and parts of the area between Golden Bay and the mouth of the Buller River.

- 5.3.10 However Grey's confidence glossed over the serious deficiencies in these blanket tribal purchases. There were numerous protests by many of the tribes concerned that these early purchases had been incomplete, that legitimate rights had not been recognised, that the wrong people had received payment and that significant areas of land had not in fact been bought. We will be examining these complaints in detail as they apply to Ngai Tahu when we discuss the individual purchases. Until 1853 the Crown generally rejected these complaints, or offered some additional payments, as in the case of Ngai Tahu's rights to lands north of the northern boundary of Kemp's purchase. However, in 1853 the Crown's efforts to purchase land it acknowledged as remaining in Maori title in the South Island were being stalled by the major tribes involved. Ngai Tahu and Ngati Toa refused to enter into any further land sales with the Crown unless their rights were recognised to areas supposedly already purchased. Other tribes such as Rangitane, Ngati Tama, Te Atiawa and Ngati Apa had not had their rights recognised at all. Ngai Tahu had complained on numerous occasions since 1848 that their rights north of Kaiapoi pa had been ignored, and that Ngati Toa had been wrongly paid for this land. After having these grievances rejected for several years, Ngai Tahu made recognition of these rights in North Canterbury conditional on entering into negotiations for the sale of Akaroa (T1:271). For their part Ngati Toa refused to enter into any further sale agreement until rights to Arahura were recognised.
- 5.3.11 Between August 1853 and 1860, the whole question of Crown purchases was re-opened in the South Island. The Crown entered into several new purchase agreements. Many of these were particularly vague about boundaries. The terms of the "Te Waipounamu" deed is typical. Grey, who with Donald McLean negotiated the deed which was signed on 10 August 1853, aimed at extinguishing the rights of Maori on the island once and for all. Henceforth Maori would be confined to reserves:

Na, ko te paunga rawatanga tenei o a matou whenua katoa ki tera moutere, ka oti nei i a matou te tuku, te tino whakaae, me ona Rakau, me nga Roto, me nga Wai, me nga Kohatu, me nga mea katoa, o runga ranei o te whenua, o raro raro o te whenua, me nga aha noa iho o aua whenua ki a Wikitoria te Kuini o Ingarangi, a ake tonu atu. (A8:I:307)²⁶

Which was translated by Alexander Mackay as:

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Now this assuredly is the final transfer or sale of all our lands on the said Island, which we have hereby certainly and faithfully conveyed, with its trees, lakes, waters, stones, and all and everything either under or above the said land and all and everything connected with the said land, to Victoria the Queen of England, for ever and ever. (A8:I:307–308)²⁷

Despite this deed claiming to represent the interests of all the tribes in the island, including Ngati Toa, Ngati Awa (Te Atiawa), Ngati Koata, Ngati Rarua, Rangitane and Ngai Tahu, this was not the last but the first of a series of purchase agreements with these tribes. Ngai Tahu were not in fact even a party to the deed.

In 1854 a further deed was entered into with Te Atiawa (2 March). On 10 November 1855 Ngati Rarua and Ngati Tama signed a deed ceding all but specified lands in the South Island to the Crown. On 1 February 1856 Rangitane signed a similar deed. During 1856 several deeds were signed with Te Atiawa, Ngati Rahiri, Ngati Kuia and Ngati Koata. In this year also the last Ngai Tahu sale on Banks Peninsula was completed. In 1857 the Crown negotiated the North Canterbury purchase with Ngai Tahu and in addition, Matiaha Tiramorehu received £200 for his rights north of Kaiapoi. In 1859 the Kaikoura deed was signed by Ngati Kuri of Ngai Tahu and finally, in 1860, the Crown purchased Arahura from Ngai Tahu (A8:I:2–5).²⁸

There was a sketch plan with the North Canterbury deed, and clear maps accompanied the deeds negotiated with James Mackay Jr for Kaikoura and Arahura. For the most part however, there was little attempt to determine precise boundaries to the non-Ngai Tahu deeds. It would appear that the Crown wanted to claim that all rights were extinguished wherever they may be, and the sellers may have in turn seen these deeds as some form of recognition of rights in areas where their ownership could have been highly contentious. We are reminded of Grey's advice to Earl Grey in 1848 that waste lands distant from the usual residence of their Maori claimants and subject to competing claims could be acquired cheaply by simply recognising Maori ownership. Eventually, when the lands were occupied by settlers, so the argument ran, Maori would forget all about them.

- 5.3.12 The last of the Ngai Tahu purchases, that of Rakiura (Stewart Island), took place in 1864 and stands out on its own. This was the final purchase of a large block of Ngai Tahu land. After this the tribe would be confined on the various reserves which had been imposed or agreed to during the process of the sale negotiations. Despite this purchase taking place with a good deal more attention to the needs of the Ngai Tahu sellers than had many of the previous purchases, only four years after the deed was signed the Crown was obliged to send a further commissioner to allocate additional reserves. From 1864 on, Ngai Tahu would be involved in a series of campaigns to

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have their claims to further lands and their interpretation of the terms of these purchase agreements acknowledged.

5.4. **The New Zealand Company and the Crown**

5.4.1 Several of the Ngai Tahu purchases were a direct consequence of Edward Gibbon Wakefield's New Zealand Company scheme to colonise New Zealand and turn the country into a prosperous version of rural English society. The Otakou purchase in 1844 led to the settlement of over half a million acres by the Scottish settlers of the Otago Association. The Kemp purchase became the location for the proposed Canterbury Association settlement, following the failure of the Crown to purchase land in the Wairarapa, the association's first choice for Canterbury. The Port Cooper and Port Levy purchases were also to provide land for company settlers and investors. Although the North Canterbury, Arahura, Port Cooper, Port Levy, Akaroa and Kaikoura purchases took place after the company's demise, they all in some way resulted from earlier acquisitions for one or other of the Wakefield settlements.

Ngai Tahu land provided the laboratory for Wakefield's experiments in colonisation. Not only was Ngai Tahu land acquired so that these settlements could take place, but Wakefield's ideas were influential in the policy adopted by the Crown in dealing with the Ngai Tahu sellers.

The idea of colonising New Zealand for profit was not a new one. In 1825 an expedition was sent to New Zealand under Captain James Herd to explore the potential for colonisation as a commercial venture. Rapid industrialisation and population growth were seen by many in Britain as dangerous to social order. Colonisation was promoted as a solution to the problems of overcrowding, population explosion and the boom and bust cycles which marked the British economy from the 1820s to the 1840s. Social and economic uncertainty were accompanied by intellectual and political ferment, with any number of radical philosophers offering their panacea for society's ills. It was during this period that the Chartist movement demanded universal male suffrage and that the ideas of Marx and Engels on economics and history were developed. Edward Gibbon Wakefield entered this debate about what was called the "condition of England". Wakefield was an entrepreneur who wove around the idea of systematic colonisation a vision of an idealised rural England, recreated in a new country and better than the original.

5.4.2 Wakefield's views were first expressed in what were described as *Letters from Sydney*. Although supposedly written by a colonist with first hand experience of the situation in New South Wales, they were

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actually written while Wakefield was in Newgate prison serving a three year sentence for abducting a fifteen year old heiress. The problem with colonies, according to Wakefield, was that land could be obtained too cheaply. This destroyed the social order of things because labourers, not capitalists, gained access to land. Low land prices were a disincentive to investment and without investment the colony was starved of capital, immigration stagnated and the colony languished. Wakefield's solution was simple. Control colonisation through a single association or company. Keep the price of land high to European investors. Use the proceeds from these sales to encourage the migration of labourers and for public works so that the colony would develop. The price of land would increase as development occurred. The original purchasers would make a tidy profit, and profits would promise even further investment.

The other side of the equation was that land would have to be acquired cheaply from the indigenous proprietors. The cost of the scheme in New Zealand was to be borne by the original Maori owners. But Wakefield saw no injustice in this. Sharing the commonly held European view that only European labour and European capital could give value to land, he saw Maori title as without commercial worth. He argued that Maori interests could be protected by ensuring that 10 per cent of all lands purchased were reserved for Maori. This land would enable Maori chiefs and their immediate families to become part of the gentry classes as they became Europeanised and shared in the increasing value of their estates. It was assumed that the rest of the tribe would become landless labourers like everyone else.

Wakefield and his supporters' self confidence and zeal were as high as their knowledge of Maori and New Zealand was low. One historian described the hyperbole with which the venture was floated:

Like the modern advertising agent, Wakefield and John Ward, the first Secretary of the New Zealand Company, were masters of the gentle art of the puff direct and the puff oblique. Fine phrases flowed smoothly and abundantly from their pens, and although neither of them had ever visited New Zealand, this acted only as a further stimulus to their imagination. 'There is probably no place in the world,' declared Ward, 'which presents a more eligible field for the exertion of British enterprise New Zealand is fitted by nature for the production in abundance of those three articles, which have always been the especial signs of plenty, wealth and luxury of a country—corn, wine and oil. The vine has already been found to thrive luxuriantly in the islands, and the possibility of its successful cultivation, both for home consumption and commerce, admits of no doubt . . . and there is good reason to believe that the wines, not only of Italy, but of Spain, Portugal and the south of France, might be brought to as great perfection as in those countries. Finally, the latitude and climate are suitable to the olive, the plant, *par*

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excellence, of the sweet south, and the ancient emblem not less of plenty, than of peace.' Thus argument passed into poetry; reason into faith.²⁹

Maori were presented in these arguments as a noble race, industrious, peaceful and above all, ready to throw off their own culture and adopt that of the European almost as soon as the first immigrants arrived on their shores.

Wakefield's ideas were taken up by many influential parliamentarians, and by a number of associations promoting emigration and colonisation. In 1832 some of these theorists turned their attention to the possibility of a colony in South Australia and after various negotiations with government, an Act was passed in 1834, which incorporated Wakefield's ideas about emigration based on a land fund. Wakefield was not involved in the implementation of the scheme and was critical of the compromises being made with his theoretical principles. His attention turned to New Zealand.

- 5.4.3 Between 1837 and 1839 three organisations were established to promote colonisation in New Zealand; the New Zealand Association, the New Zealand Colonisation Company and the New Zealand Land Company. By this stage intervention by the British government was becoming inevitable. The high enthusiasm of prospective colonists and investors became channelled into a race to establish a stake in New Zealand before the country became a British colony. On 12 May 1839, the *Tory* left England to purchase land in New Zealand. In September 1839, before any word could have reached England about the success of the mission, four boat loads of colonists were farewelled from England, many of the emigrants firm in the belief that they possessed a secure title to lands in New Zealand.

In attempting to turn the New Zealand Company vision into reality William Wakefield, Edward's brother, entered into a number of deeds with Maori from Taranaki to Cook Strait in late 1839. These deeds made provision either for a tenths reservation or for the reservation of sufficient lands for Maori endowment. When Colonel Wakefield was sent by the company to purchase land in New Zealand before the Crown arrived he took the following instructions:

you will take care to mention in every *booka-booka*, or contract for land, that a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe . . . you will readily explain that, after English emigration and settlement, a tenth of the land will be far more valuable than the whole was before. And you must endeavour to point out, as is the fact, that the intention of the Company is not to make reserves for the native owners in large blocks, as has been the common practice as to Indian reserves in North America, whereby settlement is impeded, and the savages are encouraged to continue savage, living apart

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from the civilized community—but in the same way, in the same allotments, and to the same effect, as if the reserved lands had been purchased from the Company on behalf of the natives. (C2:4:20–21)³⁰

The *Tory* arrived at Te Whanganui a Tara (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased twenty million acres of land on both sides of Cook Strait and at Taranaki. Although tenths were not specifically identified in all these deeds, there can be little doubt from Wakefield's instructions that this was what was intended.

There was no intention that these reserved lands would be held directly by Maori, at least not in the foreseeable future. The sections were to be selected by ballot in the same way as all the other sections in the new settlements. An agent of the company would collect every tenth (or every eleventh) section balloted and this was to be held by the company in trust for the Maori sellers. Just who would manage this trust became a matter of debate. Under an agreement made between the Crown and the company in late 1840, the Crown took over responsibility for providing reserves for Maori. We now consider this agreement in the light of the relationship between the Crown and the New Zealand Company.

- 5.4.4 The Colonial Office was not impressed with the company's frantic rush to establish a foothold in New Zealand before the Crown arrived and it remained hostile to the plans of the New Zealand Company to colonise New Zealand as a private capitalist venture. Hobson was told that the governor of New South Wales would be instructed to have the claims of private purchasers of Maori land investigated by a commission to determine:

what are the lands in New Zealand held by British subjects under grants from the Natives, how far such grants were lawfully acquired and ought to be respected, and what may have been the price or other valuable considerations given for them. The commissioners will make their report to the Governor, and it will then be decided by him how far the claimants, or any of them, may be entitled to confirmatory grants from the Crown, and on what considerations such confirmations ought to be made. (A8:I:14–15)³¹

On 30 January 1840 Hobson issued a proclamation declaring that Her Majesty did not:

deem it expedient to recognise as valid any titles to land in New Zealand which are not derived from or confirmed by Her Majesty. (A8:I:23)³²

This was followed up by the appointment of land claims commissioners with wide powers to investigate the nature of pre-Treaty purchases. If these purchases were found to be valid, the commissioners were able to recommend that Crown grants be issued up to a maximum of 2560 acres.

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5.4.5 The New Zealand Company's claims were similar to hundreds of other European claims. But because the company's claims involved hundreds of settlers already in the country, it was essential that the Crown and the company come to some special arrangement. The British government was forced to acknowledge the company and in late 1840 it negotiated an agreement which gave Crown sanction to the company's colonisation scheme (C2:4:1-4).³³ This led the way for the company to receive a Royal charter. The agreement included provisions for:

- a government-appointed accountant (James Pennington) to examine the company's total expenditure on colonisation;
- the granting to the company four acres for every pound spent; and
- the lands to be granted in the parts of the colony already settled with 160,000 acres available for the company around Port Nicholson and New Plymouth.

A lead was taken from the Aborigines Protection Society, which maintained that Maori rights could be protected by the kinds of safeguards promised by Wakefield under clause 13 of the agreement. The Crown assumed responsibility for implementing the Maori reservations intended in the original company deeds of purchase. It also provided for:

the Government reserving to themselves, *in respect of all other lands*, to make such arrangements as to them shall seem just and expedient for the benefit of the natives. (C2:4:3)³⁴ (emphasis added)

On 22 April 1841, after representations from the company, Russell allowed the company to exchange their grants for land outside the original deed boundaries, but subject to existing provisions for Maori reserves and not for lands in the vicinity of Auckland.

5.4.6 In entering this agreement with the company, Russell assumed that their deeds of purchase had in fact extinguished title to substantial areas of the colony. This was soon found not to be the case. William Spain, sent to investigate the purchases, found all the company purchases around Cook Strait to be seriously flawed. The tribes involved informed Spain that they had not agreed to sell all their rights to the lands involved and they refused to shift from their traditional places of occupation onto the company tenths set aside for them. The issue became serious, since the lands most desired by the settlers at Pipitea and Te Aro were occupied by Te Atiawa, who refused to abandon them. Professor Alan Ward described the situation in Wellington as it applied to these tenths reserves:

Notwithstanding the deeds, which purported to convey some 20 million acres of land to the Company, the resident Maori clearly had no intention

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of handing over both ownership and control of this vast territory and putting themselves at the disposition of the Company's officers. Whatever they had intended (those who in fact marked deeds) they did not mean that. However well-intended the 'tenths' scheme, the Wellington Maori in particular, declined to vacate their pa and their cultivations within the new town boundaries in favour of the subdivisions that were selected on their behalf upon some of which they were supposed to reside. (T1:75)

By 1842, then, it was clear that the company had not extinguished Maori title to the lands it had sold to settlers and that Maori were refusing to abandon their pa and cultivations for tenths which they did not directly own or control.

- 5.4.7 The uncertainty continued while the Crown and the company argued over who would be responsible for purchasing the lands to be granted to the company under the Pennington award. Finally on 12 May 1843, the company's offer to provide funds to buy further land from Maori was accepted (P3:180).³⁵ Meanwhile the impatience of the Wellington and Nelson settlers increased. With the question of the company's rights to land at Wairau still being considered by Spain, the settlers attempted to occupy the valley. In an armed and violent confrontation on 17 June 1843, four Maori and twenty-two Europeans were killed. The dead included Te Rongo, the wife of Te Rangihaeata, and Captain Arthur Wakefield, a brother of Edward Gibbon Wakefield.³⁶ Governor FitzRoy arrived in New Zealand at the end of 1843 and was forced to consider the situation on his first visit to Wellington in February 1844. He acknowledged the injustice of the settlers' attempt to occupy the lands still being considered by Spain, and earned the ire of many Europeans by taking a conciliatory line with the tribes involved. However he had little alternative: his powers were limited, his lines of communication difficult and he had few troops at his disposal to enforce his will against Ngati Toa and Te Atiawa, had he decided such a course was justified.

The Wairau affray further heightened uncertainty about the state of affairs in New Zealand. A fortnight after the confrontation, George Rennie's scheme to establish a Scottish colony was accepted by the New Zealand Company in Britain. The scheme was eventually abandoned when 11 months later news of the Wairau reached Scotland and startled investors and prospective colonists. It was not known in New Zealand until mid-September that the settlers were not coming. By this time the company had completed its purchase of lands at Otakou.

Armed with greatly increased resources in money and troops, Grey was able to restore some optimism to the company's British investors and prospective immigrants. In 1847, the Otago Association was able

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to send immigrants to take up the land purchased in 1844. In the same year plans were advanced to establish a high church, Anglican settlement to be called Canterbury. Grey's apparent success in dealing with Ngati Toa and Ngai Tahu in 1847 and 1848 was a major factor in his ability to sustain this confidence.

5.5. **The Protectors of Aborigines**

5.5.1 Before 1839 there had been little consideration by the Colonial Office of just how Maori interests would be protected should New Zealand become a British colony. Normanby's instructions made protection of Maori interests one of the chief justifications for British intervention and also one of the prime responsibilities of a new administration. These instructions included the appointment of a special protector of aborigines. The protector's role was to include watching "over the interests of the aborigines" as Hobson's representative in negotiating purchases of land from Maori by "fair and equal contracts". The protector was also to ensure that Maori did not alienate lands which would cause them "stress or serious inconvenience" (A8:1:15).³⁷

5.5.2 George Clarke was appointed the first protector on 6 April 1840. A missionary who had been in the country since 1824, Clarke was fluent in Maori, knowledgeable of tribal custom and well qualified to take on the position. Initially, as Normanby's instructions made clear, he was expected to be the official who bought land from Maori while promoting their amelioration. This dual role was an inherently contradictory one. The requirement to maximise profits from the resale of land created serious difficulties for the protector. It was impossible for him to offer Maori a good price, although he could ensure that sales were otherwise fairly conducted and that sellers did not part with land that they needed. There was a danger that it would undermine the protector's more important tasks if he continued to be an entrepreneur in land dealings, albeit for the Crown. Clarke requested to be relieved of this duty in 1842 and this was accepted.

As it turned out, one of the most important roles of the Protectorate was defusing potentially disruptive situations because the governor had few means to deal with clashes between the races. During the Hobson and FitzRoy period the protectors were an essential arm of government. The protectors' advocacy of Maori interests however, earned them the approbrium of many of the company settlers. In the Spain inquiry, George Clarke Jr, sub-protector and son of the chief protector, actively assisted Maori to provide evidence against the company's claims. It was not a role which endeared him to settlers holding company titles. Although a continuing financial crisis

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prevented money being available for land purchases, the failure of the Crown to acquire land for settlement was often blamed on the protectors. When tensions in the far north and in Wellington led to war in 1843, this too was seen by many settlers as a consequence of the protectors' actions and those of the missionary families who supported them.

FitzRoy used George Clarke Jr to look after the interests of Ngai Tahu during the Otakou negotiations and chose John Jermyn Symonds, previously a sub-protector, to supervise the company purchase on behalf of the Crown. In the wake of the Wairau disaster the protection of Maori interests and keeping the peace were closely allied.

5.5.3 Prior to 1848 the Crown's principal relationship with Ngai Tahu had been to some degree protective in nature. In 1843, the land claims commission held an inquiry into the pre-1840 purchases from Ngai Tahu. The tensions created by the Crown leading the market for land sales were little in evidence. In the years immediately following annexation, land was not bought on a large scale anywhere in New Zealand by the Crown itself. Shortage of resources made it impossible for governors before Grey to embark on ambitious land purchase programmes or to attempt to extend control over Maori districts. The Imperial government, anxious to save British taxpayers' money, provided the barest elements of a civil administration and virtually no military force. In the circumstances, most tribes, including Ngai Tahu, continued to be regarded as outside the scope of British law. The emphasis was on protection from the adverse effects of encroaching European colonization, rather than on government. In theory, the policy was to protect Maori society in the observance of its own customs while it was gradually adjusting to the presence of Europeans. Hobson's instructions here indicated that there would be occasions when intervention would be necessary, for example for the suppression of cannibalism, infanticide and tribal warfare, for which the Crown would rely on moral influence. By not involving the use of an army on the colonial frontier, this policy was intended both to save money and to satisfy the humanitarian ideal of peaceful coexistence of aboriginal and settler societies.

5.5.4 Despite the essential role the Protectorate had played in both Hobson and FitzRoy's administrations, Grey decided to abolish it only a few months after his arrival. Explaining his actions to Lord Stanley, Grey made a series of accusations against the department and against George Clarke Sr:

when I arrived here, I found that a department termed that of the Protector of Aborigines, was maintained at an annual cost of about £2500 of which sum about £1000 was appropriated to the salaries and allow-

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ances of Mr Clarke and two of his sons, and that not a single hospital, school or institution of any kind supported by the Government was in operation for the benefit of the Natives.

I found moreover, the Natives were generally utterly wanting in all confidence in the Government, insomuch as, that several of the Native chiefs refused positively to trust themselves on board a British man of war and visit me . . . A rebellion was raging in the North, the Native race were paramount in the South. I found that Mr Clarke and his sons were equally disliked by the Natives and the settlers (X6:appendix:37)³⁸

Grey determined that he would personally control the Crown's dealings with Maori and argued that the sums spent on the Protectorate would be much better spent on schools and hospitals and other means for bringing Maori the fruits of "civilisation". It was quite true that the cost of the Protectorate had been considerable and that little real benefit had been provided Maori by the creation of institutions for their use. However the Protectorate had supervised land transactions and since 1842 had been able to provide some protection of Maori interests by not being directly responsible for purchasing land. In abolishing the Protectorate at a time when he was about to embark on a massive land purchase programme, Grey recombined the role of land purchase officer with that of the protection of Maori interests. In all the Ngai Tahu purchases after Otakou, Ngai Tahu had no authority to advise them other than the purchasing officer.

5.6. **Endowments for Maori Purposes**

5.6.1 When the Colonial Office had to turn its attention to how it would run the new colony, it found much in the theory of the Wakefield scheme to recommend it. The prospect of establishing a fund to make the government and public works of the colony self-sufficient and therefore not a drain on the Imperial coffers was particularly attractive. Normanby's instructions to Hobson on buying land from the Maori cheap and then selling it at a very substantial profit have already been discussed. We have seen how the financing of the colony was to be firmly fixed into the policy of pre-emption, and how Sir George Grey saw pre-emption as the means of providing the Crown with sufficient land for colonisation.

The British government believed that not only were Maori entitled to retain the lands they required for their economic needs, both present and future, but that additional measures needed to be taken to ensure their future prosperity and progress. The company scheme, with its reservations held by the company, or later by the Crown, provided one possibility. During the 1840s, as disputes between Maori and the company over the Wellington purchases were worked through, there evolved a three-fold classification of land required by Maori. The first was pa and cultivations. Maori rights to their villages and their actual

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cultivations after the sale of lands to the Crown were clearly acknowledged by the mid-1840s. The next class of land to be considered was land for additional cultivation. As Professor Ward demonstrated to the tribunal, the Crown realised that larger areas of land would be required to allow for future cultivation and for increased agricultural activity when hunting and gathering declined as a part of the Maori economy (T1:166–167). Finally it was also recognised that additional land could be required as an endowment. These lands would not be directly controlled by Maori, but income from them would be used for Maori purposes. These concepts of Maori needs and endowment were, of course, to apply to lands which Maori were prepared to sell.

The last of these categories, the provision of endowment lands, became somewhat confused by a parallel provision which provided for a fund to be established from the sale of Crown lands for Maori purposes. On 28 January 1841 Lord Russell directed that a sum of not more than 20 per cent and not less than 15 per cent of the proceeds of the sale of lands purchased from Maori be placed in a fund for Maori purposes. These purposes included the costs of the Protectorate Department and the measures recommended by the protector and approved by the governor and his Executive Council for “promoting the health, civilisation, education and spiritual care of the natives” (X6:appendix:1–2).³⁹ Any funds not immediately required were to be invested. The money received from the New Zealand Company reserves was separately administered and trustees were eventually appointed to administer proceeds from these reserves. In this case, however, no actual funds were made available to the trustees.

- 5.6.2 Although administrative measures were taken to implement these instructions, in practice they fell far short of what was intended in providing for Maori needs. One of the Crown’s historians, Mr David Armstrong, examined these provisions in some detail (X6:3–5). Mr Armstrong agreed with Professor Ward that this fund was only of limited value. The cost of the Protectorate took up a good deal of the money, and the Crown purchased and on-sold so little land that the account was starved of funds. Only in one year following sales of Auckland lands was a considerable sum made available. In the period of severe financial crisis during the early 1840s the fund was severely short-changed.

Following the abolition of the Protectorate more money was spent on the provision of educational and health facilities. Professor Ward considered that Grey also used the fund for immediate political expediencies:

Grey also paid salaries to Maori assessors attached to the Resident Magistrates Courts, and gave additional sums for the building of flour

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mills, provision of agricultural implements etc. Some of this was useful but it was increasingly condemned by the settlers, as a 'flour and sugar policy' which temporarily enhanced Grey's mana but left a dangerous void in Maori involvement on a regular basis in the colony's affairs. (T1: 401)

The situation was further complicated by the separate provision made for the New Zealand Company. The government used funds from land sales for its overall Maori programme. Until specific provisions were provided in some deeds in the 1850s for a percentage of the returns from Crown sales to be allocated to the sellers, the land fund was used for all Maori. However those tribes included in the company scheme were to be provided for from their own reserves. In granting control over land to the New Zealand Company, the Crown was unable to use a 15 or 20 per cent of company sale proceeds for Maori purposes.

Moves to provide settlers with their own representative government further threatened the provision of Maori services from ordinary revenue. The legislatures of New Ulster and New Munster were followed by provincial and national legislatures with the coming into effect of the 1852 constitution. These settler parliaments were loath to spend money on Maori purposes. Although some Maori were eligible to vote for these assemblies, the vast majority were disenfranchised. Grey was successful in having a £7000 fund established in the civil list although, as Mr Armstrong pointed out, Grey continued to draw as he saw fit on the land fund.

In considering the Ngai Tahu purchases, we will have to determine what obligation there was, if any, on the part of the Crown to provide either considerable additional reserves as an endowment for the tribe and or an endowment fund for the provision of such amenities as schools and hospitals.

5.7. **Maori and Pakeha Understandings of Land Sales in the 1840s**

- 5.7.1 Both parties to the deeds which were signed between Ngai Tahu and the Crown in the 1840s and 1850s had different assumptions about what these agreements involved. Professor Ward discussed a number of concepts shared by settlers and officials in their dealings with Maori. He identified a degree of "arrogance and condescension and aggressiveness" among many of the Europeans due to an assumption of cultural superiority (T1:5). However he did note that there could also be sense of responsibility and obligation among the more principled Crown agents. In assessing Maori needs Europeans were often convinced that the race was doomed to extinction. This view was at times shared by Maori themselves. Tuhawaiki commented that his

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tribe was but a “poor remnant now, and the Pakeha would soon see us all die out” (R35(a):33). Officials who believed that Ngai Tahu numbers would inevitably decline were less likely to ensure adequate reserves for the future needs of the tribe. However as we shall see, evidence presented to the tribunal shows that Ngai Tahu’s numbers were beginning to improve, even as the later sales were being negotiated.

- 5.7.2 A sense of cultural superiority led most Europeans to the view that only rapid and complete amalgamation with their own culture – assimilation – would preserve Maori at all. Colonial secretaries urged governors to promote the skills of civilisation and demanded that Maori custom most offensive to European sensibilities be suppressed. Although Maori traditional practices were to be respected and tolerated, it was always assumed that they would be rapidly replaced by European customs. Evidence of a desire to use European technology and culture was often misinterpreted by Europeans as a displacement of things Maori. Tribalism was seen as one of the worst evils of Maori life and strenuous efforts were made to replace the communal rights of the tribe with the individual rights of the chief. Communal reserves were discouraged and Maori were expected to rise by dint of their individual effort. Professor Ward commented that:

there was a deliberate determination on the part of some officials . . . to keep them [reserves] small so that Ngai Tahu should not persist with a traditional lifestyle but be obliged to leave reserves and engage with the European order. Capital and training for the purpose was not provided by government because nineteenth century people believed, not in welfare, but in an ethic of individual competition and self-reliance. It should be noted of course that this attitude was applicable to poor settlers as well as Maori – it was not discriminating in that sense. But members of ruling groups often conveniently overlooked the fact that they had not risen entirely on their own merits but had inherited capital or had acquired wealthy or powerful patrons – a usual way to advancement in those days, which even some Maori profited from. (T1:5–6)

Professor Ward went on to comment that European confidence in amalgamation could have been an encouragement for intermarriage with Europeans. By the 1840s Ngai Tahu had themselves assimilated many Pakeha into the tribal community.

- 5.7.3 Ngai Tahu shared some of the concerns of Europeans, but their perceptions and objectives in dealing with the Crown over land were essentially Maori. The tribe clearly wanted to engage in the new order and profit from opportunities to trade and acquire European goods. The pigs, corn, whaleboats, muskets, blankets and military uniforms were eagerly sought and paid for in the commodities easily provided by Ngai Tahu—fish, flax, timber and labour. Ngai Tahu’s rangatira coordinated the tribal effort. Ngai Tahu also saw amalgamation in

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quite different terms from Europeans. The Europeans who married into the tribe provided the means of strengthening its resources. While for Ngai Tahu the signing of the Treaty roughly coincided with the achievement of peace with the northern tribes, a primary concern was still the desire to enhance tribal mana. In the 1840s this was still seen as best achieved by close contact with the new settlers, through the sale of land if necessary. Two decades later, however, the consequences of settlement and the marginalisation of the tribe which resulted left Ngai Tahu much less certain of the value of land sales. By that time it was too late to turn back the clock.

The fact that both sides to the purchase agreements had different agendas and different perceptions of the agreements they were involved in, leads us to consider how well Maori understood the European concepts of alienation. These concepts were an essential part of the signing of sale deeds. As we have already seen, Ngai Tahu had signed numerous so-called deeds of sale prior to 1844. The vast majority of these deeds, when brought before the land claims commissioners, were found to be invalid. Despite Maori signatures, the wording of the deeds often did not reflect the Maori understanding of these agreements. Misunderstandings about the nature of sale may well have flowed directly from quite different cultural conceptions of the nature of ownership. Professor Ward commented that:

When the British arrived in New Zealand and tried to apply their property concepts they found they did not fit the Polynesian realities. And indeed they do not. There is a fundamental disjunction between the two systems, one derived from the state and centralised law and viewing land largely (though not wholly) as a commodity; the other based on a complex system of kinship, with many different kinds of association with the land, including spiritual. (T1:8–9)

With large cultural differences between Maori and settler and with the new immigrants clamouring for land, there was an enormous potential for cultural misunderstanding. In such an environment, Maori preparedness to welcome new technology and the advantages of economic association with Europeans had the potential to leave them the victims of agreements which came to be interpreted entirely from the European side.

5.8. **Conclusion**

5.8.1 The Treaty had set the stage for the land purchases, providing a guarantee of protection in Ngai Tahu's dealings with the Crown over land. Upon this basis, Ngai Tahu willingly entered into the sale process. In doing so they were left in a vulnerable negotiating position should the Crown ignore the assurances contained in the Treaty. The pre-emption provision prevented them from finding a

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market price for their lands even if it protected them from exploitation by private individuals. The Native Land Purchasing Ordinance 1846 implemented pre-emption, but also made it illegal to lease Maori land. By this measure Ngai Tahu were prevented from gaining an income from leasing their land to private individuals while retaining title to such lands. Up until 1846 this practice had been common and most Europeans on Ngai Tahu land paid some kind of rent. After 1846 the practice continued informally, but as time went on European officials were in a better position to suppress private leasing. Ngai Tahu, then, could only sell, and they could only sell to the Crown.

Unlike many North Island tribes, Ngai Tahu were unable to rely on the threat of force to assert their position. Weakened by civil war, invasion and imported diseases, they had only a limited ability to dictate terms in any negotiation. Declining economic fortunes were also a consideration. Whaling, which had been a source of considerable wealth prior to 1840, was on the decline and many of the tribe were in situations of considerable poverty. Although Ngai Tahu still had its traditional resources, new commodities had created new dependencies. If anything it would appear that from 1840 the number of Europeans coming to trade with the tribe was actually falling.

- 5.8.2 Given these circumstances the Treaty provided an essential protection in Ngai Tahu's dealings with the Crown over land. Following the abolition of the Protectorate Department, which had overseen the Otakou negotiation, Ngai Tahu had to rely on the ability and goodwill of land purchase officers to protect their interests in negotiations. With the tribe unable to find alternative buyers, the Crown was under a strong obligation to deal with the utmost good faith in such matters as the quantity of land purchased and the price paid. Adequate reference to the provisions of the Treaty, particularly the requirement to protect Ngai Tahu's rangatiratanga, could have ensured that Ngai Tahu's willingness to sell land was not allowed to compromise their future as a tribe. Such a concern could have prevented the inevitable cultural misunderstandings which accompanied these negotiations from seriously disadvantaging Ngai Tahu. Given the prevailing European assumptions about land values and ownership, the Treaty was one of the only things Ngai Tahu could rely on to ensure that a Maori perspective of the agreement was given adequate weight. In coming to a conclusion over whether the Crown did take into account Treaty principles we will have to turn to the individual purchases.

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Chapter 6

Otakou

6.1. Introduction

On 31 July 1844 “the chiefs and men of the Ngaitahu tribe” (“Ko matou ko nga rangatira me nga tangata o Ngaitahu”) sold over 400,000 acres of land at Otakou. This included the present site of Dunedin. A deed of sale was signed by 21 rangatira. They were the principal men from Otakou and included Tuhawaiki, Taiaroa and Karetai. The purchaser was “William Wakefield, the Principal Agent of the New Zealand Company, of London, on behalf of the Directors of the said

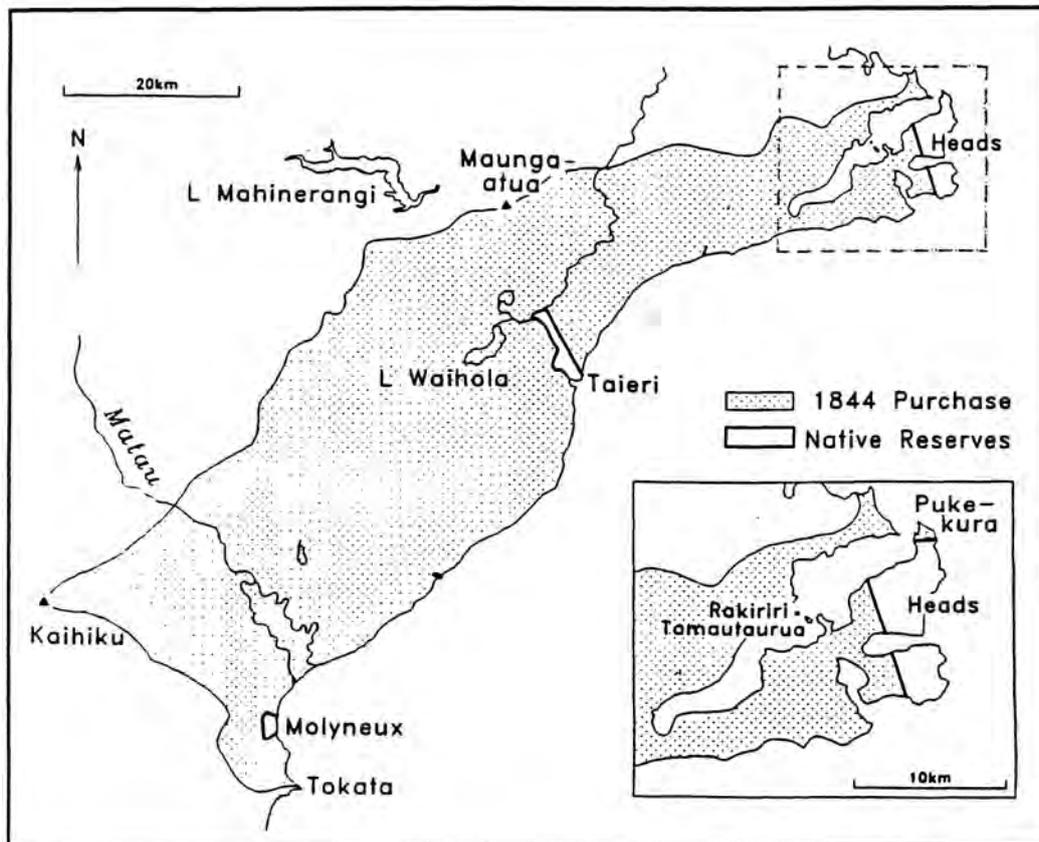


Figure 6.1: The Otakou purchase as defined by DOSLI and estimated at 533,700 acres, showing the reserves at the Otakou Heads, Taieri and Molyneux (O45)

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Company". The price was £2400. No acreage was mentioned in the deed but the land sold fell within certain stated natural boundaries. Although at the time the area was estimated at 400,000 acres, the Department of Survey and Land Information (DOSLI) have indicated to the tribunal that the block may have been as large as 533,600 acres. Ngai Tahu excepted from the sale four separate parcels of land, the boundaries of which were also recorded in the deed. Before the deed was signed representatives of the Ngai Tahu vendors, the New Zealand Company and the Crown traversed the boundaries of the land being purchased and the land being withheld from sale.

6.2. **Statement of Grievances**

The claimants say that during the negotiations which led to the sale of the Otakou block the Ngai Tahu chiefs were given to understand, and expected, that they would be granted special reserves, commonly known as tenths – that is, one-tenth of all the land sold. They have, at the hearing before us, made the following five specific grievances concerning this purchase:

1. The Protector, Symonds, failed to discharge his responsibilities at the time of the negotiation and afterwards.
2. The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate.
3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.
4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.
5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation (W6).

The Crown's failure to make provision for tenths is the principal grievance in respect of this purchase. At the heart of the claimants' case is the conviction that Ngai Tahu were either told directly that they would get tenths, or were, at the very least, led to believe that this would occur.

6.3. **Background to the Purchase**

The New Zealand Company begins colonisation

- 6.3.1 The Otakou block was bought by Colonel William Wakefield on behalf of the New Zealand Company. We will later show how it came about that the New Zealand Company and not the Crown, exercising its right of pre-emption, was the purchaser. The New Zealand Company and its predecessors had experienced a troubled relationship with the Imperial government. In May 1839 it dispatched its ship the *Tory*, with Colonel William Wakefield in charge of an expedition to

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purchase land from Maori in New Zealand. This was to be done as quickly as possible before the Crown intervened. The Colonial Office refused to approve the venture and warned that no pledge could be given that titles to land purchased from the Maori would be recognised.¹

The *Tory* arrived at Port Nicholson (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased about 20 million acres of land on both sides of Cook Strait and at Taranaki. The first New Zealand Company settlers arrived at Port Nicholson in January 1840. Soon after, on 6 February 1840, Hobson obtained the signatures of northern chiefs to the Treaty of Waitangi. Article 2 gave the Crown the sole right to purchase lands from Maori, that is, the right of pre-emption. Even before the Treaty was signed, Hobson, on instructions from Lord Normanby, had issued a proclamation (on 30 January 1840) that the Queen would only acknowledge titles to land derived from the Crown. A commission would be appointed before which all purchasers would have to prove their claims. A Land Claims Act of 1840 passed by the New South Wales government, which for some time had jurisdiction over New Zealand, provided that no grant was to be recommended by the commissioners for more than 2560 acres unless the governor specially authorised it. This provision was re-enacted by the New Zealand government in 1841. William Spain was appointed by the British government as commissioner on 20 June 1841. He arrived in New Zealand at the end of that year to start work.

6.3.2 Fortunately for the New Zealand Company their relationship with the colonial office in London, which had been seriously ruptured by the dispatch of the *Tory*, was restored by Lord Normanby's successor as colonial secretary, Lord John Russell. In October 1840 Russell decided to reverse the policy of his predecessors and to recognise the company as an instrument of government in the colonisation of New Zealand. An agreement between the British government and the company in November 1840 was formally incorporated on 12 February 1841.² It will shortly be necessary for us to examine some parts of the agreement carefully. In the meantime it should be noted that under the agreement:

- a government-appointed accountant, James Pennington, was to ascertain how much the company had spent on colonisation in New Zealand. This included the purchase of land, sending emigrants to New Zealand, the provision of supplies and so on;
- the company would be entitled to a Crown grant of four acres for every pound spent on colonisation as determined by Pennington;

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- the lands to be assigned to the company were to be in those parts of the colony at which their settlements had been established. The first 160,000 acres were to be selected in the Port Nicholson and New Plymouth localities; and
- in return the company was to surrender its claims to most of the 20 million acres of its pre-annexation “purchases” (C2:4:1–4)³.

6.3.3 Unfortunately for the New Zealand Company, Commissioner Spain proved to be a thorough investigator. The company’s expectation that he would confirm their extensive “purchases” proved illusory. Their strenuous objections, made to the Colonial Office in November and December 1842, met with an unsympathetic response from Lord Stanley (C2:4:5–7).⁴ As a result the directors of the company in January 1843, concerned at the difficulties of obtaining a conclusive title, announced the cessation of land sales and a drastic retrenchment of their activities.⁵ For a time the company was buoyed up by Lord Stanley agreeing in May 1843 that the governor should be instructed to grant it a conditional title to lands already selected by its agents. The company did not realise until early in 1844 that it was still obliged to show that its purchases were valid.

Meanwhile, in New Zealand, Spain recognised that it was impracticable to return certain disputed lands to Maori claimants at Port Nicholson. Wakefield offered to pay compensation but agreement could not be reached on the amount (C1:12).⁶ It was not to be settled until FitzRoy’s arrival in Wellington early in 1844.

Rennie’s “New Edinburgh” scheme

6.3.4 A Scotsman, George Rennie, devised a scheme for a new settlement of 100,600 acres on the east coast of the South Island. He put his proposals before the New Zealand Company, and on 12 August 1842 the directors expressed support for the scheme but left it to Rennie to obtain the necessary consent of the British government.⁷ The colonial secretary, Lord Stanley, was not encouraging (C2:5:9).⁸

For a time the project lapsed. But in May 1843 Rennie, assisted by one of his Scottish associates, William Cargill, a former army officer, raised the matter again with the New Zealand Company. The company, encouraged by its May agreement with Lord Stanley, had resumed land sales. It approved the scheme on 30 June 1843 and the new prospectus, known as the “terms of purchase”, was published on 1 July 1843.

Rennie and Cargill envisaged the new settlement should be a Scottish one, open to all classes of Scottish society; it should include provision for religious and educational purposes connected with the Presbyterian Church of Scotland. The emigration fund arising from the

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sale of the company's lands at New Edinburgh was to be employed in assisting the emigration of Scottish labourers.⁹

- 6.3.5 Rennie, meanwhile, had been busy recruiting emigrants. Early in January 1844 he was able to announce that some 40 heads of families, in all numbering over 200 people, were enrolled for the first expedition, which it was hoped would sail in the spring. Word was anxiously awaited from Colonel Wakefield of the locality selected for a new settlement. Bad news came instead. A report came to hand of the Wairau affray. In March 1844 Rennie learned of the continuing difficulty the New Zealand Company was experiencing over the validity of their land titles. Negotiations with the Colonial Office were proving fruitless.¹⁰

Plan for New Edinburgh settlement deferred

- 6.3.6 On 30 April 1844 the New Zealand Company concurred with Rennie's recommendation that plans for the New Edinburgh colony should be suspended pending advice from New Zealand that a site had been chosen. Deposits paid by purchasers were to be returned to them (C2:5:6–7).¹¹ Not until June 1844 did the company learn that Governor FitzRoy had authorised the selection of a site for the New Edinburgh settlement in the South Island (C2:5:8).¹² In the event, it was not until three years later, in November 1847, that two emigrant ships finally left the United Kingdom for the Scottish settlement in Otago. In the interval Rennie was displaced by Cargill and the Reverend Burns. An association of lay members of the Free Church of Scotland, formed in May 1845, took over. In September 1845 it entered into a new agreement with the New Zealand Company. The area of the settlement was increased to 144,600 acres. Cargill became resident agent for the new settlement.¹³

6.4. **The Question of Tenths**

- 6.4.1 Before recounting the steps taken by the New Zealand Company to acquire the Otakou block it is necessary to explore the question of whether the Crown's policy for dealing with the New Zealand Company purchases required the Crown to reserve tenths or other large reserves within the Otakou purchase. To ascertain this it is necessary to go back to Wakefield's 1839 pre-Treaty purchases.
- 6.4.2 In Wakefield's 1839 instructions from the New Zealand Company, one-tenth of the land purchased by the company was to be reserved for the future benefit of the chief families of the tribe (C2:4:20–21).¹⁴ This was done in the first of the pre-Treaty purchase contracts pertaining to Port Nicholson on 14 September 1839 (C2:4:26).¹⁵ However the second and third deeds of purchase, dated respectively 25 October 1839 and 8 November 1839, did not refer to tenths but

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said that, “a portion of the land ceded by them [the Maori owners] suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families”, would be reserved (C2:4:28–30).¹⁶ The absence of any reference to the tenths in the latter two deeds leaves open the question of what portion of land would be “suitable and sufficient”.

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

- 6.4.3 This agreement was completed on 19 November 1840 (C2:4:4).¹⁷ We have already referred to a number of its provisions (6.3.2). It was concerned to provide for Pennington’s award which would determine the amount spent by the company on pre-Treaty purchases from the Maori and for colonisation expenses. As we have noted, four acres were to be awarded for every one pound of expenditure as found by Pennington.

Under clause 5, the lands to be assigned to the New Zealand Company under Pennington’s award were to be within the bounds of Wakefield’s pre-Treaty purchases. They would not, for instance, apply to Ngai Tahu land at Otakou (C2:4:1–4).¹⁸

Clause 13 of the agreement referred to the company having entered into engagements for the reservation of certain lands for the benefit of Maori; it being agreed that in respect of all lands to be so granted reservations would be made for the benefit of Maori by the Crown in fulfilment of such stipulations. Clause 13 further provided for “the Government reserving to themselves, *in respect of all other lands* to make such arrangements as to themselves shall seem just and expedient for the benefit of the Natives” (C2:4:3).¹⁹ We note that under this second part of the clause any reservations made by the government might or might not take the form of tenths.

- 6.4.4 In April 1841 the New Zealand Company asked the Colonial Office to remove the restriction imposed by clause 5 as to the location of the company’s future settlements. On 22 April 1841 Lord Russell gave Hobson a discretion to comply with the company’s request, subject to two conditions. One excluded settlements on the future capital of New Zealand or in close proximity to Auckland. The second is the relevant one:

Any lands which may be granted to the Company in exchange for those to which they are at present entitled, [ie within the company’s “district”] must be so granted, subject to those reservations, and subject to all the other conditions which would, by the terms of the existing agreement, [of November 1840] attach to lands assigned to the company in the vicinity of their present settlements. (P3:195)²⁰

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The question arises as to the application of clause 13 of the November 1840 agreement to lands bought by the New Zealand Company “in exchange” for those they were entitled to under the 1840 agreement. That is, as to land bought, say at Otakou, outside the company’s pre-Treaty purchase “district”. The question is whether the first or second part of clause 13, referred to above, applies to the Otakou purchase.

There are difficulties about applying the first part of clause 13 to the Otakou purchase in relation to tenths, because the provision of tenths as such was not a common provision in all the pre-Treaty New Zealand Company deeds of purchase. Which pre-Treaty purchase(s) was the Otakou purchase in exchange for? We do not know. So far as we are aware no such decision was ever made. This being so, we believe the second part of clause 13 applies. This left the government with a discretion to make such arrangements as it thought just and expedient for the benefit of Maori sellers. It did not impose any legal obligation to award tenths in respect of a purchase such as the Otakou purchase.

The terms of purchase for the New Edinburgh settlement

- 6.4.5 As earlier indicated, the New Zealand Company on 30 June 1843 approved a new prospectus known as the “Terms of Purchase”. These provided that the New Zealand Company had decided to form a new settlement to be called New Edinburgh, of 120,550 acres in extent. The company offered the land for sale on terms specified in the prospectus. These included provision for the subdivision of the land into 550 town acres, 20,000 suburban acres and 100,000 rural acres with provision for further subdivision. This would enable each purchaser, for £120, to obtain a quarter acre town lot, 10 acres of suburban land and 50 acres of rural land. Two hundred town lots were to be reserved free of cost for the future municipal corporation of the town. In addition, 200 properties (a property comprising one town lot, one suburban lot and one rural lot) were reserved to the company.

We particularly note clause 6 of the terms of purchase as relevant to the present claims:

It is contemplated that in addition to the Reserves to be made by the Company for itself [200 properties] and for the Corporation [200 town lots], the Local Government will make such further Reserves for the Natives, and for Public Purposes, as it may see fit. (C2:6:2-5)²¹

This provision left it to the discretion of the local New Zealand government to make such reserves for Maori or for public purposes as it might think fit. It did not specify tenths.

*The Ngai Tabu Report 1991****Authority for the New Zealand Company to acquire land outside its districts***

6.4.6 The new governor, Robert FitzRoy, was in England at this time. On 15 June 1843 he wrote to Lord Stanley asking (among other things) whether the New Zealand Company could take land “without” (outside) the districts now claimed by them in exchange for an equal quantity of land within those districts. In a confidential reply of 26 June 1843, Lord Stanley merely referred FitzRoy to Lord John Russell’s instruction to Captain Hobson of 22 April 1841 (P3:181–182).²²

Quite independently, the New Zealand Company had written to Lord Stanley on 23 June 1843 referring to Lord John Russell’s despatch to Hobson of 22 April 1841 and seeking confirmation that the governor of New Zealand could sanction a new body of settlers locating themselves in a place they considered most eligible, subject to the terms and conditions laid down by Lord Russell (P3:192).²³

Stanley referred the company to the commissioners of colonial land and emigration. The New Zealand Company wrote to the commissioners on 7 July, and on 27 July 1843 the commissioners informed the Colonial Office that, as far as they could see, the new governor of New Zealand was still authorised to exercise the powers given to Hobson. Copies of this correspondence were sent to FitzRoy by Lord Stanley on 1 September 1843 (P3:182–185).²⁴

On 17 August 1843 the directors of the New Zealand Company gave detailed instructions to William Wakefield, their principal agent in New Zealand. It was envisaged the New Edinburgh settlement would be in the South Island. Wakefield was told:

It will be your duty to take Governor FitzRoy’s directions with respect to Reserves for the natives, and for public purposes. (C2:5:3)²⁵

Port Cooper, now Lyttelton Harbour, was first envisaged as the likely site for the Scotch colony. The new governor would arrive in New Zealand shortly after Wakefield was likely to receive these instructions. Wakefield was supplied with a copy of the 30 June 1843 “terms of purchase” and told to get in touch with FitzRoy immediately concerning the New Edinburgh plans in particular (C2:5:2).²⁶

Crown policy towards the purchase of land

6.4.7 The new governor arrived in Auckland on 23 December 1843, and departed for Wellington less than one month later, arriving there on 24 January 1844. His main concern was the Wairau affray of June 1843 and the major crisis in Maori-European relations which related specifically to the question of the New Zealand Company’s title to land (P2:24).

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On 29 January 1844 FitzRoy held his first conference with Wakefield. This was devoted to a discussion of the New Zealand Company's entitlement to land with particular reference to Maori counter-claims.²⁷ Present were Spain, Richmond, Hamilton (FitzRoy's private secretary), Protector Clarke, Protector Forsaith and Colonel W Wakefield. Dr Evans was sent for to assist Wakefield. The question of whether Maori should be compelled to give up their pa and cultivations was raised by Governor FitzRoy.²⁸ Wakefield equivocated, but under pressure from FitzRoy finally agreed that they should not be. It is apparent that this lengthy conference had its genesis in the difficulties arising from tents and the Maori desire to remain in their pa and kainga.

6.4.8 Wakefield discussed the New Edinburgh settlement with FitzRoy the next day, 30 January 1844. On the same day Wakefield wrote to FitzRoy referring to their interview. He advised that he proposed, "with your Excellency's sanction", to send an agent to treat with Ngai Tahu for the territory in the neighbourhood of Port Cooper:

To effect this object in the most satisfactory manner to all parties, it would be highly desirable, and would greatly facilitate the transaction, were an officer of the Government, and a Protector of Aborigines, as interpreter, to be instructed by your Excellency to give their assistance and countenance to it on the spot. (P3:191)²⁹

FitzRoy replied to Wakefield on 2 February 1844:

In reply I am happy to inform you that I have no objection to offer to the formation of a settlement in that locality [Port Cooper], provided that a valid purchase can be effected.

Directly that payment of the Compensation to the Port Nicholson natives (now under consideration) is made, I will order a Protector of Aborigines and another officer of Government to proceed to Port Cooper, and there assist in effecting a purchase of land for the contemplated settlement of New Edinburgh. (P3:191)³⁰

On 3 February 1844 Governor FitzRoy sailed for Nelson, and from there to Kapiti on 11 February. He attended a service conducted by Hadfield in the presence of Te Rauparaha. The next day he held a more formal meeting with Richmond and Symonds from Wellington together with George Clarke. He returned to Wellington on 16 February 1844. In Wellington he appointed the former police magistrate Richmond as superintendent of the southern division of New Zealand.

Between 24–26 February 1844 he conducted negotiations with Wellington Maori over compensation, and settlement was effected on 27 February. The same day Bishop Selwyn, Bishop of New Zealand, arrived from Stewart Island and Banks Peninsula in a small coaster owned and commanded by a chief described by FitzRoy as well

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known in New Zealand and named “Tou-wha-iki” (Tuhawaiki). They were accompanied by Te Rauparaha’s son and five other Maori. FitzRoy gave no details as to any discussion he may have had with Tuhawaiki when Bishop Selwyn introduced the chief to him (C2:3:1–3).³¹ There was considerable conjecture by counsel for the claimants and to some extent by Professor Ward. But this can only be speculation.

- 6.4.9 On 27 February 1844 FitzRoy gave written instructions to J J Symonds, a police magistrate based in Wellington. The following are the relevant provisions:

You are hereby required and directed to proceed to New Munster (or the Middle Island), and there superintend and assist the agent of the New Zealand Company in effecting the valid purchase or valid purchases of not more than 150,000 acres of available land, without regard to figure or continuity of blocks.

To such an extent of land, the Crown’s right of pre-emption will be waived, upon your report of the validity of the purchase, under certain conditions.

You will be most careful not to countenance any, even the smallest encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate successor. [sic, for ‘possessor’]

You will inform settlers now established in New Munster, that their cases will be most carefully and kindly dealt with by Government, under existing regulations, or by a special act of grace, such as by waiving the Crown’s right of pre-emption in their favour to a reasonable extent.

You will inform the aboriginal native population, that you are sent to superintend and forward the purchase of lands which they wish to sell, and that you, on behalf of the Government will not authorize, nor in any way sanction any proceedings which are not honest, equitable and in every way irreproachable. (C2:7:4–5)³²

We note the waiver of the Crown’s right of pre-emption and the absence of any reference to tenths or indeed the provision of any other reserves.

- 6.4.10 On the same day FitzRoy, through his secretary, W J W Hamilton, wrote to W Wakefield. A copy of FitzRoy’s instructions to Symonds was enclosed. Wakefield was told that the Crown’s right of pre-emption to the proposed purchase would be waived on certain conditions:

The conditions referred to, are – 1st. That all existing arrangements made by the Government with respect to the New Zealand Company’s settlements shall be strictly observed, except as altered by the present arrangement.

2d. That the land so purchased shall be counted in exchange for an equal number of acres claimed by, and to which a valid title can be proved by the New Zealand Company elsewhere; it being clearly under-

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stood, that the purchase-money in both cases referred to is to be provided by the Company. (C2:7:4)³³

A third condition related to the survey of the exterior and interior boundaries of the land to be at the expense and by surveyors of the New Zealand Company.

Nothing is said in either memorandum about tenths or other reserves. The reference in the first condition to Wakefield to “existing arrangements” is a reference to the 1840 agreement as modified by Lord Russell’s 1841 instructions (see our earlier discussion of these in 6.4.3–4). As we have earlier held, the second head of Lord Russell’s 1841 conditions applies, that is, it was left to the New Zealand governor to make such reserves for the Maori vendors as he might see fit.

6.4.11 Did Governor FitzRoy give Wakefield, Symonds or Richmond either verbal or written instructions to include a provision for tenths (or an equivalent) in the New Edinburgh purchase agreement? The Crown’s historian, Dr Donald Loveridge, suggested in his evidence that it was difficult to believe that Governor FitzRoy did not give explicit verbal directions of some kind in February 1844 (P2:34).

(a) Dr Loveridge noted that Wakefield had instructions to take Governor FitzRoy’s directions with respect to reserves for Maori (6.4.6). He argued that Wakefield had to know what the governor’s intentions were with respect to reserves for Maori people. We note, however, that under the New Zealand Company’s terms of purchase it was for the New Zealand government to make such further reserves for Maori and for public purposes as the New Zealand governor saw fit (6.4.5).

(b) Dr Loveridge suggested that Symonds was in a similar position. He needed to know what the governor would define as a valid purchase; a sale agreement which included terms which FitzRoy would not accept, or excluded those which he deemed essential, would be a waste of time if the governor subsequently decided not to waive the Crown’s right of pre-emption.

We note, however, that Symonds, as our account of the purchase negotiations will show, was extremely cautious and followed his instructions so carefully that he twice returned to Wellington having broken off his supervision of the purchase. As will be seen, he did not require any provision for tenths to be made in the deed when it was finally signed. In our view this strongly indicates that he was under no requirement from the governor to do so. We find it difficult to believe that he would have omitted to do so had he received instructions, whether in writing or verbal, to provide for tenths. Nor,

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as will be seen, did Symonds receive any instructions from Richmond to provide for tenths.

(c) As to Richmond, Dr Loveridge thought that he was definitely under the impression at one stage that one-tenth of the land purchased by the company would be returned to the original owners (P2:34).

(d) Dr Loveridge referred to Richmond's despatch of 23 May 1844 to Governor FitzRoy. Richmond informed the governor that:

In relation to the New Settlement, when the choice of Sections are being made, it will be necessary to have an Officer on the spot to select Reserves for the Government and Natives; for this duty (should I not be previously instructed by Your Excellency) it is my intention to appoint Mr Symonds . . . I shall endeavour to furnish him with a list of what is required, in the event of my not learning in time what Reserves Your Excellency may consider necessary. (C2:9:1-5)³⁴

We are left wondering why the comment about the expected instructions being received from the governor is made, if Richmond had in fact already received instructions from the governor. In fact, Richmond wrote to Symonds on 30 May 1844 sending him a schedule of proposed reserves for government. But he made no reference at all to reserves for Maori. Why not? We would have expected him to do so had he been verbally told by FitzRoy that reserves (in particular tenths) were to be provided. We note the reservation about his not learning in time what reserves the governor might think necessary.

In fact, the above extract from Richmond's 23 May despatch is from the final two paragraphs. The principal subject of the despatch is a report to the governor explaining the reasons for Symonds' return to Wellington. Richmond gives details of the more stringent directions he has given Symonds to enable him to prevent any measures by Tuckett (the New Zealand Company representative) which might "bring on a collision with the aborigines . . ." (C2:9:3).³⁵ The paragraph cited above is concerned with an unrelated topic.

Governor FitzRoy evidently saw Richmond's despatch on 18 July 1844. He annotated the despatch as follows:

Dr Sinclair,
Acknowledge the Receipt – Convey my approval of what the Supt. S D has done in these matters.

P S Do *not* express any feeling – or make any remark about the Company's Agents. (C2:9:6)³⁶

There is also a note on the governor's direction, presumably by Dr Sinclair:

General letter to the Supt, No. 25; 19.7.1844. (C2:9:6)³⁷

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Sinclair's letter to Richmond of 19 July 1844 was in the following terms:

With reference to the report contained in your letter of the 23d of May, No. 15, I am to convey to you his Excellency's approval of all that *has been done by you* in the matter referred to. (C2:7:12)³⁸ (emphasis added)

This is clearly a reference to Richmond's report concerning Symonds' difficulties with Tuckett and the "more stringent directions" and other steps taken by Richmond, as indicated in his report. In short, in FitzRoy's language, to what Richmond "has done". As instructed, Sinclair made no reference to the New Zealand Company agent Tuckett. In our view Richmond was not being commended for his intended actions on public and Maori reserves, but for his dealings with the New Zealand Company agents.

(e) On 12 June 1844 Richmond wrote again to Governor FitzRoy. He enclosed a copy of his letter to Symonds of 30 May 1844 (see 6.4.11(d)) and added:

In addition to what is detailed in the Memorandum, I have directed Mr Symonds to require a large space to be set apart as a place of recreation for the Inhabitants. (C2:9:13)³⁹

Did this mean a recreation place for the new settlers or for Ngai Tahu? Given the context, we believe the former.

Richmond then purported to quote from the sixth paragraph of the terms of purchase for the New Edinburgh settlement:

that the provision hitherto made for the Natives by the Directors of the New Zealand Company is left to the Local Government. (C2:9:13)⁴⁰

This is quite misleading – see clause 6 cited in 6.4.5 which says, "the Local Government will make such further reserves for the Natives and for public purposes as it may see fit".

Richmond then said:

I shall therefore demand on their [Ngai Tahu] behalf one-tenth of each description of Allotments i.e. Town, Suburban and Rural, and arrange with the Principal Agent of the Company, or the Agent for the New Settlement on the mode to be adopted for their selection, should I not receive Your Excellency's instructions on the subject previous to the arrival of the latter with the Emigrants. (C2:9:14)⁴¹

In short Richmond advised Governor FitzRoy that:

- he had instructed Symonds in writing to arrange for specified public reserves to be set aside and verbally to reserve a large place for recreation for the settlers; and

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- unless advised otherwise, he intended to arrange with either the New Zealand Company principal agent or the agent for the new settlement for tenths to be allotted on behalf of Ngai Tahu.

There appears to be no record of Richmond so instructing Wakefield, presumably because the emigrants did not arrive for some years.

FitzRoy evidently saw Richmond's despatch of 12 June on 10 August 1844. It bears two annotations by FitzRoy:

- I have answered this privately – both verbally & in writing
 - Dr Sinclair, Write to Superintendent – approving of what he has done in this matter and conveying my sanction of the arrangements. (C2:9:12)⁴²

Dr Sinclair did not write to Richmond until 9 October 1844, when he said:

Your proceedings, as reported in your letter No. 17 (44/1928) of the 12th June last, relative to the selection by Mr Symonds of public reserves at the settlement of New Edinburgh, have been approved by His Excellency. (C2:9:11)⁴³

This letter refers only to *public reserves* and omits any mention of tenths or Maori reserves. The tribunal concludes that there appears to be no record of any instructions, verbal or written, from Governor FitzRoy to Richmond concerning either tenths or reserves for Maori, nor of Richmond implementing what he told FitzRoy he would do.

The tribunal's view that no such record of instructions from FitzRoy to Richmond exists is confirmed by a report of a Joint Parliamentary Committee on Middle Island Native Claims of 1890 (M17:I:doc 2).⁴⁴ In 1889 a similar committee instituted inquiries to ascertain the nature of the governor's instructions sought by Major Richmond in his letter of 12 June 1844. The 1890 committee reported that, following a reference to the Colonial Office, no evidence could be obtained showing the instructions were ever given by the governor to reserve tenths. The committee advised that after careful consideration it had been "unable to satisfy itself that a principle of tenths was applicable to the Otakou purchase".

The tribunal also finds that there is no evidence before us that Symonds, Clarke or Wakefield received instructions whether verbal or written from Governor FitzRoy to make provision for tenths in the Otakou purchase.

FitzRoy's actions in waiving the Crown right of pre-emption

- 6.4.12 Before FitzRoy left England for New Zealand he wrote on 16 May 1843 to the colonial secretary seeking Lord Stanley's comments on several questions. His second inquiry was whether:

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Under defined restrictions, may the Crown's right of pre-emption be waived in certain cases? (R36(b):II:329)⁴⁵

Lord Stanley responded on 26 June 1843. He told FitzRoy that:

In the absence of any report from the colony itself, stating the difficulties which you anticipate . . . I consider it premature to attempt to prescribe the mode in which it will be proper to attempt to meet and overcome them; and I should therefore prefer waiting for a report from you, after your arrival at your government, accompanied by such suggestions on the subject as, after inquiry on the spot, you shall deem it expedient to make. (R36(b):II:329)⁴⁶

Soon after FitzRoy's arrival in New Zealand he received addresses from the Waikato and Ngati Whatua tribes at a levee at Government House, held at Auckland on 26 December 1843. Both addresses included a complaint about the Crown's exclusive right of pre-emption. In his written reply to Waikato he said:

The Queen has heard of your wish to sell land to Europeans *direct*, without in the first place selling them to Her Representative, and Her Majesty has authorised me to enquire among you, and make arrangements more pleasing to yourselves. (R36(b):II:439)⁴⁷ (emphasis in original)

And to Ngati Whatua he replied:

The Queen has authorised me to make enquiries among yourselves with the view of altering the present method of selling your lands. (R36(b):II:438)⁴⁸

It is clear that while Governor FitzRoy was sympathetic to the request that the Crown should waive its right of pre-emption, he proposed to make further inquiries into the matter before settling on any new arrangements. This was still the position when he went to Wellington late in January 1844.

FitzRoy waives the Crown right of pre-emption in respect of the New Edinburgh purchase

6.4.13 We have already noted the instructions given by FitzRoy to Symonds (6.4.9) and his advice to William Wakefield (6.4.10), each given on 27 February 1844, in which he indicated to both his intention to waive the Crown's right of pre-emption in respect of the New Edinburgh purchase.

FitzRoy, in the course of his lengthy despatch of 15 April 1844 to Lord Stanley, explained why he had felt obliged to adopt this course as part of the arrangements for providing more land for the New Zealand Company. FitzRoy made the following points:

- the New Zealand Company had instructions to prepare immediately for the reception of the proposed Scotch settlement in New Munster (South Island);

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- the government had no land there. Nor did the company except a small amount at Nelson;
- the government had neither the funds nor the personnel to effect a purchase; and
- the protectorate officers were fully occupied, as was Commissioner Spain.

FitzRoy continued:

In this dilemma, I adopted the only course which appeared to me practicable; namely, to waive the Crown's right of pre-emption over 150,000 acres of land in New Munster, where selected by the company's agent, and to leave it to him to effect the purchase under the superintendence and with the assistance of the most efficient Government officer of whose services I could then avail myself.

I trusted that the bitter experience which the New Zealand Company's agent has had of the difficulty of effecting valid purchases of large tracts of land in New Zealand, and his present acquaintance with the native habits and customs, would be a security for the *bona fide* character of any purchase now made under his directions; but, in order to give a character to the whole transaction, to show that the Government gave it countenance, and to be a check on any unadvisable proceedings or over-hasty arrangements, I directed Mr John Jermyn Symonds to superintend the whole transaction, and gave him the annexed instructions.

Mr Symonds has been several years in New Zealand. He was employed as a surveyor, then as a sub-protector of aborigines, and is now a police magistrate. He speaks the native language, and bears an irreproachable character.

I have found myself under the necessity, not only of acting without instructions in this important matter, but of acting against the established regulations, with regard to the figure and continuity of blocks of land. (C2:3:5)⁴⁹

After discussing problems created by the topography of the New Zealand landscape in ensuring continuous blocks of land, he then referred to the need to provide land for New Zealand Company settlers in the region between Port Nicholson and New Plymouth. He enclosed a copy of his instructions to Commissioner Spain to assist the New Zealand Company to acquire specified areas of land in the Wairarapa and elsewhere within the company's areas under Pennington's award. The Crown's right of pre-emption would be waived for such purchases.

- 6.4.14 Stanley made a lengthy and considered reply to FitzRoy's report on 30 November 1844. After approving FitzRoy's findings in respect to the Wairau confrontation and other actions of the governor, the colonial secretary then discussed the problem of shortage of land for New Zealand Company settlers. In particular he referred to the arrangement made by FitzRoy on 27 February with the agent of the New Zealand Company, William Wakefield, and FitzRoy's reasons for

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waiving the Crown right of pre-emption in respect of 150,000 acres in New Munster. In the circumstances he approved FitzRoy's action. He also approved the waiver in respect of the purchases to be supervised by Commissioner Spain in the Wairarapa and elsewhere in the company's "district". The arrangement of 27 February was, Lord Stanley said, "adopted under the pressure of peculiar circumstances, limited in its amount, and designed to meet a specific exigency". He then referred to FitzRoy's "more general and extensive measure": the general waiver proclamation of March 1844 (R36(b):320–321).⁵⁰

We will discuss this topic shortly. At this point we would emphasise that FitzRoy's action in agreeing, on 27 February 1844, to waive the Crown's right of pre-emption to enable the New Zealand Company agent to purchase direct from Ngai Tahu up to 150,000 acres for the New Edinburgh settlement, was approved by Lord Stanley. This approval was given quite independently and separately from his later consideration of FitzRoy's waiver proclamation of 26 March 1844. It is abundantly clear that the 27 February waiver was seen as a discrete action unrelated to the general waiver proclamation which followed it one month later. We turn now to the 26 March proclamation.

FitzRoy's waiver proclamation of 26 March 1844

6.4.15 Colonel William Wakefield later reported, that the governor while in Wellington in February 1844 had "intimated to some private land-claimants his intention, at some future period, to allow the natives to dispose of their lands to private individuals upon certain conditions" (P3:148).⁵¹ On returning to Auckland the next month, FitzRoy gave the matter further consideration. On 25 March 1844 he secured the approval of his Executive Council to, "the conditions on which he proposed to waive Her Majesty's right of pre-emption over certain portions of land in New Zealand", to enable "the aboriginal owners to sell their lands to certain persons" (C2:3:11).⁵²

The Executive Council duly approved the governor's proposals which were publicly proclaimed the next day, 26 March 1844 (P3:197). In brief, the proclamation:

- called for an application to be made in writing to the governor to waive the Crown's right of pre-emption over a specified number of acres;
- stated that the governor was free to consent or refuse his consent. In doing so he would have regard to the public interest and the interests of the Maori owners and other considerations; and
- stipulated that sale of pa and urupa would not be approved.

Clause 5 provided for tenths as follows:

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Of all land purchased from the aborigines in consequence of the Crown's right of pre-emption being waived, one-tenth part of fair average value, as to position and quality, is to be conveyed by the purchaser to Her Majesty, her heirs and successors, for public purposes, especially the future benefit of the aborigines. (P3:197)⁵³

It will be noted that the tenths were to be vested in the Crown, not the Maori vendors, "for public purposes, especially the future benefit of the aborigines".

- 6.4.16 On the day the waiver proclamation was made public, 26 March 1844, the governor addressed a meeting of Maori chiefs at Government House, Auckland. He explained his reasons for making the new arrangements, cautioned the Maori not to sell their land hastily and elaborated on the arrangements he had made for the provision of tenths:

In the arrangement I have made for allowing Europeans to buy land from you, I have made distinct conditions that one-tenth of all land so purchased is to be set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children.

The produce of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there, and teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use.

Provision will thus be made, in order to prevent your children from suffering by neglect and want of education; the management of these reserves will be entrusted to a board or committee, consisting of the Governor, the Bishop, the Attorney-general, the Commissioner of Crown lands, and the Chief Protector of Aborigines. (C2:3:10)⁵⁴

Again we find the governor making it clear that the tenths were to be vested by the Crown in trustees. The proceeds were to be principally applied for the future benefit of the Maori by the provision of hospitals, schools, religious, moral and vocational training and associated matters.

- 6.4.17 In his 15 April 1844 despatch to Lord Stanley, FitzRoy explained his reasons for the waiver proclamation. He described the Maori population as being clamorous to sell their lands, asking exorbitant prices, the Crown having no funds itself to purchase lands for resale, and the great discontent caused by the Crown neither buying nor letting others buy. He therefore:

determined to take that step which I proposed in a letter to your Lordship, dated 16 May 1843, on which a qualified opinion was given in your Lordship's answer, dated June 26th ultimo. (C2:3:7)⁵⁵

As we have seen (6.4.14), Lord Stanley had no difficulty in exercising the royal prerogative and approving FitzRoy's February action in waiving the Crown's right of pre-emption to enable the New Zealand

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Company to purchase land in the South Island for the New Edinburgh settlement. But the “more general and extensive measure, calculated to make a far more important alteration in respect to the sale of land” caused him very real concern, particularly in the light of a committee of the House of Commons resolution, which had been passed “unfavourable to this measure”. Unlike FitzRoy’s 27 February 1844 waiver to facilitate the New Edinburgh purchase, his 26 March waiver proclamation received Lord Stanley’s somewhat grudging and qualified approval:

While I admit the cogency of the motives by which you have been influenced, and am not prepared at this distance to condemn, or disclaim the arrangement which you have made, I think it necessary to point out to you some objections, to which your plan is obviously liable, and which will require your attention. (R36(b):II:322)⁵⁶

After setting out his objections Lord Stanley said:

With these observations I am prepared to sanction and approve the step you have taken in admitting the natives, under restrictions, to the privilege of selling their lands directly to settlers. (R36(b):II:323)⁵⁷

- 6.4.18 In the course of lengthy closing submissions by Mr Temm, counsel for the claimants, it was contended that Governor FitzRoy, on receiving advice that the Otakou sale had taken place, was under a duty to ensure that the provisions as to tenths in clause 5 of his March waiver proclamation were complied with regarding the 400,000 acre New Zealand Company purchase. The Crown strongly disputed that the March proclamation applied to the Otakou purchase. After careful consideration of the submissions on the point, the tribunal has come to a clear view that the Otakou purchase stood alone and was not covered by, or intended to be covered by, the provisions of the 26 March waiver proclamation.

Governor FitzRoy gave his instructions to Symonds on 27 February 1844, a clear month before the decision was taken to issue the more general waiver proclamation on 26 March. His decision to authorise Colonel Wakefield to purchase direct from the Maori in the South Island was taken for the reasons which he subsequently related to the colonial secretary. Lord Stanley, in exercise of the Royal prerogative, expressly approved FitzRoy’s decision to waive the Crown’s right of pre-emption to enable the purchase of land for the New Edinburgh settlement to proceed. As we have seen, he was much less enthusiastic about FitzRoy’s 26 March waiver proclamation. He clearly saw the two as discrete and unrelated actions on the part of the governor.

- 6.4.19 The March proclamation called for written application to be made to the governor through the colonial secretary for the waiver of the Crown’s right of pre-emption. No such application was made by the

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New Zealand Company. Nor was it required to do so. There is nothing in the March waiver proclamation to suggest that it was intended to operate retrospectively. Nor is there anything in the proclamation to suggest that it was intended to override or be in substitution for the prior act of the governor in authorising the New Zealand Company purchase, in terms of the conditions conveyed to Wakefield by the governor's secretary on 27 February 1844. These conditions were laid down well before the waiver proclamation was issued. There would need to be clear evidence that FitzRoy, in making his March proclamation, expressly or by necessary implication repealed his earlier authorisation. There is no such evidence. On the contrary the tribunal considers, having regard to all the circumstances, that the only reasonable conclusion is that the March waiver proclamation did not and was not intended to apply to the New Edinburgh purchase. Included among the claimants' grievances are the following:

3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.
4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.
5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation. (W6)

The tribunal finds that none of these grievances are made out, for the reason that the waiver proclamation of 26 March 1844 did not apply to the purchase of the Otakou block for the New Edinburgh settlement. Accordingly there was no obligation on the Crown to comply with its provisions in respect of the Otakou purchase.

We must now turn our attention to the purchase itself to determine whether the claimants' remaining grievances are made out.

6.5. **The Purchase**

Tuckett's expedition

- 6.5.1 In anticipation of FitzRoy sanctioning the purchase of land in New Munster, Colonel William Wakefield appointed Frederick Tuckett, the principal New Zealand Company surveyor at Nelson, to select a suitable site for the New Edinburgh settlement. Tuckett accepted the assignment on the condition that he would not be tied to the Port Cooper locality but could look further afield in the South Island (P2:60–62).⁵⁸ On 2 April 1844 Tuckett, his assistant surveyors, Barnicoat and Davison, and Symonds sailed from Wellington on the *Deborah*. Earlier that day a meeting was held in the office of the southern district superintendent, Richmond, attended by Symonds, Colonel Wakefield, Tuckett and Commissioner Spain. Richmond gave written instructions to Symonds that in superintending the purchase,

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no survey was to be carried out prior to the land being purchased by the company (C2:7:7).⁵⁹ But, at Tuckett's request, it appears Richmond verbally modified these instructions to the extent that Tuckett could take soundings and survey harbours provided that Maori did not object and Symonds' consent was first obtained. Spain later recalled that Richmond instructed Tuckett to "be very cautious and not bring about another 'Wairau affair'" (P2:56–59).⁶⁰

These instructions posed a problem for Tuckett in that he would not be able to begin negotiating with Ngai Tahu unless he could give a reasonably precise indication of the land he sought to purchase. The combination of Tuckett's impetuosity and Symonds' cautious and somewhat literal approach to his duties was to produce much discord between them.

Following an inspection of the Port Cooper district, the *Deborah* proceeded south, reaching Waikouaiti on 19 April. Having obtained the consent of the local Maori, Tuckett proposed to survey the Waikouaiti Bay roadstead. Symonds would not consent and, in the face of Tuckett's persistence, departed for Wellington on the *Scotia*, a vessel owned by the whaler and trader John Jones. Tuckett proceeded on his expedition south without Symonds and made a thorough examination of all the districts between Waikouaiti and Fiordland. By 25 May he had virtually decided on Otago Harbour, the Taieri plains and Molyneux Bay for the settlement (P2:62–63; C2:8:1–8).⁶¹

- 6.5.2 Tuckett found that nearly 20 Europeans were living at Otakou, on the eastern harbour, with houses and cultivations of enclosed land. His journal continues:

If any claim has been advanced by any of these squatters, none has been approved by the Land Commissioners; yet they will consider themselves aggrieved if ejected from their dwellings without compensation; whilst, on the other hand, if the land is purchased for New Edinburgh, this locality will probably be a portion of the town. (C2:10:10–10a)⁶²

As Professor Ward noted, this comment of Tuckett's foreshadowed what was to be a major aspect of the subsequent negotiations – who was to own or control the peninsula on the eastern shore of the harbour? Clearly the area was attractive to Europeans. If Ngai Tahu retained the peninsula there was a distinct danger that a settlement there, which included Europeans, would be an economic rival to any new settlement at the head of the harbour. Ngai Tahu had already developed their own social and economic relations with the squatters and, it appeared, wished to maintain that relationship (T1:88).

Because he was prohibited from surveying any land before he purchased it, Tuckett was unable to define with any real precision the

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150,000 acres he wished to buy. The only solution appeared to be to purchase a substantially greater area and then survey off the land the New Zealand Company wished to retain. On 25 May 1844 he wrote to Colonel Wakefield. After stating his preference for a site at Otago he said:

I wish to be authorized to purchase and survey 150,000 acres interjacent between Otago and the South Headland of Molineux Bay (called the Nugget) or between Otago and the North Bluff river, or the North Headland of Moeraki Bay, the precise boundaries of such lands to be defined hereafter on completion of the *actual survey*, the Reserves within said points to be specified by *the vendors* in the Deed of Conveyance or agreement of purchase. (C2:8:1-2)⁶³ (emphasis in original)

Tuckett envisaged that it would be easy for Ngai Tahu to define within that larger block (likely to be considerably in excess of 150,000 acres), the areas they did not wish to sell and only then survey the company's 150,000 acres. Professor Ward noted Tuckett's emphasis was on Ngai Tahu defining their own reserves, rather than having them selected by the company. No suggestion was made about tenths (T1:89).

- 6.5.3 Meanwhile Symonds had arrived back at Wellington on 30 April. In his report to Superintendent Richmond he complained of Tuckett proceeding to survey lands and roadsteads without Symond's consent. He was also critical of the company's intention to pay Ngai Tahu for their land partly in goods and partly by cheque (C2:7:8).⁶⁴ He was backed up by Richmond who gave him more stringent instructions should Tuckett make any further surveys without his consent. To improve relations between Symonds and Tuckett, Colonel Wakefield decided to send his brother Daniel to Otago to act as an intermediary. Daniel Wakefield was also provided with the purchase money of £2000.

Symonds now returned on the *Scotia*, accompanied by Daniel Wakefield, Wakefield's interpreter, David Scott and John Jones, the owner of the vessel. Tuhawaiki and Taiaroa joined them at Port Cooper. They reached the Otakou harbour on 8 June 1844 having left Jones at Waikouaiti the previous day. It appears Jones did not go down to Otago until 18 June (P3:6-7).⁶⁵

Tuckett's proposal

- 6.5.4 Symonds first learned at Waikouaiti of Tuckett's choice of Otago as the site of New Edinburgh. Tuckett arrived three days later on 11 June having walked from Molyneux. By now he had a reasonably clear idea of the land he wanted. He asked Daniel Wakefield to advise Symonds that:

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. . . I wish to effect a purchase of the 150,000 acres allowed for the settlement of New Edinburgh, in a district interjacent between the harbour of Otago and the South Headland (Tokata) of Molineux Bay (Kunesoo), the precise limits of such 150,000 acres to be defined hereafter on execution of an actual survey, the reserves within such limits, if any, are required to be defined by the sellers. It would greatly facilitate a clear understanding with the present proprietors, if a continuous block of land equal to about 12 miles in its extreme breadth, in a course inland about due west by compass, might be acquired. (C2:7:13–14)⁶⁶

With this letter Tuckett sent a note of his “Remarks on the District”. He first described the principal places where Otakou Ngai Tahu were living and went on:

I wish it to be clearly stated in the deed of purchase, or clearly explained to the Maoris and recorded, that the names of such Maoris as are now actually resident and occupiers of land within the district described, and that other Maoris cannot, after the land is paid for, reside within the district, excepting on such land as may be specially reserved for the present residents or others. The two clearings of Te-kaki are near the mouth of the Taiarea; the other, on the plain on the east bank of the river, I have not coloured, supposing he would not part with them, otherwise, the latter I should like to acquire. The native proprietors at Otago are, I believe, known to Mr Symonds; I do not wish to acquire any of their usual places of residence at the entrance of the harbour, but of a point occupied as a whaling station, and thence inland on the east side of the harbour, on which many Europeans reside, I consider it important that I should be put in possession, either by the magistrate or the aboriginal proprietors. (C2:7:14)⁶⁷

Professor Ward commented on two notable elements of Tuckett’s approach, (the company approach in fact, for Colonel Wakefield shared his views). There was first the desire to assume possession of the land occupied by European squatters, notably on the eastern peninsula. Secondly, the desire, no doubt based on their bitter experience in Wellington and Nelson, to maintain a clear distinction between areas of Maori occupancy, and the lands of the proposed settlement (T1:90).

In a letter to Colonel Wakefield, also on 13 June 1844, Tuckett explained his proposal to purchase a large coastal block. This, he said, would “simplify the definition of the Boundaries between us and the Aborigines with the belief that the whole may be purchased for about the same sum as the half”. He was, however, sceptical that the sum of £2000 provided would be sufficient (P3:82–83).⁶⁸

Symonds approved Tuckett’s proposals and advised Richmond that the long narrow piece of land extending from the Port of Otago to beyond the Molyneux River would be between 300,000 and 400,000 acres in extent. But Symonds’ approval was, as Richmond later reported to Governor FitzRoy, subject to the condition that “the

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unappropriated residue after the Company has selected 150,000 acres of available land, should be dealt with in such manner as Your Excellency may deem fit". Richmond advised that he had approved Symonds' decision (P3:97–98).⁶⁹ Dr Loveridge has shown that this letter, dated 16 July 1844, was misdated in transcription and was probably written by late June (P2:77). Richmond suggested the residue should be retained by the Crown and let to the settlers for grazing. He made no mention of tenths or indeed any other reserve for Ngai Tahu or public purposes, in any part of the block.

- 6.5.5 When Symonds returned to Otago on 8 June accompanied by the Ngai Tahu leaders Tuhawaiki and Taiaroa, he soon met other Ngai Tahu chiefs. On 10 June 1844 he noted in his journal, "Many natives arrive Tuhawaiki, Taiaroa, Pokene, Karetai, Koroko etc" (P3:8).⁷⁰ On his way north overland from the Molyneux, Tuckett had told Ngai Tahu that he wished to negotiate a land purchase with them. No doubt they arrived in response to this invitation.

Did Ngai Tahu request two reserves at Otepoti?

- 6.5.6 Before discussing the negotiations which were set in train a few days later, it is convenient to consider a deposition made 23 years later in 1867. This deposition was made by John Jones in support of a petition of John Topi Patuki pertaining to the Princes Street reserve, which we discuss later in this chapter. In the following discussion we are indebted to an analysis and commentary made by Dr Loveridge (P2:80–84). Jones stated that in 1844 he had taken Symonds, Daniel Wakefield, David Scott as interpreter, and Tuhawaiki from Wellington to Otago on the *Scotia*. Jones stated that he then returned to Waikouaiti to bring down a large number of other Ngai Tahu. On their arrival a meeting took place at Koputai (Port Chalmers). Reserves were discussed. Wakefield agreed to a burial ground at Port Chalmers being reserved. Jones recited that they (Symonds, Wakefield, Jones and various Ngai Tahu chiefs) then went to "where Dunedin now stands". There, he says, the Ngai Tahu selected two spots referred to in clause 3 of Topi Patuki's petition. These are referred to in our later discussion of the Princes Street claim as the hostelry site and the Princes Street reserve site. Jones described them as being sought for boat harbours. According to Jones, Daniel Wakefield at first assented, but later "insisted upon retaining them". This brought the negotiations to an end. Jones claimed the "whole of the Natives, including Towaki" (Tuhawaiki), returned to Waikouaiti.

Ten days later, Jones claimed, Daniel Wakefield sent a "note" asking Ngai Tahu to return and resume negotiations, which they did. When negotiations resumed, Daniel Wakefield "gave in". Jones "was acting for the Natives". At the end of the deposition it is recorded that Jones

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was asked what he knew respecting the phrase in Patuki's petition that the petitioner "was also entitled to one-eleventh of the sections into which their lands might after their cession be divided". He answered that he was "quite certain that at the time of the purchase no such question as this was mooted". (A8:I:154–155)⁷¹

6.5.7 Jones' testimony can only relate to June 1844. Symonds, Daniel Wakefield and Scott did voyage to Otago on the *Scotia* in June, accompanied by Jones and, from Port Cooper on, by Tuhawaiki and Taiaroa. But when Symonds returned for a second time in July 1844 he journeyed on the *Deborah* with Colonel Wakefield, Spain and Clarke. Daniel Wakefield, who had left Otago with Symonds on 20 June, did not return in July. We agree with Dr Loveridge when he said it is extremely difficult to fit Jones' story of two negotiating meetings in June, between Symonds and Daniel Wakefield on the one side and Jones and Ngai Tahu chiefs on the other, into the chronology of events. Jones claimed:

- that the first meeting took place a few days after Symonds and Daniel Wakefield reached Otago;
- that *all* the Ngai Tahu involved, including Tuhawaiki, then departed, staying away at Waikouaiti for at least 10 days; and
- that the second negotiations, again with Daniel Wakefield (and presumably Symonds) took place after their return to Otakou.

6.5.8 Dr Loveridge questioned whether Daniel Wakefield met with representatives of Ngai Tahu soon after 8 June as Jones claimed. He thought not. As he said, Symonds was present at Otakou from 8–20 June and makes no mention in his journal of any such meeting, nor do any of his surviving reports to Superintendent Richmond. Tuckett and his assistant Barnicoat were present from 11 June 1844 onwards. Neither Barnicoat's journal nor Tuckett's reports to Colonel Wakefield make any reference to formal negotiations taking place before 18 June. Moreover, neither of the two Ngai Tahu eye-witnesses who testified before the Smith–Nairn commission in 1880 suggest there were two sets of negotiations in June. Horomona Pohio and Rawiri Te Maire both referred to meetings which took place nearer the end of the month. Neither referred to the dramatic breakdown in negotiations and their resumption 10 or more days later (C2:14:18–66).⁷²

No contemporaneous evidence suggests a large scale exodus by Ngai Tahu earlier in June. Dr Loveridge pointed out that Tuckett noted on 13 June that, "at present the negotiation has not been attempted, all the parties interested not having yet arrived" (P3:82–85).⁷³ Symonds recorded in his journal that Tuhawaiki was in Koputai on 11 June "with a working party, making [a] house" and on 13 June Maori

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people were still busy building houses (P3:8).⁷⁴ It appears that the principal Ngai Tahu chiefs were on hand in Otakou from the time of Symonds' arrival up to the start of negotiations on 18 June. Symonds records in his journal for 18 June that Jones arrived at Otago that evening and that on the nineteenth endeavoured "in his way to settle matters but does not succeed" (P3:9).⁷⁵ Tuckett's report of 20 June 1844 to Colonel Wakefield supports the likelihood of a discussion about reserves at Koputai. But we agree with Professor Ward, who found there to be no 1844 evidence in reference to reserves at Dunedin (T1:95).

- 6.5.9 The tribunal has come to the clear conclusion that there is no satisfactory evidence that Ngai Tahu, in 1844, requested the setting aside of two reserves in the location of the future Princes Street, as claimed by John Jones. We agree with Dr Loveridge's conclusion, "There was no exodus to Waikouaiti" (P2:84).

June 1844 negotiations

- 6.5.10 These have been succinctly described by Professor Ward and we largely adopt his account as an accurate record of the principal events (T1:91–95).

Symonds, while agreeing with Tuckett's proposal to acquire a substantially greater area than 150,000 acres, was still anxious that there should be no misunderstandings on the part of Ngai Tahu. Accordingly, he proposed to Tuckett that, before negotiations began in earnest, there should be an inspection of the proposed boundaries. Tuckett, representative Ngai Tahu chiefs and Symonds would all participate in the inspection. He suggested that the meeting with Ngai Tahu to ascertain whether they were prepared to sell, be deferred for a week—the boundary inspection to take place meantime. Tuckett was anxious to press on with discussions. Frustrated by Symonds' cautious approach, Tuckett wrote to Colonel Wakefield on 16 June 1844 asking to be relieved at once "from the vexations of office" (P3:86–89).⁷⁶ Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" on the part of Tuckett, resolved on 17 June to return to Wellington on the *Deborah*. Daniel Wakefield supported Symonds and decided also to return to Wellington (C2:7:15–18).⁷⁷

- 6.5.11 As Professor Ward noted, Symonds knew that Ngai Tahu would be displeased at having assembled to no good purpose. A series of meetings therefore took place on 19–20 June. These were, however, preceded by discussions on 18 June which were recorded by Scott, Daniel Wakefield's interpreter. Scott stated that since his arrival in Otago (on 8 June 1844), he himself had a number of conversations

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with the principal chiefs and Ngai Tahu generally, but more particularly that morning with Tuhawaiki, Taiaroa and other named chiefs:

who severally distinctly expressed themselves highly satisfied with the arrangement of pointing out and fixing the general boundary of the intended purchase, as well as the portions they wish to reserve, to prevent any future misunderstanding with the settlers, and they are all (chiefs and dependents without any exception) to my knowledge, willing to sell the block described in Mr Tuckett's sketch plan, subject to the reserves I have mentioned, with a copy of which they have been furnished, and which was carefully examined and explained in my presence at a general meeting of the natives this morning, the result of which was an unanimous expression of their anxiety to complete the transaction with as little delay as possible. (C2:7:18)⁷⁸

At the morning meeting Symonds told Ngai Tahu of his intention to return to Wellington with Daniel Wakefield and to come back as soon as possible, "to which they agree" (P3:9).⁷⁹ So by the afternoon of 18 June Tuckett became the principal negotiator. He attempted to reach an agreement. He reported on this meeting to Colonel Wakefield the next day:

I addressed the maories and did my best to explain to them the objects of my expedition and pressed them to give me the names of all the Proprietors of Land in the District which I wished to purchase, to state some reasonable amount of payment in money or goods for which they would alienate the Lands, the amount to be paid to each Proprietor[;] also if not disposed to sell the whole District to delineate on the Plan, that which they wished to reserve. Their expectations are perfectly childish in fact they have no idea of the amounts which they specify and which are too extravagant to be worth recording (C2:11:51).⁸⁰

As Professor Ward commented, "this was an early phase, when 'ambit claims' and inflated demands could be expected" (T1:92). Barnicoat noted in his journal that Tuhawaiki mentioned a million pounds as the purchase price (P3:47).⁸¹ In his journal for the following day, 19 June, Barnicoat recorded that there were:

now 18 boats belonging to the natives lying on the beach. The number of natives present cannot therefore be less than 150. Today a meeting of the Chiefs took place, at which an attempt was made to get a price named. It was not altogether successful. (P3:47)⁸²

6.5.12 The next day, 20 June 1844, a turnaround took place. Following further public negotiations, agreement was reached which established the main features of the Otago purchase (T1:93). Tuckett wrote the same evening to Colonel Wakefield, enclosing the following agreement:

Otago June 20th 1844.
The Maori Chiefs Tuawaite, Taiaroa and Karetai offer to the Principal Agent of the New Zealand Company the whole tract of Land colored Red

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and Green on this Plan excepting a Reserve of Land on the East side of the Lower or outer Harbour of Otago from 1 to 2 on the accompanying Plan, being about four miles in length measured along shore at high water mark from 1 to 2 for the sum of Twenty four Hundred Pounds (£2400) to be paid to them this day month (20th of July) or in default of the payment being made to the parties entitled to receive payment for the Land, at the time above specified, the Company's Acting Agent Frederick Tuckett shall remove his party and effects from the ground which he now occupies and until the 20th of July has their *permission to occupy*

signed on behalf of themselves and others
by Tuawaite Taiaroa & Karetai

and witnessed by John Jones, T H Barnicoat and Frederick Tuckett.
(C2:11:14–15)⁸³ (emphasis in original)

Barnicoat's journal for 20 June 1844 records that the three Ngai Tahu chiefs that day "signed a memorandum binding them to sell the whole country from Otago to Molineux . . . with a single reserve for the sum of £2,400 . . ." (P3:47)⁸⁴

6.5.13 What had changed between 18–19 June, when negotiations stalled, and 20 June, when an agreement was reached that remained firm in all essentials and was to be formally concluded on 31 July? In answering this question Professor Ward pointed to two matters in particular:

(a) *The price.* Whereas on 18–19 June the company appears not to have gone above £1200 or £2000 at most, on 20 June the Maori negotiators had come down to £2400 which presumably they thought realistic. Tuckett, whose limit was £2000, realised it would be sensible to agree to £2400; he agreed to this sum subject to his superiors confirming it.

(b) *The inclusion in the sale of part of the eastern side of the harbour.* On 18 June Ngai Tahu indicated their wish to retain all the eastern side. Two days later they were willing to relinquish most of the eastern side except for a four mile reserve on the outer harbour. This included land occupied by European squatters which Tuckett was most anxious to acquire and which Colonel Wakefield, a month later would still try to buy. But on 20 June Tuckett must have realised that Ngai Tahu was unlikely to include any more. And so he recommended acceptance (T1:94 & C2:11:13).⁸⁵

(c) Professor Ward made a third point, in his view of less importance, but still significant. Tuckett, in his 20 June report to Colonel Wakefield, referred to a piece of land on the western shore of the harbour near Koputai claimed by Taiaroa's sister, married to one Thomas Chasland, an associate of John Jones. The claim was presented by John Jones on behalf of Chasland's wife. However Tuckett was adamant that he would not recommend the purchase if any part of the western side was withheld. Ngai Tahu accepted this.

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Nevertheless Tuckett recommended to Colonel Wakefield that one of the future town sections near the spot and with a water frontage, be given to either Jones or Chasland's wife. Otherwise Jones might use his influence to have the portion (and Tiarea Island adjacent, where he had part of his fishery) reserved directly to him by Ngai Tahu. Or else, Tuckett suggested (apparently suspecting that there might be other Maori claims to portions on which they were not actually residing) that Wakefield should be prepared to pay one or two hundred pounds over and beyond the £2400 sought, to extinguish any such claims (C2:11:13).⁸⁶

We note that tenths were not mentioned in the agreement of 20 June 1844, or in Tuckett's report to Colonel Wakefield. He simply recommended that the:

offer of the Land . . . should be accepted, subject to obtaining the approbation of the Government, and its decision to whom the money shall be paid and in what proportions to each Proprietor. (C2:11:10)⁸⁷

Symonds was not privy to Tuckett's negotiations with Ngai Tahu which led to the 20 June agreement. Further negotiations would be necessary with Symonds present. A decision by the company on the purchase price was required.

The July negotiations and the purchase

6.5.14 Symonds, who had left Otago on the *Deborah* with Daniel Wakefield on 20 June, reached Wellington on 29 June. Symonds duly reported the reasons for his return to Superintendent Richmond. Tuckett's report to Colonel Wakefield was also on the *Deborah*. Colonel Wakefield decided to go down to Otago himself in place of his brother Daniel. On the return south on the *Deborah*, in addition to Symonds and Colonel Wakefield, were George Clarke Jr, sub-protector of aborigines, and Commissioner William Spain. They arrived at Otago on 16 July 1844.

6.5.15 In his report on the purchase of 31 August 1844, Wakefield stated that Tuckett had left little to be done beyond verifying the boundaries in the presence of the principal vendors and effecting payment (C2:11:27).⁸⁸ Before the boundary inspection commenced however, Symonds was present at a meeting with Ngai Tahu on 18 July. He noted in his journal for that day:

Hold a meeting of natives concerning reserves, the point in question viz their extent having been settled we start for the Head of the Harbour with Col. W[akefield], Mr Clarke and Mr T[uckett]. (P3:10)⁸⁹

The boundary inspection party set out later on 18 July accompanied by "six natives deputed by the assembled natives of the district . . ." (C2:11:27)⁹⁰ It went up the harbour, over to the Taieri valley and by

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boat to Lake Waihola. They camped about 6 miles from the lake by a hill named “Owiti” (C2:11:40).⁹¹ From, the top of Owiti they could see the south-western boundaries. On returning to Taieri they reached agreement on the boundaries of the Taieri reserve. They returned to Otakou on 26 July and the following day the party inspected the boundaries of the Ngai Tahu reserve on the south side of the harbour (Omate). Symonds then notes in his journal, “matters satisfactorily arranged” (P3:11).⁹²

- 6.5.16 On Monday 29 July Symonds and Clarke prepared the deed of purchase in Maori and English (P3:137–138).⁹³ That day Symonds also obtained Wakefield’s signature to a statement in which Wakefield undertook:

to select 150,000 acres, to which the Crown’s right of pre-emption has been waived in favour of the said [New Zealand] Company, . . . leaving the unappropriated residue to be dealt with in such manner as his Excellency the Governor shall deem fit. (C2:7:3)⁹⁴

The deed is signed

- 6.5.17 On 31 July 1844 all was ready. Ngai Tahu were assembled and Wakefield had the £2400 purchase money. Symonds, in his report of 2 September 1844 to Richmond, with which he enclosed a copy of the deed, explained that before it was formally read over and signed he had requested George Clarke, the protector, to explain to Ngai Tahu the nature of the transaction:

that in disposing of their land they for ever surrendered their interest and title to such land; that their consent to sell it was binding on their children, as well as themselves, that they should remove from any portion then occupied by them, and confine themselves exclusively to their reserves, and never expect to receive further compensation, that they should not alienate or let any portion of their reserves without having previously obtained the sanction of his Excellency the Governor; to all which stipulations they unanimously consented. (C2:7:2)⁹⁵

Symonds further reported that the boundaries were frequently explained by Clarke to Ngai Tahu who “stated that they fully understood all the terms and conditions of the purchase, as specified in the deed” (C2:7:2).⁹⁶ Wakefield later reported that Karetai (the senior chief of Otakou itself) then spoke to the assembly, reiterating the need to respect each other’s areas to avoid disputes (C2:11:57–58).⁹⁷

The deed was then read over in Maori and English. The Maori version was signed by the influential Ngai Tahu chiefs (twenty three in all, plus two by proxy), then by Tuckett and Scott for the company and Symonds and Clarke for the Crown. The purchase money was amicably divided among the different families under Tuhawaiki’s supervision. A copy of the deed is in appendix 2.1.

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Tuhawaiki then removed a tapu from a burial site at Koputai and took away the remains for reburial. The Union Jack was raised and formalities thereby completed. Wakefield, Spain, Symonds and Clarke immediately departed north on the *Deborah* (C2:11:60–61).⁹⁸

6.6. The Claim for Tenths

6.6.1 The foregoing account is drawn from records made at the time, in 1844. Professor Ward considered they testify to a completed transaction. We agree that this is a reasonable conclusion, but remind ourselves that we have yet to consider later testimony.

Under the English version of the deed, Ngai Tahu consented, “to give up, sell, and abandon altogether” to William Wakefield, on behalf of the New Zealand Company, specified lands within certain named boundaries, together with some eight named islands, for £2400. The deed excepted certain places “which we have reserved for ourselves and our children”. The boundaries of the lands excepted from the sale and reserved to Ngai Tahu were then described in some detail; “which said reserved places we agree neither to sell nor let to any party whatever without the sanction of His Excellency the Governor of New Zealand” (appendix 2.1).

The latter provision reflects Wakefield’s concern that Ngai Tahu might sell to the European squatters and that some part of the 6665 acres reserved on the eastern peninsula might be developed in competition with the New Edinburgh settlement. The total area of the four reserves was later found to be 9615 acres. We now know that the land sold, once thought to be 400,000 acres, was more like 533,000 acres. At the time Colonel Wakefield estimated that Ngai Tahu had retained about 13,000 acres for (as he erroneously thought) a resident population of about 60 people (C2:11:49).⁹⁹

6.6.2 The deed makes no mention of tenths or anything like them. There was no contractual obligation on the part of the company or the Crown to make further provision by way of reserves for Ngai Tahu. But the subject was adverted to by Symonds in his final report of 2 September 1844. In his account, the question of reserves was linked to the question of who, Ngai Tahu or European, was to have control or management over them. He reported that:

[Ngai Tahu] expressed their anxiety to make some special provision for the future benefit of themselves and children, by reserving certain portions of land within the limits of the purchase, *which they now partially occupy, the management of which, to a certain extent, they were desirous of retaining in their own hands.* (C2:7:1)¹⁰⁰ (emphasis added)

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Symonds approved their selections (those named in the deed). He went on:

I pursued this course as regards native reserves, from the conviction that the system heretofore adopted in other purchases of large tracts, was beyond the comprehension of the aborigines, and at the suggestion of Colonel Wakefield I left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:1-2)¹⁰¹

Both the claimant and Crown witnesses agreed that this statement suggested that some kind of tenths system was probably discussed with Ngai Tahu. But it does not appear to have been their preferred choice. Professor Ward, in his report on the historical evidence, expressed the opinion that this would not be surprising, given that a tenths system in 1844 did not involve the transfer to Maori of sections in the new subdivision, but rather their vesting in the Crown, mainly, but not exclusively, for Maori purposes. He pointed out that Ngai Tahu, by Symonds' account, wanted to have the land in *their* ownership and control. All the 1844 evidence, Professor Ward suggested, from Tuckett's journal entries to the accounts of Karetai's speech, emphasise the wish on both sides for these separate spheres (T1:98).

- 6.6.3 We agree with this analysis of the 1844 evidence by Professor Ward and his conclusion that the outcome was exactly what the deed states – an excepting or reservation of the named areas in favour of Ngai Tahu, with them binding themselves not to let or sell the land retained without the governor's consent. Whether the governor, in addition to this, wished to provide for tenths was left entirely to his discretion. On the contemporary (1844) evidence of the negotiations, and on the plain meaning of the deed, no *obligation* rested on the governor to provide for tenths.

In his report to London Colonel Wakefield expressed regret that the deed did not prevent, as fully as he would have liked, Ngai Tahu from disposing of the land exempted from the sale (C2:11:52-53).¹⁰² Later in his report he said:

The right of pre-emption of the excepted land by the Company might have been reserved in the deed or it might have been made a special reserve for the natives as the tenths in the other settlements are; but the latter provision would have placed it in the hands of the trustees lately appointed by an Ordinance and they might hereafter have thought it their duty to grant leases of portions of it to the detriment of the property of the purchasers from the Company. Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements; not contemplated in the Company's New

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Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:54–55)¹⁰³

Wakefield was nervous about land being vested in trustees. Nevertheless he recognised that although special Maori reserves were not contemplated for the New Edinburgh scheme, the possibility remained that the governor, in his discretion, might require tenths to be vested in the Crown.

While we believe the position to be as we have found on the contemporary (1844) evidence, it remains to be seen whether later evidence, both Maori and European, leads to a different conclusion.

A twenty years silence?

- 6.6.4 Unfortunately Tuhawaiki, one of the principal Ngai Tahu involved in the sale of Otakou, died by drowning in October 1844. It was suggested to us by Dr Ann Parsonson that this was a major calamity for the tribe and that, had Tuhawaiki not died so tragically, the question of the provision of tenths would have been raised much sooner (R35:33–35).

But, as Professor Ward testified, a number of letters from Taiaroa, Karetai, Tiramorehu and other Ngai Tahu leaders to government officers in the 1850s still survive, as does evidence of meetings with Governor Grey in 1848, with Governor Browne in 1857 and with the premier and native minister in 1858. These cover a whole range of contentious matters with Pakeha or among themselves. None has so far emerged which suggests that anything like tenths were to follow on the survey and sale of the Dunedin settlement (T1:100).

- 6.6.5 On 27 September 1872 Matenga Taiaroa's son, Hori Kerei Taiaroa, produced to a parliamentary inquiry a statement dated 13 February 1862, said to have been made by his father. Included in the statement is the following:

Secondly. After that land purchase commenced in this Island, the first land we sold was Otago; it was sold to Colonel Wakefield. We pointed out all the boundaries, and all stipulations were mentioned to Colonel Wakefield, as follows:– We said the first payment for this land would be £100,000. Colonel Wakefield said, “That is too much, £2,400 will be ample, and that is all the cash consideration; it had better be arranged in this manner, viz., that one acre in every ten shall be reserved for you.” We agreed to this, and said, “You can have the land according to these terms.” We do not know whether these words were written down or not, but all the people present heard these words.

These are the places about which we spoke, and stated that we desired to retain – Otakori, Taiari, Maranuku, Te Karoro, and other places. (C2:21:9)¹⁰⁴

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We are inclined to agree with Professor Ward, who suggested it is difficult to know what weight to put on this document. While it is very likely that before his death Matenga Taiaroa did make a statement to his people about Ngai Tahu claims, it is surprising, if it was reduced to writing during his lifetime, that it was not produced earlier. While it is true that Ngai Tahu began airing their principal grievance regarding the Princes Street reserve in the early 1860s, by 1867–68 a growing claim for tenths was also coming under parliamentary scrutiny. If not written down until later, its accuracy may be open to question.

Topi Patuki's petition

- 6.6.6 The first documentary claim to tenths made public by Ngai Tahu was a petition by John Topi Patuki dated 17 August 1867. The petition appears to be principally concerned with the failure of the New Zealand Company and the Crown to set aside two small reserves at Princes Street, Dunedin. But Patuki also claimed that he was entitled, “under the arrangements then existed between your Majesty’s Government and the said [New Zealand] Company, to one-eleventh of the sections into which their lands might after cession be divided”. (C2:12:5)¹⁰⁵ We note that Patuki does not claim that the arrangement had its genesis in discussions or an agreement with Ngai Tahu at the time of the sale. Rather he invoked “arrangements then existing” between the government and the New Zealand Company. For reasons we have earlier stated, no such arrangement existed in 1844. Further, in 1844, no tenths arrangements contemplated by the government, or company officials, would have envisaged vesting the sections in the Maori tribes themselves. As Professor Ward indicated, Patuki, in 1867, appears to be beginning to “read back to 1844 a later concept of ‘tenths’“. This, said Professor Ward, is not entirely surprising, for in 1866–67 the tenths in Wellington, plus McCleverty’s awards which were already in Maori hands, were processed through the Native Land Court. And in the same year, 1867, preparations were in hand to put the Otago reserves secured under the 1844 deed through the court to obtain the issue of individual Crown grants (T1:101).

Mantell's assertions

- 6.6.7 Walter Mantell, whose various activities as a commissioner to extinguish Maori claims (1848–1854) and as commissioner of Crown lands in Otago (1851–1854) will engage our attention in the Kemp, Banks Peninsula and Murihiku purchases, and the Princes Street reserve claim, also gave evidence before the 1872 parliamentary inquiry. In 1872 he testified that his official connection with Ngai Tahu commenced in 1848. But before then, he said, he knew Tuhawaiki who told him that he “considered the Natives were entitled to these tenth parts”. Mantell added that the “old chiefs Taiaroa and Karetai – in fact

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all of the older chiefs . . . repeatedly asked me about these reserves". He explained his inaction at the time on the grounds that he had no knowledge of the documentary evidence; that for a time he had no authority over Crown lands in the Otago block, and that later he was too busy (C2:21:7).¹⁰⁶

Professor Ward in his report considered Mantell's hypocrisy and deceit to be blatant. He pointed out that since 1855 – when he resigned office as commissioner of lands – Mantell had been waging an unrelenting campaign about unfulfilled promises to Ngai Tahu (principally concerning schools and hospitals), some of it to good effect. Moreover, as Professor Ward reminded us, Mantell had twice held office as native minister in the 1860s, making it a condition of his accepting office in 1861 that certain promises be fulfilled, and instructing his officers to investigate other outstanding grievances. He had supported Topi Patuki's petition in 1867. But, Professor Ward said, in all these 17 or more years Mantell did nothing about the Otago tenths – did not even mention them. Quite apart from Tuhawaiki, who died in October 1844, Karetai and Matenga Taiaroa were principal owners in the block and leading participants in the 1844 negotiations. Yet they failed to raise the issue of tenths publicly, as they raised many other issues (T1:101–102). We share Professor Ward's scepticism about Mantell's 1872 recollections.

1872 Maori witnesses

6.6.8 At the same 1872 inquiry at which Mantell gave evidence, the committee heard evidence from two Ngai Tahu witnesses to the 1844 negotiations.

(a) Tare Wetere Te Kahu

The following account is taken from Professor Ward's report and accurately records and comments on the salient points of Te Kahu's evidence (T1:102).

Te Kahu confirmed the general boundary agreed with Colonel Wakefield and Symonds. With regard to reserves he said that one was asked for and granted at Port Chalmers. He went on:

A reserve was then asked for at Dunedin, when Captain Symonds proposed to arrange it in this manner, that Maori and European land should be in alternate pieces, i.e., Maori land, then European, then Maori, and then again European. (C2:21:11)¹⁰⁷

According to the witness, David Scott was unable to interpret to Wakefield's satisfaction, Clarke was sent for and "talking then commenced again":

It was then clearly stated that a Native reserve would be made at Dunedin or Otepoti, where it was absolutely decided that a reserve should be

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made. The lands on either side of Otepoti Creek marked A and C on tracing (made by witness) were reserved for the Natives by Colonel Wakefield. The intervening part marked B was to be European land; these reserves were made to draw up the boats on. (C2:21:11)¹⁰⁸

When Kettle came to survey the area, Te Kahu said, he confirmed this arrangement and Ngai Tahu from the Heads lived in three houses on the land. Shortly after this the first two immigrant ships arrived. John Jones built a house on the portion marked B (C2:21:11).¹⁰⁹

Though this evidence tends to telescope time, and probably reflects the fairly common confusion between Daniel Wakefield (with Scott in June) and Colonel William Wakefield (with Clarke in July), it is evidence of a reserve at Princes Street and of the interest and role of the ubiquitous Jones. It also provides the first, and perhaps most authentic reference, to an alternation of Maori and European sections—in one specific location. Te Kahu proceeded:

–There were to be reserves at Taiari, Molyneux, and Kai Tangata. These are the only reserves of which I am aware. I heard the promises made about these reserves.

29. Was anything said about reserves to be made afterwards? – I do not know.

30. If the reserves mentioned in Symond's deed, and which I have now read over to you, together with those at Port Chalmers and Otepoti were made, would you consider conditions of sale fulfilled? – If the reserve at Otepoti was returned to Maoris, I should think all promises made by Colonel Wakefield and Captain Symonds would be fulfilled.

31. Did you ever hear anything about reservation of one section for Maoris to every ten sections for the Europeans? – I do not know anything about that condition. The alternate sections to which I referred before I understood only to refer to the Otepoti Block.

35. [Mr Macandrew]. How old were you at the time of the negotiations for the land purchases? – I do not know, but I at the time had two children.

36. How many pieces did Colonel Wakefield promise? – He promised us two pieces. The whole block was divided into three allotments, the centre piece to be for the Europeans. I do not know what were the exact boundaries of these pieces. (C2:21:12)¹¹⁰

We conclude this account by observing that this evidence in no way substantiates a claim that tenths were to be provided.

(b) *Hoani Wetere Korako*

Korako said he was present at the negotiations and signed Symonds' notebook, not the deed itself. The name Korako does appear on the deed as a signatory, but Korako explained it was that "of old Korako", not his. He claimed that Taiaroa, Karetai and Tuhawaiki told Colonel Wakefield they wanted £800,000 for their land, which Colonel Wakefield refused to give. Later the Maori were told "they were to receive £2,400 and a piece of land at Port Chalmers and two pieces

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in the town with allotment of European land between them” (C2:21:12).¹¹¹ The chairman then read over part of the Otakou deed of purchase to the witness. He was asked:

45. Would you consider that all promises made to you by Colonel Wakefield and Captain Symonds, concerning reservation of land for Natives, had been fulfilled, if you were now to obtain the reserves at Port Chalmers and at Otepoti? – No; I heard that promises were made concerning hospitals and schools.

46. I am not alluding to hospitals or schools, but to the reserves? – There are many things connected with the land sales still unfulfilled.

47. [Mr Taiaroa] If you got reserves at Port Chalmers and at Otepoti, would you consider promises fulfilled? – No, I should not.

48. [Mr Sheehan] How would there, in that case, be still unfulfilled promises? – The reserves were the principal subject of discussion at sale of land, and now the Natives have no reserves.

49. Can you mention hearing of reserves not handed to Natives? – The land at Molyneux, near the present reserve, does not belong to the Natives, as it ought to do. It is situated towards the north of the Molyneux, and called Kaitangata. (C2:21:12)¹¹²

As with the evidence of the other Ngai Tahu witness, Te Kahu, there is nothing in Korako’s evidence to suggest that tenths or anything like tenths were promised by the European negotiators.

The Smith–Nairn Royal commission

6.6.9 Five Ngai Tahu gave evidence before the Smith–Nairn commission in 1880 concerning the July negotiations. All said that “wakawakas” were discussed with Colonel Wakefield. (Wakawaka is defined by H W Williams, *A Dictionary of the Maori Language*, 7th ed, 1985, as “share” or “division”). But the evidence of one Merekeherike Hape, was entirely hearsay as he was not personally present (P3:116–119).¹¹³ The evidence of Hone Kahu was brief. He said that Maori portions were to be chosen from the places which had been occupied by their ancestors (“Ko nga whenua Maori hei nga Papatupu”) and he claimed four named places (P3:120–124).¹¹⁴ More specific evidence was given by Wiremu Potiki, Horomona Pohio and Rawiri Te Maire. The latter two were present in June 1844 as well.

6.6.10 They told the commission that the purchase price was the first matter discussed and that the question of “wakawakas” was raised in this context. Potiki said:

When I got here I heard that the price of the land was named. Taiaroa, Karetai & Tuhawaiki asked what was the amount of money . . . Wakefield said it was £2,400. Karetai & the natives did not agree to that amount. Then Wakefield told them that the land would be divided, and then they agreed to that amount . . . He mentioned that the land was to be divided into sections, and that was the reason why they [the Ngai Tahu] agreed to take the £2400. (P3:100–111)¹¹⁵

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Horomona Pohio first referred to Mr Wakefield (presumably Daniel Wakefield) offering them £1200, which was rejected. Wakefield then asked to have the land divided into sections but Taiaroa, Karetai and Tuhawaiki told him they would not sell the land. Wakefield then said if the land was divided into sections he would make them an additional payment. “They would not agree to sell the land. Mr Wakefield returned” (C2:14:25–37).¹¹⁶ We note that Pohio had either forgotten, or did not know, that on 20 June 1844 the three chiefs referred to above offered to sell the land for £2400.

Pohio later testified that he recalled Mr Wakefield coming down a second time about a month afterwards. This is obviously a reference to the arrival in July of Colonel William Wakefield, who came instead of his brother Daniel. Pohio said:

The natives then asked Mr Wakefield how much money he would give for the land. He replied £2,400, and he said “And the land also shall be divided into sections for you natives [?]. The natives then consented, as the land was to be divided into sections. (C2:14:31)¹¹⁷

The portion of the deed relating to reserves was then read to Pohio. He was asked why Ngai Tahu did not sell those pieces, to which he replied, “Because they considered the payment was too small. It was not what they had asked for” (C2:14:27–35).¹¹⁸

- 6.6.11 Rawiri Te Maire early in his evidence related that Wakefield, presumably Daniel Wakefield, came down on the *Scotia*. He held a discussion about boundaries and offered £1200 for the land. Te Maire said that Ngai Tahu would not part with the land; that “they would not sell the land, and Wakefield returned”. He came back about three weeks or a month later. We note that this account resembles that of Horomona Pohio, except that he makes no reference to Daniel Wakefield offering to divide the land into sections. Like Pohio, he has either forgotten or did not know that Taiaroa, Karetai and Tuhawaiki had offered to sell the land for £2400 in June. Te Maire then relates that after Wakefield “returned” in July he offered £2400 (C2:14:44–49).¹¹⁹ He was questioned by the lawyer Izard:

Did the natives at first refuse to take the £2,400 altogether for the land? – The natives did not agree to take the £2,400.

When the natives refused to take the £2,400 did Wakefield say anything to them further? – He said that he would return a portion of the land he wanted to buy to the natives.

Did he explain in what way the land was to be returned? – There were to be sections made, and the land given to the natives. (C2:14:50)¹²⁰

A discussion about the sections or wakawaka then ensued. Te Maire said that no size (acreage) of the wakawaka was mentioned. They

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were to be allocated after the survey was made and were to be in addition to the blocks reserved from the sale. Izard then asked:

Then it was after Wakefield had mentioned these wakawakas that the natives agreed to take this £2,400; is that not so? – It was after these promises were made that they accepted the money. (C2:7:52)¹²¹

When Te Maire resumed his evidence the next day he was asked who had acted as the interpreter at the meeting. He said that Clarke and Scott were involved. Izard then asked:

Was it Scott or Clarke who explained to them what Wakefield said about the wakawakas?–It was Clarke.

Did Symonds say anything to them about the wakawakas? – No; I did not hear him say anything about the wakawakas. (C2:14:62–63)¹²²

Soon afterwards Izard asked:

Did Mr Clarke explain to the natives that the land would be divided in a similar manner [i.e. into sections in the same manner as Maori cultivations] after the survey?–Yes. Mr Clarke explained to us that the divisions would be the same as in a cultivation. I myself was listening to it. (C2:14:62–63)¹²³

- 6.6.12 We are unable to reconcile the evidence of Horomona Pohio and Rawiri Te Maire as to Daniel Wakefield's first visit and the alleged refusal of Taiaroa, Karetai and Tuhawaiki to sell the land, with the proved action of those chiefs in signing the 20 June offer to sell for £2400. As to the July meeting with Colonel William Wakefield, the three witnesses agreed that Wakefield opened the July negotiations by offering £2400. They do not specify what reserves were offered in conjunction with this offer. Ngai Tahu are said to have rejected it. Wakefield then offered to return a portion of the land in the form of sections or wakawaka, unspecified as to area, after the land was surveyed. Te Maire claimed that George Clarke explained how the system would work. None of the witnesses stated what proportion of the land was to be returned in this way. They said that Wakefield's offer of £2400 was accepted after – and because – the promise regarding sections or wakawaka was made.
- 6.6.13 There are problems in reconciling this evidence with what we know the three leading chiefs – Taiaroa, Karetai and Tuhawaiki – had done on 20 June 1844. The evidence of Potiki, Pohio and Te Maire is that in July, the three chiefs were not willing to sell for £2400. They made no mention of the chiefs' offer of 20 June to sell for £2400. Instead they maintained that the Ngai Tahu leaders agreed to the sale in July only after Colonel Wakefield is said to have offered sections or wakawaka. If the recollection of these witnesses some 36 years after the event was correct, we would have expected Symonds, in his daily journal or his final report, or Wakefield in his comprehensive report,

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or Clarke in his Smith–Nairn evidence or memoirs, to have recorded discussions on such an important matter. In fact Colonel Wakefield’s only comment on the £2400 price was:

It is probable that the natives would have consented to receive something less; but the sum having been fixed upon by Mr Tuckett before my arrival at Otago, I thought it better not to disturb his arrangement and that every security against future dissatisfaction of the natives should be taken by a compliance with their expectations. (C2:11:56–57)¹²⁴

On the question of tenths we have already cited from Wakefield’s report (6.6.3), in which he expressed his reservations about tenths being vested in trustees under the 1844 ordinance. He went on to say:

Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements, not contemplated in the Company’s New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:55)¹²⁵

Colonel Wakefield expressly stated that the “special native reserves, as in the other settlements” – a reference it would appear to tenths – were “*not contemplated* in the Company’s New Edinburgh scheme . . .” Had Colonel Wakefield in fact promised sections or wakawaka to secure the agreement of Ngai Tahu to sell, he must be guilty of practising a massive deception in hiding this from his superiors. He must also have deceived Symonds and Clarke or secured their connivance in his deception. Wakefield’s report was written on 31 August 1844, a month after the sale. We have no reason to suspect its accuracy on this matter. We are not able to find that the evidence of the three Ngai Tahu, based on their recollection of events some 36 years later, should be preferred to the contemporaneous evidence recorded in 1844. This latter evidence makes no reference to tenths being part of the bargain for the sale of the Otakou block.

Later European evidence

6.6.14 It remains to consider later evidence of Symonds and Clarke given before the Smith–Nairn commission in 1880.

Symonds gave evidence on 18 February 1880. He said that Ngai Tahu pointed out the land they wished to keep for themselves:

I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them [Ngai Tahu]. I mean the large reserve up to the Heads. (C2:14:2–13)¹²⁶

Later, asked whether he had any discussion with Maori about the tenths he replied: “No, none whatever”. Asked whether Colonel Wakefield had any discussion with Maori about tenths he answered:

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“I cannot tell”. When questioned by Commissioner Smith as to whether he had any knowledge of the fact that Colonel Wakefield alluded to the tenths (to Ngai Tahu), he answered: “No”. He made it clear that he himself had not told Ngai Tahu that tenths were part of the agreement. Later, the following dialogue took place:

Mr Nairn – Do you remember any particular spot of land which the natives desired to except from the sale, and which was not reserved? – No, I do not. The places they mentioned to me were reserved by me. I do not know of any reserve which the natives desired to reserve from sale which was not reserved.

Mr Izard – Did the Maoris point down to where Dunedin now is, and say they wanted any land reserved there? – No; I don’t know that they did. I was very careful in reserving what they desired, and think I should have remembered it if they had requested land to be reserved which was not reserved. (C2:14:16–17)¹²⁷

- 6.6.15 George Clarke, in 1880, was a congregational minister in Hobart, Tasmania. The Smith–Nairn commission sent him a copy of Symonds’ evidence to the commission. It asked him to comment. In his affidavit of 7 April 1880 he said that Symonds’ report, “accords very well with my recollection of what took place”. But he added “some particulars with which I am strongly impressed” (T1:106).¹²⁸ He went on to say he had gone straight to Otago from assisting Spain to sort out the confusion in Wellington:

I went into the matter with the determination that the whole terms of the purchase should be expressed in the Deed of Conveyance, and that I would have nothing to do with any sort of engagement that was not put clearly on record. I pressed the necessity of this on all the parties concerned and cited the case of other purchases as a reason why we should be specially careful in our conduct of this. (T1:106)¹²⁹

Therefore he approved of Symonds’ insistence on the boundary inspection, although Ngai Tahu themselves were doubtful about the necessity for it. He continued:

Then came the question of Reserves. I need hardly say that before a purchase of this kind is concluded a good many conversations pass, between the contracting parties. All kinds of proposals are made and discussed, and they are accepted, modified, or rejected as the case may be. It is quite possible that in some such conversations Colonel Wakefield may have proposed as a condition of sale that a certain proportion of the alienated land should be set apart for the natives. I think that he did propose it on the understanding that the natives should make over the *whole Block* to the Company. But this they were unwilling to do. They said that such promises had been given in the other purchases of the Company, and they feared lest only the worthless sections would be assigned to their use. To the best of my belief such a proposal formed no part of the final arrangement. If it did it would certainly be expressed in the Deed of Conveyance. What happened was, I think, this. There were certain lands about Omate, Pukekura and Taiari which the natives were

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very anxious to retain, and Colonel Wakefield just as anxious to buy. The Chiefs took us over the ground and pointed out how thickly it was studded with the graves of their relations. They told how only a few years before the tribe had been decimated by measles and other epidemics, and how whole families had been swept off in the course of a few weeks; and when pressed by Colonel Wakefield, they angrily declared that sooner than part with these places they would throw up the bargain altogether. It was then that Colonel Wakefield said that *if* they would only sell these grounds, the actual burial places should be respected, and ample reserves should be made for the natives elsewhere. The chiefs however were decided, and refused to let these lands be included in the sale. What arrangement Colonel Wakefield may have made with the Government as to the reservation of any part of the *alienated* land for the Natives I do not know, – but my impression is that there was no such stipulation in the bargain as between the natives and Captain Symonds and myself.

I am not able, Gentlemen, after so many years to recall the provisions of the Deed, but of this I am certain, that whatever its terms, they were most carefully and elaborately explained to the natives at the time (and I was not without experience as an Interpreter) – and I am almost as certain, that *nothing whatever beyond the contents of the Deed was promised as a condition of the sale.* (T1:107)¹³⁰ (emphasis in original)

We note that Clarke gave a similar account in his memoirs, published in 1907 (P3:135–138).¹³¹

Was the provision of tenths a condition of the Otakou purchase?

- 6.6.16 After carefully considering all the evidence (including more than 1000 pages of documentation put in by Dr Ann Parsonson on behalf of the claimants) and counsel's submissions, the tribunal finds that the deed of purchase, signed on 31 July 1844, accurately reflected the agreement reached between the parties. While a decision remained to be made by the governor, as to whether provision would be made for tenths, this was not part of the contractual arrangements between the parties. Nor was, as we have earlier indicated, the Otakou transaction governed by the waiver proclamation of March 1844.
- 6.6.17 It was strongly urged on us on behalf of the claimants, that even though no provision was made in the deed of purchase for tenths, Ngai Tahu *at the time* believed that tenths would be provided after survey. It is certainly possible that Colonel Wakefield discussed with Ngai Tahu leaders the possibility of providing for tenths if they would agree to surrender the whole block free of reserves, especially the eastern peninsula. But other evidence suggests that Wakefield was not keen on the provision of tenths, especially as they would be vested in trustees over whose actions the company would have no control. Reference was made to publication of the March proclama-

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tion in *Te Karere* (U10(c):27). But Dr Ann Parsonson was critical of the Maori translation as being difficult to follow. We do not know what, if anything, FitzRoy may have said about tenths to Tuhawaiki in Wellington on 27 February. There is no evidence that Symonds had instructions from the governor, or Superintendent Richmond, to ensure that provision was made for tenths. It is clear that he did not discuss the subject with Ngai Tahu. George Clarke, although recollecting events many years later, considered that tenths were no part of the arrangement which he fully discussed with Ngai Tahu. We are disposed to agree with Professor Ward, that Ngai Tahu much preferred to have land they wished to retain set aside as excepted from the sale, and thereby reserved. In short, we believe there is no good contemporary evidence that Ngai Tahu had an expectation that the company or the government would provide tenths on their behalf. Nor are we persuaded by any later evidence that such was the case.

We agree with Professor Ward when he said that the matters raised by Topi Patuki in 1867 probably reflect very well the real and actual concerns of the southern Ngai Tahu at that time. As will be seen in chapter 7 when we discuss the claim over the Princes Street reserve, Ngai Tahu by 1867 felt a genuine grievance about specific pieces of land at Dunedin and, as Professor Ward said, “the beginnings of a wondering about entitlement to ‘tenths’ in view of the matter having been left for FitzRoy’s decision and in the light of general Company/Government undertakings” (T1:109). How was this non-contractual matter, that had been left for the governor’s discretion, dealt with? This question and related matters we will consider shortly. But before doing so we must consider a further complaint by the claimants.

6.7. **Symonds’ Responsibilities for the Purchase**

6.7.1 The claimants in their first grievance complained that “the protector Symonds, failed to discharge his responsibilities at the time of the negotiations, and afterwards” (W6).

The claimants referred to Symonds as “the protector”. A reference to the instructions dated 27 February 1844, which Symonds received from FitzRoy (6.4.9), shows that Symonds was required:

- to proceed to the South Island and there superintend and assist Tuckett, in effecting a valid purchase of not more than 150,000 acres;
- to be careful not to infringe the slightest way on existing rights or claims, whether Maori or otherwise. (This direction was made with the recent Wairau affray very much in mind); and

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- to inform the Maori population that he was sent to superintend the purchase of lands which they wished to sell, and that he, on behalf of the government, would not authorise or sanction any proceedings which were not honest, equitable and in every way irreproachable.

He received no instructions as to reserves for the Maori vendors.

It is apparent from the foregoing that Symonds had dual responsibilities. First, to assist the New Zealand Company agent to make a valid purchase. Secondly, to ensure that the company only purchased lands which the Maori owners wished to sell and that the proceedings were honest, equitable and irreproachable. Symonds therefore had obligations to both parties—the New Zealand Company and the Maori—but he was not designated protector. That role was assigned later to George Clarke Jr, a sub-protector who was sent down by FitzRoy in July, when it appeared an agreement to sell might be finalised.

6.7.2 Counsel for the claimants, in the course of his closing address, made various criticisms of Symonds' conduct:

(a) He complained that Symonds absented himself from the negotiations because of his quarrel with Tuckett in June 1844. We have already related the reasons for Symonds' return to Wellington (6.5.10). He had proposed to Tuckett that before the negotiations began in earnest, there should be an inspection of the proposed boundaries by Tuckett, representative Ngai Tahu chiefs and himself. He suggested deferring the meeting with Ngai Tahu for a week, to enable this to be done. Tuckett was anxious to press on with the discussions and very reluctant to participate in a prior boundary inspection. He made very clear his opinion of Symonds in a note to Daniel Wakefield. Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" by Tuckett, resolved on 17 June to return to Wellington. Daniel Wakefield, the New Zealand Company agent, supported Symonds and not Tuckett. He also decided to return to Wellington. Symonds told Ngai Tahu the following morning of his decision to return, to which it is said they agreed.

All this, however, did not deter Tuckett, lacking an adequate interpreter, from proceeding with negotiations with Ngai Tahu. We are not able to find that Symonds acted otherwise than as he saw proper in the circumstances. Tuckett chose to proceed with negotiations without Symonds' sanction and knowing that no final agreement could be reached in his absence. In fact, it was more than five weeks later before an agreement was reached.

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(b) Mr Temm submitted that from March 1844 to October 1844 FitzRoy, Richmond, Wakefield and Symonds all expected tenths to be made from the Otago purchase (W1:96). The tribunal is not satisfied there is any convincing evidence that Symonds had any such expectation. As he indicated in his 2 September 1844 report to Superintendent Richmond, the question of tenths was left to the discretion of the governor. If FitzRoy or Richmond had any such expectation, they do not appear to have communicated this to Symonds. Wakefield also took the view that it was a matter for the governor.

(c) It was further submitted by Mr Temm that Symonds, on his own admission, took no part in the negotiations and had nothing to do with the price or terms of purchase except to record in the deed the land Ngai Tahu were not willing to sell (W1:111–112). In our opinion this does not fully represent the burden of Symonds' evidence before the Smith–Nairn commission. We set out the following passage from Symonds' testimony on being questioned by Izard, counsel for Ngai Tahu, about the July negotiations:

Mr Izard: – Then negotiations took place with the natives about the purchase of the land, I believe? – Well, that I am not aware of. They were carried on by Mr Tuckett, and so far completed when we arrived that the sum had been agreed upon.

That is to say, when you arrived you found Mr Tuckett had agreed with them as to the land and price? – Yes; to give them £2,400 for such land as they were willing to point out, and they pointed out certain boundaries to him.

Did you go over the boundaries yourself? – Yes, with Colonel Wakefield, Mr Tuckett and six young natives, sons of chiefs, in order to point these boundaries out and to remember them.

Mr Smith:–You traversed the whole of the boundaries? – No; we went to *all the* points named in the Deed, from which we could see the boundaries.

Mr Izard: – Then the natives understood, I suppose, that they were parting with all the land within the boundaries, except certain lands which they would not sell at all? – Yes; they are excepted in the Deed.

Did you have any personal negotiations with the natives about the price to be paid? – None.

Or about the boundaries? – No. I was merely there to see fair play, and that the natives were not imposed upon; to see that the boundaries were clearly defined. The Govt wished to avoid anything that might lead to a collision with the natives.

Then, in fact, you considered it no part of your duty to interfere as to the price, or as to the land? What you did was to see that the thing was conducted in a fair, straight-forward, honest way?" – Yes; and that the natives were satisfied.

Then as to the negotiation, you had nothing whatever to do with it? – No.

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I suppose the negotiations were quite completed, or did Colonel Wakefield finish them after arrival? – That I can hardly tell you. I imagine they put their heads together, and managed to complete the negotiations.

The natives pointed out to you the land they did not sell? – Yes; what they wished to keep for themselves. I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them. I mean the large reserve up to the Heads. (C2:14:5–8)¹³²

Although he does not say so in his evidence, the boundaries inspection was made at Symonds' insistence. Ngai Tahu were not overly anxious to participate. But Symonds, as he said in evidence, was there to see fair play, that the Maori were not imposed upon and that the boundaries were clearly defined. Not only was he concerned to see that the transaction was “conducted in a fair, straight-forward, honest way”, but also that Ngai Tahu “were satisfied”. We note too, that despite his agreement that he had nothing to do with the negotiations, he did in fact intervene. How otherwise would he have had “some trouble to get Colonel Wakefield to agree” that “the large reserve up to the Heads” should be kept back for Ngai Tahu. We also recall that Sub-Protector Clarke recorded in his memoirs that:

With Symonds's consent, as well as Colonel Wakefield's, I started with the understanding that the whole negotiation with the Maoris should pass through my hands, and I told the natives that I should be answerable for no conditions or promises whatever, except what I myself should tell them. (P3:135)¹³³

It is clear that Clarke in his role of protector played an active part in ensuring that Ngai Tahu understood the arrangements being entered into.

(d) Mr Temm further submitted that Symonds, Wakefield, Richmond and FitzRoy all knew in July 1844 that the governor was to set aside reserves from the land that was to be sold under the March waiver proclamation. We do not accept this submission. There was no persuasive evidence before us that this was so, quite apart from the consideration that, in our view, for reasons we have given, the March waiver proclamation did not apply to the Otakou purchase.

- 6.7.3 We conclude our discussion of this grievance, which we do not find to be made out, by observing that the evidence showed Symonds, if he had a fault, to have been over cautious in his efforts to superintend the activities of the New Zealand Company agents who had the responsibility of negotiating the purchase. But, in so acting, he did not disadvantage Ngai Tahu.
- 6.7.4 But while we believe Symonds conscientiously followed his instructions, we are bound to say that his instructions were defective. FitzRoy made no reference to the question of reserves when he

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formally commissioned Symonds, on 27 February 1844, to undertake the supervision of the purchase. Nor did he specifically refer to reserves in his letter of the same date to Colonel Wakefield. He did, it is true, make it one of the conditions of the waiver of the Crown's right of pre-emption, that all existing arrangements made by the government with respect to New Zealand Company settlements should be strictly observed. As we have indicated (6.4.4), these left the government with a discretion to make such arrangements as it thought just and expedient. In the same way clause 6 of the terms of purchase provided that the local (New Zealand) government would make such further reserves for Maori vendors and public purposes as it might see fit. Further, the company's detailed instructions to Colonel Wakefield told him he was to take FitzRoy's directions with respect to reserves for Maori and for public purposes (6.4.6).

Nor did FitzRoy, or anyone authorised by him, give verbal instructions as to what reserves, if any, should be set aside. Their instructions were to purchase the lands which Maori "wish to sell" up to 150,000 acres. FitzRoy failed to give any instructions that Symonds or the others involved in the purchase were to ensure that the Maori retained sufficient land for their present and future needs. In short that they were left with an adequate endowment. The fault, in our view, lay not with Symonds, but with Governor FitzRoy, who failed in his instructions to advert to the question of adequate reserves being secured to Ngai Tahu.

6.8. **Developments After the Purchase**

6.8.1 Symonds duly reported on 2 September 1844 to Superintendent Richmond on the successful completion of the purchase. As noted earlier, Symonds advised that he had:

left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:2)¹³⁴

Richmond sent Symonds' report to Governor FitzRoy early in September 1844 (P2:126). By this time news had reached Wellington from London that the company's operations had been suspended due to difficulties between the New Zealand Company and the Colonial Office. Consequently, in September Colonel Wakefield instructed Tuckett to defer any further work in Otago (P3:159).¹³⁵

As there was no longer any urgency to advance the proposed New Edinburgh settlement, FitzRoy deferred reporting to the colonial secretary until December 1844. He assembled a large number of documents and correspondence relating to the purchase. These he

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sent to Lord Stanley with a brief covering letter dated 10 December 1844:

I have the honour of transmitting to your Lordship copies of correspondence relative to the purchase of a tract of land at Otago, in New Munster (Middle Island) accompanied by tracings of the plans made by the New Zealand Company's surveyors.

Mr J. Jermyn Symonds has acquitted himself of his difficult task more speedily and successfully than I could have anticipated, satisfied, as I felt of his ability and judgment.

The principal known qualifications of Otago as a site for a settlement, are, a moderate harbour (not accessible in strong northerly winds), an extensive tract of country well adapted for pasturage, but without timber; a fine climate, neither too wet nor too windy; and an abundant supply of good bituminous coal.

There are so few natives in New Munster, not more than 1,500 altogether, that colonization might there be carried on unimpeded, if the Government were to buy from the few native claimants (securing them ample reserves), and then dispose of the land. (C2:7:1)¹³⁶

Symonds' report of 2 September was with the first enclosure which also included a copy of the deed. FitzRoy spoke of Symonds' conduct in a complimentary manner. But he made no mention of Symonds' action in leaving to him as governor the decision as to whether further reserves in the form of tenths would be provided. He did however suggest that, given the small Maori population in the South Island, colonisation could proceed there unimpeded.

- 6.8.2 No evidence was put before us that FitzRoy considered that further provision for reserves in the form of tenths, or any other form, should be made for Otakou Ngai Tahu. We infer from his brief uncritical letter to Lord Stanley that FitzRoy entirely approved of the transaction, including the provision for reserves in the deed, and that he did not propose to take any further action as to the provision of tenths. Whatever his intention may have been at the time, in fact he took no further action. Tenths were not provided either by FitzRoy or by Grey who succeeded him as governor soon after in 1845.

The Colonial Office response

- 6.8.3 FitzRoy's 10 December despatch was received by the Colonial Office on 29 May 1845 (P2:128). It arrived at a time when a fresh round of negotiations concerning the New Zealand Company's entitlement to land was coming to a head. On 6 July 1845 Lord Stanley sent a lengthy despatch to George Grey, who had by then replaced FitzRoy as governor (C2:18:1-6).¹³⁷ This contained instructions for implementing Pennington's award, under which it appeared the New Zealand Company was entitled to some 885,000 acres. Lord Stanley reviewed the company's claims, district by district, including Otago. Stanley

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referred to it as having been purchased under “special circumstances”, these being that the Crown’s right of pre-emption had been waived in favour of the company to the extent of 150,000 acres, the company being limited to that quantity. The colonial secretary went on to say that, as soon as the survey was completed and Colonel Wakefield was able to apply for a Crown grant, Grey was:

to make it to him with the least possible delay, not only for the 150,000 acres, to which the Company would be entitled, under the arrangement sanctioned by Captain FitzRoy, but to any larger extent of available land not already reserved by Mr Symonds for the natives or Government purposes, out of the tract included in the deed of sale, dated the 31st July 1844. (C2:18:3)¹³⁸

6.8.4 Dr Ann Parsonson, on behalf of the claimants, suggested to us that:

as Lord Stanley had seen the Otakou deed of sale, he was clearly not referring to the lands named therein which the sellers wished to keep for themselves, but considered that Symonds might since have made further selections for them. (C1:63)

This does not seem to us a tenable view. Lord Stanley also had before him Symonds’ report of 2 September 1844. There Symonds referred to Ngai Tahu “reserving certain portions of lands within the limits of the purchase”, which he approved (C2:7:1).¹³⁹ Moreover, the deed itself refers to Ngai Tahu “excepting the following places which we have reserved”. Lord Stanley was saying that the company, in addition to the 150,000 acres, could be given any other lands in the block not “already reserved” by Symonds for Maori or government purposes.

That this was his intention is confirmed by a letter at the direction of Lord Stanley to the company directors on 7 August 1845, in which it was said:

With respect to the proposed settlement at Otago, Lord Stanley will at once instruct the Governor to make to the Company an unconditional grant of the 400,000 acres, purchased at Otago, *excluding, of course, the land reserved to the natives*; the Company engaging, within a limited period, to select the 150,000 acres proposed, and also such further quantity thereof as they may desire, and to re-convey the remainder to the Crown. (P3:206)¹⁴⁰ (emphasis added)

On 15 August 1845 Lord Stanley sent two despatches to Governor Grey. In one he requested Grey to convey to Symonds “my approbation of his conduct and my sense of the service which he rendered on that occasion” (P3:211).¹⁴¹ In the other, a copy of the letter of 7 August to the company directors was enclosed, and Grey was instructed “to take the instructions intimated in that letter as here repeated for your guidance”.¹⁴² That is, as if they were direct instructions from Stanley.

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We infer from Lord Stanley's directions to Grey that the British government considered that the reserves already approved by Symonds adequately met the obligations of the Crown so far as land endowment for Ngai Tahu was concerned. The question of tenths was not mentioned. But it does not follow that Grey, who would have had before him Symonds' report on the sale, could not have exercised the discretion vested in his predecessor, FitzRoy, to provide for tenths had he thought this appropriate. In fact, given that the block was surveyed while Grey was governor, he may have had even more responsibility to consider the matter than his predecessor.

The New Zealand Company response

6.8.5 While it is apparent that neither of the governors in New Zealand appear to have given any real consideration to the question of tenths being provided once the Otakou block was surveyed, the New Zealand Company officials did at least discuss the matter. Thus William Cargill, who had replaced Rennie as leader of the New Edinburgh Association, wrote to Harington, the New Zealand Company secretary, on 29 August 1845. He expressed the view that:

inasmuch as the Natives are so few in number (being under 60 in all), and as a distinct block of land, of ample dimensions has been reserved for them at their own desire and not included in the purchase – no other Native reserves ought to be laid out within the boundaries of this Settlement.

Had these people been more numerous it would have given the leaders of our enterprize the greatest pleasure to have forwarded the Company's general views upon this subject, and to have promoted the location of Natives under their own chiefs and amidst the examples of a civilized community; but it is strongly felt that in the present instance any such reserves would be not only unnecessary but an absolute hindrance to the purposes of the Settlers, by interposing unoccupied wastes, and increasing the expense of roads &c, without benefit to anyone. (C2:6:6-7)¹⁴³

A meeting of directors on 4 September 1845 accepted Cargill's recommendations (C2:6:9-10).¹⁴⁴ Under clause 6 of the 1843 terms of purchase the responsibility for the provision of reserves for Maori and for public purposes rested not on the company but on the New Zealand government. Accordingly the company acted within its rights in deciding that no additional reserves ought to be provided for Ngai Tahu within the boundaries of the purchase.

On 13 April 1846, Grey issued a Crown grant to the New Zealand Company for the whole of the Otakou block, estimated to contain 400,000 acres, but excepted from the grant the reserves named in the deed.

*Otakou****The governors' responsibility***

6.8.6 Professor Ward told us that while he could understand FitzRoy's hesitation in taking tenths, especially as the settlement had been deferred, he agreed with the claimants that:

to be consistent with its own public undertakings, the government should have taken an endowment equivalent to tenths, if not within the 150,000 acres (if that were deemed to be already balanced by the agreement over the Heads) then within the balance of the block, before it was Crown Granted to the Company. I have suggested . . . that this would have *eventually* provided useful revenue to government for Maori purposes, and some of the land might, in later generations have come back into Ngai Tahu hands. (V9:13)

Support for this view is to be found in the following:

- Lord Russell's direction of 31 December 1840 that in future sales of public land by the Crown, not less than 15 and not more than 20 per cent was to be appropriated by the governor to the use and benefit of Maori. (Lord Russell said he did not mean that money should be given to them but that the salary of the protector, the cost of agricultural tools, the salaries of schoolmasters etc should be paid partly by this sum) (T1:78);¹⁴⁵
- additional instructions on 28 January 1841 embodying the 31 December instruction were sent to Governor Hobson. It was now contemplated that the fund would, in addition, be used "for promoting the health, civilization, education and spiritual care of the natives" (T1:78);¹⁴⁶
- the action, in July 1842, of the New Zealand governor, in appointing the chief justice, the anglican bishop of New Zealand and the chief protector of aborigines as trustees to administer the funds directed by Lord Russell to be set aside, and also the New Zealand Company's reservation of "one-eleventh of their town, suburban and country allotments for the benefit of the natives". The chief justice was advised that:

With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made, by the New Zealand Company, and any monies which may prove from time to time to be disposable out of funds, so to be set apart, after paying the expenses of the protector's department, should be vested in one set of trustees (C2:4:36)¹⁴⁷

It was made clear that the company reserves were to be legally vested in the Crown. Further, and of special reference to Otago, it was expressly provided that "the funds arising from the company's reserves shall be expended in the promotion of these objects in the settlement or district from which they may respectively arise . . . "

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(C2:4:36).¹⁴⁸ See our earlier discussion for the problems which the trustees encountered (5.6.2);

- the 26 March 1844 waiver proclamation, although it did not apply to the Otakou purchase, made provision for tenths to be vested in the Crown “for public purposes, especially the future benefit of the aborigines” (P3:197)¹⁴⁹; and
- Governor FitzRoy’s belief in 1844 that tenths should be provided for Maori vendors as demonstrated by Dr Ann Parsonson. FitzRoy, in a memorandum of 14 October 1844, later sent to the colonial secretary, said:

With respect to the interests of their descendants they [the Maori] are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition. (R36(b):II:374)¹⁵⁰

6.8.7 The tribunal can only speculate why FitzRoy, given the Imperial government’s directions and his own stated views that tenths should be provided in addition to “extensive reserves”, did not in fact make provision for tenths. It may have been that because the purchase coincided with news the New Edinburgh scheme was in abeyance, he simply deferred it. It may be he did not address the question: he makes no reference to it in his December report to the colonial secretary. It may be he decided that the land excluded from the sale and reserved to Ngai Tahu, which amounted, on estimates made at the time, to something approaching one-tenth of the 150,000 acres, substituted for tenths. If so, what of the remaining land, over 380,000 acres, which in the event were also to be vested in the New Zealand Company in April 1846?

6.8.8 The tribunal accepts that, having regard to government policy prevailing in 1844 in relation to the provision of tenths, FitzRoy, or failing him his successor Grey, should have provided for an endowment equivalent to tenths and that this should have been in respect of the whole block. But having said this, the question remains whether the failure of the Crown so to provide constitutes a breach of the Treaty of Waitangi. We turn now to that question.

6.9. **Crown Actions—A Breach of Treaty Principles?**

Grievance no 2: Crown failure to provide Ngai Tahu with an economic base

6.9.1 In our opinion the answer to the question of the Crown’s responsibility under the Treaty turns on the issue of whether, given the absence of provision for tenths, the retention by the Otakou Ngai Tahu of some 9600 acres out of 533,600 acres sold was sufficient for their present and future needs and constituted an adequate endow-

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ment. The claimants, in their remaining grievance which we now consider, said that:

The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate. (W6)

We see no significant difference in this formulation from the Treaty principle enunciated by us in 4.7.8. Nor could the Crown escape its Treaty obligation by waiving its right of pre-emption, as it did here, and permitting a direct purchase from Ngai Tahu.

6.9.2 Before discussing the question further however, we should consider a suggestion made by counsel for the claimants, that in considering the adequacy or otherwise of reserves made for Ngai Tahu no account should be taken of the land, some 9600 acres, which were excepted by Ngai Tahu from the sale. We do not accept this contention. Among the instructions given Hobson by Lord Normanby was a prohibition on the Crown purchasing from the Maori any land “the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence”(A8:I:15).¹⁵¹ This tribunal has found it to be abundantly clear from these instructions, read in the light of the instructions as a whole, that no land was to be purchased by the Crown which was required for the comfort and subsistence of Maori people. In short, to comply with Treaty principles, they were to be left with a sufficient endowment for their own needs, both present and future. If, however, this requirement was not followed, whether in part or in whole, then the Crown would be obliged, out of the land purchased, to set aside by way of reserves sufficient land to secure an adequate endowment.

6.9.3 In our earlier discussion of Treaty principles we noted various factors to be considered in deciding what constitutes a sufficient endowment (4.7.9). We pointed out that much might depend upon a wide range of demographic factors including the size of the tribal population; the land they were then occupying or over which various members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds and on seasonal hunting and food gathering. In short, their dependence upon the many forms of mahinga kai.

There is no evidence that the officials involved, whether agents of the Crown or the New Zealand Company, gave any real consideration to these questions. It is true, as we have indicated, that the importance of these various elements could vary depending upon the date at which the Crown sought to acquire tribal land. Otakou was the first official sale of which Ngai Tahu had any experience. They welcomed the prospect of Europeans settling among them. Although

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they had some years of experience of sealers and whalers living alongside them, in 1844 they had no notion of the likely magnitude and rate of settlement both in their immediate locality and elsewhere where they enjoyed a variety of hunting and food-gathering rights. Nor, as we have earlier indicated, in fairness to the Crown, would the governors of the day have anything approaching a precise knowledge of the timing, scale and momentum of future settlement. Nor, for that matter, did the New Zealand Company have any certain knowledge.

- 6.9.4 The New Zealand Company, with the consent of the Crown, purchased approximately 534,000 acres from Ngai Tahu. Some 9615 acres was excepted from the sale as follows:

Reserve	Acres	Roods	Perches
Otago heads	6665	1	12
Taieri	2310	0	0
Te Karoro	640	0	0
Total	9615	1	12

(C2:17:10)¹⁵²

We have no knowledge of what consideration, if any, the Crown officials or the company agents gave as to the adequacy of 9615 acres to meet present and reasonably foreseeable needs of Ngai Tahu. In part, this would depend upon the number of Ngai Tahu who were dependent on this land. Wakefield appears to have thought there were not more than 50 in the Otago block and about a dozen in the southern part. He was aware of the earlier decimation of the Ngai Tahu population through diseases such as measles, so he may have considered 9615 acres sufficient (C2:11:47–50).¹⁵³

- 6.9.5 We received detailed evidence from Professor Atholl Anderson, an associate professor of anthropology at the University of Otago, on the population of Ngai Tahu in various localities at various periods. He produced a graph showing the estimated Maori population, including those of mixed descent, in east Otago between 1820 and 1870 (H3:fig 13). East Otago included the area of Moeraki in the north, and all settlements on the coastal strip south to a little below Nugget Point. His graph indicates that, based on the survey made in 1844 by Edward Shortland, there were some 535 Ngai Tahu people in the east Otago area. Detailed figures are shown in Professor Anderson's figure 9, which gives Edward Shortland's population figures for the following settlements, commencing with Moeraki about 45 kilometres north of the present Dunedin and running south to Karoro/Matau just

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north of Nugget Point. All the settlements, apart from that at Mataipapa/Taieri, were sited on the coast:

Settlement	Population
Moeraki	200
Waikouaiti	101
Otakou	160
Purakaunui	32
Mataipapa/Taieri	19
Karoro	23
Total population	535

(H3:fig 9)

The people at Otakou, Mataipapa/Taieri and Karoro were all occupiers of the land included in the approximately 534,000 acres sold to the New Zealand Company, while those at Purakaunui lived very close by. Those at Moeraki had close links with Ngai Tuahuriri at Kaiapoi. We have no detailed information as to the precise nature of the rights of the 100 or so Ngai Tahu resident at Waikouaiti but it cannot be doubted that they did have rights in the Otakou land. They were only 15 kilometres by sea from the Otago Heads and would appear to have enjoyed some community of interest. If the 200 people at Moeraki are excluded from the population having ownership or associated rights in the Otakou purchase we are left with a figure of some 335 Ngai Tahu. We are also conscious that some Ngai Tahu living further south in Murihiku and Ruapuke also had interests in the Otago land. The figure of 335 may be understated. But we are unable to say by how much.

We are also conscious of the fact that, just as other Ngai Tahu living beyond the boundaries of Otakou had interests in Otakou, so the Otakou Ngai Tahu had interests beyond the boundaries of the purchase. They would have looked to those rights to sustain them and in part at least compensate for the loss of a major portion of their Otakou land. And so the question of the adequacy of the reserves at Otakou is linked to both their then existing, and future, rights in the lands subsequently included in the Kemp and Murihiku purchases. But, as this report will demonstrate, insufficient reserves were made in all the Crown purchases from Ngai Tahu. They were demonstrably and grossly inadequate in both Kemp and Murihiku, as the Crown has conceded in this inquiry.

- 6.9.6 Had the Ngai Tahu people affected by the loss of some 534,000 acres known that when other land in which they had interests came to be sold the reserves would be so pitifully few, we cannot believe they

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would have agreed to sell all but 9600 acres out of over half a million acres. While they may have realised that over time, as settlement progressed in Otakou, they would no longer be able to hunt and forage with the same freedom, they would have had little appreciation that their eel-weirs and other important fresh-water based sources of food would diminish, in many cases to the point of extinction. Nor could they have reasonably contemplated that this would occur on a large scale throughout the vast areas of Te Wai Pounamu over which they had rights.

If it had transpired that in later purchases the Crown had recognised the need for generous areas of land to be retained not only for their residences and cultivations, but for their wider hunting and foraging requirements and as a future base for pastoral and other agricultural pursuits, it would perhaps have mattered less that a mere 9600 acres was left with Ngai Tahu compared with 534,000 acres acquired by the Europeans. But this did not happen. In subsequent transactions, as we will demonstrate, the reserves left to Ngai Tahu were infinitesimal. They were totally inadequate for their present, let alone their future, needs.

John Jones' award of 11,060 acres

- 6.9.7 We have had occasion to refer more than once to the whaler and trader Johnny Jones. In 1843 Jones lodged a claim for the award of 20,000 acres based on alleged purchases of land from Ngai Tahu. On 21 December 1843 the land commissioners, Colonel Godfrey and Major Richmond, reported that Jones had made a bona fide purchase. They recommended that the maximum grant of 2560 acres be awarded to him. Jones was very dissatisfied with this award. He complained to Governor FitzRoy. His claim was re-opened before a third commissioner, R A Fitzgerald, with a recommendation from FitzRoy and his Executive Council for a large extension of the grant. After investigation, Fitzgerald, on 27 December 1844, recommended an award of 10,000 acres. On the same day Fitzgerald's award was confirmed by FitzRoy to the extent of 8650 acres near Otakou. Unfortunately for Jones, Governor Grey replaced FitzRoy in 1845. Grey refused to sanction any award in excess of 2560 acres to Jones. A grant for this area was prepared. Jones refused to accept it until 1849 when Governor Grey gave his personal assurance that such acceptance would not prejudice Jones' claim to the large amount awarded by Governor FitzRoy, should grants in excess of 2560 be agreed to at any future time. Jones never gave up. His persistence was finally rewarded by the passing of a special enactment in 1867 entitled the John Jones Land Claims Settlement Act 1867. Section 2 of this Act empowered the governor to issue a land order to Jones to purchase

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land to amount to £8500 subject to the extraordinary provision that such purchase could be made by Jones without his making any payment in cash. His biographers, Alfred Eccles and AH Reed, *John Jones of Otago* from whose account we have drawn, disclose that Jones' land claims were brought to a close with a total grant of 11,060 acres.¹⁵⁴

It will be seen that FitzRoy, in December 1844, confirmed the award to one man, John Jones, of some 8650 acres. Finally, in 1867, Parliament was to award him 11,060 acres. By contrast, if the land retained by Ngai Tahu, of 9615 acres was divided among say 335 Ngai Tahu, each of them was entitled on an individualised basis to approximately 29 acres per person. Jones had a wife and seven children. Even if the 11,060 acres is divided by nine, each member of the family would have received approximately 1230 acres. The contrast is startling. We note that in the same month, December 1844, that FitzRoy confirmed an award of 8650 acres to Jones he decided to do nothing about an award of tenths to the 335 or so Ngai Tahu who had reserved to themselves a mere 65 more acres (9615) than FitzRoy thought one European should receive.

A social and demographic analysis

- 6.9.8 Mr Bill Dacker, a claimant historian from Dunedin, presented a detailed examination of Ngai Tahu's position in Otakou from the time of the sale, down to the present day (F11). He argued that Ngai Tahu were seriously disadvantaged in not being able to retain sufficient land to ensure their economic and cultural survival as a tribe. His evidence is discussed in more detail in chapter 18. He argued that Ngai Tahu had been able to trade successfully prior to the coming of the Otakou settlers, and for a short period after their arrival, but were soon marginalised and overwhelmed by settlers, unable through a lack of land to profit from the pastoral economy which soon developed across the province as a whole. While in Mr Dacker's view, subdivision and individualisation were welcomed by Ngai Tahu at Otakou as a solution to their difficulties, these only compounded Ngai Tahu's economic and social problems. With the Crown historian and the demographer who gave evidence in response to his paper, Mr Dacker saw Alexander Mackay's 1891 report on the condition of the tribe as clear proof that Ngai Tahu in Otakou were without sufficient land for their needs in the new world.
- 6.9.9 The Crown called evidence from Tony Walzl, an historian, and Professor D I Pool, a leading demographer and author of *The Maori Population of New Zealand: 1769–1971*.¹⁵⁵ In response to Mr Dacker's paper Mr Walzl gave evidence on the Ngai Tahu economy and society in the areas of Canterbury, Otago and Southland, con-

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centrating on the post-purchase period (Q8 & Q9). Mr Walzl pointed out that although in South Otago there had been little involvement in commercial agriculture, at Otakou Ngai Tahu had become heavily involved in agriculture in pre-purchase days when there was a market. The decline in this agriculture was due to the loss of that market when the whaling ceased. The non-resurgence of large-scale agriculture in the area, Mr Walzl suggested, was because post-purchase European settlement in the area was not conducive to the creation of a new market. It lapsed to a subsistence-based economy off-set for a time by a market in fish. Mr Walzl noted however, that the Otakou reserves in the years immediately post-purchase did not seem to come under pressure. Thus no evidence for this period suggests that Otakou Ngai Tahu fully utilised their reserves agriculturally, or needed to go beyond their boundaries, or seek other solutions as happened elsewhere in Otago and Canterbury (Q8:44–45).

- 6.9.10 Professor Pool's evidence was concerned with the adequacy of South Island Ngai Tahu reserves based on a demographic analysis (O15). He considered this question on the basis first of "present needs" and then of "future needs". We will confine our discussion of his evidence largely as it relates to the Otakou purchase and its outcome. In opening his discussion Professor Pool emphasised that any judgment about the adequacy of reserves must depend on the quality of the land.

(a) *A suitable amount of land*

Professor Pool cited various formula employed at the time of the different purchases and subsequently which suggest that 10–15 acres per person was the range adopted as sufficient for Maori. He compared this with the standard adopted for the contemporary Wakefield system and others. This gives a minimal figure for a European family which, when divided by an average family size of four or five, approximates the level of 10–15 acres as used by most European officials involved with the allocation of Maori reserves. In this sense, Professor Pool said, the formula did not seem out of line with what was considered equitable for Europeans. It needs to be remembered that under the Wakefield scheme only the wealthy would own land at all, the vast majority of the European population was expected to comprise of landless labourers. Professor Pool then said:

In reality, however, the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. Thus it was already clear by 1850 to many observers that pastoralism, implying more extensive holdings, had more potential as a farming system than did cultivation. Indeed, as the several sources quoted above make very clear, in the Otago and Canterbury Provinces Europeans in one way or another had gained access, often through *de facto* occupation rather than "legally",

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to extensive pastoral holdings. Thus it can be argued that for Maori land to be viable according to the “normal” use patterns emerging by the 1850’s, much higher per capita allocations would have been essential. It is not surprising, therefore, that by the 1880’s some observers had already documented that the Maori reserves were inadequate.

He noted Mackay’s comments that:

The small quantity of land held per individual [–]viz. 14 acres and in some cases the maximum quantity is less – altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a 100 acres too small to be payable. (O15:12–13)¹⁵⁶

(b) *Quality of land*

Professor Pool pointed out that the adequacy of land reserved to the tribe depended not only on the quantity, but also on the quality of the land. For Canterbury reserves he applied a formula which took in to account the varying quality of the reserves, based on contemporary information. This could not be applied in Southland and Otago due to the absence of such data. However, on the basis of the crude ratio of acres per person, which Professor Pool estimated at 28.4 acres per head, he concluded that provisions for Ngai Tahu at Otago met the prevailing formula of 10–15 acres per head at the time of the sale.

While Professor Pool’s conclusion is no doubt logical, we do not consider the “present needs” of Ngai Tahu can be based solely on a narrow and somewhat mechanistic formula. In any event, Professor Pool himself noted that the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. We must remember, however, that this was Ngai Tahu land which the Europeans wished to acquire. The Treaty required that the interests of Ngai Tahu in retaining land for their present and future needs was to be generously and fully recognised. The rigid application of a formula of say 10–15 acres is totally inconsistent with such an approach. Ngai Tahu, as owners of the land, were entitled to be left with “ample”, that is to say more than adequate land. Ten or fifteen acres per head was no more than sufficient for a bare subsistence. The Crown’s obligation under the Treaty was to respect the right of Maori, in this case Ngai Tahu, to retain sufficient land to enable them to live comfortably and to prosper. This would be possible only if extensive areas of land remained in their possession and control. While reference is made to both present and future needs, the two are necessarily interwoven. There is an air of unreality about attempting to separate one need from the other.

*The Ngai Tahu Report 1991***Future needs**

6.9.11 On this question Professor Pool stated:

For future needs several issues stand out. Firstly, it was to become clear, as the earlier quote from Mackay suggests, that the land granted was insufficient. In part this was because needs, some of which were already apparent in 1868 were changing, and in part because of issues such as the distribution of land within the Maori population. By 1881, as the following table shows, Mackay was demonstrating that significant proportions of the Maori were “landless” while even for those with land the majority had “insufficient to achieve a reasonable standard of living”. Only a small minority in each province had “sufficient” land.

Mackay’s Assessment of the Sufficiency of Land Available to Maori, 1891 (in percentages):

Province	Sufficient	Insufficient	None	Total
Canterbury	12.9	49.7	37.4	100
Otago	12.8	40.5	46.7	100
Southland	7.7	50.6	41.7	100
Totals	11.6	46.9	41.5	100

Source: Raw data: Dacker appendix 2 table A; Mackay 1891 (O15:29)

In summarising his conclusions Professor Pool acknowledged that the allocation of reserves to Otago Ngai Tahu for their “present needs” was satisfactory in terms of the formula employed at the time, but he concluded that the “future needs” of Ngai Tahu did not seem to have been adequately met. His conclusion comes from both contemporary observation and his analysis of population dynamics (O15:39).

6.9.12 We have found the evidence of Mr Walzl and Professor Pool helpful in considering the question of the adequacy of the 9615 acres retained by Ngai Tahu. But in separately discussing Ngai Tahu’s “present” from their “future” needs there is a very real danger that the outcome is distorted. The Crown was under a duty to Otakou Ngai Tahu to ensure that ample land was set aside to provide an economic base for the future. In fact it left Ngai Tahu with sufficient land only for bare subsistence with no opportunity to turn, as European settlers soon did, to pastoral farming on a relatively large scale. Moreover, the Europeans were able, through their immensely greater land reserves, to provide more than adequately for their agricultural products, thereby closing the Maori out of what in pre-purchase times had been lucrative trade. Except for a few individuals, Otakou Ngai Tahu did not prosper. We discuss their subsequent economic plight later in this report. The table in 6.9.11 graphically demonstrates the landless or near landless condition of so many Ngai Tahu some decades later.

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- 6.9.13 The tribunal has no hesitation in finding the claimants' grievance that the Crown failed to provide an economic base is made out. In short, the Crown acted in breach of Treaty principles in failing to ensure Ngai Tahu retained or were allocated sufficient land for their present and future needs.
- 6.9.14 Governor FitzRoy, in 1844, was committed to a policy that tenths should be provided when Maori sold land, in addition to their retaining adequate reserves. We consider that the Crown was under a residual obligation to make further provision for the Otakou Ngai Tahu, which the provision of tenths vested in the Crown substantially for Maori purposes might have met. We have in mind that, as later occurred for other tribes, some tenths might have become vested in Ngai Tahu as owners. The failure on the part of the Crown either to make such provision for tenths or to make other adequate provision, we consider constitutes a breach of the Treaty principle we have discussed. It is clear that Ngai Tahu have been prejudicially affected by such failure on the part of the Crown. A final comment. Had the Crown granted tenths in respect of this purchase, Ngai Tahu would have secured, in addition to a substantial interest in rural Otago, an interest in the new town, Dunedin, which was to develop at the southern end of the harbour. Had this happened the subsequent events, which we next chronicle, leading to a claim by Ngai Tahu over the Princes Street reserve would almost certainly not have occurred.

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- 128 Smith–Nairn commission evidence, affidavit of G Clarke, MA 67, appendix 33, NA, Wellington
- 129 *ibid*
- 130 *ibid*
- 131 Clarke, pp 62–67
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- 133 Clarke, p 62
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- 135 W Wakefield to the secretary of the company, 8 October 1844, in *Seventeenth Report of the N Z Company*, appendix, p 151
- 136 FitzRoy to Stanley, 10 December 1844, BPP/CNZ (IUP), vol 4, p 434
- 137 Stanley to Grey, 6 July 1845, BPP/CNZ (IUP), vol 4, pp 574–579
- 138 *ibid*, p 576
- 139 see n 134
- 140 Hope (for Stanley) to Ingestre, 7 August 1845, BPP/CNZ (IUP), vol 4, p 589
- 141 Stanley to Grey, 15 August 1845, BPP/CNZ (IUP), vol 5, pp 252–523, no 30
- 142 *ibid*, p 253, no 28
- 143 Cargill to Harington, 29 August 1845, CO 208/120, NA, Wellington
- 144 Minutes of a special committee of the N Z Company, 4 September 1845, CO 208/188, NA, Wellington
- 145 Minute of Russell, 31 December 1840, CO 209/8 pp 452–453, NA, Wellington
- 146 Russell to Hobson, 28 January 1841, BPP/CNZ (IUP), vol 3, p 173
- 147 Shortland (for Hobson) to the chief justice, 26 July 1842, in *Twelfth Report of the N Z Company*, p 108g
- 148 *ibid*
- 149 see n 53
- 150 FitzRoy's memorandum on the sale of lands in New Zealand by the aborigines, 14 October 1844, BPP/CNZ (IUP), vol 4, p 404
- 151 Normanby to Hobson, 14 August 1839, *Compendium*, vol 1, p 15
- 152 Return of reserves set up in the Otakou block, AJHR 1891, sess II, G-7A, p 10
- 153 see n 88, pp 31–32
- 154 A Eccles, A H Reed *John Jones of Otago* (Wellington, 1949) pp 31–40
- 155 D I Pool *The Maori Population of New Zealand: 1769–1971* (Oxford and Auckland University Press, 1977)
- 156 AJHR 1881, G-8, p 16

Chapter 7

Princes Street Reserve

7.1. Introduction

The claim of Ngai Tahu in respect of a small piece of land which became generally known as the Princes Street reserve has a long history. Its genesis lies in certain actions taken by Governor Grey in 1853. The claim has been pursued at intervals since the 1860s. At the hearing the historian for the claimants gave lengthy evidence supported by some 700 pages of documents. The Crown historian produced additional material. The Ngai Tahu people of Otakou have never abandoned the claim. For the first time they have had the opportunity to advance it in terms of the Treaty of Waitangi.

As the lengthy documentation would indicate, the history of this claim is complex and bedevilled with legal complications and court proceedings. At the risk of oversimplification, it can be described in the following way.

In June 1853, Governor Grey, on the recommendation of Walter Mantell, then commissioner of Crown lands, Otago, approved of a reserve being made for Ngai Tahu for the erection of houses at Port Chalmers and at Dunedin. Subsequently doubts arose as to whether the government had complied fully with legal requirements in approving Mantell's request. A few years later when the then recently created Otago provincial government heard of Grey's action, they challenged it on the ground that the land had earlier been designated as a public reserve for wharves and quays by the New Zealand Company and the Otago Association. The province contended that Governor Grey lacked authority to change that designation. Representations were made to the central government and the issue became thoroughly politicised. In the result, Governor Grey Crown granted the land to the Otago provincial superintendent in circumstances which have never been satisfactorily explained, but in which political considerations clearly played a major role.

Ngai Tahu challenged the issue of the Crown grant in the courts without success. The Privy Council gave them leave to appeal. In 1872, acting on the advice of their lawyers, Ngai Tahu somewhat reluctantly agreed to abandon their appeal and to accept a payment

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of £5000 from the Otago province. Ownership of the reserve remained with the province, which in due course transferred it to the fledgling Otago municipality. Ngai Tahu, having settled their claim, then sought the payment of a further £6000, being rents which had accrued from the letting of the reserve up to the time of it being Crown granted to the province. A committee of the House of Representatives recommended that £5000 should be paid to Ngai Tahu. Eventually Ngai Tahu felt compelled to accept this sum, although they believed they were entitled to £6000, plus interest of some £400.

While Ngai Tahu felt obliged to accept the two payments amounting to £10,000 in full satisfaction of their claims in respect of the reserves, they have always maintained that they were wrongfully deprived of the reserve. It quickly became a valuable city property. They contend that the land should have been properly vested as a “native reserve”. Had that been done they would, it is said, over the years have enjoyed very substantial benefits from the high rental value, always assuming of course that it retained its status as a Maori reserve.

7.2. **The Origins of a Reserve in Dunedin**

7.2.1 Some two years before the arrival at Otago of the first emigrant ships, the *John Wickliffe* and the *Philip Laing*, the New Zealand Company surveyor, Charles Kettle, had laid out the new town of Dunedin. Princes Street was adjacent to the foreshore of the upper harbour and parts were submerged in tidal waters. Kettle evidently envisaged some reclamation. He subdivided the irregular strip of land on the harbour side of Princes Street into lots. It was on a strip of this land that the “native reserve” was to be approved by Governor Grey in 1853. A stream, some 200 metres west along the foreshore, known to Ngai Tahu as the Toitu, crossed Princes Street and flowed into the harbour. This was a traditional landing place for Ngai Tahu in pre-settler times when they had occasion to land on the upper harbour. They did not reside there, but resorted intermittently to the site. When, in 1848, the first emigrants established their settlement on the present site of Dunedin, the Toitu estuary came to be regularly used by Ngai Tahu for landing, with a view to trading with the settlers.

7.2.2 One of the claimants’ grievances concerning the Princes Street reserve is that the Crown failed to set aside the Otepoti (Dunedin) reserves which had been promised to Ngai Tahu as part of the Otakou sale. This claim appears to have been first made by John Topi Patuki in a petition to the Queen dated 17 August 1867 (F2:56–57).¹ Topi Patuki claimed that in addition to the lands expressly excepted from the sale in the Otakou deed, the Ngai Tahu chiefs demanded certain small reserves, including two at Otepoti. One was said to be near the

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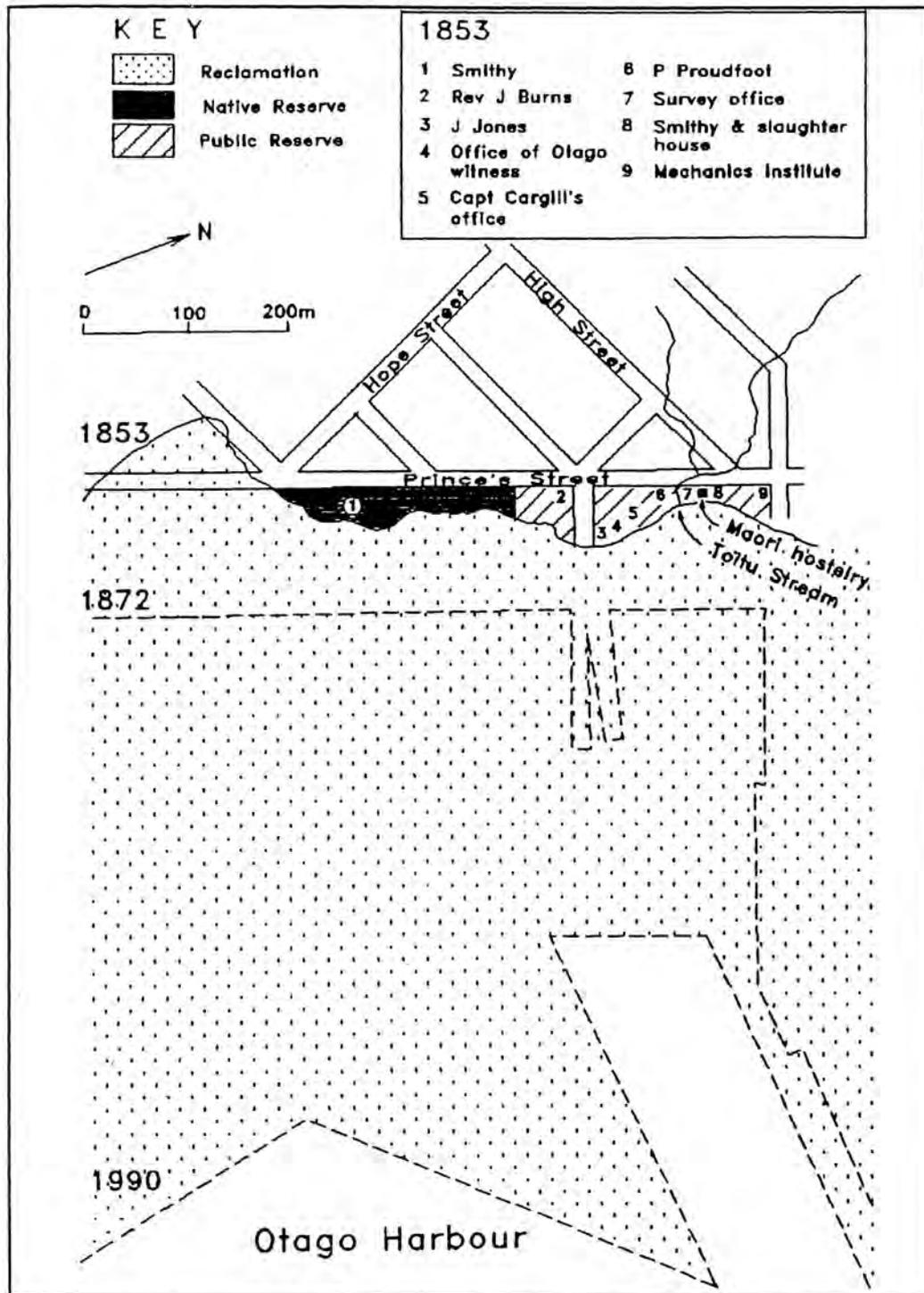


Figure 7.1: The Princes Street Reserve from Mantell's 1853 sketch, showing the location of the hostel near the mouth of the Toitu Stream and the extent of the reclamation since 1853.

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stream which crossed Princes Street (the Toitu), and the other fronting a small sandy cove to the east of the site afterwards occupied by the manse, and the land adjoining (the Princes Street reserve). Topi Patuki further alleged that during the negotiations with the New Zealand Company's agent (presumably one of the Wakefields), and the agent representing the government, J J Symonds, they were refused these demands. The chiefs thereupon withdrew from the negotiations and departed. But, Patuki said, after a lapse of some days, "on being assured that the above reserves would be made for them, the said chiefs returned, and the purchase was concluded" (F2:56).²

Mr John Jones, a well-known Otago trader, gave evidence to the petitions committee of the House of Representatives in support of this part of Topi Patuki's petition. (He did not support the reference to tenths having been promised). Jones claimed that he was present at Port Chalmers when claims for reserves were discussed and later at Dunedin when Daniel Wakefield and Symonds were present. On proceeding to where Dunedin now stands he said Ngai Tahu selected the two spots mentioned by Patuki in his petition. Wakefield would not agree and negotiations came to an end. Jones claimed that all the Ngai Tahu present, including Tuhawaiki, went back with him in his vessel to Waikouaiti. Ten days had elapsed when a message arrived from Daniel Wakefield seeking a resumption of negotiations. Jones said he took the Ngai Tahu people back to Port Chalmers. When negotiations resumed he claims Daniel Wakefield gave in. "I distinctly state that these two reserves were exempted from the sale of the block subsequently known as the Otago Block . . ." (F2:62).³

Counsel for the claimants drew our attention to a memorandum by J C Richmond, then native minister, dated 5 October 1867, in which he said that the allegations contained in Topi Patuki's petition were for the most part correct:

There is good evidence that the Native owners at the time of the first negotiations for the land at Otakou objected to giving up a part of what now forms the reserve, and in consequence of that objection the negotiation was broken off. In the subsequent deed of sale no specific reservation of the land is made, but a general understanding is indicated that some lands are to be surveyed by the Governor for the sellers, and the vague terms of the deed may have been meant to include *inter alia* a portion of the reserve in question. (F2:60)⁴

Unfortunately Richmond does not specify the "good evidence" in question. Presumably it referred to Patuki's allegations and John Jones' statement.

The claimants' historian, Dr Ann Parsonson, conceded that these reserves were not in fact mentioned in the Otakou deed. Nor does there appear to be any contemporary written account of any such

Princes Street Reserve

demands by Ngai Tahu. At the time of the Otakou purchase, the New Zealand Company proposed to establish the new town at the head of the upper harbour but was undecided as to just where it would be sited. *Maori Dunedin*, a recent study by M Goodall and G Griffiths, discusses the pre-purchase significance of the Toitu estuary landing place:

While this [the Toitu Estuary] was undoubtedly a traditional Maori landing place – probably among the half-dozen or so most used within the Upper Harbour – it was not a focal point for trade and traffic in the way that it became after the settlers built their wharves and township there. Otakou played that role for the Maoris, and the southern routes from Otakou and Purakanui went past urban Dunedin, not through it: along the western hill-tops, the line of Kaikorai Valley, and the sea-coast. Visits to the mouths of the Toitu or Owheo (Leith) would have been an end in themselves, to visit a kaika in older times, or hunt birds and eels, or round up pigs. The most important traditional landing place as far as the pre-European Maoris were concerned might well have been the place where, from Shortland's account, canoes and whaleboats usually landed for the short portage across the neck of land to the open sea. It was therefore not due to any mistake that the Toitu landing place did not appear in the 1844 deed: it simply had no special significance at that time.⁵

- 7.2.3 The contemporary documentation in no way confirms Topi Patuki and Jones' recollection of events. The New Zealand Company surveyor, Tuckett, when reporting on the offer to sell dated 20 June 1844, which was signed by Tuhawaiki, Taiaroa and Karetai, made no mention of the alleged Ngai Tahu demands for reserves at Port Chalmers and Dunedin. He did refer to a place called Otawahakoro on the lower or outer harbour, claimed by Taiaroa's sister, the wife of one Chasland, who had written to John Jones requesting him to maintain his wife's claim and not to sell it. In commenting on Jones' involvement Tuckett said:

The fact is John Jones wishes to establish himself here immediately as a Merchant, and of course does not like to lay out money as a squatter, if a water frontage Section in the Town is given to him by the Company in return for his assistance and influence he will endeavour to persuade the natives to abandon any land which we wish to acquire, if this cannot be done he will probably induce the natives to make a Reserve which will answer his purpose, for the occupation of which he will negotiate with them. (C2:11:11-12)⁶

Tuckett later recommended giving Jones or Chasland's wife a town section with a water frontage; the alternative being a sum of £200, beyond the £2400 asked by Ngai Tahu to extinguish all claims to land on which they were not actually residing.⁷

The significance of the foregoing comments by Tuckett is two-fold. They suggest that Jones was very much an interested party and was

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acting from mixed motives. And it is surely remarkable that in his report of the signing of the 20 June 1844 Ngai Tahu offer, Tuckett did not mention any demands for two reserves at Port Chalmers and Otepoti respectively. Nor did he refer to the somewhat dramatic withdrawal from negotiations and Ngai Tahu's departure for 10 days with Jones to Waikouaiti.

Symonds noted in his journal that Jones, who had arrived at Otago on the evening of 18 June 1844, had spent the next day trying "*in his way*" to settle matters without success (P3:9).⁸ It appears Jones' discussion with Tuckett took place the same day. Symonds, in his report on the sale to Richmond, made no mention of any requests for reserves at the upper harbour foreshore. Years later, on 18 February 1880, he was questioned by Commissioner Nairn. Both Mr Nairn and Mr Izard appear to have had in mind the Princes Street reserve in the questions now reproduced.

Mr Nairn – Do you remember any particular spot of land which the Natives desired to except from the sale, and which was not reserved? – No, I do not. The places they mentioned to me were reserved by me. I do not know of any reserve which the natives desired to reserve from sale which was not reserved.

Mr Izard – Did the Maoris point down to where Dunedin now is, and say they wanted any land reserved there? – No; I don't know that they did. I was very careful in reserving what they desired, and think I should have remembered it if they had requested land to be reserved which was not reserved. (C2:14:16–17)⁹

Given Symonds' meticulous, if not pedantic, care in his supervision of the negotiations it would be surprising that he would not have recalled the incidents referred to by Topi Patuki and John Jones. Griffiths and Goodall comment on the view that the Maori claim stemmed from mis-kept promises of 1844:

The first recorded reference connecting the landing-place with the 1844 deed does not appear until a quarter of a century later; corroboration is insecure and came from interested parties; and there are strong indications that, as so often happens, the events of 1844 and the Mantell promises of 1852 became telescoped in people's minds.¹⁰

It is difficult to accept that the participants would not have recorded the demands for the two reserves, had they been made in the dramatic circumstances as depicted by Patuki and Jones. Even after a lapse of 26 years Symonds would surely have recollected it.

- 7.2.4 Having regard to all the circumstances, we are not satisfied that Symonds and Wakefield or Tuckett promised Ngai Tahu the two reserves on the upper harbour foreshore. As we will explain, we believe the genesis of the Princes Street reserve lies in Mantell's initiatives in 1852. To this and associated matters we now turn.

*Princes Street Reserve***7.3. The History of the Princes Street Reserve*****Mantell proposes a reserve for Ngai Tahu at Princes Street***

7.3.1 Local Ngai Tahu quickly became important suppliers of fish, potatoes and other commodities to the new settlement at Dunedin. Griffiths and Goodall refer to “continual contemporary references to the presence . . . of the Maoris and their boats” at the Toitu estuary where they did “their brisk trade”.¹¹ It became a natural trading post. Ngai Tahu in turn utilised the services of boat-builders and other tradesmen.

7.3.2 On 24 November 1852 Mantell, then commissioner of Crown lands for Otago, wrote to the colonial secretary, Domett (F2:104–105).¹² He informed the colonial secretary that Ngai Tahu at Otakou, Waikouaiti, Moeraki and elsewhere had “urgently and constantly” requested him to persuade the governor-in-chief to grant a small portion of land at both Port Chalmers and Dunedin for the erection of houses. Mantell advised Domett that Ngai Tahu had no other shelter than that provided by “their boats, oars and sails over a low unhealthy beach near the survey office” (F2:105).¹³ Mantell asked the colonial secretary to put this request before the governor. In response to a request from Domett for plans of the proposed reserves, Mantell, on 18 April 1853, sent tracings to the colonial secretary. The tracings showed an irregular-shaped piece of land on the harbour side of Princes Street. Mantell advised that this was:

the only suitable piece of land now vacant; although steep towards the water it has (at X on the tracing) a spot where the Natives could easily construct a place for their boats to lie. (F2:15)¹⁴

In a much later memorandum (3 January 1865) for the attorney-general, Mantell advised that he had not recommended the site proposed by Ngai Tahu but “a narrow steep between Princes Street and the mud flats of the harbour which was regarded as of less value, and as at that time almost out of the town” (F2:34).¹⁵ Domett duly wrote to Mantell on 6 June 1853 advising, with reference to the two plans Mantell had forwarded in April, that:

His Excellency approves of these reserves being made as recommended by you, and has accordingly directed me to authorise you to purchase section 401 to complete the proposed reserve at Port Chalmers. (F2:16)¹⁶

We note at this point that while the governor in June 1853 approved of the two reserves “being made” he had apparently not constituted them as such. Presumably because the purchase of an additional section at Port Chalmers was first needed to “complete the proposed reserves”. As we will see, more than the governor’s approval would appear to have been necessary.

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We do not really know why Mantell did not meet Ngai Tahu's wishes and recommend a reserve at or near the Toitu estuary. There is persuasive evidence that Mantell (an Englishman and an Anglican), was not on good terms with William Cargill, the superintendent of the Otago province, (a Scotsman and a Presbyterian), and that their somewhat petty rivalry severely strained their relations. The site chosen by Mantell was next to the presbyterian manse site. It was suggested that this may have been intended to be deliberately provocative (F1:12–13). It is possible that Mantell chose it because it was, as he claimed, the only piece of land then vacant, but he later suggested it was of little value and on the edge of town. This is why, perhaps, he does not appear to have told Ngai Tahu of his actions in obtaining Governor Grey's approval to a reserve being made at the Princes Street site adjoining the manse. More than a year later 107 Ngai Tahu signed a petition to Cargill, asking that some place of shelter be provided for them on any part of the beach or other part of the town of Dunedin as Cargill might think appropriate (F2:107–110).¹⁷ Ngai Tahu appear at that time to have been unaware of Mantell's initiatives in relation to the site further along Princes Street.

- 7.3.3 Meanwhile Governor Grey's term of office expired on 31 December 1853 and he left New Zealand. On 12 May 1854 Mantell had forwarded the Port Chalmers conveyance of the section he was authorised to buy to the colonial secretary. On 5 June 1855, in response to an earlier suggestion from Mantell, the colonial secretary wrote—in Mantell's absence on leave – to the acting commissioner of Crown lands, Otago, sending:

certified plans of certain reserves at Dunedin and Port Chalmers, as enclosed in his [Mantell's] letter of the 18th April, 1853, to the Civil Secretary, in order that they may be duly recorded as approved by His Excellency. (F2:19)¹⁸

These plans no doubt included the section at Port Chalmers purchased by Mantell on the authority of Governor Grey. There is nothing to suggest that Grey, who had departed some 18 months earlier, or his successor had taken any further steps to constitute the proposed sites as Maori reserves.

A Maori hostelry is erected in Princes Street

- 7.3.4 It was not until 1858 that the actions of Mantell and Governor Grey in respect to the Princes Street reserve became known to the Otago Provincial Council. In the meantime, the provincial council was contemplating erecting a Maori hostelry. In 1855 it considered there to be an "urgent necessity . . . for the immediate erection of a suitable building at or near the beach, for the comfortable lodging of the natives in their visits to Dunedin . . ." (W2:appendix:1).¹⁹ Within two

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weeks, on 24 April 1855, plans for a building for local Maori were approved by the provincial council (W2:appendix:2).²⁰ Shortly after however, it was decided that the plan was inadequate. Instead, the council approved of the superintendent's proposal to renovate the survey office near the former Toitu estuary for the Maori people; "the site . . . being the one of all others most acceptable to the Natives" (W2:appendix:3).²¹ The council left the superintendent to carry it out, but nothing appeared to come of it.

In 1857 the *Otago Colonist*, (at the time an anti-Cargill newspaper), reported a number of Maori women "huddled together cold and shivering upon the open beach, with the thermometer below freezing point, exposed to the rain and snow".²² Such a sight, the newspaper claimed, "might have been seen any night during the past week in the Christian town of Dunedin . . ." (F1:34).²³

- 7.3.5 It took the visit of Stafford, premier and colonial secretary, and C W Richmond, native minister, to Dunedin in November 1858 to stimulate action. They inspected various sites, including the Princes Street reserve, which they found to be unfit for the erection of a Maori hostelry (F2:26).²⁴ Earlier in the same year the commissioner of Crown lands, W H Cutten, had condemned as "utterly useless" the Princes Street site (F2:26).²⁵ At the same time Cutten questioned the authority of the governor to make the site a Maori reserve, on the grounds that the land in question had already been set apart as a public reserve under the Otago terms of purchase. This and related questions we discuss later.

Following the site visits by Stafford and Richmond, Richmond wrote from Dunedin to the provincial superintendent on 22 November 1858, advising that the general government wished to erect a hostelry for Ngai Tahu visiting Dunedin. He sought the superintendent's cooperation in providing a suitable site. He continued:

The only eligible situations that exist for the purpose are on the Beach frontage of the Reserve No. 7, lately granted to the Superintendent under the Public Reserves Act 1854, or on the adjoining strip of Beach frontage extending from the new Culvert along the line of High Street – on which a Smith's Shop now stands. (F2:245)²⁶

Richmond pointed out that the second piece of land was still in Crown ownership and the government could proceed to build a hostelry on it. But he was unsure, in the absence of the provincial chief surveyor, whether a building on this site might interfere with other contemplated public works. He therefore proposed to leave it to the provincial government to fix on a proper site within the limits proposed in his letter. And he further proposed:

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that the Provincial Government will propose to the Provincial Legislature any legislation which may be requisite to secure the site in perpetuity for the use of the Natives, and for preserving a convenient landing place for their canoes at some point on the above-named Beach frontage. (F2:246)²⁷

In conclusion, Richmond sought early advice as to whether the superintendent concurred in his proposals as he was “desirous before leaving Dunedin of giving instructions respecting the erection of the Building”(F2:246).²⁸

- 7.3.6 Evidently Richmond and Superintendent Cargill came to an arrangement during this time. The central government was to get a small piece of land for the Maori lodging house and in return:

they gave (or would give) to the Provincial Government the entire right to the ground between the culvert and Gallie’s smithy. (along eastern side of Princes Street near intersection with High St.) (F1:37)

It appears that, following approval by central government of the plan prepared by the civil engineer, tenders were called (F1:37). The central government then went ahead without further consultation with the provincial government. In 1859 work began on the building on land known as reserve no 7 which had been granted to the superintendent in trust for public offices in June 1858 (W2:appendix:24–25).²⁹ This site was adjacent to the old survey office near the former Toitu estuary and was a very suitable location for a Maori hostelry.

- 7.3.7 Commencement of work on the hostelry prompted the provincial government to pass a Bill:

- authorising the superintendent to let part of reserve no 7 for a nominal rent to the governor of New Zealand. (The plan in the schedule to the Bill shows the Maori hostelry being built);
- stating that the lease was to expire whenever the provincial government should resolve that the site was required for town improvements and the building should be removed; and
- stating that the province would pay the cost of erecting a similar building in a convenient locality. (W2:appendix:9–10)³⁰

Cargill declined to approve this Bill. He explained why in a letter of 26 November 1859 to the colonial secretary.

With respect to the “Maori Lodging Bill” which nullifies the arrangement made last year between the General and Provincial Governments, and insomuch as I was a party to that arrangement I now write to Mr Richmond, who concluded it on the part of the General Government, to satisfy him that I was no party to this Bill . . . (W2:appendix:5–6)³¹

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The governor did not consent to the proposed Bill (W2:appendix:9).³² Stafford wrote on 6 February 1860 to the Otago superintendent explaining why the governor had been advised to withhold his assent (F2:248–249).³³ Stafford expressed his regret that the Bill failed to give effect to the arrangement entered into in November 1858 with the general government in relation to the erection of the Maori hostelry, and continued:

On the faith of this arrangement funds have been provided for the erection of an Hostelry on the land agreed upon, being a portion of a reserve for public purposes recently handed over by the Crown to the Superintendent, and it cannot now but be a matter of surprise and disappointment to the Government to find that the Bill under consideration, would substitute entirely different conditions as regards this building to those originally agreed upon. (F2:248–249)³⁴

It appears from Stafford's letter that in 1858, agreement had been reached with the province that the hostelry would be built on part of reserve no 7 – which in fact is where it was built. Unfortunately he does not spell out the “entirely different conditions” which were originally agreed on, but which were not contained in the provincial Bill. In the result, a hostelry was constructed by the central government on land vested in the provincial government, and which consequently had no security of tenure.

According to Griffiths and Goodall the hostelry was a two-storeyed stone building with sleeping quarters upstairs and cooking facilities and market space downstairs. “It was a feature of the township for some years, then became swallowed up in the rapid reclamation of the foreshore”.³⁵

The fate of the Maori hostelry

7.3.8 By 1863 it seems the Maori hostelry fronting Princes Street, erected by the central government on provincial reserve no 7, was in a parlous condition. According to the clerk of the Dunedin Town Board, street-widening earthworks had resulted in the building being almost buried and “altogether unfit for occupation”. To make way for necessary town improvements he recommended its removal or increase in height (W2:appendix:30).³⁶

Nothing further is recorded concerning the fate of the hostelry until 1865 when, on 27 May, the Otago Executive Council received advice from A Chetham Strode, a central government official, that he had authority to remove the building (W2:appendix:39).³⁷ On 30 May 1865 the Otago Executive Council “Agreed to provide a Site for the Native Hostelry on the north side of Stewart Street Jetty” (W2:appendix:40).³⁸ On 8 September 1865 the council decided that “the materials of the Maori House be removed to the site approved by Mr

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Stroke for re-erection” (W2:appendix:48).³⁹ In fact the building was not re-erected. Nor was any other hostelry provided for Maori at Dunedin either by the province or the central government.

Provincial government questions validity of the Princes Street reserve

- 7.3.9 While, as we have seen, belated provision was made by the Crown for a Maori hostelry in Dunedin, it was on a site with no security of tenure and it survived for no more than five or six years. Having recounted the rise and fall of the Maori hostelry further along Princes Street, we now return to the Princes Street reserve adjoining the manse site, to which Mantell had secured Governor Grey’s approval in June 1853. In the year when the provincial council decided to dismantle the Maori hostelry, it instructed the superintendent, on 11 July 1865, to obtain from the colonial secretary the reasons for the delay in deciding “as to the so-called Maori Reserve in Princes Street south”, and to suggest that the matter be laid before the general assembly (W2:appendix:42).⁴⁰
- 7.3.10 As earlier indicated (7.3.4), Mantell’s initiatives over the Princes Street reserve did not become more generally known until 1858. On 14 April of that year W H Cutten, then commissioner of Crown lands (and also the provincial secretary), reported to the superintendent on the topic of the 16 Maori reserves in Otago. Besides those reserves which he considered to strictly adhere to the description of Maori reserves, he referred to two others:

a reserve . . . made at Port Chalmers of nearly an acre in extent. It consists of sections 403 and 404, and a portion of unsurveyed land. It is not shown on the record plan. This reserve was recommended by Mr Mantell, and was sanctioned by the Governor in 1854 and 1855.

A quarter of an acre adjoining, viz. section 401, was purchased by Mr Mantell from Mr R. Williams with the sanction of the Governor. The reserve was made under the pretence of its being required for the use of the Natives landing at Port Chalmers; but for that purpose it is entirely useless, as it has a steep frontage to the beach of considerable elevation. It has never been used by the Natives.

A reserve for a similar object was made at Dunedin. Its exact extent is not defined, but comprises all the land between the shore of the harbour and the east side of Princes Street, and abuts upon the land upon which the Manse has been built. This reserve was made upon the authority of the Governor; but it appears to me that His Excellency the Governor exceeded the powers vested in him in this latter case, the land in question having been already set apart as a public reserve under the Otago Terms of Purchase (F2:26).⁴¹

Cutten suggested it would be for the commissioner of native reserves to ascertain the correct legal position of each of these two reserves. Each he considered “utterly useless” for their contemplated purpose.

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The matter lay in abeyance until 1862 when the Otago gold rush, which had begun the previous year, greatly increased the population and commercial activity in the town of Dunedin. Shipping entering the port of Otago trebled within the year. New jetties in deeper water and reclamation of the foreshore proceeded. This greatly increased activity stimulated the trader John Jones and 18 other merchants to petition the governor to agree to the Princes Street Maori reserve being leased for storing various goods until the government required it for another purpose. In a report of 15 January 1862 to the secretary of Crown lands, Cutten advised that:

The land referred to by the petitioners was in the original survey of the Town of Dunedin laid off in sections, and ran some distance into the water below high water-mark. But as it was deemed advisable by the New Zealand Company that there should be no exclusive privilege to the water frontage, but that it should be made a public quay, the sections were withdrawn from the map and marked as reserved. Subsequently Mr Mantell, the Commissioner of Crown Lands in Otago, selected a portion of the reserve, and recommended that it should be appropriated to the use of the Natives on their visits to Dunedin, an arrangement which I believe was sanctioned by His Excellency Sir George Grey. The Natives however never made use of the place, it being not suited to the purpose, but continued to land their produce at a small bay where the water is deeper, and upon which latter spot a stone house for their use has been erected by the General Government. A portion of the frontage reserve has been used by the Provincial Government for the erection of Immigrant Barracks, and for Police Barracks and offices. In all probability the whole of the reserve will be required by the Government for public purposes, as but few reserves have been made in Dunedin. (F2:22)⁴²

In the meantime he recommended that small lots be let on an annual basis.

It is not clear whether Cutten considered the Princes Street land to be a Maori reserve. He pointed to the Maori hostelry and landing place being elsewhere by arrangement with central government. He thought it probable that the whole of the reserve would be required for public purposes. Whatever Cutten's views, the central government clearly had reservations about the position. In 1862 Cutten was required to pay the rents from the lots being leased into a bank account separate from other Crown revenue "to abide the decision of whether the reserve was a reserve for the Natives, or a reserve for the construction of a quay" (F2:34–35).⁴³

Central government intervention

- 7.3.11 In April 1864 the central government sent an officer, H T Clarke, to Dunedin to investigate the Princes Street Maori reserve and the provincial government's objections to its designation as such. He discovered that it had now produced some £5000 by way of revenue but learned little else. In November 1864 Walter Mantell again be-

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came native minister in the central government. He was now known as a champion of Ngai Tahu. On 3 January 1865 he wrote to Sewell, the attorney-general, about the Dunedin and Port Chalmers Maori reserves. He related his earlier attempts to secure the two reserves for Ngai Tahu. He concluded his memorandum by saying:

There is now no reason why the title to these reserves for Native purposes should not be distinctly recorded. How can that be done? (F2:34)⁴⁴

The attorney-general's response was to invoke the New Zealand Native Reserves Act 1856 as amended in 1862. On 6 January 1865 by order in council made pursuant to section 8 of the 1862 amendment, the governor, with the advice and consent of the Executive Council, delegated to A Chetham Strode (a government official) all of the powers of a commissioner appointed under the New Zealand Native Reserves Act 1856, in respect of the two Maori reserves set apart in Dunedin and Port Chalmers. This action necessarily assumed that such reserves did, as a matter of law, exist. The order in council did not, however, constitute them as such.

On 29 March 1865 the colonial secretary advised the superintendent that the general government wished to come to a decision as to the title to the Princes Street reserve site (F2:35).⁴⁵ The superintendent, J Hyde Harris, replied to the colonial secretary on 13 April 1865 and enclosed a copy of a letter of the same date to Postmaster-General Richardson which set out the grounds upon which he considered the provincial government was entitled to the Princes Street reserve land. In it he registered the province's protest against any act whereby the Princes Street reserve land might be transferred to trustees for Maori purposes (F2:35–36).⁴⁶

- 7.3.12 Before referring further to Superintendent Hyde Harris' letter of 13 April, it is desirable to trace the history of this piece of land from the time it was Crown granted to the New Zealand Company on 13 April 1846 as part of the 400,000 acre Otakou purchase (C2:27:1–2).⁴⁷ Kettle, the New Zealand Company surveyor, initially provided a line of sections between Princes Street and the foreshore for selection by the colonists (F4).⁴⁸ However, on 21 October 1846, T C Harington, secretary of the New Zealand Company in London, on Cargill's initiative instructed Colonel Wakefield that all water frontages from about high-water mark should be reserved for public use (F2:123).⁴⁹ The necessary changes were accordingly made—the map of the south end of Dunedin showing the land having a water frontage as “Reserves for Public Purposes” (F2:47).⁵⁰ Mantell later testified that he was aware of this designation of the land at the time he recommended it as a Maori reserve (F2:45).⁵¹ This raises the question of whether

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Governor Grey had legal authority to accede to Mantell's request that the Princes Street site be made a Maori reserve.

Legal complexities

- 7.3.13 In September 1845, prior to the Otago block being Crown granted to the New Zealand Company in 1846, the company had already agreed on terms of purchase with the Otago Association, initially in respect of some 144,600 acres of land including the site of the future Dunedin. By clause 14 of that agreement, if the association failed within five years to sell some 2000 properties, the New Zealand Company had the right to dispose of the remaining land (F2:138–144).⁵² This provision was modified by revised terms of purchase on 1 August 1849. The five years given the association to sell the 2000 properties was to run from 23 November 1847.

In 1850 the New Zealand Company surrendered its charter to the Crown, pursuant to section 19 of an 1847 Imperial Act to promote colonisation in New Zealand (F2:148–155).⁵³ On doing so all New Zealand Company land in New Zealand reverted to the Crown “as Part of the Demesne Lands of the Crown in *New Zealand*, subject nevertheless to any Contracts which [should] be then subsisting in regard to any of the said Lands” (F2:154).⁵⁴ The British government recognised the continuance in force until November 1852 of the 1847 terms of purchase agreement between the New Zealand Company and the Otago Association (F2:163).⁵⁵ In February 1851 Governor Grey was instructed by the Colonial Office that he was to interfere “as little as possible with the course of management . . . already established by the New Zealand Company” (F2:173–174).⁵⁶

By 23 November 1852 however, the Otago Association had not succeeded in selling sufficient land. Accordingly, the 1849 terms of purchase expired and legal control of all land within the Otago block was assumed by the Crown under the provisions of the New Zealand Constitution Act 1852.

- 7.3.14 The then colonial secretary, Sir John Pakington, in a despatch of 15 December 1852 advised Governor Grey that, until the general assembly constituted by the Constitution Act determined otherwise, he was to continue to administer the lands in general conformity with the terms of purchase. The New Zealand Constitution Act 1852 was proclaimed in New Zealand and came into force on 17 January 1853. Section 72 empowered the general assembly:

to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown in New Zealand. (F2:203)⁵⁷

Pending the making of any such laws the Crown retained the right to regulate such matters. On 24 June 1853, Royal instructions were

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issued to Governor Grey pursuant to section 72 of the New Zealand Constitution Act 1852, requiring him to observe the 1849 terms of purchase in respect of all sales of land and licences until the New Zealand general assembly enacted otherwise (F2:190c).⁵⁸ This instruction was despatched to Grey by the colonial secretary, the Duke of Newcastle, on 1 July 1853. What is not clear is whether Governor Grey received Pakington's earlier despatch of 15 December 1852 (gazetted in New Zealand on 13 June 1853) before he approved the Princes Street Maori reserve being made in June 1853. Given the date of gazetting it seems likely he had. He is unlikely however, to have received the Duke of Newcastle's despatch of 1 July 1853 before he left New Zealand at the end of December of that year.

- 7.3.15 The position is further complicated by the possible application of the Royal instructions of 1846. Chapter 13 of these instructions related to the settlement of waste lands of the Crown. But these provisions were suspended from operation in New Munster (including Otago) until 5 July 1850. Until that date section 2 of Act 10 and 11 Victoria, chapter 112 (1847) provided that all rights, powers and authorities of the Crown might be exercised by the New Zealand Company. No direction was given by the Imperial Parliament for the extension of the suspension beyond 5 July 1850. Accordingly, chapter 13 of the 1846 Royal instructions again appears to have become fully operative in relation to the South Island. By additional instructions of 12 August 1850 (L4:appendix A), chapter 13 of the 1846 instructions was not to apply to the New Zealand Company and the Otago and Canterbury Associations to the extent they were inconsistent with the contracts entered into by the New Zealand Company with (inter alia) the Otago Association. But as a result of a further provision in the additional instructions, the whole of chapter 13 of the 1846 instructions became fully operative as from 23 November 1852 when the Otago Association, as we have seen, ceased to exist. What is not certain is whether chapter 13, and in particular section 17 which enabled the governor, with the advice of the Executive Council, to set aside reserves, continued to apply after the New Zealand Constitution Act 1852 came into force on 13 January 1853. Neither this nor other relevant issues were argued before us and we make no decision on the point. We will later discuss the implications of the litigation brought by Ngai Tahu in the case of *Regina v Macandrew* (1869) 1 CA 172 in which section 17 of chapter 13 played a central role.

The provincial government claims entitlement to the reserve

- 7.3.16 In the meantime we return to our consideration of the fate of the Princes Street reserve. We resume our narrative at the point in 1865 when, by a letter of 13 April, the Otago superintendent advised the

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New Zealand colonial secretary of the grounds upon which the province claimed to be entitled to the Princes Street reserve. These related to the action of the New Zealand Company in October 1846 in instructing Wakefield to reserve all water frontage land above high-water mark for public use; and the failure of Mantell to consult with or advise the Otago Association of his actions and associated matters. The Otago province had at least an arguable case:

- Mantell acted the very first day after the Otago Association ceased to have control over the Otago block land;
- he did not, when seeking to have the land reserved for Maori purposes, advise the governor of the then status of the land;
- there is no evidence that Governor Grey knew the status of the site of the proposed Princes Street reserve when he approved it being made a “Native Reserve”;
- Mantell did not seek clarification from the civil secretary of his powers in relation to former New Zealand Company sections, and in particular, sections reserved for a future municipal corporation; and
- he was advised by the civil secretary, Domett, on 9 November 1853 that “With the sections reserved for a contemplated Municipality the Government cannot interfere” (F2:223).⁵⁹

7.3.17 On 20 October 1846 Wakefield was expressly instructed with regard to water frontages that instead of being sold they should:

remain in every instance, the property of the Public – or of the Municipality as the Representatives and Trustees of the Local Public. (F2:113)⁶⁰ (emphasis in original)

Had Mantell, before he initiated his application for a reserve in 1852, consulted with Cargill (at that time both superintendent and commissioner for Crown lands for the Otago block), he would no doubt have been told of the status of the land, assuming he did not already know. The province would have had notification and could have communicated with the governor. Instead, as we have seen, Mantell’s actions in relation to the Princes Street reserve did not become generally known until 1858, from which time the governor’s authority to create the Princes Street reserve was questioned by the Otago province.

7.3.18 Further correspondence ensued between the province and the postmaster-general designed to establish that the New Zealand Company had withdrawn the harbour-fronting sections from sale and reserved them for public purposes (F2:37).⁶¹ A provincial council select committee reported on the reserve. The council adopted the committee’s report, which reached a similar conclusion, on 17 May 1865. It pointed out that when he left office in 1855 Mantell had

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“stripped his office of all official documents” (F2:39).⁶² The committee recommended the issue of a Crown grant be sought from the general government and the accrued rents be paid to the province.

Meanwhile, Mantell lost the support of Postmaster-General Richardson, a Dunedin politician who for a time was also acting-superintendent of Otago. Richardson urged that the province be given an opportunity of a fair hearing of its claim to retain the reserve (F2:40).⁶³ Although on 29 June 1865 Attorney-General Sewell gave an opinion that the Princes Street site had been “duly reserved as a Native Reserve . . .” (F2:42)⁶⁴, the government appointed a select committee of the House of Representatives which reported on 25 August 1865 its conclusion that:

After a careful consideration of the above facts, as to the equity of the case, your Committee have arrived at the conclusion that the land forming the Dunedin Reserves, having been reserved from sale for a specific public purpose, was wrongfully set aside for the use of the Natives, and therefore recommend that a Crown Grant be issued in favour of the Municipality of Dunedin, as trustees and representatives of the local public, as was evidently the intention of the New Zealand Company, conveyed in the instructions of Mr T. C. Harington to Colonel Wakefield. (F2:44)⁶⁵

The reserve is granted to Otago province

7.3.19 The issue was soon to become embroiled in provincial politics. Professor Alan Ward in *A Show of Justice* succinctly describes how a cabal of politicians came to strike a bargain. Late in the 1865 session the new native minister, J E FitzGerald, (Mantell having resigned at the end of July), introduced a Native Provinces Bill which Ward relates:

envisaged the creation of semi-autonomous Maori provinces . . .

The Bill was regarded as a serious issue, especially by the Auckland members who stood to lose most by the making of three Maori Provinces within the existing Auckland Province. It was defeated by a formidable display of ‘log-rolling’, Auckland gaining the support of Wellington and Otago in return for agreeing to a clause in the Native Lands Act reserving to Wellington monopoly rights of purchase in the Rangitikei-Manawatu block, and (for Otago) the transfer of the Princes Street Reserve to that Province.

Thus was policy made in the Parliaments of the 1860s. (F1:54)⁶⁶

On 13 September 1865 the following resolution was carried by the House of Representatives:

That in the opinion of this House, the public reserve in the City of Dunedin, which was set aside by the New Zealand Company as trustees for the settlers in 1846 for the purpose of a wharf and public quay, and on which the police and immigration barracks at present stand, should

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be vested in the Superintendent of Otago, in trust for the municipality of Dunedin, as originally intended. (F2:258)⁶⁷

- 7.3.20 On 4 November 1865, no doubt as a result of the resolution of the House, two Crown grants were sent by the Otago Crown grant clerk to the secretary for Crown lands, Wellington, for the governor's signature. One of these, grant 4871, was for a "Piece of land situate in Princes Street Dunedin" for "Public utility".⁶⁸ The colonial secretary, Stafford, on 21 November 1865 demanded more specific details of the purpose of the reserve. In his reply of 28 December 1865, the superintendent advised that it was "a reserve for wharves and quays", that being the purpose for which it was originally set apart" (F2:49–50).⁶⁹

The Crown grant was placed before Governor Grey at a meeting of the Executive Council on 11 January 1866 and duly signed by the governor, who is stated to have done so on the advice and consent of the council. Present as members of the Executive Council were Stafford (the premier), Russell and Paterson. It granted one acre, two roods and thirty four perches to the superintendent of the Otago province:

in trust as a reserve for public Wharves and Quays and other purposes connected therewith of public utility to the Town of Dunedin and its inhabitants. (F2:282–284)⁷⁰

- 7.3.21 Governor Grey, in reporting to the Duke of Buckingham on Topi Patuki's petition to the Queen of 17 August 1867, enclosed a report by J C Richmond, native minister. Grey informed the duke that he:

will find from this Memorandum that my Responsible Advisers, at a meeting of the Executive Council, inadvertently advised me to sign a Crown Grant, dated the 11th January, 1866 by which the reserve in dispute was granted to the Superintendent of the Province of Otago, and which grant I signed in ignorance of what I was doing. (F2:60)⁷¹

In the enclosed memorandum Richmond, after referring to the resolution of the House of Representatives based on the select committee report declaring that a grant to the superintendent should be issued under the Public Reserves Act, said:

The Government of the day proposed that an amicable suit should be instituted to try the questions of authority on one side and the other which had been raised. The Provincial Government never acquiesced in this proposal. Mr Stafford, then Colonial Secretary, was advised that to bring the matter into Court a grant must issue to one party or the other, and had intended to recommend a grant; but in the meantime, inadvertently as regards His Excellency and the Colonial Secretary, a grant which had been prepared on the authority of the resolution of the House of Representatives was presented for signature and issued. (F2:61)⁷²

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Some 10 years later Grey, by then a member of the New Zealand House of Representatives, gave a more detailed explanation to the Native Affairs Committee on 1 November 1877 (F2:368–9).⁷³ He recalled that following discussions with the law officers, he had decided he ought not to sign the grant until further discussions took place. Grey continued:

A number of grants were formally presented to me in Executive Council for my signature, and I signed them. I believed that one of the grants presented to me for signature was the grant for this land in question, but I could not positively identify it; and as the Colonial Secretary, who presented the grants to me, was perfectly satisfied that it was not the grant for this reserve I signed it. Subsequently it turned out that the grant had been signed. It was done under a mistake, or, as Mr Richmond put it here, “inadvertently as regards His Excellency and the Colonial Secretary.” I believe there is further evidence of that in existence in the shape of a report of a speech delivered by the Hon. Mr Stafford. It was discovered the same day that the grant had been signed improperly, and the Government tried to recover possession of the grant, but it was found the grant had been sent off that day in a vessel going to Otago, and in that way the land passed into the possession of the Municipality or the Provincial Government of Otago. (F2:368)⁷⁴

On 21 August 1867, 18 months after the Crown grant was signed, Stafford also explained how the grant came to be signed:

Of the three Ministers whose names were attached to the grant, not one was aware of it. He was bound to say how the irregularity occurred. As far as he could remember, there had been an application for a grant for a reserve, which turned out to be this one; and there were, at the same time, other grants, which were addressed in the ordinary way to the Secretary for Crown Lands, and he, not finding it stated for what purposes the grant was sought, referred it back to the Commissioner in Dunedin. The Commissioner stated, in reply, that it was for certain public purposes, which appeared to the Secretary sufficient. It happened, at that time, that His Excellency was about to make a visit to the North, and there were arrears of business at the end of the session, and after the Executive Council had commenced to sit, these grants were forwarded from the Crown Lands Office without the customary schedule showing what they were for; and it so happened that a number of grants which then came from the Secretary for Crown Lands, were signed hastily by His Excellency and countersigned by his Ministers. He was unaware of the purpose of the grant at the time, but he did not wish the House to think that if he had known it he would not have recommended it; for his desire was to have the grant signed, so that there might be a status for a case in the Supreme Court. (F2:260)⁷⁵

It will be recalled that on 21 November 1865 Stafford had written to the Otago superintendent for more details of the purpose of the reserve referred to in the Crown grant, and the superintendent replied as late as 28 December 1865, only two weeks before the grant came before the Executive Council at which Stafford was present and at which it was signed. Yet Stafford says he was unaware of the

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purpose of the grant at the time. Moreover, both Grey and Stafford assert that several grants were formally presented to the governor at the Executive Council for his signature. But as the claimants have shown by producing a copy of the minutes of the Executive Council for 11 January 1866 (W2:appendix:17–19)⁷⁶, only one grant, and that being in respect of the Princes Street land, was that day in fact presented to and approved by the Executive Council, comprising Governor Grey, Stafford (described as Prime Minister), Russell (native minister), and Paterson.

- 7.3.22 It strains our credulity to accept that the signing of the grant was “inadvertent” as claimed by both Grey and Stafford. Rather, as Professor Ward, in discussing this incident pointed out:

The Stafford Government had come into office dependent upon support from Otago members, secured by promises to give the Otago Provincial Council a grant for the Princes Street reserve.⁷⁷

The evidence compels us to the view that the decision to sign the Crown grant was essentially a political one; a decision moreover taken without consultation with Ngai Tahu and with no apparent regard for their interests.

On 20 December 1866 the provincial council passed the Dunedin Reserves Management Ordinance to transfer certain lands, including the Princes Street reserve, from the superintendent to the Dunedin City Corporation. But because the dispute over the reserve was not yet settled, the governor, on the advice of the general government, disallowed the ordinance. It did not receive the governor’s assent until 1873 when, after litigation and a negotiated settlement, the title to the land was finally settled in favour of the province (F8).⁷⁸

7.4. **Ngai Tahu are Forced to Litigate**

- 7.4.1 No sooner was the Crown grant received in Dunedin than the council applied to the general government for payment of the accrued rents on the Princes Street reserve (F1:60). The government was uncooperative and Stafford questioned the right of the province to the rents accrued prior to the Crown grant (F2:50).⁷⁹ In August 1866 H K Taiaroa wrote to the governor protesting that the Princes Street reserve had been taken from Ngai Tahu. The Stafford government, apparently troubled by the course of events, wrote to the Otago superintendent in October 1866 (F2:51)⁸⁰ advising that the government had decided “the question of the validity of the grant should be submitted to a proper judicial tribunal”. The superintendent was invited to bring the matter before the Supreme Court by writ of intrusion. Not surprisingly the superintendent declined to do so.

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- 7.4.2 The matter dragged on. It appears to have been brought to a head by Topi Patuki's initiative, with support from Mantell, by now a member of the Legislative Council, in petitioning the governor on 15 July 1867 to support proceedings in the Supreme Court:

to ascertain . . . whether or not a remedy can be found for a great wrong and infringement of our rights which we conceive to have been committed. (F2:53)⁸¹

The petition requested the governor to appoint a lawyer for Ngai Tahu:

in order that our right to this reserve and to these funds [the accrued rents] may be fairly tried in the Supreme Court. (F2:54)⁸²

Topi Patuki complained that Ngai Tahu had never been warned that the Maori reserve was about to be handed over to the provincial authorities, nor had they been given a chance to defend their title to the land.

- 7.4.3 The government responded promptly on 18 July 1867 by advising Patuki's lawyer, C B Iazard, that the governor had assented to legal proceedings being taken in the name of the Crown by way of *scire facias* or such other means as Iazard thought appropriate. It was to be understood that in agreeing to this course the government expressed no opinion on the validity or otherwise of the Crown grant (F2:54).⁸³ Later that month the native minister, J C Richmond, advised Mantell that the government would guarantee Ngai Tahu legal expenses up to £200 (F2:54–55).⁸⁴ A few weeks later, however, Richmond advised Mantell by letter (19 August 1867) that the government felt obliged to withdraw its offer to guarantee Ngai Tahu's costs so far as the future was concerned, but undertook to meet costs incurred up to the date of the letter. Not surprisingly Mantell was greatly incensed and he protested in the strongest terms to Richmond (F2:58–59).⁸⁵ Two months later, on 26 October 1867, Governor Grey authorised the payment of £400 from the proceeds of other Ngai Tahu funds on the basis of a loan (F2:64)⁸⁶, and so early in August Iazard issued proceedings and a writ of *scire facias* was served on the superintendent of Otago on 13 August 1867.

- 7.4.4 At much the same time, 7 August 1867, Stafford introduced a (Dunedin) Princes Street Reserve Bill in the House of Representatives (F2:59).⁸⁷ Its purpose was to authorise the payment of the accrued rents on the Princes Street reserve site, amounting to £6031 18s 9d, to the Otago province, to be held in trust for the same purpose for which the land had been Crown granted to the superintendent. It contained no provision protecting the rights of Ngai Tahu in the event of the legal proceedings authorised by the government being successful. Strong protests by Mantell (F2:59)⁸⁸ and further petitions by Topi

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Patuki, including one to the Queen, praying that the Bill be not passed, resulted in an amendment to the Bill, before being passed by the House of Representatives. Clause 3 now protected Ngai Tahu rights in the event of the court proceedings upholding their right to the land (F2:330).⁸⁹ The Bill in fact lapsed in the Legislative Council on 12 September 1867 (F1:72).

The Otago province offers a settlement

7.4.5 The general government deferred reporting to the Colonial Office on Patuki's petition to the Queen in the hope that:

an arrangement of an equitable kind might be effected between the two claimants to the reserve – the Province and the Ngaitahu tribe. (F2:60)⁹⁰

The provision inserted in clause 3 of the (Dunedin) Princes Street Reserve Bill protecting Ngai Tahu interests appears to have stimulated the Otago province into seeking a compromise. The superintendent, Macandrew, advised Richmond, native minister, by letter of 27 August 1867, that the province was prepared to set aside for Maori purposes a piece of land at Pelichet Bay of equal area to the Princes Street reserve. Further, the province would undertake to expend not less than £1000 on erecting a suitable home, or Maori hostelry, to be built in brick. This offer was made without prejudice to the province's rights in the Ngai Tahu proceedings before the Supreme Court (F2:383a-b).⁹¹ IZARD was not impressed with the offer (F2:334).⁹² In September the mayor of Dunedin and the Otago province decided to withdraw their Pelichet Bay offer and to defend the Supreme Court proceedings. On 12 September 1867 the superintendent agreed to refund the back rents if the Ngai Tahu action was successful, and to accept the rents in the meantime, on those terms. The sum of £6031 18s 9d was paid over by the colonial treasurer on 24 September 1867 on that condition (F2:67).⁹³

7.4.6 In May 1868 the Native Land Court held its first sitting at Dunedin. An application on behalf of Ngai Tahu to have matters relating to the Princes Street reserve investigated was declined by the court on the ground that the land had been Crown granted. The applicants were told they would have to go to the Supreme Court (F2:340).⁹⁴

The Ngai Tahu proceedings known, as *Regina v Macandrew* (1869) 1 CA 172, were brought in the name of the Queen, on behalf of Ngai Tahu, against the superintendent of Otago, J Macandrew (F2:341–362). They sought a declaration by the court that the Crown grant of the Princes Street reserve be set aside, on the ground that the governor had previously reserved the land for the use of Ngai Tahu visiting Dunedin. It was claimed, on behalf of Ngai Tahu, that the reserves, recommended by Mantell in his letter of 18 April 1853

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and Domett's letter of 6 June 1853 advising the governor's approval, "were duly made". Reliance was placed on section 17 of chapter 13 of the Royal instructions of 1846. This and all other claims made on behalf of Ngai Tahu were disputed by the superintendent.

Court of Appeal judgment

7.4.7 In the Supreme Court Mr Justice Ward held that section 17 of chapter 13 of the Royal instructions did not give the governor power to make the reserve in question. In the Court of Appeal the court assumed (without deciding) that section 17 of chapter 13 applied to the making of the Maori reserve. They disagreed with Mr Justice Ward's Supreme Court decision that section 17 was not wide enough to cover the making of such a reserve. However, they went on to point out that the power to make such a reserve was not given to the governor alone, but to the governor with the advice and consent of the Executive Council. As the court emphasised, it had not been pleaded or proved that the application for the reserve had been submitted to the Executive Council and approved by it. This was held by all five judges to be fatal to the proceedings. But Mr Justice Richmond went on to stress in his judgment that the court had acted on an assumption that the power of the governor, with the advice of the Executive Council, to make such a Maori reserve, depended upon the Royal instructions of 1846. He then said:

I believe I express the opinion of the whole Court when I say that, although we have necessarily pressed upon that point, we have in the course of the argument felt that the Instructions of 1846 did not regulate the matter. (F2:362)⁹⁵

What Mr Justice Richmond is saying is that the case was put on the basis that the Royal instructions of 1846 applied. The court itself dealt with the case on that assumption but it did not consider the assumption to be sound.

Unfortunately the official report of the case does not give details of the argument of counsel or the judges' comments on this critical point. It is not clear why all members of the court considered that the 1846 Royal instructions did not apply. It may have been because of the uncertainty engendered by the coming into force of the New Zealand Constitution Act 1852 in January 1853, and the consequential doubt as to just what power the governor had in June of that year to make the reserve in question. The effect of the judgment is that Ngai Tahu were wrong in assuming they could rely on section 17 of chapter 13 of the Royal instructions as giving the governor power to make the reserve. Further, even had the governor been entitled to act under section 17, it had not been shown that he had acted with the

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advice and consent of the Executive Council, and so the Crown grant to the Otago superintendent remained in force.

A settlement is reached

7.4.8 In April 1870 Ngai Tahu's lawyer, Izard, wrote to the attorney-general confirming that an appeal would be taken to the Privy Council (F2:385–6).⁹⁶ Not until February 1872 was advice received from London that the Privy Council had given leave to appeal (F2:576–7).⁹⁷ In August 1872 on Tairaroa's application, the government agreed to grant £500 to meet Ngai Tahu's legal costs and £150 was sent immediately to England (F2:394a).⁹⁸ Soon after this Superintendent Macandrew suggested that the "proceedings [be] stopped, to save the money being squandered in law" (F2:373).⁹⁹

On 22 November 1872 Izard wrote to Topi Patuki as follows:

I have been endeavouring to make a compromise with regard to the claims of yourself and your tribe to the Princes Street Reserve.

It is the best bargain I can make, and is approved of by Mr Mantell. I do not think that the Maoris are entitled to anything less, in strict justice, than the whole of the land, but we must consider the chances of their success in the suit that you have commenced. Before it could be brought to a conclusion a very long and expensive litigation would have to be gone through, and one that might not result in the Native claims being established. If the suit failed, the Natives would get no part of the land at all.

Considering all these points, I recommend that you should agree to the terms I am about to mention. They were settled in a long interview between Mr Vogel and myself, and have been submitted to Mr Mantell, who agrees with me in thinking that the best thing to do is to accept them.

The terms of agreement, of which I send a copy, amount substantially to this, viz:— The present suit to be stopped, and each side to pay its own costs. The Provincial Government of Otago to pay to Mr Mantell, and Mr McLean, if he will consent to act, the sum of £4,650, and to pay to the General Government the sum of £500 to cover an amount advanced by the Government for the purposes of the suit. The sum of £4,650 and the sum of £350 which Mr Mantell has now, making altogether £5,000, to be divided among the Natives according to their own wish. This sum of £5,000 will therefore be free from deductions, and the Natives are not to pay anything to refund the moneys that have been advanced for the purposes of the suit. In addition to the sum of £350 mentioned above, £150 has been sent to England, and I fully believe that this £150 will fully pay all expenses. Of course the suit is not to be stopped until the money is paid.

This arrangement requires your sanction. Think over it carefully, and let me have your answer as soon as possible, because, if you agree to it, the sooner I can stop proceedings in England and any further expenses there the better. If you do not agree to the above terms, the suit must go on; but I strongly recommend you to accept them. They are, in my opinion, as good terms as can be got, and the sum of £5,000 will fully

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represent the value of the ultimate chance of getting the land. Do not delay in giving me your answer; let it be in Maori, written by yourself, and get some friend to turn it into English that I may understand it. (F2:379–380)¹⁰⁰

- 7.4.9 Mantell also approved the proposed settlement. In a letter to the Reverend Wohlers on Ruapuke at the same time as he wrote to Patuki, Mantell said:

the terms offered are beyond what I dared to hope, considering the overwhelming odds against them. (F2:573–575)¹⁰¹

In making his recommendation Izard no doubt had full regard to all the legal difficulties and uncertainties. He would almost certainly have known, as we have learnt from a search of the Executive Council minutes for the relevant period in 1853, that in fact Governor Grey did not obtain the advice and consent of his Executive Council to his approving a reserve being made in Princes Street, as recommended by Mantell. Doubts as to whether the 1846 Royal instructions applied must also have concerned Izard, given Mr Justice Richmond's statement in his Court of Appeal judgment. The legitimacy of the New Zealand Company's prior action, in setting aside the land in question as a public reserve for wharves and quays, must also have weighed with him. At this distance it is difficult to escape the conclusion that, given all the legal uncertainties and the failure of the governor, assuming he was entitled to act under section 17 of chapter 13 of the 1846 Royal instructions, to comply with his terms, the settlement was not only justified but was the wisest course for Ngai Tahu to adopt.

- 7.4.10 As will be seen, the agreed sum of £5000 was paid out to the Ngai Tahu people in January 1874. We received evidence from Mr Ah-Lek Tay, a registered valuer called by the Crown, that in 1866 the value of the Princes Street reserve, of one acre, two roods and 34 perches, was £12,600; in 1877 it was £25,200 (O1:1). The land was Crown granted in January 1866 to the Otago superintendent. How good the settlement was in monetary terms depends on what date is thought appropriate as the base date.
- 7.4.11 Patuki and H K Taiaroa both sought to have the £5000 divided between them, and each would make part of their share available for distribution to the tribe. Patuki wanted to use his share to build a house (F2:426–7; 422–3).¹⁰² Eventually, on 30 September 1873, the trustees of the fund, W Rolleston and D McLean, agreed that £1000 would be paid to each of Topi Patuki and H K Taiaroa in recognition of their initiative in instituting the proceedings and obtaining a settlement; the balance to be distributed as agreed upon by Patuki and Taiaroa “and some European gentleman to be selected by them to assist” (F2:436–437).¹⁰³

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In January 1874 the monies were distributed. Patuki and Taiaroa each received £1000; T Karetai and K Karetai and family, £225; T Ropitini and others of Otakou, £850; H Nani and others, £225; A Kihau, £200; Te Koti, Te Rato, Ihaia Tainui and others, £120. £15 went to Rakiura, £20 to Ruapuke, £25 to Hokitika, £20 each to Moeraki and Waikouaiti, and £50 to all the Canterbury kaika (F2:454–475; F1:88).¹⁰⁴

Ngai Tahu claim the accrued rents

- 7.4.12 The sum of £6031 12s 9d had accrued by way of rents paid up to the time of the Crown grant to the Otago superintendent in January 1866. On 6 March 1874 Taiaroa wrote two letters to McLean, the native minister. In one he reported the distribution of the £5000 as having taken place except for some £700 (F2:477–479).¹⁰⁵ In the second he wrote claiming the accrued rents from the Princes Street site up to the date of the Crown grant (F2:580).¹⁰⁶ Taiaroa renewed his application for the back rents to Julius Vogel on 21 July 1874 (F2:580).¹⁰⁷ Further unacknowledged efforts were made by Taiaroa in 1875 and 1876 (F1:90). Finally, in 1877 Taiaroa petitioned Parliament for the payment of the £6000 back rent, plus interest. The Native Affairs Committee of the House of Representatives held a hearing on the petition. Predictably, Macandrew from Dunedin claimed the earlier payment of £5000 was “a complete and final settlement of the whole thing” (F2:373–4).¹⁰⁸ Iazard testified that the question of back rent had not come up at the time of the compromise of the court proceedings. The £5000 was accepted, he said, for the sake of peace and quietness, and Ngai Tahu were “paid” to leave them in possession of the land (F2:371).¹⁰⁹

The Native Affairs Committee, chaired by John Bryce, reported that:

there appears to have been a misapprehension as to the full extent of the compromise enacted by the payment of the sum of £5,000 to the Natives, and the two parties understood the agreement differently. That, under all the circumstances, it is highly desirable to remove all further grounds of complaint; and the Committee is of opinion that a further payment should be made to the Natives of the rents which had accrued prior to the issue of the Crown grant, or a reserve should be made of land to that value, for the benefit of the Natives interested. (F2:364)¹¹⁰

- 7.4.13 In December 1877 the government approved the payment of £5000 out of the £6031 12s 9d accrued by way of rents. Why only £5000 was to be paid and not the full sum, as recommended by the Native Affairs Committee, is not known. Nor is it known whether the committee’s alternative suggestion, that a reserve should be made to the value of the accrued rents, was considered. On 7 June 1878, £1000 of this money was paid, with the agreement of Patuki and Taiaroa, to certain Ngai Tahu assembled at Kaiapoi by the Reverend

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James Stack (F2:506–507).¹¹¹ The remaining £4000 was remitted to Dunedin on 17 June 1878 and credited to the official account of Newton Watt, the resident magistrate, who in turn, without authority, paid it into a deposit account in the Bank of New Zealand in the joint names of Taiaroa, Patuki and himself, but subject to the condition that it could not be withdrawn except on the authority of the colonial treasurer. There the money remained until May 1880, earning interest amounting to some £400 over the period of nearly two years. It lay there because Taiaroa refused to sign the receipt and discharge for the £4000 in full satisfaction of all claims to the rent, because of the £1000 which the government had declined to pay over. In short, Taiaroa sought payment of the full £6000 whereas Ngai Tahu were being asked to accept £5000 in full satisfaction, of which they had already received and paid out £1000 (F2:592).¹¹²

7.4.14 Eventually the patience of the native minister Bryce wore thin and he threatened, unless the £4000 was accepted in full satisfaction, to have the funds returned by Mr Watt to the public account. In fact the Bank of New Zealand, in compliance with instructions, transferred the £4000 to Mr Watt's official account, while the interest of £400 was paid direct to the public account. This occurred on 4 May 1880, on which day Mr Watt withdrew the £4000 from his official account and the following day paid it over to the Ngai Tahu people at Otakou Heads, in the presence of Patuki and Taiaroa. The next day he advised the Native Department that the previous day he had paid over the £4000 and "a receipt in full" was taken from Ngai Tahu (F2:593).¹¹³ This receipt, which Taiaroa had earlier refused to sign, was in the following form:

We, the persons whose names are attached, certify that the £4,000 we have received is the balance of the final payment on account of the Princes Street Reserve, Dunedin. This is the final payment for that reserve to us, nor shall any person or persons claiming that land through us ever make a further demand for payment on account of that land hereafter for ever upon any ground whatsoever. This is the last and final payment, in final and complete extinguishment of the title of all of us for that land. (F2:598)¹¹⁴

Subsequent unsuccessful efforts were made by Taiaroa to obtain payment of the £400 interest on the accrued rents while they were held in the deposit account (F1:96–97).

Watt, in reporting on the distribution of the £4000 at Otakou Heads, gave no particulars as to precisely how the money was divided up, but on 14 March 1879, on instructions from Sheehan, the then native minister, Watt was advised that the minister had agreed with Taiaroa on the following distribution:

- £1000 to Topi Patuki;

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- £1400 to Taiaroa; the extra £400 being in consideration of the work done by him and lawyers' fees paid by Taiaroa; and
- the balance to be divided by Watt, Patuki and Taiaroa among the people entitled to receive it, as was formerly done.

We think it likely that the distribution would have followed this pattern.

- 7.4.15 Dr Ann Parsonson (F1:98–100) provided details of various later attempts by Ngai Tahu to obtain further compensation for the loss of the Princes Street reserve. These included a hearing before the Native Land Court in 1939 which rejected a submission made on behalf of Ngai Tahu that the Maori had never had their claim tested on its merits (F1:104). Judge Shepherd, whose report on the case was delayed until 1945, concluded that the two payments received by Ngai Tahu meant they could not claim to have been unfairly treated.

7.5. **Ngai Tahu's Grievances**

- 7.5.1 Throughout the long and tortured history of the Princes Street reserve it appears that Ngai Tahu, the ostensible beneficiaries, were rarely, if ever, consulted. There could be no doubt they needed, in the short term at least, a suitable landing place and adequate shelter, including a base for their trade, in the new settlement. It was reasonable for them to apply, as they did, to Mantell in 1852, and again in November 1854 to the provincial superintendent, for the provision of accommodation during their visits to Dunedin to trade. While Mantell responded promptly, he recommended an unsuitable site both in terms of the landing place and for accommodation. Nor, having obtained the governor's assent in 1853, does he appear to have told Ngai Tahu of what had been approved.

We do not know when Ngai Tahu first learned of the Princes Street reserve. It may not have been for some years. We do know that Ngai Tahu continued to use the Toitu estuary site as a landing place, making shift as best they could on the beach. Not until 1859 was a stone house, near the old survey office, erected as a Maori hostelry. While it was located where Ngai Tahu wanted it to be, it remained for no more than five or six years. It was not replaced. The Princes Street reserve was perhaps used intermittently by Ngai Tahu. We have one account of crayfish being sold from the site in 1864, but it never served the purpose for which it was ostensibly set aside by Grey in 1853.

- 7.5.2 The manner of it being Crown granted to the Otago province in January 1866 reflects no credit on the Crown. It is difficult to escape the conclusion that Governor Grey and his three ministers, including

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Premier Stafford, did not act “inadvertently”. The most likely explanation is that given by Professor Ward, that it was the result of a “deal” between northern and southern politicians, with a new government seeking parliamentary support. The feeling that they were unfairly, indeed unjustly, deprived of “their” reserve has remained with Ngai Tahu down to the present day. While their counsel recognised in his closing address (W1:124) that a binding settlement had been reached in 1880, and that could not now be challenged, it was urged upon us that:

- Ngai Tahu were promised land (in 1844);
- if there had not been some bungling or incompetence by the Crown’s administrative staff in 1853, a Crown grant would have been issued for the land at that time; and
- the tribunal’s examination should be of a breach of the Treaty by the Crown, not the settlement of 1880, but rather the failure to grant them effective control of the land, promised and designated in 1853. (W1:125)

7.5.3 In his final reply (Y1:49) Mr Temm, for the claimants, invoked the “deliberate political decision” to issue a Crown grant to the Otago province as being a breach of the Crown’s duty under the Treaty to protect Ngai Tahu interests. It was described as the basis for the claim made in respect of the Princes Street reserve. Later in his reply (Y1:52) Mr Temm submitted, in reference to the settlement, that the “real point” is whether there was a breach of the Crown’s duty to protect, in failing to set aside the land and in failing to do it properly. It was the failure to complete the designation in 1853, Mr Temm submitted, of which the claimants complained, and they have been deprived of the benefit of the land because of the Crown’s administrative bungling. Their rights, it is said, were not protected, and that failure was a breach of the Crown’s Treaty obligations.

Statement of grievances

7.5.4 In their statement of grievances relating to Otakou the claimants included three grievances concerning the Princes Street reserve. They were:

6. The Crown failed to set aside the Otepoti reserves which had been promised to Ngai Tahu as part of the sale.
7. The Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations.
8. The Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for their personal use and occupation and as a base for their commercial activity. (W5)

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7.5.5 Before considering these various claims we must first determine whether the 1880 settlement (which claimants' counsel admitted cannot be challenged) precludes any claim now being made to us under the Treaty of Waitangi Act 1975, in respect of alleged breaches of the Treaty. We do not think the fact of such a settlement necessarily excludes claims in respect of the Princes Street reserve being made under the Treaty. Our reasons are substantially those which we elsewhere articulate in respect of the Ngaitahu Claim Settlement Act 1944 (21.4). In 1880 there was no way by which Ngai Tahu could have claimed relief for the breach of the Treaty. The Treaty at that time was considered to be a nullity. There was no legal provision such as there now is, whereby Ngai Tahu could advance their claim before a tribunal having jurisdiction to entertain it. While, therefore, as Mr Temm conceded, the settlement may be taken into account, we do not consider that it precludes our entertaining a claim under the Treaty of Waitangi Act 1975. We turn then to consider whether any act or omission of the Crown in relation to the Princes Street reserve constituted a breach of one or more principles of the Treaty.

Finding on grievance no 6: Crown failure to set aside Otepoti reserves

7.5.6 We can deal briefly with this grievance, which is, that the Crown failed to set aside the Otepoti (Dunedin) reserves which were promised to Ngai Tahu as part of the Otakou sale and purchase. We have discussed this claim in some detail in the preceding paragraphs (7.2). For the reasons given we are not satisfied that the company or Crown representatives made any such promises for the two reserves at the upper harbour foreshore. It follows that the claimants have not established any breach of the Treaty in this respect.

Grievance no 7: Crown failure to create Princes Street reserve

7.5.7 We turn next to the complaint that the Crown failed to create the Princes Street reserve in 1853, which failure it is said prejudiced the position of Ngai Tahu in later litigation and negotiation. It was put to us by Mr Temm that this failure was due to incompetence by the Crown's administrative staff in 1853 and but for this a Crown grant would have been issued. This submission assumed that it was legally competent, had the correct procedures been followed, for a Maori reserve in respect of this land to have been created for the permanent benefit of Ngai Tahu. The Crown, in lengthy submissions, disputed this and invoked the Court of Appeal decision in *Regina v Macandrew* (1869) 1 CA 172. We did not receive any detailed response to these submissions from claimants' counsel. Accordingly, we are in no position at this distance to come to any conclusion on

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the question of whether there was any legal basis at the relevant time which enabled Governor Grey to create the Maori reserve on the Princes Street site, in favour of Ngai Tahu. We are, however, left with very real doubts as to whether such power did exist from the comments of Mr Justice Richmond in *Regina v Macandrew*, to which we have earlier referred.

However, as the matter was pressed upon us in such detail by the claimants' historian we will assume that it was competent for the governor, provided he followed prescribed procedures, to create such a reserve. Would his failure to comply with prescribed procedures constitute a breach of Treaty principles? We also for the purposes of this discussion set aside the fact that Governor Grey, assuming he were purporting to act under section 17 of chapter 13 of the 1846 Royal instructions, failed to obtain the advice and consent of the Executive Council. It is presumably this failure which is characterised by claimants' counsel as "administrative bungling". Behind this claim is a further assumption, that is, that in failing to create the Princes Street reserve in 1853 the Crown was under a duty to Ngai Tahu to take such action. The Crown, through its counsel, Mrs Kenderdine, submitted to us that, if a reserve were promised as part of the sale and purchase transaction in 1844, Ngai Tahu would be entitled to be compensated for breach of contract or breach of trust (with due allowance for the monies paid in settlement last century). But Crown counsel submitted that, if no promise were made in 1844 (and we are not satisfied that such a promise was made), then the Crown was under no obligation to create a reserve. She submitted that:

It is not a breach of the Treaty for the Crown to perceive a need which has arisen for one of its subjects and to fail to remedy that need effectively. (L4:7)

- 7.5.8 In her closing address Mrs Kenderdine discussed further the question of whether the non-allocation of the reserves was a breach of the Treaty. She was concerned with the implications of certain passages in Professor Ward's report which we here reproduce, the first quotation being quoted more fully:

However, no proprietary title to land was ever granted to Ngai Tahu and there is no indication that government ever intended to do that. Phrases in the evidence and the submissions which refer to 'Maori land' or 'the Maori title' are therefore misleading. What the government set out to do was to ensure that a portion of central government reserve was made a 'Native Reserve' for a hostelry and market, with the land title still in the Crown. It is doubtful therefore whether the added-value of the land could be properly claimed by Ngai Tahu, as if the land had been theirs, as distinct from entitlement to compensation for the loss of a facility with which they had been provided, and then had seen removed. Arguably

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the government had a duty to replace the hostel on other land rather than pay compensation. Indeed this was offered by the Provincial authorities in 1866–7, but rejected by Mantell, on Ngai Tahu's behalf. (T1:427)

In summarising his overview of the various Ngai Tahu claims in the second passage quoted by Crown counsel, Professor Ward said:

The Princes Street case illustrates particularly well the nature of Ngai Tahu's grievance. Taken by itself as a claim about a particular reserve, and measured in terms of formal law or obligation, it is not especially strong. Considerable compensation were paid in any case. But seen in terms of Ngai Tahu's reasonable and legitimate aspirations to engage with the commerce and development of Dunedin, the disappointment and frustration must have been great indeed and the failure of officialdom to assist that reasonable and legitimate aspiration is manifest. For, although many of their actions were taken to conserve valued traditions and lifestyle, Ngai Tahu had engaged successfully before 1840 with the modern order and wished to continue to do so, trading for its commodities, learning its skills and sharing in its enterprises. Every aspect of the claim bears on this aspiration in one way or another. Whatever the technical shortcomings in some aspects of the Princes Street claim, or any other, as matters of law or contract, all have to do with the conservation and development of a basis of self-determination, a basis combining traditional resources and skills with new learning and new forms of wealth. From such a basis Ngai Tahu could engage further still with the settlers on terms of economic, social and racial equality. (T1:25–26)

In commenting on these two passages Crown counsel first referred to earlier findings of this tribunal that article 2 of the Treaty required the Crown to ensure that Maori were left with sufficient land for their maintenance and livelihood or, put in another way, that each tribe maintained a sufficient endowment for its needs (*Orakei and Waikeke Reports*). We would affirm this proposition.

We would accept Professor Ward's view that Ngai Tahu's aspirations to engage in the commerce and development of Dunedin were legitimate aspirations. For a few years, during the life of the Maori hostelry in Princes Street, built by the general government for Ngai Tahu visiting Dunedin, that aspiration was materially assisted by the Crown. But, because ownership of the land lay with the provincial council, the Crown had no effective long-term control over the hostelry and was powerless, it seems, to prevent it being dismantled.

7.5.9 Mrs Kenderdine, for the Crown, rejected the notion which she found implicit in Professor Ward's statement, that the Treaty guaranteed Ngai Tahu, via the Princes Street reserve, a share in the Dunedin economy and that the arbitrary ending of the arrangement was a genuine deprivation in breach of the Treaty. She submitted:

- the so-called "Princes Street reserve" was integrally bound up with the Otakou purchase;

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- that Ngai Tahu chiefs at Otakou selected the land they wished to exclude from the sale and chose not to exclude the Princes Street site; and
- that the land once sold passed absolutely to the Crown and Ngai Tahu then have, in respect of it, only such privileges (if any) as other British subjects have (X1:196).

7.5.10 We would agree that it is unrealistic to consider the claim of the Princes Street reserve independently of the wider claim for tenths made with respect to the Otakou purchase. We have earlier found that the Crown failed to ensure that Ngai Tahu, in retaining only 9600 acres out of over 533,000 acres sold to the Crown, retained sufficient land for their present and future needs. We have suggested that the additional provision of tenths vested in the Crown, substantially for Maori purposes would, along with the 9600 acres retained, have provided Ngai Tahu with an adequate endowment. Obviously, had the Crown secured a suitable reserve on Princes Street for use by Ngai Tahu, this would have served to meet part of its wider obligation.

But having said this, we find difficulty in holding that the Crown was under a Treaty obligation to provide in perpetuity a specific piece of land in the new town of Dunedin for the purposes of a Maori hostelry and trade. Clearly it was highly desirable, while the new town was in its infancy and accommodation was scarce, that the Crown or the provincial government should take steps to assist Ngai Tahu with accommodation. The steps taken by Mantell led to the government approving a site which was unsuitable and largely unused by Ngai Tahu. It is not easy to reconcile the contemporary rejection of the site by Ngai Tahu with the later claim that the Crown had a duty to retain it for Ngai Tahu. In fact, as we have seen, the Crown in 1859 provided adequate accommodation suitably sited for a few years. Preferably this should have been done earlier and some such provision maintained for a longer period, but in our view the need was of a relatively transitory nature, until accommodation became more readily available in Dunedin. The Crown's failure to meet its Treaty obligations in our view rested not on the limited accommodation provided, or the disposition of the Princes Street reserve site, but on its failure, as we have found in respect of the Otakou purchase, to ensure that Ngai Tahu retained an adequate endowment for their present and reasonable future needs. If, as a result of our findings, Ngai Tahu are compensated for this breach of the Treaty, such compensation should in our view more than encompass any perceived loss by Ngai Tahu of "their" Princes Street reserve.

*Princes Street Reserve****Finding on grievance no 7***

- 7.5.11 We can now deal quite shortly with the claimants' grievance that the Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations. There are two distinct problems with this claim. First, it assumes that at the time it was competent, as a matter of law, for the governor to create the reserve in question. But, as Mr Justice Richmond indicated in *Regina v Macandrew*, this is problematical. It is simplistic to suggest that only "administrative bungling" prevented it being done. Secondly, the reserve, although recommended by Mantell and approved by Governor Grey, was by all accounts unsuitable for the purpose for which it was ostensibly created. We find it somewhat incongruous to be asked to hold that it was a breach of the Treaty by the Crown, to fail effectively to create a reserve which was not suitable for the purpose for which it was needed.

Grievance no 8: the provision of a permanent hostelry

- 7.5.12 Finally, we consider the claim that the Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for the permanent use and occupation by Ngai Tahu, and as a base for their commercial activity. This claim has wide implications. Implicit in it is the assertion that if, and when, the Crown purchased blocks of land from Maori to facilitate Pakeha settlement, it was obligated under the Treaty to ensure that in any town that resulted from such settlement, permanent accommodation was provided for Maori wishing to visit the town to trade. We find difficulty in discerning any such obligation under the Treaty, or any principle which imposes such an obligation on the Crown. We have already indicated that Ngai Tahu had, in Professor Ward's words, "reasonable and legitimate aspirations to engage with the commerce and development of Dunedin". The failure of the Crown adequately to assist them, by providing suitable accommodation throughout the period of time that was required, was both disappointing and frustrating for Ngai Tahu. But any such assistance would have been necessary only so long as other accommodation was not available and, had it been provided, it need not have been vested in Ngai Tahu. The Crown could well have retained ownership.

Finding on grievance no 8

- 7.5.13 We are unable to find that the Treaty imposed any obligation on the Crown to provide a permanent hostelry vested in Ngai Tahu, to meet a temporary need. In the event, Ngai Tahu did receive some £10,000 for the "loss" of the Princes Street reserve and the accrued rents. Regrettably, but understandably, this money was not invested by Ngai Tahu in a property of their own in Dunedin, but was, as we have seen,

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distributed quite widely among the tribe. Had it been so invested, and the property retained, almost certainly we would never have heard of this claim.

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- 74 *ibid*, p 5
- 75 Stafford (21 NZPD 526)
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- 81 Patuki to the governor, 15 July 1867, *Compendium*, vol 1, p 145
- 82 *ibid*, p 146
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- 84 Richmond to Mantell, 25 July 1867, *Compendium*, vol 1, p 146
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- 86 Grey, order in council, 26 October 1867, *Compendium*, vol 1, p 156
- 87 see n 85, p 151
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- 94 Native Land Court sitting, 18 May 1868, *Compendium*, vol 2, p 230
- 95 1 CA 172, 192
- 96 Izard to the attorney-general, 6 April 1870, MA 13/68, NA, Wellington
- 97 Izard and Pharazyn to Mantell, 21 January 1872, MS 83/179, ATL, Wellington
- 98 H K Taiaroa to McLean, 12 August 1872, MA 13/68, NA, Wellington
- 99 Native Affairs Committee, Macandrew, 7 November 1877, AJHR 1877, I3-B, p 10
- 100 Izard to Patuki, 22 November 1872, AJHR 1877, I-3B, pp 15–16
- 101 Mantell to Wohlers, 23 November 1872, MS 83/179, ATL, Wellington
- 102 H K Taiaroa to McLean, Rolleston, Mantell, 15 September 1873, MA 13/68, NA, Wellington
- 103 Rolleston, McLean, 30 September 1873, MS 83/172, ATL, Wellington
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- 105 H K Taiaroa to McLean, 6 March 1874, MA 13/68, NA, Wellington
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Chapter 8

Kemp's Purchase

8.1. Introduction

On 8 February 1848 Governor George Grey arrived at Akaroa from Nelson, accompanied by Colonel William Wakefield. They had been settling the revised terms of the Nelson Crown grant. This was the governor's first visit to Banks Peninsula.

Soon after arrival Grey met with certain chiefs of the South Island. According to Grey, in a later despatch to the colonial secretary, Earl Grey, the chiefs agreed that after reserves were set aside for their present and reasonable future needs, they would relinquish the remainder of their land between the Nelson and Otago blocks. The Crown was to pay such sum as might be arranged. Detailed negotiations did not take place on this occasion.

On his return to Auckland Grey instructed Lieutenant-Governor Eyre, who was based in Wellington, to appoint a suitable person to negotiate with Ngai Tahu for the purpose of extinguishing their title to the tract of country lying between the district purchased from the Ngati Toa tribe the previous year, and that bought by the New Zealand Company at Otago. Grey stressed the way in which the arrangement should be concluded. First, there should be reserved to the Maori "ample portions for their present and prospective wants". Secondly, the boundaries of these reserves were to be marked out and then thirdly, the Crown agent was to buy from the Maori their right to the whole of the remainder of their claims to land in the South Island.

Lieutenant-Governor Eyre appointed Henry Tacy Kemp, native secretary at Wellington, to undertake the purchase. Eyre passed on to him Governor Grey's instructions. He was authorised to pay £2000 for the land, payable by instalments over a period of years.

Kemp reached Akaroa early in May and set up a meeting with Ngai Tahu for early June to negotiate the purchase. He called at Otakou for a few days at the beginning of June. There he took on board a dozen or so leading Ngai Tahu chiefs who, according to Kemp, had authority to speak for their people. He was accompanied by the New Zealand Company surveyor Charles Kettle. The party arrived at Akaroa on

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7 June 1848. Discussions were held over the next few days about the purchase. On Saturday 10 June some 500 Ngai Tahu were assembled at Akaroa. Lengthy discussions were held with Kemp about boundaries, the claimants and related matters. Kemp offered £2000 for the land. He understood from Ngai Tahu that the whole of Banks Peninsula had already been sold to the French. After a further meeting on Monday 12 June 1848, agreement appeared to have been reached. A deed of purchase was prepared by Kemp and a map showing the boundaries drawn by Kettle was attached to it. The leading chiefs were invited on board the *Fly*, the deed was read over to them and then signed or assented to.

Kemp had not complied with his instructions. He did not first find out and reserve to Ngai Tahu the land they wished to keep, which Kemp was to ensure was ample for their present and future needs. Consequently no reserves were surveyed or marked out although Kettle, the surveyor, was available. It was winter, rivers were difficult to ford and the journey on foot to the various Ngai Tahu settlements between Kaiapoi, in the north, and Waikouaiti, in the south, would have been unpleasant and time consuming. Instead, Kemp provided in the deed that their kainga and mahinga kai (which Kemp translated as plantations) would be reserved to them, and when the land was surveyed the governor, in his discretion, would make additional reserves. The price was to be £2000, payable by instalments of £500. The deed and map were intended to show that the purchase went from east coast to west coast between the Wairau and Otakou purchases. Other promises not referred to in the deed as to the retention of eel-weirs and landing places (to be shared with the Europeans) were made by Kemp. Ngai Tahu were also told by Kemp that their reserves would be “ample and in addition to their villages and cultivations.”

Ngai Tahu’s understanding of the agreement was not the same as Kemp’s. Ngai Tahu had no intention of parting with the land they needed for their future livelihood. They intended to retain considerable areas for producing and gathering food, including foraging and hunting. They anticipated being able, as settlers arrived, to participate in agricultural and pastoral activities and benefit from the new economy. They certainly did not agree, as soon unfortunately transpired, to being confined to minuscule reserves barely capable of maintaining them at a mere subsistence level.

Kemp, on his return to Wellington, was reprimanded by Lieutenant-Governor Eyre for not following his instructions. Eyre appointed a new commissioner, Walter Mantell, to replace Kemp. Mantell was commissioned to make an overland journey from the northern to the

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southern boundaries with a surveyor to mark out on the ground appropriate reserves for Ngai Tahu. A liberal provision was to be made by way of reserves for both their present and future wants. Due regard was to be shown to the interests of Ngai Tahu and in meeting their wishes.

Unfortunately Mantell also failed to comply with his instructions. While he travelled throughout the area on the east coast over several months, he ended up, out of an area of 20 million acres included in the deed, reserving a mere 6359 acres for the estimated 637 Ngai Tahu. This averaged out at 9.98 acres per individual Ngai Tahu. The failure of the Crown's agent Mantell, to set aside adequate reserves lies at the heart of the present claim. But included is a claim which came to be made 20 or so years after the deed was signed, that Ngai Tahu did not sell more than the land on the eastern coastal plains up to the foothills, an area of some seven million acres. The Crown later purchased (or repurchased) the west coast. The land lying between the west of the eastern seaward range of mountains and the Southern Alps has come to be called the "hole in the middle", which it is said was not sold to Kemp.

The foregoing, as the subsequent detailed account will show, is no more than a very bare sketch of the Kemp purchase and Ngai Tahu's principal grievances. We turn now to a detailed discussion of the claims.

8.2. **Statement of Grievances**

We set out here the claimants' grievances relating to Kemp's purchase. We will consider each of these at the appropriate time and state our conclusions and findings. While all are of importance to the claimants, the principal grievances are nos 2, 3 and 4. Most, if not all, of the remainder stem from, or are related to, the three main complaints. The grievances are:

1. That the Crown's inclusion of Kaiapoi in the Wairau Purchase of 1847 from Ngatittoa exerted unfair pressure on Ngai Tahu to part with Kemp's Block on unfavourable terms.
2. That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kems Purchase, in particular –
 - (a) Ample reserves for their present and future benefit were not provided, and
 - (b) Their numerous mahinga kai were not reserved and protected for their use.
3. That the Crown declined the Ngai Tahu request to exempt from the sale the area between the Waimakariri and Kowhai rivers, or to reserve

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it for their future exclusive use, to which they were entitled under Article II of the Treaty.

4. That on the matter of boundaries the Crown enforced an interpretation which had not been agreed to by Ngai Tahu: in particular with regard to –

(a) the western boundary, which Ngai Tahu wanted to follow the “foot-hill” ranges from Maungatere to Maungaatua as had been previously agreed with Governor Grey, and

(b) the eastern boundary, which Ngai Tahu wanted to follow the line-of-sight from Otumatua to Taumutu and thus to exclude from the sale Kaitorete, most of Waihora (Lake Ellesmere), and its north-eastern shoreline with the adjoining wetlands.

5. That the Crown failed to ensure that a claim was lodged on behalf of Ngai Tahu to protect their interests under the New Zealand Company Land Claimants Ordinance of 2nd August 1851.

6. That the Crown on 7th August 1851 passed the Canterbury Association Amendment Act without providing for the protection of Ngai Tahu interests derived from the unfulfilled promises of the Crown under Kemps Purchase.

7. That the Crown under the Native Land Act of 1865 failed to provide for adequate protection for Ngai Tahu in the conduct of the Native Land Court.

8. That the Crown passed the Ngai Tahu Reference Validation Act of 1868 to the detriment of Ngai Tahu.

9. That the Crown aborted the Royal Commission of Smith and Nairn and suppressed its evidence to the detriment of Ngai Tahu.

10. That the Crown in the years 1893–1909 under the Land for Settlements Acts resumed some sixty valuable estates in Kemps Block at a cost of some £2,000,000 (A9:12) for the benefit of landless Europeans but failed to do likewise for landless Ngai Tahu, in breach of Article III of the Treaty.

11. That the Crown by the South Island Landless Natives Act of 1906 assigned to Ngai Tahu lands, none of which were in Kemps Block, and which were much inferior to those provided contemporaneously for landless Europeans under the Land for Settlements Acts – a breach of Article III. (W4)

8.3. **Background to the Purchase**

The 1847 Wairau purchase

8.3.1 Kemp’s purchase was the second of Grey’s large acquisitions of South Island Maori land. On 18 March 1847, just over a year before Kemp was sent to negotiate his purchase with Ngai Tahu, Ngati Toa rangatira signed a deed of sale with the Crown, which became known as the Wairau purchase. This deed was seen by the Crown as extinguishing Maori title to the disputed area of the Wairau, and thereby resolving the impasse which had resulted from the killings there in

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1843. The sale provided land for the Nelson settlers to expand into the rich valleys of what was to become Marlborough.

This purchase has to be considered for two reasons. First the question of the location of the northern boundary of the Kemp purchase has been a matter of some considerable discussion before the tribunal. According to Kemp's deed, the southern boundary of the Wairau purchase is also the northern boundary of the Kemp block. The maps to both deeds identify their common boundary on the east coast at a place labelled "Kaiapoe" or "Kaiapoi". To find the Kemp boundary we have to consider the location of the Wairau boundary. In August 1848, Walter Mantell fixed the northern boundary of the Kemp purchase at Kaiapoi pa and there it has remained ever since. However the Crown's historian, Dr Donald Loveridge, has argued that the actual boundary agreed between Grey and Kemp and Ngai Tahu was not at the pa but near the mouth of the Hurunui River, a considerable distance to the north. Secondly, because Ngati Toa had invaded Ngai Tahu little more than a decade prior to the Treaty, how far south Ngati Toa's rights went was a question of the respective mana of the two tribes. Only a few months after the Kemp purchase was signed Ngai Tahu were complaining bitterly that a considerable amount of Ngai Tahu's land had been purchased by the Crown as if it belonged to Ngati Toa.

- 8.3.2 The claimants in their first grievance have alleged that, in including Kaiapoi in the Wairau purchase, the Crown exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms. To consider this question we will have to review the background to the Wairau purchase in some detail. This agreement was the culmination of the series of events which began with the attempts of the New Zealand Company to purchase lands in the country prior to Captain Hobson's arrival to negotiate the Treaty of Waitangi. We have seen how these purchases allowed Wakefield to claim to have acquired around 20 million acres of land from Maori for his New Zealand Company settlers. These lands extended from the 41st parallel in the north to the 43rd parallel in the south. We have also seen that when these purchases were examined by Commissioner William Spain in 1843 he found that the company's claims were wildly exaggerated and that Maori title to all but relatively small areas of land on both sides of Cook Strait remained firmly intact.
- 8.3.3 The New Zealand Company's claims to land in the South Island were based on the two deeds negotiated with William Wakefield in late 1839. In the first, that of 25 October 1839, the chiefs of Ngati Toa at Kapiti, including Te Rauparaha and Te Rangihaeata, were purported to have sold all their rights to land down to the 43rd parallel (L9:8).¹

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A fortnight later, on 8 November 1839, a deed was signed by Te Atiawa chiefs at Queen Charlotte Sound which also purported to sell their lands down to the 43rd parallel (L9:9–10).² It was the attempt of company settlers to enforce these deeds while they were still being considered by Spain which led to the tragedy at Wairau in June 1843.

When Spain finally completed his report on the New Zealand Company's claims to lands in the Nelson district on 31 March 1845, he found that the New Zealand Company had not acquired any title to the Wairau from the tribes involved. Spain outlined the principle on which he acted in deciding who, among competing Maori claimants, had the right to alienate any land:

I have set it down as a principle in sales of land in this country by the aborigines, that the rights of the actual occupants must be acknowledged and extinguished before any title can be fairly obtained upon the strength of the mere satisfaction of the claims of the self-styled conquerors, who do not reside on nor cultivate the soil. In short, that possession confers upon the Natives of one tribe the only and real title to land as against any of their own countrymen; and that the residents, whether they be the original unsubdued proprietors, the conquerors who have retained their possession acquired in war, or captives who have been permitted to re-occupy their land on sufferance – in all cases the residents, and they alone, have the power of alienating any land. (L9:5)³

Spain then went on to consider the Wairau. He found no evidence that the owners, Ngati Toa, had sold the district of Wairau and accordingly he was not prepared to recommend that the Wairau district should be included in the Crown grant to be made in favour of the New Zealand Company. He referred to Ngati Toa, assisted by the Te Atiawa and Ngati Raukawa tribes, as:

making frequent efforts to subjugate the tribes along the eastern coast as far as Banks Peninsula, which to this day bears marks at Akaroa of the incursions of these ferocious conquerors, and sometimes carrying war, though with less success, into their enemies' country as far south as Foveaux Strait. (L9:5)⁴

Spain later proceeded to define the various districts within the areas included in the two deeds, which were “in real and *bona fide* possession of the Ngatitōa Tribe” as including “on the Middle [South] Island in Cloudy Bay, comprising the Wairau, a part of Queen Charlotte's Sound”. This land he held not to have been sold to the New Zealand Company.

Out of the vast area in the South Island which the New Zealand Company had purported to purchase under the Kapiti and Queen Charlotte deeds, Commissioner Spain awarded only 151,000 acres in and around Nelson. All these areas were well distant from the 43rd parallel of latitude, the southern boundary as defined in the deeds (L9:7).⁵

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8.3.4 In 1847 the New Zealand Company was having difficulty in meeting its obligations to its purchasers in respect of certain Ngati Toa land in the North Island and in “the district of Wairau, in the Middle Island, and the country lying immediately to the southward of that district”.⁶ Governor Grey decided that he himself would have to take steps to remedy the position, and negotiate a purchase with the Ngati Toa tribe. Containing Ngati Toa was also on his mind. He later explained to Earl Grey that, in agreeing to pay Ngati Toa £3000 for the land in five annual instalments of £600 each:

the fact of the Ngatitua Tribe receiving for several years an annual payment from Government, will give us an almost unlimited influence over a powerful and hitherto a very treacherous and dangerous tribe. (L9:15)⁷

Spain had identified Ngati Toa's rights to the Wairau as based on occupation and cultivation. He did not specify the geographical limits of these rights. Following the purchase, Grey described to Earl Grey the size of the block involved and explained his reasoning in making such a large purchase. He suggested that in recognising Ngati Toa's title to the Wairau, Spain had in effect acknowledged title to a much larger area. This decision he said:

really gave a claim to the Ngatitua Tribe to a tract of country in the Middle Island extending to about 100 miles south of Wairau, as their claim to the whole of this territory is identical with their claim to the Valley of the Wairau. (L9:14)⁸

Grey went on to advise the colonial secretary that in reference to the Wairau district he:

thought it advisable not only to purchase this district, which was estimated by the Surveyor-General to contain 80,000 acres of the finest agricultural land, and about 240,000 acres of the finest pastoral land, but also to endeavour to purchase the whole tract of country claimed by the Ngatitua Tribe, and extending about 100 miles to the southward of that valley . . . (L9:15)⁹

Grey envisaged much of this land as being suitable for grazing sheep and cattle by European settlers “almost immediately”. Relying on Spain's investigations into the company's title to the Wairau, Grey made no attempt to determine if tribes other than Ngati Toa held rights within the block.

Grey therefore saw himself as buying Maori rights to the Wairau and an additional area of land running to about 100 miles south of the Wairau. Since the 43rd parallel is approximately 100 miles south of the valley, it may be assumed that Grey had in mind the southern point of the original Kapiti and Queen Charlotte deeds of 1839. Further confirmation of this comes from an 1847 letter of Colonel Wakefield which described the southernmost point of the purchase

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as on the coast by “Table Island”, or Motunau, which is a few miles south of the 43rd parallel (L8:12).¹⁰

The wording of the deed, however, identified the southern point of the purchase as Kaiapoi:

Beginning at Wairau, running along to Kaiparatehau (Te Karaka) or Cape Campbell, running along to Kaikoura until you come to Kaiapoi. (A8:I:204)¹¹

- 8.3.5 The Crown historian, Dr Donald Loveridge, proposed to us that it is clear from Grey’s geographical descriptions that the Kaiapoi named in the deed could not have been the famous old pa near the mouth of the Ashley River. This pa lay considerably more than 100 miles south of the Wairau valley.

Dr Loveridge suggested that the Kaiapoi here was either another Kaiapoi altogether, or that the purchase extended to the northernmost edge of the “Kaiapoi district”. In her closing address, Mrs Kenderdine argued that the Hurunui was a suitable location for such a boundary:

there may have been a Maori component in this designation as well. According to Dr Anderson the Hurunui marked the northern limit of the territory which Ngai Tahu continuously occupied throughout their wars with Te Rauparaha. (X1:224)

The claimants have vigorously opposed any suggestion that there were two Kaiapoi, one near the Ashley River which was sacked by Te Rauparaha and another on the Hurunui. They said that they know of no such place on the Hurunui (O46:5–6). We find it difficult to accept that, given the history of Kaiapoi pa, another Kaiapoi could have existed in 1847 and played such an important role in the events of the times, only to disappear from memory or written record. Whether Kaiapoi can be interpreted as a district we shall discuss later when we come to consider the Kemp purchase itself.

As Dr Loveridge pointed out there is a considerable weight of evidence to support his view that the Hurunui or the 43rd parallel was associated, at least in the European mind, with Kaiapoi. The Nelson Crown grant of 1848 has its southern point identified as Kaiapoi, and the map locates this point as “Kaipoe”, just north of the 43rd parallel. The Kemp deed map too, as we shall see, locates its Kaiapoi near a river not far from the 43rd parallel, as does another more detailed map also drawn up by Charles Kettle at the time. The simplest explanation is that the Europeans involved did not actually know where Kaiapoi pa was. For convenience they placed it at the 43rd parallel near the Hurunui. In neither the Kemp nor Wairau purchase negotiations was the place visited. For Ngai Tahu and Ngati Toa the boundary issue had little to do with parallels, but with places

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indelibly etched in memory because of their significance in the tribes' recent histories.

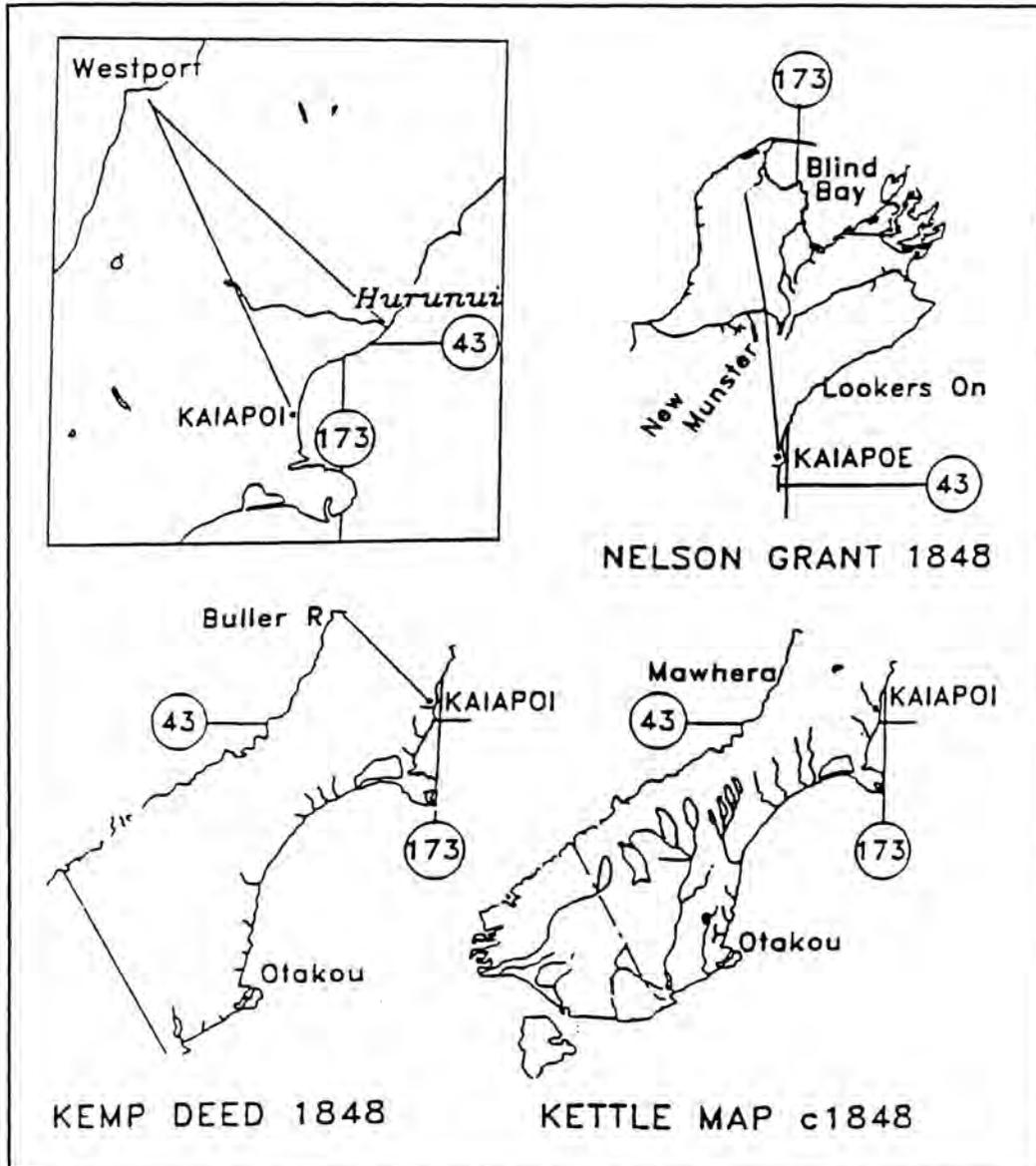


Figure 8.1: Comparing the location of Kaiapoi in relation to the 43rd parallel, as shown in three 1848 maps – the Nelson Crown grant map, the Kemp deed map and Charles Kettle’s map. This shows the common but erroneous belief that Kaiapoi was located above the 43rd parallel, rather than further south at the mouth of the Rakahuri (Ashley) River.

8.3.6 Some light on this question may be provided by a memorandum made in 1850 by Lieutenant W F G Servantes explaining why Kaiapoi had been chosen as the “nominal” boundary of the Wairau deed:

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The Natives were in the first place asked to dispose of the Wairau valley only, but they themselves proposed to cede all their lands as far as Kaiapoi to which point they stated that the property to which they had a sole title extended.

Doubts were at the time entertained of the Ngatitōa Tribe having an undisputed title to the land further south than Kaikoura, but at the same time it was known that they had a claim to a certain extent as far as Kaiapoi, the point mentioned by them in consequence of several of their principal chiefs having been murdered there, and their having in revenge nearly exterminated the original tribe, the few that escaped having sought safety by flying to the Southward. [marginal note: "From Kaikoura To Kaiapoi"]

On this account it was thought advisable to include the land in question in the Deed of Sale in order to extinguish whatever claim the Ngatitōas had to it [,] for if excluded and the boundary fixed at Kaikoura, it was certain that they would dispute the right of any tribe or persons who might afterwards wish to dispose of it, and would moreover if their title was found to be valid, demand as much for the alienation of that portion, as they received for the whole Block including the Wairau.

Although the right of the above named Tribe was considered doubtful, I beg to add that I believe it is very questionable whether according to Native customs the Ngaitahu people have a better one. (L9:552-553)¹²

Servantes makes it clear that the extension of the purchase to Kaiapoi was initiated by Ngati Toa and that it was a question of utu. In Ngati Toa eyes Kaiapoi was the place where Te Pehi and their chiefs had been slain. This can only have been the pa. However, Servantes emphasised that other rights were known about and that the southern boundary was a nominal location. As a result of this memorandum Grey was prepared to see Ngai Tahu paid for their rights to land ". . . South of the Kaikouras" (L9:551).¹³

- 8.3.7 In her closing address Mrs Kenderdine presented the view that Grey was purchasing the Wairau completely from Ngati Toa and the rest of the land only to the extent that Ngati Toa had rights to it. Other tribes could also have had rights which the Crown would have to have dealt with at a later date. However this is not what the governor told Earl Grey he had done when he stated that Ngati Toa rights to the larger area were "identical with their claim to the Valley of the Wairau" (L9:14).¹⁴ The fact that, as we shall see, Grey then proceeded to have a Crown grant prepared as far south as the 43rd parallel, without any further investigation of Maori title, supports the idea that he believed he had extinguished aboriginal title over the whole of the block. By 1850, when Grey suggested the possibility of making Ngai Tahu a further payment, the governor was well aware of the location of the pa, and his "South of the Kaikouras" can be seen as the area between the southern boundary of the Wairau purchase as at 1847 and the pa.

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It is clear that the Crown's understanding of the limits of the Wairau purchase stopped at about the Hurunui. There was no intention on the part of Grey or any other of the Crown's agents to purchase from Ngati Toa as far down as the Ashley River, where Kaiapoi pa was located. In fixing the boundary of the Wairau purchase in so vague a manner significant problems were later created when this was used as the boundary of the block purchased by Kemp from Ngai Tahu.

We will defer reaching a conclusion on the question of the claimants' first grievance until we have considered the Kemp purchase itself. This we will do after discussing Governor Grey's negotiations with Ngai Tahu early in 1848.

Grey's negotiations in 1848

- 8.3.8 Governor Grey, accompanied by Colonel Wakefield, arrived at Akaroa from Nelson on 8 February 1848. On his return to Auckland after this South Island visit, Grey made no mention of it in his despatches to the Colonial Office until some six months later, well after Kemp's deed had been signed. In a despatch of 25 August 1848 reporting on Kemp's purchase, Grey advised Earl Grey that he had earlier found all the principal chiefs of the South Island acquiesced in the propriety of an immediate settlement of their claims to land upon the following basis:

that the requisite reserves for their present and reasonable future wants should be set apart for themselves and their descendants, and should be registered as reserves for such purposes, and that they should then relinquish all other claims whatever to any lands lying between the Nelson and Otago Blocks, receiving for so doing such sums as might be arranged, in four annual payments. (L9:16)¹⁵

Grey went on to say that, considering the number of Maori involved, he thought a total sum of £2000 divided into four annual sums of £500 would suffice.

- 8.3.9 Colonel William Wakefield, however, reported to London on 29 February 1848, soon after his return to Wellington. From this report it appears that:

- Grey met with all the "native men of Ports Cooper and Levi and the neighbouring plains" at Akaroa;
- they all proposed to sell the block of land between that lately purchased from the Ngati Toa (the Wairau purchase) and Otakou, including the portion of Banks Peninsula not sold to the French;
- such sale was to include the country as far south as Otakou and "the level country back to the central range of mountains"; and
- the party then travelled to Otakou where Grey saw the few Maori living near the anchorage at the head of the upper harbour and

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discussed with them the purchase of their claims to the above block of land and gave them the same assurances he had given at Akaroa. For the “extensive district” Grey thought £2000 would be ample payment (L9:57–58).¹⁶

According to Wakefield, Grey’s discussions with Ngai Tahu at both Akaroa and Otakou involved a willingness on their part to sell “the level country back to the central range of mountains” lying between the Wairau purchase and the Otago Block. The “central range of mountains” we would expect to be a reference to the Southern Alps. But “level country” does not extend all the way to the alps. Wakefield may not have known this. It is not possible to be certain what area Wakefield had in mind. We believe his apparent confusion is best explained in Professor Ward’s report. The report referred to the suggestion that Wakefield’s account shows that the purchase discussed by Grey at Akaroa involved an offer of the plains, or at most the land to the main divide. Grey then changed the scope of the intended purchase to include the west coast before sending Kemp on his mission. Professor Ward commented:

This argument is difficult to sustain. There is no indication that Grey regarded the purchase as having an inland boundary. Grey seems to have believed that he had arranged to purchase all Ngai Tahu had a right to between the Wairau and Otakou blocks and subsequently issued instructions to this effect. To understand Wakefield’s comment it is necessary to distinguish between the question of where Ngai Tahu might have rights and the question of the scope of the intended purchase. There is nothing in either Governor Grey or Lieutenant-Governor Eyre’s correspondence to suggest that the purchase of a coastal strip was first contemplated, then rejected, in favour of a coast to coast block. On the other hand, the notion that Ngai Tahu might not have rights over the interior of the island or on the west coast was very much at the forefront of official thinking. The mention of the central range of mountains in Wakefield’s account is not difficult to explain. Wakefield’s suggestion that a coastal strip was going to be purchased reflected his understanding, or rather lack of understanding of the nature of Ngai Tahu’s rights. At Akaroa Grey was discussing a prospective purchase with Ngai Tahu’s Ngai Tuahuriri hapu. Ngai Tuahuriri did not have rights west of the main divide, but this did not mean that other sections of the tribe did not have rights there. Wakefield left with the impression that the purchase would involve a strip of land on the east coast because he did not understand that rights were not held uniformly over all sections of the tribe and that other sections of the tribe would have rights which had not been discussed with Grey. (T1:124)

We consider Professor Ward’s explanation to be a persuasive one.

- 8.3.10 It does appear from Wakefield’s report that Ngai Tahu agreed to accept the southern boundary of the Wairau purchase as the northern boundary of the lands to be sold. Dr Loveridge claimed this is confirmed by Matiaha Tiramorehu in a letter written in October 1849

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to Lieutenant-Governor Eyre. Included in Tiramorehu's letter was the following statement:

I also remember the conversation that Governor Grey had at Akaroa with the Natives of Port Levy; Ngaituahuriri spoke to the Governor concerning the payment for Kaikoura and **Kaiapoi**; he (the Governor) told the Ngaitahu Tribe that (the payment for) **Kaiapoi** should not be given to the Ngatitoas, but that for Kaikoura was already gone to them. Upon which Te Uki said to the Governor, Do not hide from us what you may have wrongly done with our place or country, but tell us that we may all know what you have done. After which conversation Governor Grey asked Ngaituahuriri if he [sic] would part with some of his land; upon which the Ngaitahu Tribe hearing, gave their consent that **Kaiapoi** should be given up to the Governor, relying implicitly on his former promises; but no, it (the payment for **Kaiapoi**) has been given to the Ngatitoas. When Mr Kemp came here, he placed the boundary of the Ngatitoas' land at **Kaiapoi**; this mistake caused our hearts to be darkened. (L9:23–24)¹⁷ (emphasis added)

Dr Loveridge commented that this as it stands is somewhat obscure, but said that if the passage is suitably amended it is much clearer:

After which conversation Governor Grey asked Ngaituahuriri if he would part with some of his land; upon which the Ngaitahu tribe hearing, gave their consent that **Kaiapoi district** should be given up to the Governor relying implicitly on his former promises; but no, it (the payment for **Kaiapoi district**) has been given to the Ngatitoas. When Mr Kemp came here he placed the boundary of the Ngatitoas' land at **Kaiapoi pa**; this mistake caused our hearts to be darkened. (emphasis added)

Dr Loveridge argued that in February 1848, looking back to the Wairau purchase and Grey's recent discussion in Nelson about the new Nelson Crown grant, Grey would have been quite prepared to accommodate the Ngai Tahu claim to lands as far north as the 43rd parallel. He contended that Tiramorehu's statement that Kemp placed the boundary of Ngati Toa land at Kaiapoi pa was mistaken and this change was made later by Mantell. It is true that Mantell did later fix the boundary of Kemp's purchase at Kaiapoi pa.

Mr Evison, for the claimants, disputed Dr Loveridge's comment on Tiramorehu's view of where Kemp put the boundary of Ngati Toa land and cites some Maori evidence before the Smith–Nairn commission which suggests Kemp knew where Kaiapoi pa was (O46:6). But this is questionable. Kemp may well have thought the Kaiapoi referred to was at the 43rd parallel near the Hurunui River. It is possible that Kemp saw the map of the 1848 Nelson Crown grant in Eyre's office in Wellington in April 1848. If so, he would have seen Kawatiri and the Buller River shown on the plan of the Crown grant. That being the point to which the northern boundary on the Kemp deed plan goes across to the west coast.

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- 8.3.11 Professor Ward pointed out to us that Kaiapoi could mean different things to Maori and European. Thus, in European terms Kaiapoi was simply a location which could be used as a boundary as readily as any other:

It was entirely realistic to purchase one block from Ngati Toa and another from Ngai Tahu, placing the dividing line at the heart of Kaiapoi pa. In Maori terms this was inconceivable. Either Ngati Toa got the money for Kaiapoi or Ngai Tahu got the money for it. Ngai Tahu's claim to Kaiapoi involved not just the pa. Kaiapoi was the hub from which a network of rights radiated. An offer to purchase *from Kaiapoi* could only be interpreted as recognition of Tuahuriri's right to that place and all that went with it. (T1:126) (emphasis in original)

We believe this explanation legitimises the addition of the word "district" in Tiramorehu's letter as proposed by Dr Loveridge (8.3.10). It is consistent with Professor Ward's view that when Ngai Tahu referred to Kaiapoi they referred not only to that place but all that went with it in the district throughout which their rights radiated.

- 8.3.12 The Ward report also cites and discusses the passage from Tiramorehu's letter under discussion. Professor Ward inferred from it that Ngai Tahu understood the governor to have agreed not to pay Ngati Toa for Kaiapoi. The Ward report comments that although Grey was not prepared to accept that Ngai Tahu had rights in Kaikoura, he had at least shown he was prepared to restore to Ngai Tuahuriri the mana of Kaiapoi. This is described as a "major victory". It would be left to Ngati Kuri to establish their claim to Kaikoura. Tiramorehu is said to have made it clear that Ngai Tuahuriri were prepared to sell at least some of their land. The report points out that Grey was interested in buying land but not in renegotiating the Wairau purchase. "His goal remained the purchase of the area connecting the Wairau and Otakou blocks and he left under the impression that Ngai Tahu had agreed to this" (T1:123).

It seems to us reasonable to infer from Tiramorehu's letter that Grey in 1848, in agreeing that payment for Kaiapoi should not be given to Ngati Toa, was recognising Ngai Tahu rights to Kaiapoi. And by Kaiapoi, Ngai Tahu would mean not simply the pa but the Kaiapoi district. This was confirmed by Professor Ward, who in cross-examination said that "from the Maori point of view Kaiapoi would have been seen as a district" (tape T8:5740).

- 8.3.13 Mr Temm, for the claimants, made passing reference only to Grey's visit in 1848. The Crown cited a passage from the Ward report (T1:122-123) to the effect that the Wairau purchase was in the forefront of Ngai Tahu concerns and that Grey seems to have used this as an opening to discuss the purchase of Ngai Tahu interests in the area between Wairau and Otakou blocks. The Crown refuted the

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implication that Ngai Tahu were reluctant to sell land to the Crown in 1848, or that Grey had to create an “opening” by the exercise of some kind of pressure. On the contrary, the Crown said such evidence as there is points to the opposite conclusion: that Ngai Tahu were more than willing to sell. Reference was made by the Crown to correspondence from Ngai Tahu which suggests that negotiations came about as a result of an invitation from Ngai Tahu (L8:4).¹⁸ It is of course always possible that such invitation arose in part because of Ngai Tahu concern about the extent of the Wairau purchase and its encroachment onto Ngai Tahu territory. The Crown further suggested that the purpose of Governor Grey’s visit (his first to those parts) may merely have been to open the way for full negotiations and not to undertake them himself. This does seem a likely scenario.

The Crown, in discussing Tiramorehu’s 1849 letter, referred to Professor Ward’s acknowledgement that from the “Maori point of view Kaiapoi would have been seen as a district” (tape T8:5740). That district, it was said, was also the northern limit of the territory continuously occupied by Ngai Tahu during their wars with Te Rauparaha. Professor Anderson is also cited as confirming this (X1:230–231). The dividing line between the Ngai Tuahuriri district, with rights centred on Kaiapoi pa, and the district claimed by the Kaikoura people, lay in the vicinity of the Hurunui near the 43rd parallel. Accordingly, the Crown submitted that Grey and Ngai Tahu were in substantial agreement in February 1848 as to the location of the north-eastern boundary of the proposed purchase. On giving the matter careful consideration, we believe that the weight of evidence supports this view.

- 8.3.14 It is, we believe, also possible to infer from the limited contemporary evidence available that Governor Grey very probably thought he had a broad agreement with the Ngai Tahu people to sell all their land between the Wairau and Otakou blocks. But the contemporary evidence is such that no firm conclusion can be drawn as to the Ngai Tahu state of mind at the time.

8.4. **The Purchase**

Grey’s instructions to Eyre

- 8.4.1 Governor Grey, on his return from his South Island trip early in 1848, gave verbal instructions to Eyre to make arrangements for the purchase of lands from Ngai Tahu. He indicated that he hoped to be able to send the surveyor-general to conduct the purchase (L9:16).¹⁹ This proved to be impossible. Instead, in his despatch of 8 April 1848 to Lieutenant-Governor Eyre, he suggested that Kemp be appointed

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commissioner, or, failing Kemp, that Kemp should go as an interpreter to the commissioner. Governor Grey instructed Eyre that:

In reference to the anxiety which has been manifested by some of the Natives inhabiting the Middle Island to dispose of the tract of country lying between the district purchased from the Ngatitōa Tribe and that purchased by the New Zealand Company, at Otago, I have the honour to acquaint you that I have found it impossible to dispense with the services of the Surveyor-General from this part of the Colony, and it will therefore be necessary for you to appoint some person for the purpose of extinguishing any title to the tract of country in the Middle Island lying within the limits before alluded to, which may, upon inquiry, be found to be vested in the Native inhabitants thereof.

The mode in which I propose that this arrangement should be concluded, is by reserving to the Natives ample portions for their present and prospective wants; and then, after the boundaries of these reserves have been marked, to purchase from the Natives their right to the whole of the remainder of their claims to land in the Middle Island. (L9:16)²⁰

Governor Grey's instructions were brought to Wellington from Auckland on the sloop HMS *Fly* and were in Eyre's hands on 21 April 1848. Eyre offered the commission to Henry Kemp the next day. Kemp, aged thirty, was bilingual, being the son of a Keri Keri missionary and born in New Zealand. He had been a secretary and interpreter to the lands claims commissioners (Colonel Godfrey and Major Richmond) in the early 1840s. In 1846 he became the native secretary at Wellington, replacing Dr Edward Shortland. He assisted Grey in making the Wairau purchase in 1847 and claimed to have personally drawn up the Wairau purchase deed (L8:31).²¹ Kemp received his written instructions from Eyre on 25 April 1848. Discussions and correspondence took place between Eyre and Colonel William Wakefield on the same day. Wakefield agreed to pay up to £2000 for the proposed purchase, in annual instalments of £500 and offered to make £500 available to Kemp to take with him (L8:34–35).²² Also on 25 April, Eyre formally requisitioned the *Fly's* services, requiring Captain Oliver to visit Akaroa and Otago with Kemp. Oliver agreed but made it clear that he must sail no later than 29 April as he was under orders to proceed to the Auckland Islands without delay.

Eyre's instructions to Kemp

- 8.4.2 Lieutenant-Governor Eyre's instructions, dated 25 April 1848, were written on his behalf by his private secretary, W Gisborne, and included a copy of Wakefield's letter to Eyre of 25 April 1848. Among other things, Kemp was told that:

The object of your mission is the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitōa tribe and that purchased by the New Zealand Company at Otakou.

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In entering upon the arrangements necessary to effect this object, it would be your duty to reserve to the natives ample portions of land for their present and prospective wants, and then, after the boundaries of these reserves have been marked, to purchase from the natives their right to the whole of the remainder of their claims to land in the Middle Island. The payment to be made to the natives must be an annual one, and be spread over a period of four or five years, as the only means of removing all possibility of the occurrence of any future disputes or difficulties regarding native claims to land in that part of the Middle Island. (L9:68)²³

We note that in the first of the above paragraphs the object of Kemp's mission is the extinguishment of any Maori title to land within the boundaries mentioned. But in the second paragraph Kemp is told that to effect this object he is to mark off ample reserves and then to purchase from Maori their right "to the whole of the remainder of their claims to land in the Middle Island". We interpret this as meaning the whole of their claims to land between the two districts mentioned in the first paragraph. A literal interpretation would take the purchase beyond these boundaries and extend into Murihiku in the south and areas to the north not covered by the Ngati Toa purchase, which is clearly inconsistent with the expressed object in the first paragraph.

At the last moment (27 April) Eyre instructed Daniel Wakefield, the Crown solicitor for New Munster, to prepare a draft deed of purchase (L8:40). The draft was clearly inadequate. It stated that the purchaser was to be William Wakefield, as principal agent of the New Zealand Company of London, instead of the Crown (L9:486–488).²⁴ Eyre appears to have sent the hastily prepared draft to Kemp without comment and possibly without having perused it. The arrangement was that Kemp would proceed to Otakou on the *Fly*, having first made a stopover at Akaroa on the way to see Maori there and prepare them for entering into negotiations on his return. The *Fly* would then go on from Otakou, after leaving Kemp there, to complete its mission at the Auckland Islands, then return to pick up Kemp and Charles Kettle, the New Zealand Company surveyor assigned by Wakefield to assist, and "such Native Chiefs" as necessary, and carry them all to Akaroa (L9:68).²⁵

Kemp then, on the eve of his departure:

- had orders to extinguish Maori title to all land lying between the districts purchased from Ngati Toa and that bought by the New Zealand Company at Otakou;
- was not provided with any maps;
- had authority to pay up to £2000 over a period of four to five years, a sum fixed by Governor Grey after consultation with Wakefield

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but not with Ngai Tahu. Kemp was not told how the first payment of £500 was to be distributed;

- had orders to reserve to Ngai Tahu “ample portions of land for their present and prospective wants”;
- was to mark out the boundaries of these reserves;
- having surveyed the reserves, was to then purchase from the owners their rights to the whole of the *remainder* of their claim to land within the limits earlier described;
- was not given any guarantee of a vessel at his disposal for the whole time he might be engaged on these duties; and
- had a defective draft deed of cession.

Kemp departs for the south

- 8.4.3 HMS *Fly* left Wellington on 29 April 1848 and reached Akaroa on 2 May. Captain Oliver had hoped to stay for four days only at Akaroa while Kemp made arrangements for Ngai Tahu to meet with him on his return from Otakou. In the event, bad weather detained the sloop at Akaroa until 17 May. Kemp, as a consequence, spent some two weeks there (L8:44). From there the *Fly* proceeded to Otakou and again encountered strong winds which prevented it entering the harbour. Captain Oliver decided to sail directly to the Auckland Islands, further south, which he reached on 23 May 1848. Kemp was forced to accompany him, it being impossible to disembark at Otakou as instructed by Lieutenant-Governor Eyre. He finally arrived at Otakou on 31 May 1848, where he spent three to four days in discussions with Ngai Tahu chiefs and made contact with Charles Kettle. Presumably because Kemp was due back by a pre-arranged time to meet with the other Ngai Tahu chiefs at Akaroa, no reserves were marked out near Otakou.

When the *Fly* sailed north on 4 June 1848 it had on board, in addition to Kemp and Kettle, a dozen or so Ngai Tahu chiefs from Otakou and Waikouaiti (L9:70).²⁶

- 8.4.4 Kettle had been assigned to Kemp by Colonel Wakefield. A mathematics teacher, Kettle had emigrated to New Zealand from England in 1840 at age twenty. He became assistant surveyor for the New Zealand Company in 1841 and worked around the southern end of the North Island. He went back to England in 1844 and returned to New Zealand two years later. While in England he gave evidence before the House of Commons select committee on New Zealand in June 1844. He claimed to know the Maori language well. In 1846 he became the New Zealand Company’s senior representative at Otakou until William Cargill’s arrival as the new resident agent in 1848. In the intervening period Kettle, in addition to overseeing the work of

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contract surveyors, personally carried out a detailed survey of Otakou harbour and laid out much of the Dunedin town site along with the “suburban” lots around it (L8:45). Wakefield told Cargill that Kettle’s “acquaintance with the southern Natives” particularly qualified him for the task (L8:46).²⁷ Wakefield had earlier in the year seen something of Kettle as he, along with Grey’s party, stayed in the Kettle house in February 1848. Kettle had then acted as Grey’s guide on trips to the Taieri plains and other parts of the Otakou block (L8:47).

Dr Loveridge considered that at this time Kettle probably knew more about the geography of the southern part of the South Island than any other European. Kettle had received detailed descriptions from William Fox (the New Zealand Company’s resident agent at Nelson) of Fox’s trip inland with Heaphy and Brunner, and of Brunner’s journey to the west coast. Kettle was probably the first European to set eyes on central Otago (L8:47–48).

Maps

8.4.5 Kemp had been unable to obtain maps from either Eyre or the New Zealand Company’s Wellington office. He told the Smith–Nairn commission in 1879 that the map drawn up at Akaroa was based on:

plans on board of different kinds belonging to the ship [HMS *Fly*], as well as the surveyor’s plans, which I think Mr Kettle furnished me with . . . I think the plans we were more particularly guided by was the plan which Mr Kettle was instructed to bring up with him. (L9:95–96)²⁸

8.4.6 Dr Loveridge discussed in some detail what he referred to as the Turnbull map (L8:48–51). He produced a photocopy (L21(a)) and a re-drawn enlargement (L21(b)). The tracing of the Turnbull map shows the southern two-thirds of the South Island plus Stewart Island. It starts part way along the Kaikoura coast on the east, and shows Cape Foulwind on the west. It incorporates among other things:

- extensive information about trails, lakes, rivers and terrain in the interior of the island;
- many coastal place names including Milford Haven, Awarua and Mawhera on the west coast; and
- information about Kemp’s purchase. The southern boundary is drawn in and Maori settlements are indicated with numerals showing their population.

The presence of the southern boundary of Kemp’s purchase on the Turnbull map indicates that it was completed at some time after 12 June 1848 (the date of the Kemp purchase deed). As the tracing had reached London by 31 October 1848, it appears to have been forwarded by Colonel Wakefield with a letter to the London secretary of the New Zealand Company dated 26 June 1848. There is also clear

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evidence that the map, or a copy from which this tracing was produced, was in existence in Wellington barely a week after Kemp's purchase was completed. This appears from a detailed description of the lakes shown on the map (not shown on the deed map) which appeared in the issue of the *New Zealand Spectator* published in Wellington on 21 June 1848, nine days after the Kemp purchase and five days after Kemp and Kettle reached Wellington on the *Fly* (L8:50; for the full press report, L9:615).²⁹

It is not disputed that both the Kemp purchase deed map and the Turnbull map were drawn by Kettle; the place names and numbers on both are in the same hand and the coastal outlines are the same (L8:51). It seems probable that Kettle had an earlier version of the Turnbull map in his possession when he left Otakou in June 1848 and used this to produce the deed map. Dr Loveridge suggested that while at Akaroa, Kettle added more information to his original map (in addition to the purchase details) to produce the final version of the Turnbull map (L8:51).

The Ward report, however, while considering it to be clear that the Turnbull map was prepared at a similar time as the deed map, pointed out that the latter is not simply a summary of the Turnbull map (T1(d)). It agreed that the information on the Turnbull map must have come from Ngai Tahu sources, but not necessarily at Akaroa. The report thought it more likely the information was obtained on the voyage to Akaroa when more time was available. While some information may well have been obtained during the voyage from Otakou in the course of discussions, it is also quite possible, as Crown counsel suggested, that the source of the names on the northern part of the west coast and especially for the northern trails, would have been the Poutini people present at Akaroa, whether Wereta Tainui or any other Poutini. The Crown pointed out that Kettle was present in Akaroa for eight days, five before the signing and three after (the trip north to Akaroa on the *Fly* took three days). Given that the "census" figures were on the deed map on 12 June, the Crown considered all the information on both maps was collected from Ngai Tahu before that date and while negotiations were underway (X1:295A). This seems to us a reasonable conclusion.

Kemp's negotiations

- 8.4.7 As we know, Kemp spent 15 days at Akaroa delayed by bad weather when he first called there on his way south. Professor Ward was reluctant to agree that Kemp could have had discussions with the Ngai Tahu present because of the absence of any record by Kemp (tape T8:1693–1807). Clearly Kemp made arrangements for all the Ngai Tahu chiefs on Banks Peninsula and the coastal plains to as-

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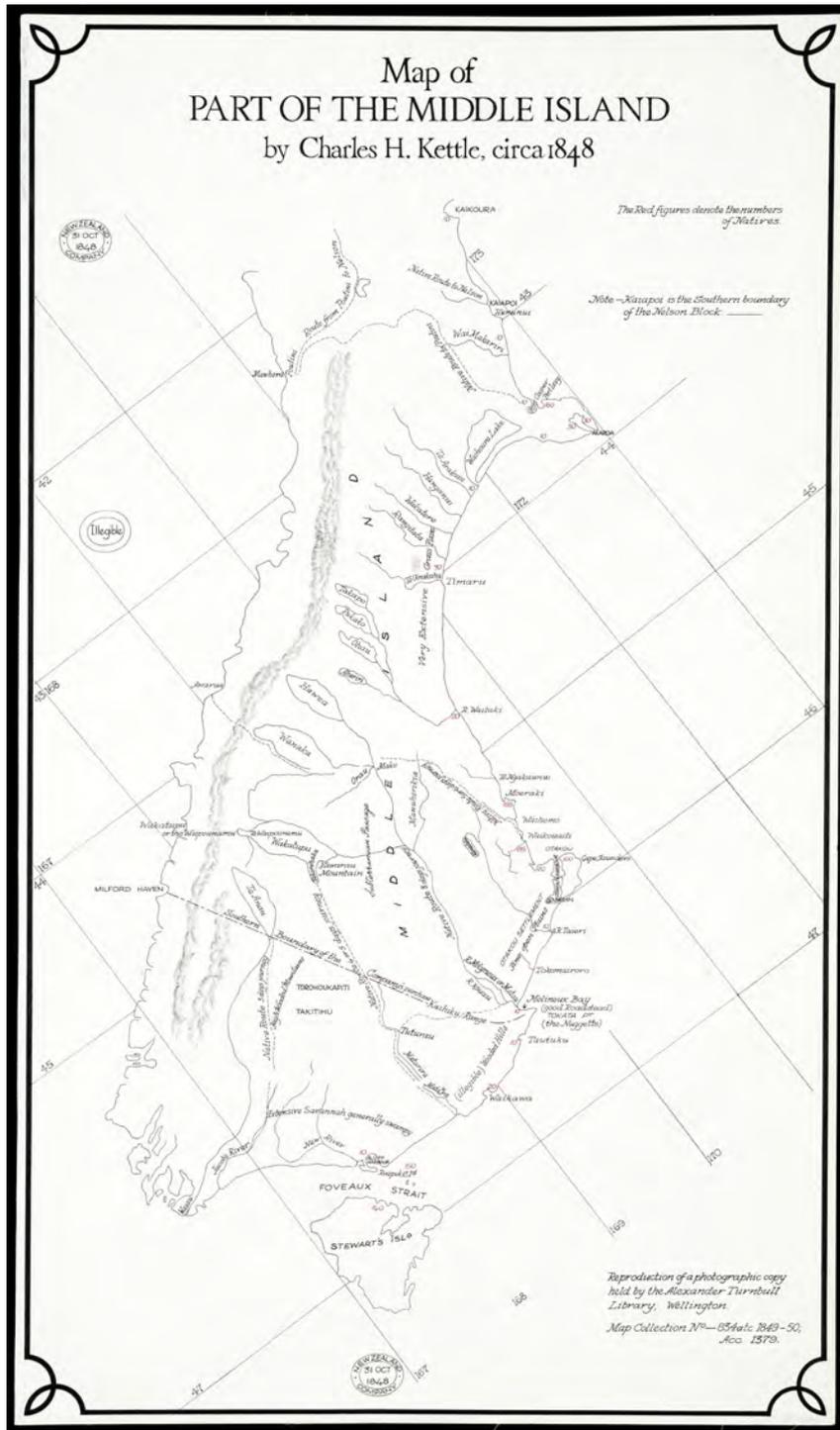


Figure 8.2: The Turnbull Map reproduced for Dr Loveridge and originally drawn by Charles Kettle, Kemp's surveyor, during the negotiations for the Kemp purchase in June 1848 (L21(b)). Reproduced by permission of the Alexander Turnbull Library, Wellington (MapColl-834atc/1849-50(1989)/Acc.21689).

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semble in June for the purposes of discussing the proposed purchase. It is difficult to imagine that he did not, on his first visit, explain what his instructions were as to the land the Crown wished to purchase, even if he may have held back on the purchase price. He could, after all, speak Maori and was a well-versed negotiator.

Kemp spent three or four days at Otakou following his arrival there on 31 May. In the course of his discussions some 12 or so leading chiefs, including Taiaroa and Karetai, assembled and then travelled north on the *Fly*. Kemp, in evidence to the Smith–Nairn commission said, “We brought up all those who were deputed by their own people to represent them in the negotiations of the purchase” (L9:77)³⁰. As the Ward report indicated, and Professor Ward agreed under examination, the Otakou chiefs were “probably” involved in the discussions. Again, it stretches credibility to imagine that Kemp and Kettle remained mute throughout three days on the voyage from Otakou to Akaroa, when the very purpose of their lengthy trip was to negotiate a purchase. It is not difficult to contemplate long and animated discussion of the Crown proposals. It is likely the names of Milford Haven and Wakatipu-Waitai were given to Kemp during the voyage as being the boundary points on the west coast.

By the time Kemp arrived in Akaroa on 7 June 1848 he had already spent 15 days there in the first half of May, where he had the opportunity to discuss the sale with those Ngai Tahu living in Akaroa and probably with members of Ngai Tuahuriri and other hapu who were living on and around Banks Peninsula. The trip to Otakou had given Kemp from three to six days to discuss the purchase with rangatira from the southern extremities of the block. Once returned to Akaroa, Kemp had major discussions with the assembled Ngai Tahu hapu for between two and five days. Among the 500 present at these discussions were rangatira from all the hapu of Ngai Tahu from Kaikoura to Otakou, including at least some Poutini Ngai Tahu from the West Coast. We shall discuss the evidence for the Poutini present later in this report. Only Ngai Tahu from Foveaux Strait and Ruapuke appear not to have been present. Finally, on the day the deed was signed, Kemp dealt with the leading rangatira on the deck of the *Fly*. In all, Kemp had opportunity to discuss the purchase with a portion of the tribe for up to 22 days and with all the hapu present for a further five days with the tribe assembled as a whole. We do not know how many of these days were actually used in discussion. Unfortunately, if Kemp kept a record during this lengthy period, it is not available to us now.

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The only contemporary record is that of Kettle who made daily journal entries from the time of his departure from Otakou (L9:387–396).³¹ Kettle's entries for 3–6 June 1848 covering the journey north from Otakou refer only to the weather and the sloop's progress. Those for 7–9 June indicate that the negotiations were delayed due to the late arrival of the Port Levy Maori and others, and inclement weather. Kettle lived ashore at Akaroa in the resident magistrate's house, while Kemp spent two nights ashore also at Mr Watson's. In his evidence before the Smith–Nairn commission, Kemp stated that they had several meetings and discussions on shore with the Ngai Tahu chiefs (L9:80).³²

- 8.4.8 On 10 June all was apparently ready. As Kettle related it, by noon that day some 500 Ngai Tahu were gathered at the French blockhouse with Kemp and Kettle. As Kettle noted, most of the Maori “who live along the coast and on Banks Peninsula” were assembled (L9:70).³³ Kettle recorded that by noon:

Most of the natives from the opposite side had arrived numbering altogether about 500 – The “correro” commenced by the chiefs coming forward and calling the names of the lands to be sold – Commencing from Kaikora one chief went down to the Peninsula – Then Tairoa called the lands from the Peninsula to Waitake – Then Soloman from Waitake to Moeraki. Portiki and others southward from thence to the Heads of Otakou. Tikau, a native who lives on the western side of Akaroa and who appears to be an influential person from his superior intelligence though a chief of no importance by birth, was at the head of the natives living on the Peninsula and to the North[war]ld of it – He began his speech by stating that he thought that the natives were not all fully agreed as to the sale of the land-Mr Kemp then interrogated him with regard to the Claim of the French Company, and he very clearly stated that they (the natives) had sold the *whole* [sic] of the Peninsula to them, and amongst all the natives present there was not a dissident.

It was then made known to them the sum which was offered – net £2,000 in four half yearly instalments of £500 (originally intended to be yearly instalments). – They seemed very much surprised at the small sum and stated that they had originally asked £10,000, and in a letter lately written to the Governor in Chief had reduced it to £5,000. There was considerable hesitation amongst them as they argued that the sum was so small that many would receive no benefit from it and from what they had heard from the Governor in his late visit they were induced to hope that they would be placed in such a position as to be able to purchase sheep and cattle – We informed them that we were bound down to instructions and that we would give them till Monday Morning to consider the matter, and if they did not then come to terms the ship would sail as the Captain was very anxious to get back to Wellington – Tairoa and other chiefs stated that they would come to terms if they had £1,000 to distribute amongst them at once – At dusk the meeting broke up. (L9:390–393)³⁴

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Kettle's report to Wakefield on 19 June provides some additional information about this meeting:

After a day's discussion respecting the boundaries and the claimants, we informed them that the sum to be paid was 2,000 *l.* in half-yearly instalments of 500 *l.*, one of which would be paid as soon as the deed was signed. It appeared that this was below their expectations as they stated that they had originally asked 10,000 *l.*; but in a letter lately written to the Governor-in-Chief they had reduced the sum to 5,000 *l.*. We explained to them that ample reserves would be made for them, and that, under those circumstances, the sum offered was in fact a gratuity. After some hesitation they agreed to accept the 2,000 *l.*, provided they had 1,000 *l.* as the first instalment. But we informed them that there were only 500 *l.* on board the "Fly", and as the ship could not be detained, we would give them a day to consider the matter, and, if they did not come to terms, she would sail.

. . . With regard to Banks' Peninsula, all the natives acknowledged having sold the *whole* of it to the French Company. (L9:70)³⁵ (emphasis added)

It appears from the foregoing that there were discussions respecting the boundaries and the claimants, as well as negotiations over the price and method of payment. A further day was given Ngai Tahu to consider the matter. It is clear that Ngai Tahu had previously been in correspondence with Grey over the sale of their land. They originally sought £10,000 and later reduced this to £5000. This suggests they were willing to sell to the Crown provided they were satisfied with the price. It may very well be that they were induced to accept so small a sum as £2000 in reliance on the assurances, to which Kettle refers, "that ample reserves would be made for them". Tikao was later said by Waruwarutu to have asked Kemp for £5 million for the land. When this was refused Tikao is said to have responded:

If I accept your offer, I expect to have returned me the eel weirs, the mahinga kai, the places of settlement, the burial places, the landing places and also additional reserves out of the land. (B2:doc 3/11: 182)

After a long debate Kemp was said to have accepted these terms.

Kettle noted on Sunday 11 June that:

In the evening Tairoa came up to Mr Watson's and told us that sooner than the sale of the land should not take place he would give up his own portion in the present instalment and receive it in the next – Mr Kemp then told him that we would go on board in the morning and if they made up their minds to receive the £500 they were to follow us. (L9:393–4)³⁶

The deed is signed

- 8.4.9 Again, the only contemporary account of events surrounding the signing of the deed is that of Kettle. On Monday morning, 12 June 1848, Kettle and Kemp "saw the Natives . . . and found that they were inclined to come to terms":

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About 10 AM went on board the “Fly” whither we were followed by the Principal chiefs – Mr Kemp drew out the deed in the Maori language and I executed a plan to connect with it – The northern boundary to be at Kaiapoi, adjoining the Nelson Crown Grant, and across the island to the west coast – The southern boundary a line from the Kaihiku range to Milford Haven on the West Coast As the localities of the native settlements and cultivations were not known it was stated in the deed that such lands would be reserved for them together with other blocks of land which should hereafter be determined upon when the surveys should be made – Tairoa and the Otakou natives were quite ready to sign the deed, but Tikau made a long speech and hesitated for some time – but on seeing Tairoa and others signing the deed Tikau and his party came forward and subscribed also – Tairoa took £250 for his own party South of the Peninsula and Tikau took the other half for his party North of the Peninsula and it was further arranged that the same chiefs should take the next instalments in the same way for their respective people – [The journal ends here in mid-page] (L9:394–396).³⁷

A week later Kettle reported in similar terms to Wakefield on the signing of the deed:

On the 12th instant we went on board the “Fly”, and were followed by the principal chiefs. Mr Kemp drew out the deed in the Maori language, in which it was stated [that] the northern boundary was to be from Kaiapoi, adjoining the Nelson Crown grant, across the island to the west coast, the southern boundary, a line from the Kaihiku range, south of the Molyneux, to Milford Haven, on the west coast. I executed a map of the boundaries, which was attached to the deed.

As the localities of the native settlements and cultivations were not known, and it being impossible to convey any idea of extent in the native language, it was stated in the deed that such lands should be reserved for them, together with other blocks which should hereafter be determined upon. The deed, after being read aloud, was then signed by the chiefs, in the presence of Captain Oliver, Lieutenant Bull, Mr Kemp, Mr Bruce and myself. The money was afterwards divided without any difficulty, Taiaroa taking 250 l. to be subdivided amongst the natives south of Banks' Peninsula, and Tekau the other half, for the natives north of the Peninsula, and it was unanimously agreed to, that the same chiefs should receive the future instalments, in the same proportions, for subdivision. (L9:70)³⁸

The following points might be noted from Kettle's account at this stage:

- Kemp drew the deed in Maori and Kettle executed a plan which he says “was attached to the deed”;
- the deed “after being read aloud” was then signed by the chiefs; and
- Kettle erred in stating in his report to Wakefield that the northern boundary, as read out in the deed, was to be from Kaiapoi, and across the island to the west coast. In his earlier journal entry he correctly attributes that boundary to the plan attached to the deed.

*The Ngai Tahu Report 1991****Agreement by threat of force?***

8.4.10 The question of whether Kemp used threats of force to obtain Ngai Tahu agreement to the sale is usefully discussed in the Ward report (T1:131–132) and we set out here the discussion by Professor Ward:

Evidence given to the Smith–Nairn Commission in 1879 stated that Kemp used threats of force to obtain Ngai Tahu agreement to the sale. There is no contemporary evidence to support this claim. The allegations do have some basis however, in that they are a commentary on the way Ngai Tahu saw their position in 1848. The 1847 purchase from Ngati Toa and the New Zealand Company plans for further settlement of the Middle Island have been discussed as part of the background to the purchase. These were seen by Ngai Tahu as threatening their mana and conceptualised in terms of a threat of force.

The report quotes Kemp’s testimony to the Smith–Nairn commission:

I was to take care to explain to the Natives that in selling the block there was a promise of settlement under the Canterbury Association. I was instructed to say positively that the Company was coming out, and would occupy the land; and I was to call their attention to the fact that in ceding the block they would derive very great advantages from these people coming to settle on the land. (L9:75)³⁹

The report continues:

It is likely that Grey made a similar ‘promise’ in 1848. From the Government’s point of view there was little point negotiating the purchase of the land unless Ngai Tahu also understood that it was going to be settled by Europeans.

Matiaha Tiramorehu’s testimony before the same commission illustrates how such a “promise” might have been interpreted by Ngai Tahu.

[Kemp] said “Well, if you choose to keep hold of Kaiapoi, I shall take this money, and pay it over to the Ngatitōa”. He said “If you are still further obstinate, I will bring soldiers to occupy all your land”. This is what he meant, but he has turned it in another way by saying that a number of people from England were expected to arrive in New Zealand. (L9:191–2)⁴⁰

From this the report concluded that:

It is hardly surprising that Ngai Tahu conceptualised the displacement of their mana in terms of a military threat. The Wairau affray had shown Ngai Tahu that land sales and settlers brought soldiers. After 1847 the government was committed to defending an agreement between Ngati Toa and the Crown. If Ngai Tahu were to challenge Ngati Toa’s right to sell they would also be directly confronting the settlers and the Crown who derived their title from the sale. There was always the possibility that Ngati Toa rights would be recognised further south. (T1:131–132)

Our understanding of this discussion is that the Ward report is suggesting that Ngai Tahu may in retrospect have inferred from Kemp and possibly Grey’s reference to the coming of settlers to settle on

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the land, that soldiers might be brought to enforce this. That is to say, that Ngai Tahu “conceptualised this displacement of their mana in terms of a military threat”. Professor Ward does not seem to be saying that actual threats were made by Kemp to bring soldiers. Nor, on the evidence, are we satisfied that such threats were made.

The deed

- 8.4.11 The following is Kemp’s deed as drawn up by him in Maori and signed by Ngai Tahu:

WAKARONGO mai e nga iwi katoa. Ko matou ko nga Rangatira ko nga tangata o Ngaitahu kua tuhi nei i o matou ingoa i o matou tohu ki tenei pukapuka i tenei ra i te 12 o Hune, i te tau tahi mano waru rau wha tekau ma waru ka whakaae kia tukua rawatia atu kia Wairaweke (William Wakefield) te Atarangi o te Whakaminenga o Niu Tirenī e noho ana ki Ranana, ara ki o ratou Kaiwhakarite, o matou Whenua, o matou oneone katoa e takoto haere ana i te taha tika o tenei moana timata mai i Kaiapoi i te tukunga a Ngatitōa i te rohe hoki o Whakatu, haere tonu, tae tonu ki Otakou, hono tonu atu ki te rohe o te tukunga a Haimona, haere atu i tenei tai a te mouna [sic] o Kaihiku, a puta atu ki tera tai ki Whakatipu Waitai (Milford Haven) otira kei te pukapuka Ruri te tino tohu, te tino ahua o te whenua. Ko o matou kaainga nohoanga ko a matou mahinga kai me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou; a ma te Kawana e whakarite mai hoki tetahi wahi mo matou a mua ake nei a te wahi e ata ruritia ai te whenua e nga Kai Ruri – ko te nui ia o te whenua, ka tukua whakareretia mo nga Pakeha oti tonu atu.

Ko te Utu kua tukua mai mo matou e Rua mano pauna moni (£2,000) e tuawhatia mai te utunga mai o enei moni ki a matou, utua mai kia matou inaianei, e Rima rau pauna (£500), kei tera utunga e £500, kei tera atu £500, kei tera rawa atu e £500, huihuia katoatia, e £2,000.

Koia tenei tuhituhinga i o matou ingoa i o matou tohu, he whakaaetanga nuitanga no matou, i tuhia ki konei ki Akaroa i te 12 o Hune, 1848. (appendix 2.2)

Kemp translated his deed into English as follows:

Know all men. We the Chiefs and people of the tribe called the “Ngaitahu” who have signed our names & made our marks to this Deed, on this 12th day of June 1848, do consent to surrender entirely & for ever to William Wakefield the Agent of the New Zealand Company in London, that is to say, to the Directors of the same, the whole of [the] lands situate on the line of Coast commencing at “Kaiapoi” recently sold by the “Ngatitōa” & the boundary of the Nelson Block continuing from thence until it reaches Otakou, joining & following up the boundary line of the land sold to Mr Symonds; striking inland from this (the East Coast) until it reaches the range of mountains called “Kaihiku” & from thence in a straight line until it terminates in a point on the West Coast called “Wakitipu-Waitai” or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same (the condition of, or understanding of this sale is this) that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the land shall be properly surveyed hereafter, we leave to the Government

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the power & discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.

We receive as payment Two Thousand Pounds (£2,000) to be paid to us in four Instalments, that is to say, we have this day received £500, & we are to receive three other Instalments of £500 each making a total of £2,000. In token whereof we have signed our names & made our marks at Akaroa on the 12th day of June 1848. (L9:416–418)⁴¹

Following the signing of the deed the money, according to Kettle, was divided without any difficulty. Taiaroa took £250 to be divided among the Ngai Tahu south of Banks Peninsula, and Tikao took the other half for Ngai Tahu north of the peninsula. Kettle says it was unanimously agreed that the same chiefs would receive the future instalments in the same proportion for “subdivision” (L9:70).⁴²

Other promises

8.4.12 It is apparent from the evidence that the deed did not contain all the terms of the agreement between the parties. This point is well made and appropriate details are given in the following passage from the Ward report:

The deed signed on 12 June 1848 was not a full or accurate expression of the agreement Kemp had come to with Ngai Tahu. It is apparent that Kemp gave Ngai Tahu a number of undertakings which were not written into the deed. Although Kettle’s diary indicates that some arrangements were made regarding payment of the balance of the purchase money, the deed made no mention of this. Kemp later recalled the discussion of eel weirs and landing places, which were ‘promised by me in a more or less fair proportion’. (L9:86) Some promises were made about the size and value of the reserves. Ngai Tahu were told that their reserves would be ‘ample’ and that the real payment for their land was the increase in value of these reserves once adjacent areas had been settled by Europeans. That is the tribe was promised an endowment in land as well as land for their sustenance. The localities of reserves were not discussed. (L9:89) Later accounts by Ngai Tahu signatories suggested that Kemp promised Ngai Tahu would retain their burial sites and sacred places in addition to eel weirs and other fisheries, mahinga kai, kainga, landing places and reserves, and that together these promises induced Ngai Tahu to sign. (L9: 146, 189–190, 242, 259, 291, 323–4) Kemp himself acknowledged that there had been discussion of landing places and eel weirs, (B3, 3/7:21–2) though he did not understand the reservation of eel weirs to be an exclusive one. (T1:138)

8.5. The Boundaries of the Purchase***Claimants’ criticisms of the deed***

8.5.1 The claimants made a variety of criticisms of the deed (B2:8–22). In outlining their chief concerns, they:

- said the plan was not attached to the deed or, if it was, Ngai Tahu did not see it at the time;

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- said that many of the names on the deed are not accompanied by any signature or mark, suggesting that the deed did not necessarily have the consent of all those whose names are recorded;
- criticised the descriptions in the deed and the deed plan of the boundaries, in particular the western and northern boundaries;
- were emphatic that “Kaiapoi” named in the deed and the deed plan was Kaiapoi pa, not the Kaiapoi district; and
- denied the boundary went beyond the foothills and relied principally on the evidence to this effect given some 30 years later at the Smith–Nairn hearing.

Was the plan attached to the deed at the time of signing?

8.5.2 As we have seen, Kettle stated clearly in both his journal for 12 June 1848 and his official report to Wakefield on 19 June, that the deed was read out before it was signed. In the latter report he confirmed that the map was attached to the deed. He later referred to the deed being read aloud and then being signed by the chiefs. Kemp made no record at the time, but gave evidence many years later to the Smith–Nairn commission. While somewhat uncertain initially, he was recalled after Mantell gave evidence confirming both Kettle’s and Kemp’s writing on the map, as well as the note on the deed stating that the map was attached and signed by Lieutenant Bull of the *Fly*, (one of the witnesses to the deed). Kemp then recalled the plan being attached to the deed at the time and the seal being on it. After examining the deed Ngai Tahu’s counsel, Mr Izard, accepted that the map had been attached to the deed (L8:60–63).

Mr Evison, in his comment on Dr Loveridge’s evidence (O46), referred to Maori testimony before the Smith–Nairn commission. He cited Waruwarutu (B3:doc 3/11:192)⁴³ and Te Uki (B3:doc 3/13:286)⁴⁴ as each saying they saw no map. He quoted Tiramorehu as saying variously that, “we saw no map”, “there was no map”, and that the plan was not fixed to the deed at the time he signed it. It was only when Mantell came to Akaroa that he saw there was a plan attached to the deed (B3:doc 4/2:270–271).⁴⁵ Mr Evison, later in his comment, did not dispute that the deed was read out but suggested that, whatever Kettle recorded as having been done, it was not done effectively, because the Maori evidence is that they saw no map or plan until Mantell showed it to them when he arrived at Akaroa in August 1848 (O46:12). Mr Evison’s complaint was that the Crown failed to ensure that the Maori vendors knew of the plan and agreed it was an accurate representation of the extent of the land they were agreeing to sell.

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In assessing this evidence it is necessary to bear in mind that it was given 30 years after the event and tended to concentrate on specific issues as to whether the deed was read out and whether the map was attached to the deed at the time it was signed. But the parties' knowledge of the proposed boundaries would not be confined to these specific incidents. For instance Kemp told the Smith–Nairn commission that he frequently talked over the boundaries of the land he proposed to buy “both on board and on shore too” (L9:85).⁴⁶ This is what one would expect; two questions would be uppermost in the minds of both parties, namely, the extent of the land which Kemp wished to buy, and the price the Crown was prepared to pay. Kettle recorded that at the lengthy korero attended by some 500 Ngai Tahu on 10 June, boundaries, claimants and the price were discussed. Clearly there were various such discussions, including on the morning of 12 June when the deed was later signed. We have no reason to doubt that Kemp and Kettle would have been concerned to ensure that the deed and map conformed with the oral agreement reached with Ngai Tahu.

Signatures on the deed

- 8.5.3 The claimants also argued that the Kemp deed was not signed by the majority of those chiefs whose names are written on the deed, and that one chief, Metehau, named on the deed, denied signing it and did not agree to the Kemp purchase (Z14(b)). Mr Evison maintained that this suggests that “the majority of Kemp’s signatories did not sign the Deed at all, and that Kemp and Mantell were at pains to override and discredit their objections” (Z14(b):2). Mantell was well aware that the deed had not been signed by all those named and divided the list of names into those who signed in their own hand, those who marked the deed, those whose names were written by the commissioner, and proxies. Mantell’s own list differs from Mr Evison’s (X12(a):39).

According to Mr Evison, the deed was signed by ten people, had the tohu of six others and two possible duplications (“Te Hau” and “Tiraki”). He argued that the remaining 20 names, including the two proxy signatures, were written only by Kemp, without signature or tohu (Z14(b) and modified in Z41). Mantell believed that in addition to those named by Mr Evison, Ihaia, Waruwarutu, Taki, Rangi Whakana and Te Whaikai Pokene signed with their own names. On examination of the deed it would appear that at least some of the names claimed by Mantell as signatories were not.

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	Mantell	Evison
Signed	14	10
Marked	8	6
Commissioner's hand	13	16
Proxy	3	3
Total	38	35

Those chiefs who did sign with their own names were identified by Mr Evison as:

John Tikao	John Pere	Te Uki
Matiaha	Koreke	Pukenui
Pohau	Wiremu Te Raki	Tiari Wetere
Solomon Pohio;		

and those who marked the deed as:

Taiaroa	Maopo	Paora Tau
Tainui	Koti	Potiki.

Given the difficulty of associating marks with names and with identifying the handwriting of many of the names on the deed, it is impossible to be definite about who signed and who did not. Nevertheless it is clear that a large number of chiefs, possibly a majority, did not actually mark the deed.

Among the explanations suggested for this was the possibility that Kemp had made a list of the names whom he considered should be included, but when the deed came to be signed only a portion of these came forward and, due to their rank, Kemp considered these were sufficient. This scenario must be discounted as the names, signatures and marks are interspersed on the sheet. Secondly, it was suggested that the names could have been added later. This too must be discounted, for the same reason. While those who did not sign tend to be grouped towards the bottom of the sheet, a number have had their names recorded between the signatures of others. The deed was witnessed by officers of the *Fly*, the resident magistrate at Akaroa and the local store keeper, all of whom would have been well aware if Kemp had tampered with the deed in some way. No evidence was produced to suggest that Kemp would have undertaken so fraudulent an action.

The second question raised by Mr Evison relates to Metehau's possible non-adherence to the Kemp agreement, despite Mantell's insistence that he signed the deed (Z14:10). Metehau certainly was no friend of Mantell and he opposed the setting aside of the Tuahiwi reserve, disrupted the survey, and, so Mantell suggested, threatened him with a mere. There are two Te Hau on the deed, both written by

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Kemp, but one is marked with a double cross. Mr Evison did not believe that this mark was made by Metehau. Whether the deed was signed by Metehau or not, there is no statement in the evidence which suggests that he did not take part in the Kemp agreement. His hostility to Mantell can be explained entirely by his concern that the commissioner was not implementing the agreement as he understood it. As we shall see, Ngai Tahu believed that they were entitled under their agreement with Kemp to reserve a very substantial area of land for Ngai Tuahuriri. Metehau's resistance to Mantell was due to the commissioner's determination to reduce this reserve to only 2650 acres.

There has never been any previous suggestion in the 142 years since 1848 that the signatories' names were fraudulently attached to the deed. With the possible exception of Karetai, leading rangatira such as Taiaroa, Tikao, Horomona Pohio, Tiramorehu, Paora Tau and Wiremu Potiki either signed or placed their marks on the deed. Given that the deed was witnessed by reputable men and that the signatures and marks are interspersed on the sheet, the tribunal can only conclude that those who were named but did not sign still gave their consent to the agreement.

The boundaries in the deed and deed map

8.5.4 The deed does not give a clear or full description of the boundaries of the block purchased. Only three of its corners are identified by name. These are conveniently summarised by Dr Loveridge:

- 1) the northeastern, at "Kaiapoi" – identifying this as the southernmost point of the Wairau Purchase and the "Nelson Block".
- 2) the southeastern, where the southern boundary of the Otago Block (which ran through the Kaihiku Range) reached the sea, and
- 3) the southwestern, at "Wakitipu Waitai, or Milford Haven". (It should be noted that, according to one authority, "Whakatipu Waitai" is the Maori name for Lake McKerrow, on the "Whakatipu Katuka" or Hollyford River. This flows in Martin's Bay, a few miles north of Milford Haven – which was more commonly known as "Piopiotai". This being the case, there are in fact two possible southern boundaries for the Purchase).

The northwestern corner is not identified by name, nor is there any indication in the Deed as to how or where the boundary ran between Milford Haven and Kaiapoi. (L8:56–7)

The map attached to the deed was intended to "more particularly describe" the boundaries and size of the land sold. It included two important features not explicitly described in the deed itself. Here again, for convenience, we quote from Dr Loveridge as follows:

- 1) the northern boundary is shown as a straight line running due northwest from [a] place labelled "Kaiapoi" on the east coast, across the Island to the west coast. The line itself bears the bilingual legend "Ko

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Figure 8.3: The Kemp deed map. On the original there is a blue border around the coast line, Banks Peninsula is coloured green and the Otakou purchase is coloured yellow. Reproduced by permission of Archives New Zealand, Wellington (AWBN 8102 W5279/f37)

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Rohe a Ngatitōa o Whakatu – The boundary line of the land sold by the Ngatitōa and of the Nelson Block”.

2) Bank’s Peninsula is separated from the mainland by a line across its base, and is tinted in green. A caption reads “The land coloured green is that acknowledged by the natives to have been sold to the French Co[mpany]”.

The map also has red numbers inscribed at several points along the coastline. A caption reads “The Red figures indicate the number of natives at each settlement”. Kemp later explained (L9:424–425) that these were to serve “for a guide as to the quantity of land it may be thought desirable to set apart for their use; a matter which, I believe, may be easily and finally settled as the surveys of the coast line progresses. (L8:57)

We note that “Kaiapoi” is shown on the deed map as being placed a short distance to the north of the 43rd parallel, at the mouth of a river, well to the north of the old Kaiapoi pa. The Turnbull map puts it in the same position, with the river being labelled on that map as the Hurunui. Kettle used this “Kaiapoi” as his starting point and drew a line across to the opposite coast, coming out at Kawatiri at the Buller river mouth.

A “hole in the middle”?

- 8.5.5 The boundaries described in the deed and more particularly defined in the attached map have already been discussed. In essence the question is whether, as the Ngai Tahu later claimed, the land sold was the eastern seaboard from Maungatere to Maungaatua or, if not, what were the boundaries agreed upon. It is this land west of the foothills above the Canterbury plains, and east of the main divide, which the claimants say was never purchased, and which was referred to by them as the “hole in the middle”. The land west of the Southern Alps was later part of the Arahura purchase. It is necessary at this point to look closely at the evidence relevant to each of the four boundaries.

The northern boundary

- 8.5.6 The deed referred to lands situated on the line of coast, commencing at Kaiapoi recently sold by the Ngati Toa and the boundary of the Nelson block continuing from there until it reached Otakou. It says the boundaries and size of land are more particularly described in the map.

The map attached to the deed (L23) showed the northern boundary as starting on the east coast at a point labelled “Kaiapoi”. It is at or very near the mouth of an unnamed river just to the north of the 43rd parallel. On the Turnbull map (L21(b)) which the Crown submitted was the model for the deed map, the river is identified as the Hurunui. The northern boundary runs in a straight line from “Kaiapoi” in a north-westerly direction until it reaches a black line with blue shading

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at a point to the north of the 42nd parallel. This blue-shaded line runs south and west to Milford Haven (or Wakitipu-Waitai) and was clearly meant to represent the western coast line. Above and below the northern boundary line is a bilingual legend: “Ko Rohe a Ngatitoo o Whakatu—the boundary line of the land sold by the Ngatitoo and of the Nelson Block”. The caption “Buller R” next to the western end of the northern boundary appears to have been a later addition in pencil (T1:136).

The “Kaiapoi” shown on the deed and the Turnbull map is situated at a point well to the north and east of the position of Kaiapoi pa. The pa lies some 45 kilometres south and 45 kilometres west of the Hurunui – almost 70 kilometres away (X1:269).

The Crown contended that there was little doubt that both Kemp and Kettle:

- thought that the Kaiapoi referred to in the Wairau deed and the “Kaipoe” of the Nelson Crown grant map were the same place; and
- believed that the northern boundary of the Ngai Tahu purchase should start at the mouth of the Hurunui. (X1:269–70)

It will be recalled that this location for Kaiapoi has already been discussed as the point regarded by Grey and other European officials as the southernmost point of the Wairau purchase.

The Smith–Nairn commission requested Kemp to clarify earlier comments about “Te Rohe a Ngatitoo”. In a written response Kemp said:

I think I should be right in saying that Either of those lines eg. Sir Geo: Grey's & that on the Deed, were known at the time to the Ngaitahu as the Southern boundary of the Ngatitoo Purchase, & as such, formed the Northern outlying Boundary (as then *unsurveyed*) of the Canterbury Purchase. (T6:141)⁴⁷ (emphasis in original)

As the Crown pointed out, the line of “Sir Geo: Grey's” referred to by Kemp was the unmapped southern boundary of the Wairau purchase. The Wairau deed defined the southern limits of the purchase solely in terms of “Kaiapoi”. Kemp, in his deed map, used “Kaiapoi” as the eastern anchor for the northern boundary of the Ngai Tahu purchase. In 1848 he adopted the point at which the Wairau and Nelson Crown grant boundary lines started in defining “Te Rohe a Ngatitoo”. As the Crown suggested, Kemp could not have adopted the line of the Wairau purchase boundary as such, because this did not exist. Nor could he have adopted the line of the southern boundary of the Nelson Crown grant (assuming he knew more or less where it went) because it did not run across to the west coast. The Crown suggested, for reasons which are referred to later, that Kemp evidently took

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“Kaiapoi” as the proper starting point for a “purpose drawn” Ngai Tahu boundary (X1:271).

- 8.5.7 Did Ngai Tahu consider, as the claimants insisted, that “Kaiapoi” in Kemp’s deed and on the plan referred to Kaiapoi pa and not the northern point of a Kaiapoi district? The claimants were adamant that there was only one Kaiapoi, that is, Kaiapoi pa, and that Kemp’s plan was defective because it put Kaiapoi pa in the wrong place on the east coast (Y1:76).

The Crown relied on the following:

- (a) Charles Kettle recorded in his journal for 10 June that:

the correro commenced by the chiefs coming forward and calling the names of the lands to be sold – commencing from Kaikoura one chief went down to the Peninsula. (L9:390)⁴⁸

The Crown suggested the first speaker was probably John Tikao, who would have been describing the Ngai Tuahuriri claim. Statements made later during the negotiations for the purchase of the North Canterbury and Kaikoura blocks in 1856 and 1859 showed that Ngai Tuahuriri asserted exclusive rights as far north as the Hurunui River, with the area between the Hurunui and Waiau Rivers overlapping with the Kaikoura people, whose undisputed area began on the Waiau (M10:17). In the later North Canterbury and Kaikoura purchases the shared area was included in both purchases, that is to say, the Crown bought it from both hapu.

- (b) The Crown said that Ngai Tahu came away from the Kemp negotiations with the same impression – that they had sold lands to the north of the Ashley River and the nearby Kaiapoi pa. On 1 September 1848 Mantell went to Kaiapoi pa. He was aware that the northern line started in the deed map “at a point on the east coast considerably to the North of Kaiapoi Pa” (L9:357).⁴⁹

He later told the Smith–Nairn commission that:

Beyond the mark on the plan attached to the Deed, no line was known to me [in 1848], or I think to Ngaitahu, as “te rohe a Ngatitōa”, before I went on to the ground. I believe that the Deeds of Cession by Ngatitōa to the Government [referring to the Wairau Deed of 1847] describe Kaiapoi as the southern boundary of their claims on the East Coast of the Middle Island . . . acting on that belief, and finding it necessary in my transactions with the natives to have some fixed northern boundary mutually understood between me & them, I made it my first business as reported at the time, to find out Kaiapoi. Arrived there (at Kaiapoi pa) I pointed out to the Natives a line in a north-westerly direction by compass as being “te rohe a Ngatitōa”, and as being the boundary to the northward of which my distributions of money in respect of the Ngaitahu Block, made by me, would not extend. (L9:356–7)⁵⁰

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Mantell appears to be suggesting here that Ngai Tahu did not know where the northern boundary lay and it was necessary for him to establish it. In fact, the Crown claimed, Mantell's own evidence of discussions at Kaiapoi pa on 1 September 1848, shows otherwise. The following extract is cited from his *Outline Journal* of 1 September 1848:

. . . I had to listen to nineteen or twenty speeches referring almost exclusively to the Ng[at]ittoa sale and to the manner in which at the June payment [by Kemp] the natives had not devoted any money to Kaiapoi but to the Land thence to Kaikoura. [I] Told them that if they conducted themselves better I would report their case to the Lieut. Govr. and returned to the camp having first pointed out the boundary. (M3:136)⁵¹

In his January 1880 evidence to the Smith–Nairn commission Mantell told the commission that:

. . . The Natives told me, and I dare say you have had it in evidence, that a considerable portion of Kemp's first distribution was allotted to lands north of this boundary. A considerable portion was allotted by the Natives themselves to land north of this boundary. (L9:358–359)⁵²

Immediately after the above passage there is the following very interesting dialogue between Commissioner Nairn and Mantell:

Mr Nairn – I cannot see how the Maoris should recognise the line by your merely pointing out a line in a north-west direction, unless there was some particular point or feature to which their attention was drawn? – I think the line went near to Maungatere (Mount Grey).

Was that mentioned at the time as being on the boundary do you think? – No; it certainly was not mentioned as being on the boundary. Nothing was mentioned. We all saw the direction. The Natives came to my standpoint, and looked in that direction.

Mr Smith – That was done when you were at Kaiapoi? – Yes, at Kaiapoi. (L9:359)⁵³

We think this passage may offer a clue as to how Ngai Tahu came to regard the north-western boundary as commencing at Maungatere.

8.5.8 To resume the account of the Crown's view of events. On 5 September 1848 Mantell had reported to Eyre:

that, at the last payment for the Ngaitahu Block [in June], the sum apportioned by the Commissioner [Kemp] for the Kaiapoi District, was by the Natives allotted to the land between the Waimakariri and the Peninsula, and to that [land] from Kaiapoi Pa to the Waipara purposely to exclude the plain between Waimakariri and Kaiapoi, and to give them some sort of ground for asserting that they had not sold it. (L9:19–20)⁵⁴

The Crown observed that the Waipara River in effect marks the northern limit of the plains. The coastline between it and the Hurunui River is relatively rough country. The river valley, however, penetrates northwards behind the coastal mountains as far as the 43rd parallel.

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The Crown concluded from the foregoing that part of the £250 given to Tikao by Kemp for the “Kaiapoi district” had been allotted as payment for that part of the Canterbury plains lying between Kaiapoi pa and what the Ngai Tahu then believed to be the northern boundary of the purchase (X1:275).

In the same report of 5 September 1848, Mantell informed Eyre that a Ngai Tahu delegation was coming to Wellington “to assert their right to the land between Kaiapoi and Kaikoura included in the Nelson Block sold by the Ngatitōa” (L9:19).⁵⁵

The Crown cited the Ward report as pointing out that:

Ngai Tahu’s claim to Kaiapoi involved not just the pa. Kaiapoi was the hub from which a network of rights radiated. An offer to purchase *from Kaiapoi* could only be interpreted as recognition of Tuahuriri’s rights to that place and all that went with it. (T1:126) (emphasis in original)

The Crown said this was precisely the point.

The Crown maintained that Grey in February of 1848 offered to purchase, and Kemp in June of 1848 actually purchased, the whole of the Kaiapoi district up to its northern boundary on or near the Hurunui River. This included the purchase of the rights relating to Kaiapoi pa and those “radiating” out from the pa.

Our observation is that it is difficult to believe that Ngai Tuahuriri would have agreed with Kemp that the Ngati Toa boundary came right down to the Kaiapoi pa, and that they would not have claimed rights to the Kaiapoi district at least up to the Hurunui (as subsequent protestations to Mantell clearly show they did). In the lengthy discussions about boundaries and claimants which culminated in the signing of the deed this boundary would have been of particular concern to them. Given the importance of manawhenua, we believe they would have strongly resisted any suggestion by Kemp that the Ngati Toa purchase line came to Kaiapoi pa. But there is every indication that Kemp and Kettle both thought Kaiapoi was at or near the Hurunui, and they would have had no difficulty in agreeing with Ngai Tahu that that was where the north-eastern boundary should be.

- 8.5.9 The claimants, particularly in their comments on Dr Loveridge’s evidence, strongly contested this conclusion. Mr Evison (O46:33–40) made numerous comments, the main purport of which was to assert that Ngai Tahu understood the north-east boundary agreed with Kemp was at Kaiapoi pa. For instance, in response to Mantell’s statement that at the old pa of Kaiapoi he listened to many speeches on the subject of the Ngati Toa boundary, which they said should be north of Kaikoura, Mr Evison commented that it was clear that Ngai Tuahuriri were disputing the Ngati Toa boundary not the boundary

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of Kemp's purchase as such. In particular he invoked the following evidence of Ihaia Tainui before the Smith–Nairn commission:

next morning we and Mantell went to the Kaiapoi pa. When we got there Mantell went right in the centre of the pa. Then Mantell said – “This is the boundary of Ngatittoa, from here to the north side of Maungatere.” Then the Maoris said – “No; we shift the line further to Oteruawhare, further north from Kaiapoi pa”. Then Mantell said – “No; this is the boundary at the centre of Kaiapoi pa”. They had a long argument over it. Paora Tau told the rest of the natives to sit down. Paora Tau also told Mantell to sit down. After the natives and Mantell sat down, Paora Tau got up and made a speech. Paora Tau said – “I don't want the boundary to be left at Oteruawhare; I want the Ngatittoa boundary to be put right back to Te Parinuiowhiti”. The reason Paora Tau told Mantell to put the boundary right back to Te Parinuiowhiti was, that there are a good many dead people along the coast right to Te Paruparu. Paora Tau said to Mantell “The reason Ngatittoa sold this block up to Kaiapoi was, that it should be a payment for the pakeha blood spilled at Wairau. I have also got a lot of my dead people at Oraumoa.” When the rest of the people heard Paora Tau make this speech they agreed to what Paora said, and asked to have the boundary shifted back to Te Parinuiowhiti. The most of those people who agreed with Paora Tau's proposal are dead. There were 35 people who took part at Kaiapoi in that conversation with Mantell. Mantell did not agree to Paora Tau's proposal, and the Maoris did not agree to Mantell's proposal. Of course both Mantell's and the Maoris' boundary was not fixed; it was left unfixed, and the sun was nearly going down, and they came back. Mantell said – “We will go back to where we slept last night.” The next morning they began to talk about the Kaiapoi reserve. They were about 2 days engaged in that matter. In about a week afterwards there was a fire-signal from Port Levy, that there was a vessel ready there to take Tairaroa and others to Wellington. That evening, the people said to Mantell that they were going to Port Levy to see Tairaroa and those who were going to Wellington to see the Governor and try and shift the line back to Te Parinuiowhiti. Mantell replied – ‘Very good; the Governor is in Wellington’. (G2:773–775)⁵⁶

This outline of events corresponds very closely to those described by Mantell in his various journals.

Mr Evison, after referring to this evidence argued:

This particular argument was not about the boundary of Kemp's Purchase, but about the boundary of the Wairau Purchase, – the “Ngatittoa boundary”. That Ngai Tahu were prepared to sell the bulk of their land to the Crown was one thing. That the Crown should prefer the manawhenua of a rival tribe over Ngai Tahu ancestral lands was entirely another, and struck at the heart of Maori sensibilities. The sale of Ngai Tahu lands to the Crown by Ngai Tahu would not diminish their manawhenua; rather, it would vindicate it. But the sale of the Ngai Tahu lands between Kaiapoi and Te Parinuiowhiti to the Crown by Ngatittoa had been an insufferable blow at Ngai Tahu manawhenua there. Ngai Tahu had paid for the recovery of this land in blood, in the course of their successful reprisal raids against Ngatittoa at Cloudy Bay and Queen Charlotte Sound in the 1830s, and Ngatittoa had let their fires go out.

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Therefore it was an over-riding concern – an obsession – in all their dealings with Grey, Kemp and Mantell, that the blot on Ngai Tahu manawhenua embodied in Grey’s Wairau Purchase should be removed by the Crown acknowledging that the true Ngatitōa/Ngaitahu boundary was back at Te Parinuiowhiti. (O46:36)

8.5.10 In response to these arguments Dr Loveridge made the following points:

- it is clear from Ihaia Tainui’s testimony that the speeches referred to by Mantell took place *after* the latter had declared that Kaiapoi pa was the starting point for the boundary of Kemp’s block;
- the northern boundary of Kemp’s block was by definition, the same line as the Ngati Toa boundary (see the deed and deed map);
- since the Ngati Toa boundary and Kemp’s purchase boundary were synonymous it is “splitting hairs” to say that Ngai Tuahuriri were disputing the Ngati Toa boundary, not the boundary of Kemp’s purchase as such;
- to dispute one was to dispute both: Mantell had just declared that the Ngati Toa boundary lay some 40 kilometres further south than Grey in February, and Kemp in June 1848, had defined;
- Ngai Tahu evidently interpreted Mantell’s action as an explicit repudiation of the agreements which they had made in February with Grey and in June with Kemp. This, in their view, provided ample justification for a reassertion of their claims to all the lands between the Wairau and the 43rd parallel which the government had purchased from Ngati Toa in 1847; and
- Mantell’s report of 5 September 1848 referred to “repudiation of the sale” by Ngai Tahu during his trip to Kaiapoi (L9:19).⁵⁷ This can only mean that the boundary of Kemp’s purchase was disputed by them, that is, the boundary as modified by Mantell (R2:13).

8.5.11 We agree with Mr Evison that Ngai Tahu had an over-riding concern to assert their manawhenua over the Kaiapoi district and indeed further north. It is for this reason, as we have earlier indicated (8.5.8), that we do not believe Ngai Tuahuriri would have agreed in their negotiations with Kemp that the Ngati Toa purchase line came to Kaiapoi pa. We consider that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui. Consequently we also agree with Dr Loveridge that it was Mantell’s subsequent action later in the year, in asserting arbitrarily and categorically that the north-eastern boundary line was at Kaiapoi pa, which immediately triggered Ngai Tahu’s strong and concerted objection. For this would have required them to concede that Ngati Toa, not Ngai Tahu, had manawhenua over the Kaiapoi district. We do not believe they would have conceded this in their negotiations with Kemp, any more than they accepted Mantell’s

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unilateral decision. For this involved redefining the north-eastern boundary of Kemp's purchase at Kaiapoi pa and hence redefining the Wairau purchase line as also being at Kaiapoi pa.

Why Mantell chose to arbitrarily fix the boundary of the purchase at Kaiapoi pa remains something of a mystery. A map he made at the time compares his understanding of the line of coast of Pegasus Bay with that of the deed map (X13(b)). This suggests that he felt Kemp and Kettle had got the geography wrong. They had put Kaiapoi up at the 43rd parallel in error and he simply corrected their mistake. Eyre's instructions to Mantell at Akaroa were also ambiguous:

'Kaiapoe' being the Southern boundary of the "Ngatitua" Purchase you are not to set apart any reserves to the *north of that* point but as there is reason to believe that a considerable number of Natives wish for their reserves in that immediate neighbourhood, His Excellency wishes you to endeavour to meet their wishes and requirements by appropriating as reserves, for their benefit such land as they may desire, and as you may consider it equitable for them to possess south of Kaiapoe. (M2:30)⁵⁸ (emphasis in original)

These instructions suggest that Eyre and Mantell remained unaware that Kaiapoi pa was not on the 43rd parallel even after both men had had several days discussion with Ngai Tahu at Akaroa. Once Mantell had located the pa and fixed it as the boundary of the two purchases, he was forced doggedly to maintain his position. He was relying on a deed he believed to be faulty, and was faced with opposition from Ngai Tahu on a number of fronts. When Ngai Tahu raised the matter directly with Mantell's superiors (in Kemp's presence) they too saw it as expedient to stand behind Mantell's decision.

Finding on grievance no 1

8.5.12 It is appropriate that we here record our finding on the claimants' first grievance:

That the Crown's inclusion of Kaiapoi in the Wairau Purchase of 1847 from Ngatitua exerted unfair pressure on Ngai Tahu to part with Kemp's Block on unfavourable terms.

In our discussion of the Wairau purchase we noted the doubts as to how far south the Wairau purchase extended. Lieutenant Servantes' memorandum (8.3.6) referred to the "nominal" boundary of the Wairau purchase being placed at Kaiapoi. But he added that there were doubts entertained at the time that Ngati Toa had an undisputed title to land further south than Kaikoura.

We recall that Matiaha Tiramorehu recorded, in a letter written in October 1849 to Eyre, that the previous year, when Governor Grey had discussions with Ngai Tuahuriri at Akaroa, the governor told them that the payment for Kaiapoi should not be given to Ngati Toa

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Figure 8.4: Mantell's redrawing of Charles Kettle's Turnbull Map (see figure 8.2) relocating Kaiapoi at Kaiapoi Pa and redrawing the boundary between Banks Peninsula and the Kemp block to run around the hills. The dotted semi-circular lines on the east coast from Taumutu to Otakou are Mantell's attempt to divide the territory between the various Ngai Tahu rangatira and their hapu. Mantell collection, Alexander Turnbull Library, Wellington (C-103-049).

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but that the payment for Kaikoura had already been given to them. Tiramorehu complained in his letter that when Kemp came he placed the boundary of Ngati Toa's land at Kaiapoi. As we have just indicated, we believe this error should be attributed to Mantell, as Kemp believed he was purchasing up to the Hurunui on the 43rd parallel.

As earlier indicated (8.3.12), we consider it reasonable to infer from Tiramorehu's letter that Grey, in 1848, was recognising Ngai Tahu's right to Kaiapoi district. We believe that Grey and Ngai Tahu were in substantial agreement in February 1848 that the north-eastern boundary lay in the vicinity of the Hurunui near the 43rd parallel (8.3.13), and that Ngai Tahu and Kemp were of the same mind (8.5.8).

There is evidence that Ngai Tahu were willing to sell land, and indeed, that negotiations came about as a result of an invitation from Ngai Tahu. But, as we have noted (8.3.13), it is always possible that such invitation arose in part at least because of Ngai Tahu's concern about the extent of the Wairau purchase.

While we accept that the inclusion of Kaiapoi pa in the nominal boundary of the Wairau purchase would have been a source of anxiety to Ngai Tahu, we believe it was substantially mitigated by Governor Grey's 1848 assurances, and by the arrangement reached by Kemp and Ngai Tahu at the time of the purchase. We are not able, therefore, to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms.

The north-western boundary

- 8.5.13 The Crown in its final submissions (X1:278) commenced its discussion of the western or north-western boundary by challenging the following statement from the Ward report:

At the time of the purchase Europeans knew little about the west coast of Te Waipounamu. Neither Kemp nor Kettle could have predicted where a line drawn from Kaiapoi across the island would come out (T1:136)

Crown counsel, Mrs Shonagh Kenderdine, claimed the deed map (L23) was clearly based on Kettle's Turnbull map (L21). The surveyor took his outline of the western boundary from the current admiralty chart of the South Island (L20), which would have been available on the *Fly*. He would have observed, the Crown claimed, that the northern-most point on the western coastline was Cape Foulwind (so labelled on the admiralty chart).

We here summarise the main points made by the Crown:

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- as earlier indicated (8.4.4) Kettle knew about Heaphy and Brunner's 1846 expedition from his correspondence with Fox;
- the Kawatiri (Buller) River, and Cape Foulwind were shown on the map of the Nelson Crown grant incorporating the Wairau purchase (L19), a version of which Kemp may have seen in Eyre's office before leaving Wellington;
- the "Mawhera" shown on the Turnbull map is clearly meant to represent the mouth of the Mawhera (Grey) River;
- the evidence suggesting Kettle drew the north-western boundary on the deed map by compass-direction is derived from Mantell, but on examination it appears that all Mantell said was that on the deed map the boundary was a line running in a north-westerly compass direction from its starting point on the east coast – not that it was *originally* defined in that manner (R1:10);
- that the point chosen on the west coast – at or near the Kawatiri – corresponds exactly to the division of territorial rights recorded by Brunner in 1847, which in turn is said by Crown counsel to echo a comment which Heaphy made in his report on their 1846 trip. Heaphy reported that some "Ara[h]jura natives have a few rods of land planted with potatoes" in order to "obtain a title to the Kawatiri district by *occupation*" (N2:9).⁵⁹ It is inferred by the Crown that Kettle may well have known of Heaphy's comments; and
- that Poutini Ngai Tahu would have claimed undisputed control of the west coast as far north as Kawatiri (where the north-western boundary on the deed map comes out).

As the Crown conceded, the significance of these latter elements depends on the question of whether the Poutini people were present at Akaroa in June of 1848. We turn next to that question.

Poutini Ngai Tahu presence at the negotiations

- 8.5.14 If Poutini (west coast) Ngai Tahu were present at the negotiations and if, as the Crown contended, Tuhuru signed the deed, this is strong evidence that Ngai Tahu intended to sell from coast to coast. The presence of Poutini Ngai Tahu could also have meant that Kemp or Kettle or both obtained information from them as to their occupation of Kawatiri. The Crown criticised the Ward report for "glossing over" the involvement of Poutini Ngai Tahu in the purchase and for suggesting that they tried to associate themselves with Kemp's purchase *after* it had taken place (X1:284).

According to Natanahira Waruwarutu (a party to the deed) Poutini representatives included "Old" Tainui, Hakiaha, Waipapa and Korako, and their wives, from the west coast, and Tainui (presumably

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Werita Tainui) and Ihaia Tainui (Werita's son) who then lived on the east coast. Waruwarutu added that Werita Tainui "received the money" (presumably on behalf of the west coast chiefs present) (L9:170–171).⁶⁰ Another witness, Wiremu Naihira, listed Tainui, Hakiha, Mokohuruhuru, Ihaia Tainui and Te Waipapa as being at Akaroa "in Mantell's and Kemp's time" (L9:328–9).⁶¹

Dr Loveridge claimed that the reference to "Old" Tainui refers to Tuhuru, the principal chief of Poutini Ngai Tahu. And he argued Tuhuru must in turn be "Tuahuru" who signed the deed. The Ward report commented that this may be so but there is no conclusive evidence. The name, it was suggested, may also be that of Huruhuru, a Waitaki chief, or indeed someone else. The Ward report also questioned whether Poutini Ngai Tahu could have got to Akaroa in time (T1:143). The Crown, however, responded that a Poutini party may have gone across in the summer or autumn and, in any event, news of Grey's February 1848 visit could have been sent to Poutini Ngai Tahu and a Poutini party could easily have travelled to the east coast in the time available (X1:287–288).

- 8.5.15 The Crown disputed the Ward report's suggestion that the Poutini people attempted to attach themselves to the purchase after the event (T1:144). In support, they relied on the evidence as to the arrangements made for payment to Poutini chiefs of the first payment of £250 by Kemp to Tikao, of which Werita Tainui received a part (L9:22).⁶²

We should explain here that Werita Tainui was a younger son of the principal Poutini Ngai Tahu chief Tuhuru. Werita Tainui fled the west coast in the early 1830s at the time of the invasion of Poutini Ngai Tahu territory by a war-party led by Niho and Takerei of Ngati Rarua and Ngati Tama (L8:6). Werita Tainui settled among his fellow Ngai Tahu at Kaiapoi. He was a signatory to the Kemp deed of purchase. That he retained extensive rights to land on the west coast will be demonstrated in our later consideration of the Arahura purchase, in which he played a leading part.

- 8.5.16 Walter Mantell was aware of west coast interests in the purchase and attempted unsuccessfully to include them in the second payment. But he was silent at the time as to the extent of west coast involvement in the original purchase. In 1888 a parliamentary commission asked Mantell about the extent of the purchase:

204 . . . You stated to the Committee that Kemp's proceedings and yours acquired for the Government the Ngaitahu Block-an area of twenty million acres? – I do not know what is its exact area.

205 That went from coast to coast, did it not? – Yes.

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206 How is it that further purchases have been made from the West Coast Natives? – I am not in a position to explain that thoroughly; but it might be because the West Coast Natives, with the exception of Tainui, were not all consulted in the Ngaitahu purchase. (M17:I:doc 2)⁶³

Before the second payment, Mantell obtained from Werita Tainui details of the “principal men on the West Coast” and made the following allocation:

West Coast		
Mawhera	10	Tainui* for Tahura and Tarapuhi
Okarito	10	Matiaha } * for { Taitai
		Tikao } * for { Ruerau
Aurhura [sic]	10	Matiaha* for Koura
Okahu	10	Huri* for Warekai (L9:22) ⁶⁴

Mantell noted that, as far as he could learn, the Poutini named in the last column were the principal men on the west coast. Those marked with an asterix were to receive the money for them and were related to them. In fact, Mantell did not pay out the £40 but deposited it with Mr Watson, the sub-treasurer at Akaroa, on 22 February 1849 for payment with the final instalment in December 1849.

The third and final payment for the Kaiapoi purchase was made at Akaroa on 28 December 1849. Unfortunately the Poutini Ngai Tahu did not arrive in time. Instead of depositing the further instalment with the sub-treasurer, Mantell gave the amounts owed from both payments to Werita Tainui, Tikao, Tiramorehu and others to pass on to the rightful recipients (L8:71). A week later, after this distribution, a large Poutini Ngai Tahu party arrived at Kaiapoi from the west coast. W J W Hamilton reported them as being highly indignant that the money “. . . given as payment for the West Coast” had been paid out to others. Charles Torlesse also reported that Maori from the west coast had arrived in January “in expectation of receiving the payment for their land” but found that the money had been “paid by the Commissioner in trust to various Natives who have spent it” (L9:607).⁶⁵

Dr Loveridge noted that at the distribution on 28 December 1849 Werita Tainui received a £10 share of his own in addition to the £20 to be held for Tuhuru and Tarapuhi (L8:78). If all of the £30 had been intended for Poutini Ngai Tahu claims in the Kaiapoi area, it was suggested it would have been allocated in one lump sum.

- 8.5.17 If the evidence of Natanahira Waruwarutu and Wiremu Naihira (8.5.14) is correct, then it would appear that some leading Poutini Ngai Tahu were present when Kemp negotiated his purchase in June 1848. We note, however, that while Werita Tainui signed the Kemp deed, we cannot say with any certainty that the name Tuahuru, appended to the deed, is that of Werita Tainui’s father Tuhuru, the principal chief of the Poutini Ngai Tahu. While Werita Tainui undoub-

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tedly retained substantial rights on the west coast, he had been living on the east coast for upwards of 16 or 17 years. He clearly had rights at Kaiapoi where he resided.

Two letters from Werita Tainui, written in 1852, suggest that as far as he was concerned the west coast had been included in the purchase. In asking for payment for the places north of Kawatiri, Tainui defined the area paid for by Mantell as lying between Kawatiri and Wakatipu, the same area as defined in the Kemp deed map.

E ta, titiro mai koe ki tenei pukapuka e mea ana au ki nga Pakeha e noho ana ki waenganui o Kawatiri puta atu ki te hauauru ki tatahi; ko te mutu tenei o ka utu a Matara, takoto haere ki Wangatipu. Kei kon[a] i takoto ki tena pihī. Kaore ano kia utua [a] Oruaaiti, Wareatea, Waim[h]angarua, Te Puru, Ka Koau, Poinaki, Mokihīwi, Wanganui, Karamea, Oparara, Ohaehae, Wangapoui, Toropihi, ko te mutunga tenei. (Z10:8)⁶⁶

Sir, consider this letter; I am speaking of the Pakeha living in the centre of [Kawatiri] and westwards to the coast. This is the end of Mantell's payments, lying along to Wakatipu. [The payment] lay there on that piece. Not yet paid for are Oruaaiti, Wareatea, Waimahangarua, Te Puru, Ka Koau, Poinaki, Mokihīwi, Wanganui, Karamea, Oparara, Ohaehae, Wangapoui and Toropihi completes it. (Z10:9)

Another letter written a little later, on 12 November 1852, in the names of Werita Tainui and six others, again urged the governor to pay the £200 for the land north of Kawatiri, commenting that "it is not alright that one portion of the land be paid for, and another portion left" (Z10:11).⁶⁷

All this would suggest that as far as Werita Tainui and the six others were concerned the west coast was included in the sale, and the definition of the Kemp boundary as it applies to their own land accords to that in the Kemp deed map. However, this does not necessarily prove extensive Poutini Ngai Tahu participation or adherence to the Kemp purchase. We already know that Werita Tainui was present at Akaroa in June 1848. He signed the deed and received some of the payment. These letters were written to Grey not from the west coast but from Kaikainui, not far from Kaiapoi.

It also appears that some sums were set aside by Mantell for Poutini Ngai Tahu. But there is no evidence that other than Werita Tainui they received any part of these payments. Moreover, no reserves were set aside by Mantell on the west coast. Given these two circumstances it is not surprising that, some 12 years later, the Crown was to negotiate directly with Poutini Ngai Tahu for the purchase of the west coast. While it is clear that Poutini Ngai Tahu did cross the alps in an attempt to collect payments and that Werita Tainui considered the west coast had been sold under the Kemp deed, there is a possibility that such

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payments were viewed by the tribe as a whole as being for Poutini interests on the east coast not the west coast.

While we cannot exclude the possibility that Poutini Ngai Tahu were present and participated in the Kemp purchase, we are left in too great a state of doubt to find that this was the case.

8.5.18 But, irrespective of their presence at the time, it is clear that Werita Tainui was present. He could well have been the source of information about that coast and his 1852 letters suggest he was well aware of the Kawatiri at the north-western corner of the block. It is clear from the Turnbull map that Kemp and Kettle did obtain information about west coast places and Poutini trails. The Turnbull map in fact terminates just above Cape Foulwind at the approximate point where the Kawatiri River meets the coast, as does the Kemp deed map. We find it difficult to accept that, in fixing the north-western boundary on the deed map at Kawatiri, Kemp and Kettle acted arbitrarily or capriciously. The most reasonable inference, having regard to the information before us and to Crown counsel's submissions, is that that point was chosen as a result of discussion with Werita Tainui and possibly other Ngai Tahu who were familiar with the extent of re-occupation by Poutini Ngai Tahu of their lands on the west coast.

8.5.19 The claimants strenuously and consistently maintained that, notwithstanding the evidence of the deed and the attached map, the western boundary of the Kemp purchase ran from Maungatere (Mount Grey) in the north, then along the foothills to Maungaatua and Kaihiku in the south. Mr Evison, for the claimants, relied on the evidence of the following witnesses in relation to the inland boundary of the Kemp purchase.

Natanahira Waruwarutu, who states that Paora Tau, after some argument said:

This is what I agree to; the boundary is from Kaiapoi to Purehurehu, the inland boundary from Maungatere to Maungaatua. The Maoris agreed to this . . . (L9:151)⁶⁸

Matiaha Tiramorehu:

Paora spoke again. He said "Let the boundary be from Maungatere to Maungaatua". That gave rise to a long discussion . . . It was the Maoris who proposed there should a boundary between Maungatere and Maungaatua. (L9:187)⁶⁹

Wiremu Te Uki:

Had anything been said on shore about the boundaries of the land? – Yes. Mr Kemp said he wished to purchase the land between Kaiapoi and Purehurehu. That was his boundary. Paora, Tikao and myself then said,

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“Let the boundary be from Maungatere to Maungaatua – Write that down.[“] These were the boundaries that were mentioned on shore.

You say those boundaries were mentioned on shore – Did Kemp agree to them or not? What did Kemp say about the boundaries? – Mr Kemp agreed to his own boundary, but we proposed the boundary from Maungatere to Maungaatua to which Mr Kemp also agreed.

Do I understand you to say that Mr Kemp agreed to the boundaries from Maungatere to Maungaatua? – Yes. (L9:244–245)⁷⁰

Later in his evidence Wiremu Te Uki said:

What did he [Paora] say? – He said “Mr Kemp, look here.[”] He pointed and he said, “This land will be given up to you; the boundary runs from Maungatere to Maungaatua”. That was all. We then agreed to accept this money . . . (L9:248)⁷¹

Wiremu Naihira, after saying the deed was read over *after* but not before it was signed and that he could not recollect what was in the deed, was asked:

Do you recollect anything about the boundaries of the land mentioned in the deed? – Yes.

What do you recollect? – That the boundaries were from Kaiapoi to Purehurehu and Maungatere to Maungatua [sic].

Do you mean to say that that was in the deed, or that it was the land spoken about? – If they are not mentioned in the deed then they were only spoken about. If they are in the deed then they are the lands mentioned in the deed.

What boundaries did you hear spoken of, or which were in the deed? – Kaiapoi to Purehurehu and the boundary from Maungatere to Maungaatua.

Did you hear anything about Whakatipu-Waitai? – I never heard Paora or any of them talking about that.

Did you hear anyone else speaking about it? – I never did. (L9:321–322)⁷²

A further signatory to the deed, Tare Wetere Te Kahu, not mentioned by Mr Evison, also gave evidence which was discussed by Dr Loveridge. This evidence is lengthy and is not reproduced here but it is referred to in the following analysis of the evidence of the various Ngai Tahu witnesses by Dr Loveridge (L8:76–85).

- 8.5.20 After pointing out that Ngai Tahu began to agitate against the north-eastern boundary as soon as Mantell made “his unauthorised and unjustified ‘Kaiapoi’ revision”, Dr Loveridge claimed that many years after Kemp’s purchase a totally different claim was advanced. This, he said, first appeared in the 1874 Ngai Tahu petition to Parliament, which stated that in June of 1848:

The Native chiefs entered [into negotiations] with Kemp to define the boundaries – namely, the seaboard, breadth limited by a chain of hills, ceded to Kemp; the inland to remain ours. This was the then settlement

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of boundaries. Recently, when we got a copy of the deed drawn out by Kemp of that transaction, we find that what he put down in that paper differed from what we said above. (L8:77)⁷³

Professor Ward later provided evidence of a petition in 1867 which asked for the reservation of lands “lying between the seaward range on the east and the seaward range on the west of the province” (T2:125).⁷⁴ As the Crown acknowledged, this is the first statement we have in the evidence of the claim to the “hole in the middle” (X1:239). There is also a vague reference to “ka whenua ki waekanui o te tuawhenua” (lands in the midst of the interior), which Tiramorehu suggested had not been paid for, in an 1863 letter to Mantell (Z10:29).⁷⁵

Dr Loveridge summarised the evidence of five of the six original Ngai Tahu parties to Kemp’s deed who testified before the Smith–Nairn commission (Waruwarutu, Tiramorehu, Te Uki, Naihira and Te Kahu). Because of the central importance of this evidence to the “hole in the middle” issue we quote much of it from Dr Loveridge’s evidence:

1) four of the five stated that the Ngai Tahu had offered to sell Kemp the lands bounded on the north by a line from Kaiapoi to Mount Maungatere (Mt. Grey), on the south by a line from Purehurehu to Mount Maungaatua (on the northern boundary of the Otago Block), on the east by the coastline (excluding Banks Peninsula) and on the west by the foothills of the interior mountain ranges. All four claimed that these boundaries were discussed with Kemp, and physically pointed out to him by one or more persons. The fifth witness (Wiremu Naihira) could not remember any discussion of boundaries before the Deed was signed, but had thought that those described above had been agreed upon.

With respect to the Crown’s version of the boundaries, two witnesses (Matiaha Tiramorehu and Tara Wetere Te Kahu) agreed that Wakatipu-Waitai had been mentioned in discussions in June of 1848, and rejected as a boundary-point by the Ngai Tahu. Tara Wetere Te Kahu, however, also admitted that this place was referred to in the Deed, which he heard read out, and signed. Two men (Wiremu Te Uki and Wiremu Naihira) stated that the name Wakatipu-Waitai had not been mentioned at all. The other did not comment on this point.

2) One witness (Tara Wetere Te Kahu) stated that the Deed had been read out by Kemp before the signing. Three (Natanahira Waruwarutu, Matiaha Tiramorehu and Wiremu Te Uki) were not sure – two whether anything was read out; one whether the Deed was the document read, and one (Wiremu Naihira) thought that it had not been read out beforehand. Three of the five, incidentally, mentioned that there was a great deal of noise and confusion on the deck of the “Fly” at the time. (L8:77–78)

Dr Loveridge proceeded (L8:79):

Some of this evidence must be discounted – that of Wiremu Naihira and Tara Wetere Te Kahu in particular. The first, at 70 years of age, had no

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recollection of the negotiations which preceded the signing of the Deed, and could not remember if he himself had signed it. Tara Wetere Te Kahu also had memory problems, of a different kind. His testimony opened with a series of declarations about the negotiations in Otago, on the "Fly" on the trip north, and at Akaroa which indicated that Commissioner Kemp had fully understood and had indicated his acceptance of the Ngai Tahu version of the boundaries.

Dr Loveridge then quoted Te Kahu's response to a question about the deed itself:

Witness: In that document were mentioned those boundaries and a sum of £2000. It was further set out that £500 would be paid into their hands; that afterwards £500 were to be paid. Those statements were made in the deed. The same boundaries were mentioned in this document; that is to say Maungatere to Maungaatua & from Kaiapoi to Purehurehu – these were the names of the boundaries mentioned in the deed that was read to us [on the "Fly" at Akaroa on June 12th] . . . (L9:293)⁷⁶

Te Kahu described the signing of the deed and the payment of the first instalment of money under Izard's questioning and continued:

Could you read at that time? – I could read printed books in Maori at that time.

Could you read writing? – Yes, I could write. I was a catechist at that time.

Did you read the deed before you signed it? – No, I did not read it. Mr Kemp read it.

Are you sure that the boundaries you mentioned to us were those that were put in the deed, or were they those that were talked about by the natives? Are you sure they were in the deed? – The boundaries were in the deed; that is to say, Mr Kemp read them out, and the ears of the people heard them.

Mr Izard [to Commissioners]: Will you allow Mr Young to read the boundaries that are in the deed?

Mr Smith: Yes. (Kemp's Deed was then read aloud)

Witness: Where is the plan that is referred to?

Mr Izard: I will come to that afterwards. Keep to one thing at a time. Now, you have heard the words that are in the deed; are you quite sure your memory was quite correct when you told us about the boundaries just now? – What I said was the correct statement.

As to the boundaries? – Yes. These came after. The others were at the beginning of the deed.

Mr Smith: The witness states "as read by Mr Kemp". That is his evidence.

Witness: Yes, as read by Mr Kemp . . . (L9:298–300)⁷⁷

Then followed questions about the map, about conditions at the time of signing of the deed and about discussions of "Wakatipu-Waitai" prior to it, in which Te Kahu stated that the name was discussed and "not agreed to" by Ngai Tahu. At this stage Commissioner Smith intervened and asked:

You say you heard Mr Kemp read over the deed? – Yes.

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And afterwards you signed that deed? – Yes, I signed it.

When you heard the name of Whakatipu-Waitai did either you or anyone else object to it? – Yes; objections were raised.

Why didn't you say that before in your evidence? – There was no reference made to Whakatipu-Waitai.

Tell us what was said in objecting to this name of Whakatipu-Waitai? – People did not know, did not understand, about Whakatipu-Waitai when Mr Kemp was reading it.

By Mr Izard: Were no questions asked of Mr Kemp about it when Mr Kemp read the word Whakatipu-Waitai? – Mr Kemp was asked about it.

What was said? – All the people did not know. If all the people had understood about it at the time, he would have heard everyone talking about it. (L9:303–304)⁷⁸

Dr Loveridge commented that this part of Te Kahu's evidence raises two possibilities, which he considered are equally difficult to entertain:

1) that Kemp added a clause [referring to Maungatere to Maungaatua] when reading out the deed which directly contradicted the written clause in it relating to boundaries (which Tara Wetere Te Kahu says was also read out) . . .

2) that none of the other [Ngai Tahu] men present would have remembered either a verbal reference by Kemp to the Maungatere-Maungaatua [sic] boundary, or a discussion of the significance of "Whakatipu-Waitai" immediately before the deed was signed. (L8: 81)

Tare Wetere Te Kahu gave evidence in support of a petition to Parliament in 1884. The report of the petitions commission stated that:

This petitioner positively denied the identity of the deed (Kemp's Deed) which he declared had been fabricated for the occasion: but his own signature as one of the sellers appears both on the deed of sale and on a receipt for the purchase-money on behalf of his tribe, and Tara Wetere ultimately acknowledged that this was so. (B3:6/8:3)⁷⁹

The committee rejected his claim.

- 8.5.21 We find that after more than 30 years Wiremu Naihira's testimony reflects some confusion. The evidence of Te Kahu, which we have quoted extensively, is plainly wrong in a critical respect, that is, in his insistence that Kemp's deed described the boundaries as being from Maungatere to Maungaatua and that Kemp actually read out those boundaries. No other Ngai Tahu supported these propositions and the deed, of course, does not give those boundaries.
- 8.5.22 Dr Loveridge commented that if the evidence of Naihira and Te Kahu on the various matters adverted to is set aside as possibly suspect (as we believe it to be), there remains the testimony of three chiefs, in which:

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- all agreed the Maungatere-Maungaataua boundary was discussed with, and pointed out to, Kemp before the deed was signed. Tiramorehu agreed with Te Kahu that Wakatipu-Waitai was mentioned during the negotiations, while Te Uki said it was not. Waruwarutu did not refer to this matter;
- Waruwarutu and Tiramorehu were not sure if Kemp read anything out before or after the signing. Te Uki said something was read out, but thought it was a receipt for the money; and
- none of the three acknowledged seeing any map or plan at the time of the signing (L8:81–82).

Dr Loveridge claimed that there is no obvious way to reconcile the Ngai Tahu statements with respect to the reading of the deed or, especially, the presentation of the deed map with the version put forward by Kemp (in his Smith–Nairn evidence) and Kettle (in his 1848 journal and report). As for the Ngai Tahu description of the boundaries, Kemp made a statement which Dr Loveridge claimed left no room for compromise:

I presume you [Kemp] told them [the Ngai Tahu] that you wanted to buy from Kaiapoi down to the Otago Block. Substantially something to that effect? – Yes.

What were the back boundaries? The East Sea Coast is one boundary: was there any discussion as to the other boundary? – I do not remember any particular discussion: I told them the Govt. desired to carry through to the other Coast, and they gave me the name of Milford Haven.

Do you recollect the Native names of Maugatere and Mauguatua being mentioned to you? – I don't remember now.

The Natives all assert their understanding of the block you were buying corresponded with what you have said, except that the back line was Maugatere, which is the Western line of ranges here, and Mauguatua was the northern boundary of the Otago block. They say that Tikao and Matiaha both asserted before all the people that the boundary would be from Maugatere to Mauguatua. Do you remember that statement being made?—I have not the slightest recollection of such a statement. I should say that if the boundaries had been proposed in that form I must have withdrawn entirely from the negotiations, because my instructions were imperative from the Govt. I may state also in addition that the Govt at that time had a special reason for extinguishing what was then called the Native title to the whole Southern Island.

Then I understand you do not recollect these names being mentioned? – No, I do not.

And you fully understood that you were buying right from Sea to Sea? – Oh, clearly. (L9:82–83)⁸⁰

Later, in response to further questioning, Kemp said:

If the point had been raised, namely, that the boundary was to be the foot of the hills, most decidedly I could not have agreed to it. (L9:85–6)⁸¹

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8.5.23 Dr Loveridge claimed that Mantell's evidence before the Smith–Nairn commission is supportive of Kemp and Kettle's version of what happened in Akaroa at the time of the purchase in June 1848. He made the point that by the 1870s Mantell had been a vocal critic of the government's dealings with Ngai Tahu for more than two decades. If anyone was in a position to undermine Kemp's version, or to suggest Kemp or Kettle had given a different account of events, it was Mantell, said Dr Loveridge. But Mantell did not do so. Rather, apart from the controversial question of "Kaiapoi" he supported Kemp.

Mantell told the Smith–Nairn commission that he had constantly explained the boundaries of the purchase to Ngai Tahu (L9:355).⁸² Later, in his evidence in response to questions from Commissioner Nairn, he said:

Mr Nairn – You say that at each place you arrived at you read the Deed over and explained the boundaries on the map to them? – I did not do that as a sort of service at every place. I had the thing constantly with me for reference, and if any question arose as to the sale or as to the boundaries of the land sold, as it almost invariably did at every place I visited, then I would read the Deed to the Natives and shew them the plan.

Did they accept the boundaries of the block marked on the plan? – They thought that such they were.

You could not point out the boundary to them by calling their attention to certain land marks? – On pointing to the map one could say "There is Kaiapoi, and it goes in a north-west direction; then comes down the West Coast to Whakatipu Waitai".

Still the Maoris might remain in utter ignorance of the boundaries? – There is no doubt whatever in my mind that every Maori with whom I discussed it knew that the boundaries were included in Kemp's Deed. (L9:383–385)⁸³

On 5 September 1848 Mantell reported to Gisborne (for Eyre) that a party of Ngai Tahu was proceeding to Wellington "to assert their right to the land between Kaiapoi and Kaikoura, included in the Nelson block sold by the Ngatitoo" (L9:19).⁸⁴ In a later letter of 21 September 1848 to Eyre's private secretary, Mantell makes a further reference to the Ngai Tahu being "much excited at the cession of land north of that place [Kaiapoi] by the Ngatitoo" (L9:20).⁸⁵

This meeting took place at Wellington in September or early October 1848 between Tairaoa (and possibly other Ngai Tahu) and Governor Grey and Lieutenant-Governor Eyre, when Ngai Tahu complained about the northern boundary. Tairaoa was told that any question affecting the Wairau purchase could not be reopened (M11:5–6).⁸⁶ There is nothing to suggest that at this meeting any question was

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raised by Ngai Tahu about the *western* boundary which Mantell had made clear extended to the west coast.

Nor, it appears, was the western boundary challenged at a later meeting when Eyre, Mantell and Kemp met with Tikao, Taiaroa, Topi Patuki, Tiramorehu and other Ngai Tahu early in February 1849 (A8:I:221).⁸⁷

Nor, in October 1849 when Tiramorehu wrote to Eyre, did he challenge the western boundary. "The principal cause of all the disputes in this Island", he said, "is that of your having given payment of a part of our Island to the Ngatitoas, it is this which has caused all the disputes amongst the Natives of this Island" (L9:23).⁸⁸

Dr Loveridge therefore claimed that while the Ngai Tahu of Kaiapoi wanted their rights in the north recognised, they evidently did not reject Mantell's claim that the northern boundary of Kemp's purchase ran across the island from coast to coast (L8:66).

Mr Evison (O46:13) disputed Dr Loveridge's claim and quoted from Tiramorehu's testimony before the Smith–Nairn commission some 30 years later as follows:

We told Mr Mantell to be off, and he said he would not go. We said that the thing was not clear, and that it was not right to extend the boundary right over to the Western Coast. Mr Mantell, in reply to our statements of objection, said – "I don't come here to lay off boundaries . . . you have received Mr Kemp's money." (L9:205)⁸⁹

Dr Loveridge, in responding to Evison's comments, reiterated that all of the objections recorded related to the north-eastern boundary – to the area which Dr Loveridge said Mantell had taken out of the block himself by altering the northern boundary. As far as we know, Dr Loveridge said, Ngai Tahu were repeatedly told during the period August–September 1848 that the purchase block extended across the island to the west coast. There is, he said, correctly we believe, no contemporary record of the rejection by Ngai Tahu of this claim. Dr Loveridge maintained (a view which we share) that it is difficult to understand why Mantell carefully recorded Ngai Tahu objections to the location of the boundary on the north-eastern coast and yet would have suppressed their alleged objections about the boundary extending to the west coast. Despite Tiramorehu's testimony before the Smith–Nairn commission three decades later, Dr Loveridge argued that the most tenable conclusion is that such objections were not made in 1848 (R1: 13). For reasons which we later give this seems to us the more likely explanation.

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The south-western boundary

8.5.24 The deed refers to the boundary line:

striking inland from this (the East Coast) until it reaches the range of mountains called “Kaihiku” & from thence in a straight line until it terminates in a point on the West Coast called “Wakatipu-Waitai” or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same. (appendix 2.2)

The deed map shows the line of the western boundary terminating at Milford Haven (evidently in Kettle’s printing) with the words “or Wakatipu-Waitai” added by Kemp. No other place name is indicated on the west coast.

8.5.25 The Turnbull map, completed at much the same time, shows four separate place names on the west coast, “Milford Haven”, “Wakatipu or the Waipounamu”, “Awarua” and “Mawhera”, which is shown adjoining the western end of the “Native route to Poutini” across the alps marked on the Turnbull map. Routes to Nelson from both Kaiapoi and Mawhera are also shown. In addition a variety of rivers and the major southern lakes are shown. The curious and unexplained circumstance is that very little of this information is on the deed map, perhaps because that map was drawn in some haste.

The Ward report stated:

There is no indication that Kemp discussed either the interior of the island or the west coast during the purchase negotiations. With the exception of Whakatipu Waitai at the southern extremity of the block, no interior or west coast names were placed on the map. For Ngai Tahu to have understood that the west coast was being sold the name Mawhera, Arahura or Poutini would have had to be mentioned. Although population estimates were made for each of the east coast kainga, no such information was collected for the west coast. When Kettle recorded the calling out of the names of the places to be sold, he noted only names on the east coast. (T1:142)

The Crown contended that the fact that so much information was in the Turnbull map constitutes clear evidence that the west coast was discussed at the time of the Kemp negotiations (X1:296). The Ward report suggested that:

the information on the Turnbull map must have come from Ngai Tahu sources, but not necessarily at Akaroa, during the *actual* negotiations. It would seem more likely that the information was obtained on the voyage from Otakou when there was more time available. (T1(d):136)

The Crown disputed this, arguing that the most likely source for the names on the northern part of the west coast, and especially for the northern trails, would have been the Poutini people present at Akaroa – either Werita Tainui or any other Poutini (X1:294A). Kettle

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was present in Akaroa for eight days – five before the signing and three after. The trip north on the *Fly* took three days.

- 8.5.26 It seems to us reasonable to infer that some information was obtained at Otakou, some on the *Fly* proceeding north, and some at Akaroa. If this is so, then it is difficult to believe that the west coast was not discussed during the Kemp negotiations. To hold otherwise would necessitate our finding that it was an invention resulting from collusion on the part of Kemp and Kettle. We have earlier cited Kemp's Smith–Nairn evidence where he told Ngai Tahu that, "the Government desired to carry through to the other Coast, and they gave me the name of Milford Haven". Had the boundaries of Maungatere to Maungaatua been proposed, he would have withdrawn and he fully understood he was buying right from sea to sea (8.5.22). We have also seen that both Kemp and Kettle referred to various discussions taking place about boundaries and claimants before the deed was signed (8.5.4). We have already discussed the considerable time Kemp spent with Ngai Tahu before the deed was signed. While we do not know on how many of the 26 days Kemp and Kettle and the Ngai Tahu chiefs were involved in discussions, there was clearly ample opportunity during nearly four weeks for full discussions about the boundaries of the proposed purchase to take place. Given that Kemp's mission was to extinguish Ngai Tahu's title to the land, between the named boundaries to the north and south, we believe he would have used the time available to secure agreement through discussion and debate. This would have required him to ascertain from Ngai Tahu the extent of their claim to land within these boundaries. It is apparent from the deed and deed map that he was told by Ngai Tahu that their interests extended to the west coast.

We are therefore not able to accept the suggestion in the Ward report that there is no indication of Kemp discussing either the interior of the island or the west coast during the negotiations, with the exception of Whakatipu-Waitai at the southern extremity of the block. We believe it is implicit in the evidence and records of Kemp and Kettle that such discussions took place. But at the same time it does not necessarily follow that Ngai Tahu and Kemp's conceptions of what they were agreeing to were the same. We will later be discussing Professor Ward's insightful comments on Ngai Tahu's perspective on the agreement. And in due course we will be weighing this less tangible but nonetheless real evidence against the contemporary records of the Europeans involved, as well as later testimony from both parties.

- 8.5.27 The Crown invoked other factors as indicating that the west coast was discussed:

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- Topi Patuki's letter to Governor Grey, written on 12 February 1849, records Ngai Tahu's understanding that the southern boundary of Kemp's purchase ran "over towards Wakatipu" (Q3:4-5; 40-42 of supporting papers).
- The request of Ngai Tahu for a reserve which ran across the island to the west coast. Mantell gives various descriptions of the width of the strip sought:

(a) In his *Outline Journal* for 2 September 1848 he recorded:

. . . Having combatted this notion I set out with them for the sandhills to shew what I would consent to give them arrived at the sandhills I led them on till the N. point of the bush bore N W from me and pointed out the limits of the reserve almost as it was eventually settled. (M3:136-137)⁹⁰

(b) In notes made in his *Sketchbook No 3* for 5 September 1848 Mantell records:

About ½ past 10 set out for the sand hills. The natives demanded a block from K. North to the Domett S. to run right across the island and stated themselves [] to take nothing less. [] on the sand hills they demanded from the Kawari to the Domett right across. (X12(b):141)⁹¹

The "K" almost certainly refers to the Kawari, a stream which Mantell and his party crossed on a day trip from Tuahiwi to Kaiapoi pa. The Domett is believed to be Mantell's alternative name for the Waimakariri.

(c) In a letter of 21 September 1848 Mantell reported that:

Their demand was for a tract of country bounded by the Kawari and Waimakariri Rivers, to extend thence, of the same width, *across the Island to the West Coast*" (L9:20)⁹² (emphasis added)

(d) In evidence to a parliamentary select committee given on 24 July 1888 (some 40 years after the event) Mantell confused the Kowai River, which runs further north, with the Kawari. He described a request for "a block commencing at the Kowhai on the north and south to the Waimakariri, or Waikirikiri, or Selwyn, and extending that width across to the West Coast"⁹³ which the Ngai Tahu made to Lieutenant-Governor Eyre when he and Mantell first arrived at Akaroa in August 1848. This occurred before proceedings commenced and in the presence of a large number of Kaiapoi Ngai Tahu and those having interests in Kaiapoi. Mantell testified that Lieutenant-Governor Eyre said they could have that land but Mantell, in a low voice, pointed out this would create an embarrassing precedent. He claimed the lieutenant-governor left it to him to decide (A9: 9:87).⁹⁴

8.5.28 The Crown asked why Ngai Tahu requested a block of land running right across the island if they did not think that Kemp's purchase extended from coast to coast. If they thought the interior had not

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been sold to the Crown why would they have asked for a large portion of it to be set aside for their own use? (X1:297)

The Crown also relied on the absence of protest concerning the sale of the west coast to government until the 1867 petition, as already discussed.

Although in no way conclusive, Mantell, in notes made at the time, recorded "Their wanting grounds reserved for Kauru & forests for cooking it – other forests for weka hunting – whole districts for pig runs" (X12(b)).⁹⁵ These notes suggest that Ngai Tahu were seeking substantial reserves in the interior and beyond the foothills.

- 8.5.29 Mr Temm, in his reply, dealt in some detail with the boundary question (Y1). Before summarising his submissions it may be helpful to refer to Matiaha Tiramorehu's Smith–Nairn evidence, a small quotation from which appears in Mr Temm's closing address (W1:186–187). This evidence was relied on as showing that Ngai Tahu rejected Mantell's claim that the northern boundary of Kemp's purchase ran across the island from coast to coast. The quotation cited by Mr Temm is identified below. Tiramorehu gave extensive evidence before the Smith–Nairn commission in May 1879. It covers 54 pages and covered dealings with both Kemp and Mantell (L9:188–237). The following quotations relate to the boundary question:

It is only *lately* we have ascertained that the boundary runs over to Milford Sound and also from near Kaiapoi to Cape Foulwind. (L9:194–195)⁹⁶ (emphasis added)

We note that this statement may derive from the Ngai Tahu petition of 25 March 1874 which states that *recently* the tribe had got a copy of the deed drawn out by Mr Kemp of that transaction (L8:77).⁹⁷ Tiramorehu was then questioned about discussions on the *Fly* on the day the deed was signed at Akaroa:

Who was it pointed out the boundaries on board the vessel? Was it Paora who pointed out the boundaries? – Yes; the boundaries that have already been referred to, from Kaiapoi to Otumatua & Taumutu.

Did Paora point out them again on board the vessel? – Of course he did. He pointed to the Akaroa hills, and said the boundary should extend as far as Purehurehu and also from Maungatere to Maungatua. (L9:195–196)⁹⁸

This evidence seems to suggest that although Ngai Tahu sought these boundaries, Kemp and Kettle ignored them and wrote quite different boundaries in the deed and map. If so, such action was fraudulent and collusive.

In the following evidence Tiramorehu said that, while all the chiefs were at Akaroa, discussions were held with Mantell over several days.

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He does not say whether the meeting was when Mantell first arrived in August 1848 with Lieutenant-Governor Eyre, or in December 1848–January 1849 when Mantell returned to Akaroa, after laying out the reserves, with a view to making the second payment of the purchase money. But Tiramorehu recorded that Mantell was told that the reserves “were not made so large or so numerous as they should have been” (L9:208)⁹⁹, which implies the discussions related here by Tiramorehu took place after Mantell returned to Akaroa in December 1849. Asked by Mr Izard what Mantell had said about the payment of the money, Tiramorehu said that Mantell commenced by reading out what Mr Kemp had said:

What did he read from? – He read from Mr Kemp’s deed.

What took place then? – When we heard distinctly Mr Mantell’s reading the deed over, we found that it was wrong.

In what respect was it wrong? – It was wrong in this respect; that the Maori had made one arrangement and had stated certain things. They found, when the deed was read over, that it comprised all the land between Kaiapoi and Kaihiku, and thence to Whakatipu-Waitai. That means all the land between the boundary of Capt[ain] Symonds’ purchase and Kaihiku . . .

. . . Mr Smith – The witness says that the boundary as given in Kemp’s deed commences at Kaiapoi, goes down to Purehurehu and then crosses the island to Whakatipu-Waitai. When it came to that part of going across the island to Whakatipu-Waitai, the witness says that part was wrong. In what respect was it wrong? – [Answer] The only boundary that we mentioned to Mr Kemp was from Maungatere to Maungaatua. Mr Kemp, however, did not lay off the boundary as we wished, and we did not find out it until Mr Mantell came.

Then did you point out to Mr Mantell that the boundaries were not the correct boundaries? – Yes, we objected in Mr Mantell’s presence and wanted him to depart from amongst us. We wanted to hunt him off . . .

When you pointed this out to Mr Mantell, what happened then? – We told Mr Mantell to be off, and he said he would not go. We said that the thing was not clear, and it was not right to extend the boundary right over to the Western Coast. Mr Mantell, in reply to our statements of objection, said – “I don’t come here to lay off boundaries.” But all our spokesmen, of whom there were a great many, united in desiring Mr Mantell to go away. Mr Mantell said – “You have received Mr Kemp’s money” . . . (L9:202–205)¹⁰⁰

The last passage immediately above was that cited by Mr Temm in his closing address.

He [Mantell] said to us – “I did not come here to buy land. Where were you that you did not state everything to the end and state everything you had to say in Kemp’s presence?”. We said to Mantell, in reply to that, that the extension of the boundary to Whakatipu-Waitai was done *secretly*. We were not aware of it. That was all that was said. [emphasis added] . . .

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. . . Mr Nairn: Who defined the southern boundary to Mr Kemp? – Perhaps some of us defined the southern boundary to Mr Kemp. As for ourselves we knew nothing about it. (L9:206–207)¹⁰¹

This evidence is confusing because it suggests that it was not until after Mantell had laid off all the reserves, and Ngai Tahu had gathered at Akaroa to receive the second payment, that they first heard Mantell read the deed and learned of the boundaries going across the island. But Mantell, as we have earlier recorded (8.5.23), told the Smith–Nairn commission that at almost every place he visited while laying out reserves he would “read the Deed to the Natives and shew them the plan”.

8.5.30 We here refer, by way of interpolation, to other related evidence of Tiramorehu. This concerns certain undertakings said to have been given by Mantell during his discussion with Ngai Tahu in 1848.

Following his evidence about boundaries and the reserves being too small and too few, Tiramorehu indicated that two mistakes were made. One was that the boundary was wrong, and the second that the promises regarding reserves and other matters were not carried out. He went on to say that there was a great deal of talk, taking up several days, and Mantell then made statements similar in effect to those of Kemp. Mantell is then said to have stated that he was not there on the same mission as Kemp, but on different grounds (L9:209). Mantell was then told by Ngai Tahu:

If you are obstinate you may take back your money, and you won't get any land for it, but if you choose to give us five millions, you can have the land.

Tikao said that? – Tikao said it, and I said it, and others said it. Mr Mantell said – “Sufficient; I will try what I can do by making a representation to the Govt of New Zealand. It will be for the Govt to pay you money, and if the New Zealand Govt do not agree to what I propose, then I will take the matter across the water to England.”

By Mr Smith: Were those the words of Mr Mantell – that he would take the matter to England? Was that spoken at that time or afterwards? – We had been three days discussing the matter and had agreed to have nothing to do with Mr Mantell. He said on that occasion that if his proposals to the Govt of New Zealand were not approved of, he would take the matter to England. . . Mr Mantell said we should have a large price. He said that we would gain a large price for our land. Mr Mantell spoke of money on that occasion.

By Mr Izard: Anything else? – He (Mantell) said – “I will also request the Govt to establish schools for you”. (B3:4/1:247)¹⁰²

Mantell was also reported as saying, “I will ask the Govt to establish hospitals for you” (L9:211).¹⁰³

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Then followed a general discussion about hospitals and their uses and the following passage occurs:

I [Tiramorehu] said to him – “When are we to see the fulfilment of these words?”. He said – “After the last instalment of Mr Kemp’s money has been paid”. I said – “What are you going to do then? Are you going to carry out what you have just promised, and are you going to pay us a large final payment for this island? Are you going to carry out the promises for the establishment of schools and hospitals? Will you be able to do it.” He said – “If it cannot be done in New Zealand I will apply to the Home Govt-to her Majesty’s Secretary of State on the subject”. I said – “Don’t take it right away to England; let us have the matter done on the spot, so that we may have a speedy fulfilment of the promises which you have made, don’t let any very long delay take place.” (L9:213–214)¹⁰⁴

These foregoing discussions took place at Akaroa after Mantell had completed laying off the reserves. A little later Tiramorehu produced Mantell’s letter, written from London on 8 August 1850, advising that he was taking certain matters up with the principal secretary to the Queen (L9:225).¹⁰⁵

It is difficult to escape the conclusion that Tiramorehu was here, due no doubt to the passage of time, relating back to 1848 actions which Mantell took some seven or eight years later. By then Mantell’s attitude to Ngai Tahu had undergone a major turnaround. It defies credibility that a youthful and ambitious officer on his first Crown assignment, whose high-handed and autocratic conduct seemed motivated by a strong desire to prove himself an effective Crown agent, should have even contemplated, let alone openly spoken, in terms of such disloyalty to the governor who had commissioned him and to whom he was beholden.

- 8.5.31 We here summarise Tiramorehu’s evidence. He says he signed the deed but saw no map: “There was no map”. It was only when Mantell came to Akaroa that Tiramorehu says he saw there was a plan attached to the deed. He further says that he did not hear the deed read out by Kemp, there was so much confusion going on at the time he did not hear it (L9:235).¹⁰⁶

By Mr Smith: Who told Mr Kemp where Whakatipu-Waitai was? Who was it mentioned the name of Whakatipu-Waitai to him? – *It was someone of our people.*

... Did you hear the name mentioned while Mr Kemp was present? – Yes, I did. We heard the boundary mentioned from Kaiapoi down to the boundary of Symonds’ purchase; thence to Whakatipu-Waitai—we heard the name Whakatipu-Waitai mentioned in our proceedings with Kemp and we objected to it.

Did you agree to accept that boundary or did you stand out for the boundary between Maungatere and Maungaatua? – We objected to the

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boundary extending as far as Whakatipu-Waitai. He said the matter remained unsettled.

And I suppose you thought the boundary was as you suggested, and Mr Kemp thought it was as he stated? – That was the case. Mr Kemp argues that he purchased the whole country or supposed he purchased it from sea to sea, and we supposed all we sold was from Maungatere to Maungaatua. (L9:235–236)¹⁰⁷ (emphasis added)

- 8.5.32 Perhaps not surprisingly there are some problems with Matiaha Tiramorehu's evidence, given 31 years after the events he attempts to recall. He appears to have transposed Mantell's actions in the mid-1850s in taking up Ngai Tahu's cause, particularly in relation to schools and hospitals, back to 1849. Further, whereas in 1879 he said that it was only "lately" that he discovered the boundary ran over to Milford Sound and Cape Foulwind, he shortly after described how they learnt from Mantell in 1848 that the deed went across to Wakitipu-Waitai and they wanted him to be off. According to Tiramorehu, Paora Tau pointed out the boundaries on board the vessel before the deed was signed. Paora said the boundary should extend as far as Purehurehu and also from Maungatere to Maungaatua. Yet shortly after, it appears, if this recollection be correct, Kemp read out the deed which contained quite different boundaries. Tiramorehu suggested that the boundary to "Whakatipu-Waitai was done *secretly*" (emphasis added). Given that the deed was read aloud this is surely problematical. It is, we think, straining credibility to accept that Kemp should have brazenly prepared and read out a deed with a boundary extending to the west coast if Paora only shortly before had proposed quite different boundaries. We are at a loss to know how Kemp, with Kettle's complicity and presumably that of the ship's officers present and the resident magistrate, concealed his alleged deception from Ngai Tahu.

Summary of claimants' view of the boundaries

- 8.5.33 We now summarise and discuss the main points made by Mr Temm in his reply on the boundary question.

(a) Kemp's discussion with Ngai Tahu enabled him to say that the northernmost point on the east coast was "Kaiapoi". There is only one Kaiapoi, it being a distinct place marked by a pa. When Ngai Tahu were talking to Kemp about Kaiapoi there was no doubt about which place they spoke.

We note that this assumes that Kemp spoke only of Kaiapoi pa and not, as appears in the deed and the attached map, of "Kaiapoi, recently sold by the Ngatitooa and the boundary of the Nelson Block . . .". We have earlier discounted the likelihood that Ngai Tahu would have accepted that the Ngati Toa purchase ran down as far as

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Kaiapoi pa. Moreover Mr Temm's comment implies that Ngai Tahu were willing to sell Kaiapoi pa. Professor Ward's comments when questioned on this point are of interest. Professor Ward was asked:

5368 S. Kenderdine: Now in your view of Ngai Tahu would you think that they would sell Kaiapoi pa . . . ?

5377 Professor Ward: They were anxious to receive the payment for Kaiapoi. The district, Kaiapoi.

5388 S. Kenderdine: Right, the district. But I am asking you about Kaiapoi . . . pa?

5391 Professor Ward: No they would have wanted to reserve that and Mantell undertook to do so. (W12:43)

(b) Mr Temm criticised Dr Loveridge's "theory", adopted by the Crown, which involved the proposition that Kaiapoi is "not where it was", but was to be found at a place to the north of the 43rd parallel.

We would comment that Dr Loveridge did not claim that Kaiapoi pa was not where it was. His contention was that "Kaiapoi", in the context of the deed and deed map, indicates the northern point of the Kaiapoi district and this was just north of the 43rd parallel.

(c) The line of the "west coast" on the map is obviously distorted and is unrecognisable to anyone who knows that part of the country.

This comment overlooked that the deed expressly refers to "a point on the West Coast called 'Whakatipu-Waitai', or Milford Haven" and that the deed map, which was edged blue along the western coast line, was marked "Milford Haven or Wakatipu Waitai" on the western coast line.

(d) The eastern starting point of the northern boundary remains a mystery if it is not Kaiapoi pa.

In fact the deed map locates the starting point above the 43rd parallel.

(e) If Kaiapoi pa is taken as the starting point, as Mantell did, then it begins well south of the place shown on the map. But with the true position of Kaiapoi pa as the starting point, where does the boundary go from there? The deed does not answer the question and the map is no help. Mr Temm added orally at this point, that the pivotal point is whether the Crown was buying from Kaiapoi pa. If so you have a "hole in the middle" because there is no northern boundary.

In our view, if in fact there was general understanding, as we believe there was, that the north-east boundary commenced as described in the deed map, there is no problem as to where it started. But there remains a problem as to whether Ngai Tahu had a very accurate idea of where it came out on the west coast. If, as the claimants contended, Ngai Tahu understood that it started at Kaiapoi pa, then there is an even greater problem.

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Mantell in effect redrew the northern boundary line, (that is, he altered it from the position on the plan) by starting it from Kaiapoi pa and then bringing it out on the west coast near Cape Foulwind and Kawatiri, in the position indicated on the deed map. But we lack information as to how detailed Kemp's discussions were with Ngai Tahu, including any Poutini Ngai Tahu present, about the location of the north-western boundary. The two 1852 letters from Werita Tainui would suggest that he for one was well aware of the Kawatiri as the northern boundary of the purchase on the west coast. However this was clearly not the limit of his people's rights on the west coast.

(f) During 140 years following Mantell's first visit to Kaiapoi in September 1848, no one ever mentioned he was in error in taking that place to be "Kaiapoi" referred to in Kemp's deed as the boundary of Kemp's purchase.

We believe this assertion is difficult to reconcile with the vigorous Ngai Tahu protests to Mantell (and later government officials) that Mantell had in effect fixed the boundary of the Ngati Toa sale at Kaiapoi pa. As we have seen, Ngai Tahu were very unwilling to accept that place as the boundary and contended for a boundary considerably to the north. Eventually they were to publicly argue for a northern boundary at Maungatere (Mount Grey). We agree with the observation in the Ward report that:

For Ngai Tahu the northern boundary issue was a complex one. They expected to get the money for Kaiapoi only to find that Ngati Toa rights were going to be recognised right up to the centre of the pa. Mantell was deaf to the complexities of the arguments about utu and stuck to the words of the deed, insisting that the purchase stopped at Kaiapoi. Further north he would not go, though he did make a minor compromise and shift the boundary slightly so that it ran just to the north of the pa rather than straight through it, promising Ngai Tahu that the pa site should be reserved to them. (T1:158)

It is clear from the correspondence that government officials did not wish to re-agitate the Ngati Toa purchase boundary and hence the Kemp boundary, and were content to let the matter lie as decreed by Mantell. Later the Crown was to purchase (or repurchase) the North Canterbury land north of Kaiapoi pa.

(g) The Crown cannot decide whether the fictitious "Kaiapoi – on the Hurunui" was a point (X1:230–264) or a district (X1:244) and the Crown cannot have it both ways. Either Kaiapoi was a place or it was a district.

There is some force in this contention, but Ngai Tahu were told not only of Kaiapoi (from which, as they well knew, their interests radiated out) but also of the Ngati Toa purchase boundary as being

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the northern boundary. While Kemp clearly erred in not being more precise, it does not necessarily follow, as Mr Temm seems to imply, that Ngai Tahu did not have a reasonable understanding of where the northern boundary was, that is, at the northern end of the Kaiapoi district at a point on the coast near the Hurunui River and the 43rd parallel.

(h) The northern boundary on the plan which Kemp had Kettle prepare is a fiction. And when the plan was first produced to the Ngai Tahu in August 1848 they protested immediately. The difficulty was that Mantell overrode their objection.

The evidence suggests that it was not the production of the plan as such which gave rise to Ngai Tahu's strenuous objections, but rather Mantell's arbitrary decision that the north-eastern boundary started at Kaiapoi pa and not, as stated in the deed, on the southern boundary of the Ngati Toa purchase, shown in the deed map to be just north of the 43rd parallel of latitude.

(i) If it is accepted that the northern boundary of Kemp's purchase was never determined then it inevitably follows that the western boundary was never determined either.

The deed and the deed map between them defined all four boundaries. It is a question of how well Ngai Tahu understood and agreed to this. There is evidence that they believed they had sold across to the west coast as well as evidence that they did not. They sought a large reserve from coast to coast within three months of the sale. They made no public protests about the west coast boundary for more than two decades. All the available evidence has to be weighed and considered. But having said this it may be that while Ngai Tahu agreed to sell from coast to coast, they did not have a precise idea of where on the west coast the northern boundary came out.

(j) The Crown's assertion that Kemp was buying from east coast to west coast is contradicted by the Crown's decision in 1860 to buy the west coast from Poutini Ngai Tahu.

The Crown contended that its principal reason for "repurchasing" the west coast was because it became clear that Poutini Ngai Tahu did not receive their share of the Kemp purchase monies; nor were any reserves set aside for them on the west coast. In these circumstances it was reasonable for the Crown to renegotiate a sale.

(k) Lieutenant-Governor Eyre never intended Kemp to buy from coast to coast. Two main reasons were advanced, first because:

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it was never contemplated by H M Government that the very few individuals within the limits referred to should be considered the owners or occupiers of that immense District . . . (L9:429)¹⁰⁸

The short answer to this contention is that Kemp decided (correctly) that Ngai Tahu did in fact own and occupy the “immense district”. Eyre, not Kemp, was in error.

Secondly, reference was made to Grey's instructions to Eyre and those from Eyre to Kemp. In essence, as Mr Temm agreed, Eyre repeated Grey's orders to him word for word. Mr Temm quoted only the first of the following two paragraphs which are part of Eyre's instructions to Kemp:

The object of your mission is the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitōa tribe and that purchased by the New Zealand Company at Otakou.

In entering upon the arrangements necessary to effect this object, it would be your duty to reserve to the natives ample portions of land for their present and prospective wants, and then, after the boundaries of these reserves have been marked, to purchase from the natives their right to the whole of the remainder of their claims to land in the Middle Island. (L9:68)¹⁰⁹

Mr Temm argued on the basis of the first paragraph above, that in neither Grey's letter to Eyre nor Eyre's letter to Kemp is there any reference to buying from coast to coast on the South Island. Each letter, it was said, contained an instruction to buy the land “lying between the districts purchased from the Ngatitōa Tribe and that purchased from the New Zealand Company at Otakou”. Such land, it was argued, can only be found on the east coast of the South Island.

While it is possible to engage in a semantic argument as to this interpretation, the second paragraph in the instructions cited above (not referred to by Mr Temm) puts the matter in its true perspective. It will be noted that after setting aside ample reserves and marking their boundaries, Kemp was to “purchase from the natives their right to *the whole of the remainder of their claims to land in the Middle Island*”. It seems difficult to argue that Kemp exceeded his instructions in purchasing from coast to coast between the northern and southern lines indicated in his instructions, although it is clear that as on the east coast so on the west coast he failed first to mark out reserves. In any event, even assuming that Kemp exceeded his instructions, that does not invalidate the purchase. It will be recalled that in his Smith–Nairn evidence Kemp was emphatic that his instructions were to purchase from coast to coast. But Lieutenant-Governor Eyre's report to Governor Grey of 5 July 1848 (L9:397–400)¹¹⁰ reveals no complaint that Kemp exceeded his instructions in buying beyond

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the coastal strip, rather that he recognised Maori rights over the whole of the country lying between the given limits. Eyre makes three other complaints about Kemp's conduct of the purchase and concentrates on those, saying nothing more about the first point.

8.6. **The Maori Dimension to Kemp's Purchase**

8.6.1 The foregoing lengthy discussion of the boundaries of the Kemp purchase is largely confined to an examination of the contending views of the claimants and the Crown. On occasions we have indicated our view on a particular issue. Perhaps inevitably the written contemporary or near contemporary records, mainly European in origin but not exclusively so, are relied on especially by the Crown. But in an earlier chapter we have recorded from Professor Ward's "Overview" evidence a number of contemporary Maori and European assumptions which underlay the acquisition of Maori land by the Crown.

Professor Ward also discussed the Maori view of what happened in land transactions both generally and in relation to Kemp's purchase. For instance, Professor Ward pointed out that with little or no experience of the sheer scale of settlement, Ngai Tahu must have expected many of their customary usages to continue over much of their land. Thus, as Professor Ward remarked, throughout the 1850s at least, Ngai Tahu cultivated or grazed stock beyond the reserves and must certainly have hunted and gathered very widely (T1:13). This could not last, as the Ward report explained:

Unfortunately for Ngai Tahu, as settlement pressed upon the land, power relationships changed and the British interpreted arrangements according to their notions of ownership and sale. Ngai Tahu have never ceased to protest at the narrowing interpretation of their transactions, and as they learned the European concepts of boundary and the language of deeds they began to express their protests that way. In the transactions themselves, each culture only partially understood the other, the more cosmopolitan Ngai Tahu leaders perhaps having more understanding of the Europeans' intentions than many of their kin could have. (T1:13)

Professor Ward then stressed the probability that Ngai Tahu and Crown representatives would have had differing impressions of what had been agreed:

The likelihood that Maori and Pakeha could take away different understandings of what was agreed was increased by the two cultures' perceptions of the very processes of making an agreement. To Europeans, for centuries accustomed to giving legal recognition to the written, documented records of land tenure or contracts affecting land, the deed was all-important. What was not on the deed had slim chance of later being supportable in law. For the Maori, working with an oral culture, the spoken words were all-important, especially if spoken publicly and solemnly by important men. Thus the agreement could be understood

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to include matters discussed and agreed, as well as what was in the final deed. The agreement was the process, not just the single final act. Thus what was agreed with Governor Grey, the Queen's representative in New Zealand, about the sale, could be at least as important, or even more important, in Ngai Tahu understandings and tradition, than Kemp's deed. And what Kemp and Mantell added was all part of the process of the agreement. This probably explains why many Ngai Tahu who participated in the land transactions had rather different recollections of what was agreed, depending upon at what stage they were involved. In Otago, for example, those present at the preliminary, June, agreement with Tuckett and Daniel Wakefield but not at the July final agreement with William Wakefield, had different recollections from those who took part in both. Equally, if Mantell made statements about schools and hospitals after Kemp's deed had been signed, they would still be regarded as part of the contractual arrangements of the purchase. (T1:13–14)

- 8.6.2 Towards the end of his closing address on Kemp's purchase Mr Temm quoted comments in the Ward report which were critical of the way Kemp conducted his purchase. These are contained in the following more extended quotation from the Ward report, as orally amended and amplified at the hearing by Professor Ward:

Because he [Kemp] believed that the tribe was willing to sell all of its rights, he saw no need to define the rights of either the iwi as a whole, or of its constituent parts. The problem was that this sort of indiscriminate catch-all purchase was virtually incomprehensible to Ngai Tahu in 1848. Ngai Tahu understood their rights in terms of specific individual or group relationships, current and historic, with collections of places, not as an undifferentiated collective property right over the whole block. Kemp [was] operating within a framework of official attitudes which was sceptical about the Ngai Tahu claims to the interior. This combined with his decision not to precisely define the tribe's rights would have allowed him to proceed with a purchase which purportedly included the whole block without fully discussing the future disposition of interests in the block with Ngai Tahu. Because agreement on detail, especially oral agreement, was so important to the Maori world, failure to discuss and specify that distributions of interest in any part of the purchase amounted to a failure to complete the purchase of it. It is important to have regard to the complex of interests and a blanket agreement without specificity would not be a completed agreement in Maori eyes. (T1:142–143)

There is much weight in these comments, but they require amplification. In the tribunal's view the real vice of Kemp's conduct lay in his failure to carry out his instructions. He was instructed:

- first, to reserve to Ngai Tahu ample portions of land for their present and prospective wants;
- secondly, to then mark out (survey) the boundaries of those reserves; and

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- thirdly, to purchase from Ngai Tahu their right to the whole of the remainder of their claims in the South Island (within the parameters set).

Kemp did none of these things. Instead he purchased, or believed he had purchased, the whole of the land in question; agreed that their places of residence and mahinga kai would be reserved to them and, when the land was properly surveyed, the government would have the power and discretion to make additional reserves of land. The scope of this will be considered later along with any oral undertakings given by Kemp at the time.

Had Kemp followed his instructions there would have been ongoing dialogue between him and the various hapu of Ngai Tahu. The interests of each hapu would have been ascertained. Kemp would have learned what land they wished to keep and what they were prepared to sell, he would have ensured they retained ample land for their present and prospective wants. Boundaries would necessarily have been defined with more particularity. Had this been done in an appropriate way the principles of the Treaty could have been honoured.

In fact the principles were not honoured. Kemp failed to ascertain what land Ngai Tahu wished to keep before determining what they wished to sell. He failed to ensure they retained “ample” land. No specific reserves were made – merely an agreement to buy the whole, subject to certain reserves which would only later be identified, with provision for additional discretionary reserves. Having agreed, or appearing to agree, to sell all their land, Ngai Tahu were placed at an enormous disadvantage when it came to dealing with the Crown’s agent Mantell over reserves. The Crown, through its agents, failed lamentably to provide adequate reserves.

But did Ngai Tahu agree to sell their kainga and mahinga kai? We doubt that this could have been their intention. It is surely inconceivable that they would agree to part with their villages, their cultivations, and other food producing places on the basis that these would later, after survey, be returned to them. They were agreeing to part with land surplus to their requirements within the boundaries specified. The extent and location of such surplus land would be the subject of ongoing discussion with the Crown’s representatives and settled after they had indicated the land and sources of mahinga kai they wished to retain. We do not believe they contemplated that a Crown agent and not themselves would determine how much land they would be left with or that the Crown’s agent would deny them their mahinga kai or fail to leave them with ample additional land for

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their wider needs. They would not have agreed to surrender their rangatiratanga over valued lands and food resources.

- 8.6.3 Had the Crown sent, instead of Mantell, a commissioner with a concern to conform to Treaty principles, it is possible, although far from certain, that justice would have been done. It is possible for instance that Ngai Tahu requests for extensive reserves and appropriate provision for mahinga kai would have been met. But this would have depended upon full dialogue between the Crown representative and the various hapu and, desirably, oversight by an independent protector. It is the absence of this full dialogue which lies at the heart of Professor Ward's concern. But notwithstanding Kemp's inversion of his instructions, his agreement with Ngai Tahu did not, in its terms, preclude this happening; indeed it may be said to be implicit in it. The trouble was that Mantell, as will be seen, so narrowly defined his mandate and acted in so high-handed a manner that the provisions of the deed were never implemented in the way they should have been, and in the way contemplated by Ngai Tahu when the deed was signed. Nor, given the power lying with the Crown as a result of Ngai Tahu apparently signing away their rights, was it by any means certain that they would be treated in conformity with Treaty principles. Given the situation at the time there is good reason to suspect that the odds were against this happening. The process of completing the agreement would have taken considerably longer than Grey, Eyre, the New Zealand Company and other European officials envisaged. The surveying of the very considerable areas Ngai Tahu wished to reserve would have involved much more labour and expense than anyone anticipated. The officials concerned would have had to accept Maori definitions of use and occupation and defend their actions to Eyre and Grey. Grey in turn would have had to explain to the colonial secretary why he had acknowledged Maori ownership to huge areas of uncultivated land. It will be remembered that Earl Grey rejected any idea that Maori owned large areas of land beyond their immediate cultivations and villages.

It is abundantly clear, as will be shown, that the Crown failed to ensure Ngai Tahu were left with an adequate endowment for their present and future needs. Professor Ward was correct in saying that "having regard to the complex of interests a blanket agreement without specificity would not be a complete agreement in Maori eyes". But Kemp's deed did not in its terms exclude further discussion; indeed, as we have indicated, it required that there would be further discussions centering around individual hapu rights and interests leading to agreement on the provision of reserves in various localities as required by Ngai Tahu. While Mantell in fact went to considerable trouble to ascertain and record the interests of the

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various hapu and to note their leading chiefs, he failed miserably to meet their wishes as to reserves and mahinga kai. The ultimate failure, assuming there to have been an agreement by Ngai Tahu with the Crown to sell a coast to coast block, was not so much in the deed of purchase itself, as in the failure of the Crown to honour its terms and conditions in conformity with Treaty principles. This is a failure which has carried down to the present day and resulted in grievous harm to Ngai Tahu.

Finding on grievance no 1

- 8.6.4 The tribunal notes that in his 1887 report Royal Commissioner Alexander Mackay pointed out that many of Ngai Tahu's grievances resulted from the failure of the Crown to appoint a protector.

Owing to the non-appointment of an official protector for the Natives in the South, as was promised them at the cession of their land, these people have suffered a serious loss, for, had any person been clothed with the necessary authority to look after their welfare in the early days, a great deal of the irreparable neglect they have suffered from the non-fulfillment of the promises made them at the cession of their lands would probably not have occurred. (A9:9:65)¹¹¹

The tribunal would go further and say that, had a protector been appointed to look after the interests of Ngai Tahu during Kemp's negotiations for the land, he would have insisted that Kemp followed his instructions and first marked off the reserves requested by Ngai Tahu before a deed of purchase was signed. The tribunal finds the failure of the Crown to appoint a protector to assist Ngai Tahu was in breach of the Crown's Treaty obligations and resulted in grave detriment to Ngai Tahu.

Before stating our conclusions on the question of the boundaries of the Kemp purchase and in particular the question of a "hole in the middle" we propose to discuss the Crown's actions in the provision of reserves under the deed, including the provision for mahinga kai. It will also be necessary to examine how, when, and in what circumstances, the claims in respect of Kemp's purchase came to be brought by Ngai Tahu. Only then will we be in a position to make a considered judgment on the boundary and related questions. There remains one boundary question, the subject of a grievance by the claimants, which we have not so far considered. This relates to whether the Kaitorete Spit and most of Waihora (Lake Ellesmere) was intended to be excluded from Kemp's purchase. This matter is capable of resolution at this stage and we now proceed to consider it.

*Kemp's Purchase*8.7. **Waihora (Lake Ellesmere) and Kaitorete**

8.7.1 The question of whether Ngai Tahu sold Waihora and Kaitorete is the subject of part of the claimants' fourth grievance (W4). The claimants alleged that the Crown enforced an interpretation of the eastern boundary which was not agreed to by Ngai Tahu. They claimed Ngai Tahu wanted the eastern boundary to follow the line-of-sight from Otumatua to Taumutu and thus to exclude from the sale Kaitorete, most of Waihora and its north-eastern shoreline with the adjoining wetlands (B2:38–39).

The geography of the area

8.7.2 As we have seen, Kemp excluded from his purchase the land coloured green on the deed map and marked Banks Peninsula. The map (L23) bore an endorsement that "the land coloured green is that acknowledged by the Natives to have been sold to the French Company". In fact the straight line is inaccurate in that it fails to take into account the outwardly curving nature of the hills on the westward side of the peninsula. But it does show the peninsula starting at a point a little north of Port Cooper (Lyttelton Harbour) and terminating at the foot of the hills near the coastline just to the east of Kaitorete. It clearly excludes both Kaitorete and Waihora from Banks Peninsula. Waihora is in fact shown (somewhat out of scale) on the deed map. A current map of Banks Peninsula published by the New Zealand Department of Lands and Survey (NZMS 281 Banks Peninsula) clearly illustrates the configuration of the peninsula. It consists of a series of hills and mountains which surround Lyttelton Harbour running in a westerly, then southerly, then easterly direction from the harbour across to the commencement of Kaitorete Spit and thence around the coastline back to the harbour. For a certain distance to the north-west of Kaitorete Spit the hills come down virtually to the shore of Waihora and adjacent to the Kaituna lagoon. In 1848 much of what is now pasture on the plains was low-lying swamp. The peninsula was almost an island. In our view, it is unlikely that any observer of the landscape then or now would consider that either Kaitorete or Waihora were geographically part of the peninsula, which is markedly different in character, given its hilly and undulating configuration and extensive coastline.

The Turnbull map (L21(b)) which we have earlier discussed clearly shows the peninsula reaching out into the sea. In part because of its scale and better definition it gives a clearer indication of the contours of the peninsula. It is easy to see why on the deed map, which follows the general outline of the Turnbull map, a straight line was drawn in the position shown. Waihora and the adjoining Kaitorete Spit are clearly not part of the peninsula. It seems obvious that Kemp and

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Kettle considered they were purchasing both Waihora and Kaitorete. Nor would they have had reason to think otherwise when, as Charles Kettle recorded, the various Ngai Tahu chiefs called the eastern boundaries:

Commencing from Kaikora one chief went down to the peninsula. Then Taiaroa called the lands from the Peninsula to Waitaki. Then Solomon from Waitaki to Moeraki. Portiki and others southward from thence to the Heads of Otakou. (L9:390)¹¹²

Claims made about Waihora

- 8.7.3 The first recorded claim of which we are aware concerning Waihora is in a letter of 9 September 1865 to Native Minister FitzGerald, from Natanahira Waruwarutu on behalf of the whole of the runanga of Kaiapoi:

Friend Mr FitzGerald. Here is one word to you about our land about Waihora; you yourself have seen that sheet of water which lies behind the mountains of Port Cooper; the Maoris catch eels there, and now we wish to sell that land (?water), because during the time that the lake was full of water, Mr Kemp and Mr Mantell laid down their money (in payment for the surrounding land); therefore they thought it not necessary to make any further payment for that land, and now the water is being let off by the Pakehas, that is to say by the Government, so as that land may be made a sheep station by the Europeans, and now there is very little (or no) water, it has to be left for two or three years before there is sufficient water to overflow so as to enable us to catch eels; but no, it is being drained off by the Government, so as to be a source of emolument for them. (A8:I:238)¹¹³

Waruwarutu here seeks payment for the land which he said had been previously part of the lake. He claims Ngai Tahu received no payment from either Kemp or Mantell for such land. The commissioner of Crown lands reported that the provincial government had not done anything to draw off the lake. He suggested that periodically the lake discharged itself into the sea by breaking through the shingle beach, the effect of which had been to lower the lake considerably (A8:I:240). Waruwarutu was not satisfied with the replies he received from officials and again wrote to the native minister (by now Russell) on 1 February 1866 in which he said he was writing to the government:

because that water was not included in the sale made to that sold to Mr Kemp and Mr Mantell; it is still ours, the Maoris. (A8:I:241)¹¹⁴

We note that no reference is made to the Kaitorete Spit nor is any suggestion made that it had not been sold.

- 8.7.4 In April 1868 the Native Land Court sat at Kaiapoi. Chief Judge Fenton presided. Among other matters, the court considered a claim brought by Heremaia Mautai and others, to Kaitorete Spit, described as "all that piece of land, containing from 12,000 to 15,000 acres which lies

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between Lake Ellesmere and the sea on the East Coast of Canterbury" (A8:II:204).¹¹⁵ Mautai said in evidence that the spit belonged to his ancestors and that he never sold it or gave authority to anybody to sell it. He was living at Kaitorete at the time and remembered Mantell's visit. Later, on being re-called, he said:

There were 10 of us on the land when Mr Mantell was there. None of us spoke to him. Mr Mantell only came to our pah to get persons to carry his goods. (A8:II:204)¹¹⁶

Henare Watene Tawa, who lived at Wairewa, claimed the land had not been sold. Kiriona Pohau (later to give evidence before the Smith–Nairn commission) told the court that:

I came from Taumutu and found Mr Mantell at Wairewa at the time referred to. I belong to the same hapu as Heremaia [Mautai], and am one of the claimants. I recollect Mr Kemp's coming here. I went to Akaroa at the time. My name is to the deed produced [Kemp's deed]; I wrote it. I said nothing to Mr Mantell at the time he was at Wairewa. (A8:II:204–205)¹¹⁷

Mantell also gave evidence at the court hearing as follows:

I was here in 1848 and 1849, as Commissioner for extinguishing Native claims. I remember walking along the Lake Ellesmere spit at that time, in company with Natives and Europeans. I went for the purpose of making a reserve, in accordance with instructions. The only Maoris living there resided at Lake Forsyth. On arriving at Wairewa, I proposed to the Natives to make a reserve there, but they said it was within the French boundary. On referring to the map, I found such to be the case, and I pointed out the block in which it was competent for me to make a reserve. There was no application by the Natives for a reserve on the spit. Nothing was said with regard to it by the Natives. I was informed that their cultivations were towards the Peninsula at that time. (A8:II:204)¹¹⁸

There is a clear conflict between the evidence of Mantell, who related his discussion about possibly making a reserve at Wairewa and being told that it was within the French block and his verifying this by checking on the map, and Mautai's evidence that "none of us spoke to him". Pohau also claimed to have said nothing to Mantell at Wairewa. Some twelve years later before the Smith–Nairn commission on 17 March 1880, however, Pohau described travelling from Wairewa to Taumutu with Mantell:

Did you see Mr Mantell near Kaitorete? – I saw Mr Mantell at the Little River.

Did you go with him anywhere? – Mantell was going to Taumutu, and on his way I went with Mantell down to Te Puna o Pohau.

At the time you saw Mr Mantell, was that after the purchase of the Ngaitahu Block by Mr Kemp? – Yes, it was after Kemp's purchase.

Was it after Mr Mantell himself had met the people, and had his negotiation with them? – This time Mantell came to mark off the reserves.

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Why did you meet Mr Mantell? – I did not come to meet Mantell at Wairewa. When I came to Wairewa Mantell happened to be there.

Where did you go with Mantell, and what conversation had you with him? – When I came to Wairewa I saw Mantell there. Mantell and I were going back to Taumutu. On our way back we went to this place, Te Puna o Pohau. Then when we got there I said to Mantell – “Taiaroa has a claim to Kaitorete; this land was not sold to Kemp”. Mantell asked me “Where is Kemp’s boundary, then?” and I said “at Otumatua – from Otumatua in a straight line to Taumutu” – That is all that passed between Mantell and myself.

Mr Smith – Was Otumatua the only place you pointed out to Mr Mantell? – I pointed out the boundary at Taumutu, then to Waikirikiri (the Selwyn) and then to Taumutu.

Mr Nairn – Do you know any line on the Kaiapoi side? – Yes; the boundary was from Kaiapoi pa to Otumatua.

Mr Smith – Does the boundary from Kaiapoi go along the beach? – No; it is a direct line from Kaiapoi to Otumatua.

According to you, all the land between this line from Kaiapoi to Otumatua and the beach was not sold? – The beach side of the boundary from Kaiapoi Pa to Otumatua was not sold at all, but the boundary was made from Kaiapoi Pa to Purehurehu. (P14(b):24–27)¹¹⁹

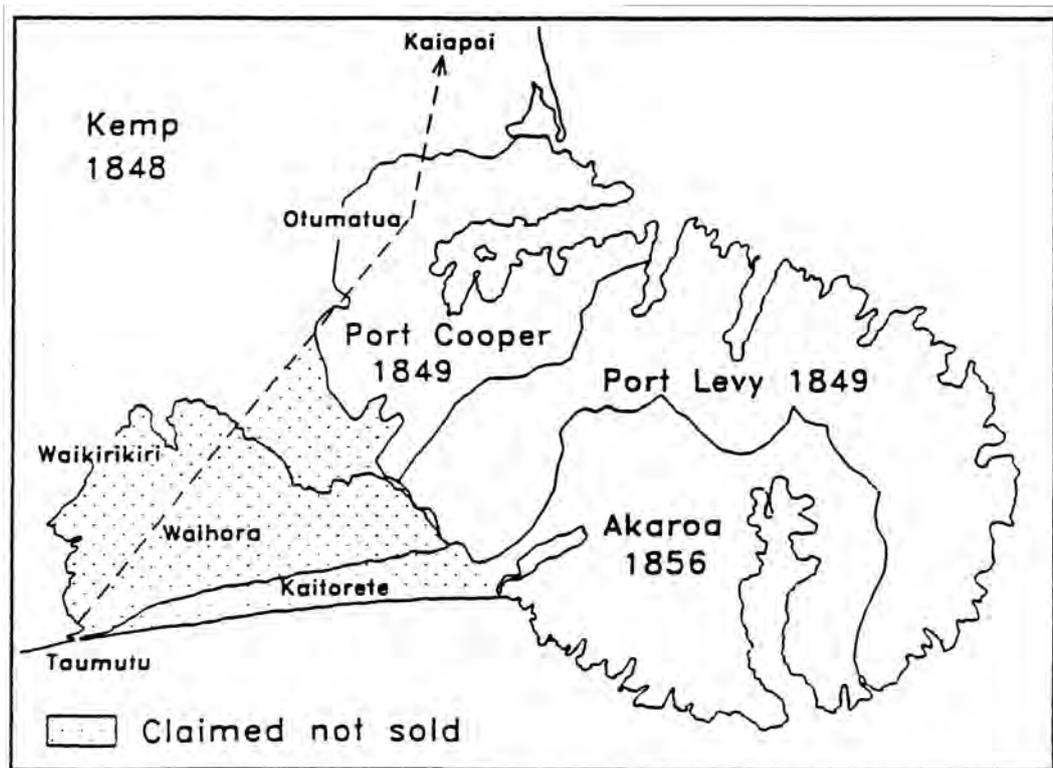


Figure 8.5: The boundary between Banks Peninsula and the Kemp purchase showing Waihora and the line between Taumutu and Otumatua, which the claimants maintained was not included in the Kemp purchase.

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We note that Pohau, in recounting his answer to Mantell's question as to where Kemp's boundary was, replied "at Otumatua – from Otumatua in a straight line to Taumutu". But then, in response to Smith's question of whether Otumatua was the only place he pointed out to Mantell, Pohau is recorded as saying, "I pointed out the boundary at Taumutu, then to Waikirikiri (the Selwyn) and then to Taumutu". We assume Taumutu, where it first appears in this sentence, should read "Otumatua". If not, it is meaningless. If so, it contradicts Pohau's earlier account of a straight line; a line from Otumatua to the Selwyn and then to Taumutu would be triangular in shape and would enclose most of Waihora. By contrast Waruwarutu in 1880 speaks only of a line from Otumatua to Taumutu, cutting approximately two-thirds of the way through Waihora.

- 8.7.5 The claimants based their claim not to have sold most of Waihora and Kaitorete on the evidence of Pohau and Natanahira Waruwarutu before the Smith–Nairn commission. Waruwarutu gave evidence that the back boundary of the Kemp purchase was from Maungatere to Maungaatua. He was then asked by Izard:

Was Kaitorete within the boundaries mentioned? – No.

Then on which side of the Lake (Ellesmere) did the boundary go? – If we were outside, I could point out the direction in which the boundaries went.

Mr Nairn – I want to learn where Otumatua is? – I could point out Otumatua; it is a hill about 20 miles south of Christchurch. The boundary runs through Lake Ellesmere; not through the centre of it exactly, but cutting off a good piece of it, and thence to Taumutu. It runs in a direct line from Kaiapoi to Otumatua and then to Taumutu, and when it gets to the line of the sea it follows the Coast. (B3:3/11:194–195)¹²⁰

Although Waruwarutu does not say so, we infer that he is claiming that this quite detailed description was given to Kemp during the negotiations at Akaroa. From there Kaiapoi, Otumatua and Taumutu would not have been visible. Given Kemp's belief that Kaiapoi was many miles north of Kaiapoi pa and his ignorance of where a spur on the other side of the Port Hills called Otumatua was, he would have had difficulty in comprehending such a detailed specification, assuming it had been given. It is possible that Taumutu, and quite likely Waihora, were pointed out to him on his journeys between Akaroa and Otakou. Waihora was shown on the deed map. He would have sailed quite close to it on both his southern and northern journeys.

We recall that when Waruwarutu was corresponding with the native ministers, FitzGerald and Russell, some 15 years earlier, he made no reference to this boundary discussion during the Kemp negotiations. Whereas in 1880 he was claiming ownership of part only of Waihora, in 1865–66 he was asserting that none of the lake had been sold. We

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find it improbable that in 1848 Ngai Tahu would agree to sell part of Waihora simply because a straight line between two points so divided it. We think it very much more likely that Ngai Tahu would have vigorously insisted on their mahinga kai rights to the whole of Waihora, given its great importance as a source of tuna and patiki to several hapu in the vicinity. It is this topic which Mantell records as having discussed with Ngai Tahu and as having acted in a high-handed manner.

- 8.7.6 Apart from Mantell's 1868 Native Land Court account of his meeting with Ngai Tahu in 1848 at Wairewa and Kaitorete, other records were made by him of events during 1848 and 1849 while these were fresh in his mind. We set out here his journal entry for 23 September, when he arrived at Wairewa and then travelled to Taumutu:

23 September Saturday Taumutu.

Crossed the remaining hills of the peninsula and reached Wairewa by tea a.m. Here tried in vain to engage natives remained in the very dirty Kaika nearly two hours and was at last obliged to send back half of the provisions and set out with the additional assistance of only one native.

In an hour reached the bed of the Waihora, a wide margin of which had been left dry since the opening of its mouth – continued to walk on this until dark when we had reached the point where the narrow spit consisted only of sand hills – walked along for an hour or two. We reached the mouth, crossed in a canoe and took shelter in a rather dilapidated grass hut at the Kaika. (P14(b): 4B:19–20)¹²¹

In his entry for 25 September Mantell recounted, after taking the census, going with Maopo and Pohau to explore Taumutu and crossing the sandy spit to the edge of the Waihora bar. The next two days involved him in setting aside reserves. It is curious that he did not record travelling with Pohau from Wairewa to Taumutu. He described journeying with one unnamed Maori who was acting as a bag carrier and was unlikely to be Pohau. Nor did he mention being told by Pohau or anyone else that the boundary of the Kemp purchase ran through or around the lake, as was much later suggested by Pohau.

In his *Sketchbook No 3* for 1848–1849 Mantell recorded miscellaneous memoranda for his report. Against a side-heading “Eel Weirs” he notes:

Why not specially reserved
Waihora etc. eventually disused
The existence of legal right inconveniences.(X12(a): 25)¹²²

In a letter of 12 April 1866 to Rolleston, Mantell (to whom Waruwarutu's correspondence had been referred) observed:

Bound as I then felt, pending the execution of the new deed which the Government deemed absolutely necessary, to maintain the validity of

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that under comment, I treated with the Natives in all matters connected with their reserves with a high hand, and as if I possessed the unquestionable right to do so. At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no case would I give way upon this point, although unfortunately my difficulty was much increased by their knowledge that at a sale then recently made in this Island, a general reservation of this right to the Natives had been conceded.

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

All that I promised at any place to the Maoris on this subject was, that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans; and this promise I hope the Government may for a time permit to hold good. (A8:I:242)¹²³

We cite this statement here because of the light it throws on Mantell's perception of the ownership of Waihora and the surrounding country, including the Kaitorete Spit. It is implicit in what he said that he discussed the lake and eel fishery questions in the context of the Crown having acquired the lake and spit. We will discuss in another place the totally unjustifiable attitude to Ngai Tahu's rights, to their fisheries and their eel weirs in particular, adopted by Mantell.

Also in Mantell's sketchbook is a map of the South Island showing Mantell's adjusted northern boundary line from east to west and showing also the boundary of Banks Peninsula with a line across Kaitorete a short distance down the spit (X13(a)).¹²⁴ It is apparent from this map, which is Mantell's handiwork, that he considered the Kemp purchase included Waihora and virtually all of the spit.

But Mr Temm for the claimants pointed out to us that when Mantell in June 1849 received instructions from Domett to proceed to Banks Peninsula to negotiate with Ngai Tahu, he made a note which read:

Require map of Peninsula - I took french claim round hills including Wairewa and Kaitorete etc. (G2:320)¹²⁵

Mr Temm submitted that from this it could be inferred that so far as Mantell was concerned the peninsula for which he was to negotiate included both Wairewa and Kaitorete (W1:48). Or in other words, that Kaitorete was not included in the Kemp purchase as part of the Canterbury Plains. But such a construction is at odds with Kemp's deed map which clearly shows Waihora and Kaitorete as included in the purchase. Moreover, it is clearly inconsistent with Mantell's

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views, which we have earlier discussed, and with the boundaries he in fact drew when he later went to Banks Peninsula in 1849.

We note that on Mantell's map of his Port Cooper purchase (M34(f))¹²⁶, the boundary terminates at the western boundary of Waihora excluding both the lake and spit, just as it does on a sketch of the Port Cooper block boundary he drew on a letter of 16 August 1849 to his father (T2:24). In the same way, Mantell's map of the Port Levy purchase (M34(c))¹²⁷ has its boundary on the western edge of Waihora, and it too excludes Kaitorete. The plan in Mackay's *Compendium* (A8:I: following 254), showing the Ngai Tahu claims referred to in Mantell's letter of 28 November 1849 to the colonial secretary (A8:I:255)¹²⁸, is based on a tracing Mantell enclosed with his letter. The plan shows the balance of the land on the peninsula again having a boundary on Waihora and shows a line crossing the head of the spit as being Kemp's boundary. Again both the lake and the spit are excluded.

Finding on grievance no 4(b)

- 8.7.7 After weighing all the available evidence we consider the better view is that Ngai Tahu, in excluding Banks Peninsula from the sale to Kemp, did not intend to exclude Waihora or the Kaitorete Spit. But Waihora was an extremely valuable food resource to various Ngai Tahu hapu in the district. It was exceptionally rich in tuna, patiki, piharau, aua and inaka. There were pipi and large cockle beds. The streams that fed into the lake provided kanakana, inaka and fresh water koura. Putakitaki were also caught on the lake and were important for food. They were gathered when they were moulting and hence unable to fly and herded by canoe into different areas around the lake so different kaika received a share (H9:39–40). Access to Kaitorete was essential to open and close the lake periodically for both fisheries and drainage purposes. It is clear that Ngai Tahu did not intend to part with this treasured fishery. We are satisfied they fully intended to retain unimpeded access to both Waihora and the spit. This they made abundantly clear to Mantell. He deliberately chose to disregard their rights. In doing so he failed to comply with the terms of the purchase which preserved to Ngai Tahu their mahinga kai, and acted in breach of the Treaty. Serious detriment to Ngai Tahu has continued down to the present day.
- 8.7.8 We were deeply impressed with the very real sense of loss and deprivation which the failure of the Crown to preserve Ngai Tahu's rights to the food resources of Waihora has caused past and present members of the Ngai Tahu people. We would recommend that the Crown recognise that it failed to meet Ngai Tahu's legitimate expectations in 1848 and takes appropriate action to remedy the situation.

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Because this issue is so deeply intertwined with Ngai Tahu's mahinga kai, we defer our discussion of how the Crown could work to remedy this grievance to that part of this report.

8.8. **The Provision for Reserves**

Events following the purchase

- 8.8.1 Kemp and Kettle left Akaroa for Wellington on 15 June 1848. They took with them the original deed. Kemp failed to give Ngai Tahu a copy of the deed or attached deed map. Shortly after the HMS *Fly* arrived in Wellington, Kemp called on Lieutenant-Governor Eyre. His written reports were made in instalments on 19, 20 and 21 June (L9:420–427). In his first report Kemp referred to his instructions to purchase the tract of country lying between the Nelson and Otago districts, thereby making one continuous and complete block of land. He advised Eyre that:

The deed of conveyance comprising the district referred to, extending over to the West Coast, was duly executed by the Native Chiefs on the 12th instant in the presence of, & with the consent of the people & I have every reason to believe that the whole of the proceedings gave them general satisfaction. (L9:420)¹²⁹

The next day Kemp discussed the provision made for reserves for Ngai Tahu. He wrote:

with reference to the Reserves intended for the Natives in the newly acquired Block of land between the "Kaikoras" & Otago, that in obedience to the Lieut.-Governor's instructions their Pas & Cultivations have been guaranteed to them as expressed in the Deed of Sale [;] they are generally speaking of comparatively small extent [.] beyond these I have not felt myself authorized in making any guarantee, & with the consent of the people, have thought it better to leave the subject to be considered & decided upon between the Govt. & [New Zealand] Company so soon as the Survey of the District shall take place. (L9:423)¹³⁰

Kemp went on to observe that while there were several Maori settlements on the coastline between Akaroa and Otago the inhabitants were small in number. Because they were widely scattered he envisaged great difficulty in inducing them to concentrate into one or even two blocks. We note in passing that Kemp, unlike Mantell, had no written instructions to attempt to relocate Ngai Tahu into fewer localities. His comment suggests however, that he may have had verbal instructions from Eyre to attempt this. Kemp then noted that, should the government decide to reserve blocks next to each of the settlements, it would cause little or no interference with the New Zealand Company's interest in the survey and division of the district (L9:423–4).¹³¹ Kemp appears here to have in mind the 1847 agreement with the British government under which the New Zealand

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Company was to take control of all Crown lands in New Munster once Maori title had been extinguished.

In his report of 20 June Kemp also discussed Banks Peninsula:

The Natives clearly admit to have sold the whole of Banks Peninsula to the French Company. With the resident Natives chiefly at Port Cooper & Pigeon Bay, I did not think it advisable on this account to enter into any arrangements with regard to the Reserves &c, knowing also that the question was one at present pending between the English & French Govts. My impression is that no definite Reserves were made for them by the French Agent at the time of Sale, & that they continue to occupy the Cultivation Grounds they formerly did & without any limitation whatever. (L9:424)¹³²

In his third report of 21 June 1848 Kemp explained why he had agreed to pay the remaining £1500 due under the deed by half-yearly rather than yearly instalments. He recommended that half of each future instalment should be paid over to Tikao at Akaroa and the other half to Tairaroa at Dunedin, in each case on behalf of the tribe and in their presence. This arrangement, he said, had been proposed by the chiefs “in the presence and with the consent of their people” (L9:426–7).¹³³

Kemp incurs Eyre’s displeasure

8.8.2 The lieutenant-governor lost no time in advising Kemp of his great concern and dissatisfaction with the way Kemp had managed the purchase. On 21 June, the day of Kemp’s third report, Eyre, through Gisborne his secretary, told Kemp:

that upon perusing these Documents [Kemp’s first report and the deed] he has learnt with surprise and very great regret that you have altogether deviated from the instructions which were given you for your guidance, and have left unsettled the very points you were sent to adjust. (L9:428)¹³⁴

A footnote acknowledged the receipt of Kemp’s second and third reports after the main letter had been written, but Eyre was unable to see in them “any explanation whatever given of the total disregard of your instructions”.¹³⁵ Eyre’s letter was characteristically lengthy and discursive. It levelled numerous charges against Kemp. We will discuss only the more significant.

(a) Eyre complained that the deed of purchase had been made between Ngai Tahu and the New Zealand Company instead of the Crown (L9:433). This was indeed unfortunate, given that the Crown had not waived its right of pre-emption. Kemp was held responsible. As he pointed out in his reply to Eyre of 22 June, in which he dealt with all Eyre’s complaints (L9:428–437)¹³⁶, the deed had been drafted by Daniel Wakefield, the Crown solicitor. He, not Kemp, was responsible for the blunder.

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(b) Eyre was disturbed at Kemp's recognition of Ngai Tahu title to the whole of the area purchased. "It was never contemplated by HM Government," he complained, "that the very few individuals within the limits referred to should be considered the owners or occupiers of that immense District" (L9:429).¹³⁷ Eyre alleged he had expressly warned Kemp against:

the error of acknowledging a validity of title in the few resident Natives to vast tracts, the larger portion of which had probably never even been seen and certainly never been made use of by them.(L9:428)¹³⁸

We would observe that Eyre lacked an appreciation of the extent of Ngai Tahu familiarity with their extensive lands. All rivers, mountains, lakes, notable physical features and localities had long since been known to and named by Ngai Tahu. They had a network of trails, including crossings over the Southern Alps. They hunted and foraged extensively throughout their large domain.

Kemp responded by pointing out that Ngai Tahu believed "that they, & they only, were the Proprietors of the land". Moreover, "the mere fact of entering into a negotiation with the Natives for the purchase of the district in question, implies a recognition of their rights to the whole". In any event, Ngai Tahu had ceded "*all their lands*, that is to say, *their rights of ownership* in the lands described in the Deed and Plan annexed" (L9:439)¹³⁹ (emphasis in original)

(c) A much more serious complaint in our opinion related to Kemp's failure to carry out his instructions to reserve to Ngai Tahu "ample portions of land for their present and prospective wants", then to mark off the boundaries of these reserves, and only then to purchase the remainder of their land. Kemp, as we have seen, failed to comply with these instructions. Ample portions of land for their present and prospective wants were neither reserved nor marked off.

Kemp sought to justify this fatal dereliction. He claimed his action, in guaranteeing in the deed pa and cultivations, with such other additional reserves as the government might think desirable to make for them when the survey took place, was the only arrangement he could make with any degree of satisfaction to Ngai Tahu. He justified the course he had adopted principally on the grounds that the weather made the six month journey of 200 miles of coast in the depth of winter over country intersected with scarcely fordable rapids, a most hazardous undertaking. In the result he did not actually set foot on a single piece of the vast territory he had acquired.

8.8.3 We can well understand Eyre's concern at Kemp's failure to obey his instructions. On Kemp must rest substantial responsibility for initiating the ensuing 140 years of Ngai Tahu disillusionment at the failure

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of the Crown and its agents to treat with them fairly and in good faith. But in fairness to Kemp, it must be said that he could not have anticipated that his successor, Walter Mantell, would have failed so lamentably to provide adequate reserves for the present let alone future needs of Ngai Tahu. Had Mantell acted otherwise and provided ample reserves for Ngai Tahu, much of the potential for great harm to Ngai Tahu resulting from Kemp's actions would have been largely, if not entirely, mitigated. Nor should Kemp be held responsible for the action of his superiors, Eyre and Grey, in endorsing Mantell's niggardly allocation of reserves.

- 8.8.4 Eyre wrote a lengthy despatch to Governor Grey. He told Grey that Kemp had acted in "direct disobedience of his instructions upon all the more important points connected with the Negotiations entrusted to him" which he went on to itemise (L9:397–415).¹⁴⁰ Grey, however, was not greatly perturbed. On 25 August 1848 he reported to the colonial secretary and said:

It may, however, be sufficient for me to say, that although I regret Mr Kemp should have departed from his instructions, I still do not view his proceedings in so unfavourable a light as the Lieutenant-Governor does; and I entertain no doubt that the transaction has been fairly and properly completed, and that the arrangements since adopted by the Lieutenant-Governor will satisfactorily dispose of any questions which might have resulted from any informalities in Mr Kemp's proceedings. I speak with the more confidence on this subject from my personal knowledge of the Natives concerned, and from my acquaintance with their views and wishes. (L9:16)¹⁴¹

Promises not in the deed

- 8.8.5 The deed of purchase did not contain all of Kemp's promises. In Kemp's own translation of the deed which he originally wrote in Maori (8.4.11) it was provided:

that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the land shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land . . . (L9:416–418)¹⁴²

In a memorandum of June 1876 from Kemp to Chief Judge Fenton, Kemp said:

And in reference to that part of the deed which refers to the setting apart of further reserves by the Government, I think that the impression on my mind, and on the minds of the Natives made at the time, was, that the provision hereafter to be made was one which was to be carried out in a liberal spirit, and in such proportions as to meet the wants and provide for the general future welfare of the Natives resident at the different settlements at the time the purchase was made. (L9:602)¹⁴³

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8.8.6 In May 1879 Kemp was examined in some detail by the Smith–Nairn commission about his discussions with Ngai Tahu before the sale as to the provision of reserves. He described several meetings and discussions. Among matters raised were:

- an assurance by Kemp that with the arrival of a large body of settlers, the value of the land retained by Ngai Tahu would increase substantially; this would give the major chiefs income and property which could be handed down to the next generation;
- that when summer came a survey would be made and “ample” reserves set apart for Ngai Tahu in such localities as was agreed on; and
- promises by Kemp that their eel weirs would be retained along with sheltered landing places “in a more or less fair proportion” (L9:80–81).¹⁴⁴

Later he was further questioned and the following additional points were made:

(a) He agreed he had promised reserves which would also be ample for their prospective wants.

(b) By prospective wants Kemp explained that he referred to Ngai Tahu’s habit of clearing new lands after having cropped a field for two or three years. So he promised that:

a sufficiency of land was to have been set apart for them under that particular heading, that is to say “Mahinga Kai” that is to say grounds fit for cultivation of their crops and to extend over any period of years, in order to give them ample time to clear on and bring in new fields for their special use. (L9:87)¹⁴⁵

(c) He confirmed that these reserves were quite distinct from and in addition to the reservation of their pa and cultivations around their pa.

(d) They were also in addition to and distinct from the other reserves to be made by the government after the survey.

(e) The reserves to be set aside by the government would, Kemp said, “*in course of time be an endowment of very large proportions and dimensions*” (L9:86–88).¹⁴⁶ (emphasis added)

(f) Questioned further about landing places, Kemp said they were to be of “very small extent” (L9:91) and that they would be used in common with Europeans, not exclusively (L9:99–100).¹⁴⁷

8.8.7 Kemp made it very clear in his evidence to the Smith–Nairn commission that three categories of reserves would be made for Ngai Tahu and that these were discussed with Ngai Tahu chiefs before the deed

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was signed. First, their kainga and adjacent cultivations; secondly, additional land for fresh cultivations in the future; thirdly, additional reserves which would constitute an endowment of “very large proportions and dimensions”.

We would observe:

- that the deed makes no express provision for the second category, which Kemp saw as falling within the term “mahinga kai” in the Maori text; and
- that whereas the deed, at least in its English translation, leaves it to the discretion of the government as to whether the third category of reserves would be provided and makes no reference to their size, it is clear that Kemp assured Ngai Tahu that such additional reserves of “very large proportions and dimensions” would in fact be provided.

No doubt Kemp assumed that when the weather improved he would be sent back to complete the purchase by supervising the survey of the reserves as he had discussed them with Ngai Tahu. He appears not to have anticipated Lieutenant-Governor Eyre’s angry reaction to the way he had conducted the purchase. How much he told Eyre of the promises he had made following his discussions with Ngai Tahu we do not know. Eyre resolved that he would dispense with any further assistance from Kemp.

Mantell’s appointment to complete the purchase

8.8.8 Without first consulting Governor Grey, Eyre decided to appoint Walter Baldock Durrant Mantell to conclude “the arrangements with the Natives” (M3:8).¹⁴⁸ Mantell was the son of a prominent English geologist. After studying medicine at London University (but before gaining a degree) he emigrated to New Zealand. Mantell was nineteen when he arrived in January 1840. Following a brief period of employment with the New Zealand Company he joined the civil service. He was a magistrates’ clerk in 1841, and a postmaster in 1842. In 1845 he was involved in the construction and maintenance of military roads in the Porirua district. By 1848 Mantell could speak Maori reasonably well but was less proficient in reading or writing the language. Mantell was offered the position of “Commissioner to Extinguish Native Claims in the Middle Island” on 2 August 1848. He would be required:

to make an overland journey from Akaroa to Otakou, in company with a Surveyor who will be appointed to attend him, delaying at such places and for such time as may be necessary to *mark on the ground* and map the Reserves which the Commissioner may consider it requisite should be set apart for the Natives who may be found resident within the limits

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of the District to which his negotiations relate. (M3:89–90)¹⁴⁹ (emphasis in original)

Mantell accepted the same day (M3:1).¹⁵⁰

Mantell's instructions

8.8.9 Mantell's written instructions were set out in a letter, also of 2 August 1848, written on Eyre's behalf by J D Ormond, one of his secretaries (M3:91–102).¹⁵¹ These stated that Mantell's primary duty as commissioner was:

to complete the negotiations connected with the purchase of certain Districts of land in the Middle Island which were partially entered upon by Mr Kemp in June last. (M3:91)152

Enclosed with the instructions were Kemp's original reports, a copy of Eyre's letter to Kemp "pointing out the particulars in which Mr Kemp had either deviated from his Instructions or had failed to carry them out" (M3:92)¹⁵³ and extracts from Kemp's instructions of 25 April 1848.

Mantell was required to traverse the whole of the district "between the Ngatitua boundary line & that of the Otakou block". He was to see all Ngai Tahu, or at least the principal men. And he was to decide upon and see marked on the ground "the various Reserves which you may consider necessary to be set apart for the use of the Natives" (M3:93).¹⁵⁴ This appears to leave the discretion as to the number and extent of reserves with Mantell. Eyre continued, "you will be guided by the following considerations", namely:

That Mr Kemp guarantees to the Natives in the Deed of Sale executed by them "that their places of residence & plantations are to be left for their use & the use of their Children" and provides further that other additional Reserves to be determined on by the Governmen[t] should also be set apart for the same purpose; to the first class of Reserves therefore they are strictly & literally entitled. (M2:23)155

Eyre feared that "the existence of innumerable small & irregularly shaped Reserves dotted all over the country" would create difficulties in laying out the land for settlers. He required Mantell to:

use your influence to induce the Natives to take their Reserves in as few localities as possible, in as limited a number of Reserves in each locality as you can persuade them to agree to, & in as regular shaped blocks as circumstances will admit of.

Much may be done towards accomplishing this by inducing the Natives of very small settlements to unite in taking their Reserves at one locality & by getting them to consent to give up the smaller patches of cultivations, in exchange for additional land nearer the larger ones: A liberal provision being made both for their present & future wants & due regard shewn to secure their interests & meet their wishes. (M3:94–95)¹⁵⁶

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Although not entirely clear, it appears from this passage that Mantell was being required to make provision for the additional reserves as well as appropriate provision for their kainga and cultivations. In any event Mantell had the deed with him and was well aware of its provisions as to reserves.

8.8.10 In addition to the directions as to reserves, Mantell received further instructions:

(a) He was to have another deed executed before the second instalment of purchase money was paid. This was to substitute the Crown for the New Zealand Company as purchaser (M3:96).¹⁵⁷ Eyre, on instructions from Grey, later countermanded this direction.

(b) He was to note the names of all the Ngai Tahu settlements within the block purchased, take a census of the number of Ngai Tahu of all ages and record the hapu to which they belonged and the principal chief acknowledged by them. Also the names of the principal or most influential men in each settlement were to be noted.

(c) He was to find out how the £500 paid by Kemp had been distributed. When he paid the second instalment at Akaroa he was not to hand over the sum to any one or two individuals as was done by Kemp. Instead, he was to divide the money into as many portions as there were hapu or kainga. The principal men of each community were to be responsible for further subdivisions.

(d) He was to mark out the lands to which the French company and John Jones of Waikouaiti were entitled. Before doing so he was to ensure that suitable and sufficient reserves were set apart for Ngai Tahu; the boundaries distinctly marked and the plans given to them. Eyre referred Mantell to the deed map and other documents for information concerning the Nanto-Bordelaise situation, and he outlined the way Jones was to be dealt with as follows:

after you have set apart such Reserves as you may deem suitable & sufficient for the Natives, that Gentleman [J Jones] is to be allowed to select the quantity of land to which he is entitled wherever he may choose in the vicinity & in as many separate Blocks as he may please, *not exceeding three*, the aggregate number of acres of which shall not be greater than what he is authorised to retain. (M3:100)¹⁵⁸ (emphasis in original)

At this stage Jones was allocated 2650 acres but, as we have seen, this was later substantially increased.

The allocation of reserves was to be such as Mantell might “deem suitable and sufficient” for Ngai Tahu. Mantell, not Ngai Tahu, was given the power to decide. This of course clearly illustrates the greatly weakened position Ngai Tahu were placed in as a result of Kemp’s

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failure to carry out his instructions to settle reserves with Ngai Tahu first before purchasing the remainder of their land. Had that course been followed they would have been in a very much stronger position to insist that they retained land they did not wish to sell.

Towards the end of his instructions Mantell was told:

One other point the Lieut. Governor would earnestly press upon your attention & that is the great necessity of exercising the most untiring patience and indefatigable perseverance in all inquiries or discussions with the Natives both in ascertaining their respective rights & interests & in winning them to acquiesce in such arrangements as *you may consider most just & best*. (M3:101)¹⁵⁹ (emphasis added)

The Crown historian, Dr Loveridge, commented that “Any arrangements within the spirit of these instructions would have ‘completed’ Kemp’s purchase in a manner acceptable to both parties” (M2:27). In our view this is very questionable. Mantell’s mandate was to persuade Ngai Tahu to “acquiesce in such arrangements as [Mantell] may consider most just & best”. Mr Evison in commenting on this instruction rightly said that, “Eyre thus deliberately left the initial decision as to reserves to Mantell” (O46:31).

Mantell journeys south

8.8.11 Mantell was accompanied on the voyage to Akaroa by Eyre and the surveyor Alfred Wills. The Fly left Wellington on 6 August (M2:28).¹⁶⁰ At Akaroa on 22 August Eyre gave Mantell additional instructions:

(a) Until further advice Mantell was not to set aside reserves for Ngai Tahu on Banks Peninsula but in all other parts between “Kaiapoe and the Otakou Purchase you are to mark off all the Reserves which *you may considere necessary*, in accordance with the general tenor and spirit of the instructions referred to.”¹⁶¹ (emphasis added)

(b) Secondly, “Kaiapoe” being the southern boundary of the “Ngatitoea Purchase”, Mantell was not to set apart any reserves to the north of that point, but as there was reason to believe that a considerable number of Maori wished for their reserves in that immediate neighbourhood, Eyre wanted Mantell “to endeavour to meet their wishes and requirements by appropriating as reserves, for their benefit, such land as they may desire, and *as you may consider it equitable for them to possess south of Kaiapoe*”. (M3:112–114)¹⁶² (emphasis added)

Here again it was for Mantell to judge what reserves he considered it equitable for Ngai Tahu to possess south of Kaiapoi. The spelling of “Kaiapoe” closely resembles the “Kaipoe” on the Nelson Crown grant (L:19) which suggests Eyre may have had it with him.

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8.8.12 The following instructions were given by the New Zealand Company to their surveyor, Wills:

Should any block of land proposed to be reserved for them [Ngai Tahu] exceed in size, or be shaped in such a manner as in your opinion would be likely to cause inconvenience, by scattering the land to be offered for choice to the Company, or in any other way oppose the concentration of the [European] purchasers in districts, hereafter to be surveyed, and increase the outlay necessary for the making of roads of communication, I wish you to represent to the Commissioner the evils that might result from such a mode of proceeding. (M2:32, n1)¹⁶³

It is apparent that the New Zealand Company hoped that the convenience of the future settlers would have precedence over the rights of Ngai Tahu.

Grievances as to reserves (nos 2 and 3)

8.8.13 The following grievances of the claimants are central to this claim. We state them now before we discuss the provision made by Mantell for reserves. They are:

- That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemp's purchase, in particular –
 - (a) Ample reserves for their present and future benefit were not provided, and
 - (b) Their numerous mahinga kai were not reserved and protected for their use.
- That the Crown declined the Ngai Tahu request to exempt from the sale the area between the Waimakariri and Kowhai rivers, or to reserve it for their future exclusive use, to which they were entitled under article 2 of the Treaty.

The request for a reserve between the Waimakariri and Kawari

8.8.14 While Eyre and Mantell were at Akaroa they held preliminary discussions with Ngai Tahu belonging principally to the Ngai Tuahuriri hapu. It was during these discussions that a request for an extensive reserve was made. We have already briefly discussed Mantell's mistaken reference to the Kowai as the northern boundary of this reserve in his testimony to a parliamentary select committee in 1888 (8.5.27). In his testimony to the Smith–Nairn commission, Mantell readily acknowledged that his memory of details was somewhat faulty:

they demanded a reserve beginning, I think, at the Heithcote [sic] and extending north to the Kowai, but I have no doubt there are natives present who will remember that better than myself. (L9:111–112)¹⁶⁴

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This confusion about the northern boundary has continued to the present day. In their grievance the claimants themselves have listed the request for the reserve as being “between the Waimakariri and Kowhai Rivers”.

Yet contemporary evidence bears out the fact that the reserve demanded was indeed bounded on the north by the Kawari which Mantell describes in his *Outline Journal* as “a small brook – and at a distance of 5 or 6 miles from our camp [at Tuahiwi]” (M3:136).¹⁶⁵ The Kowai is a much larger river and lies further north. In his sketchbook, Mantell noted that a block “from the Kawari to the Domett right across” was demanded (X12(b):141).¹⁶⁶ We take the Domett to be the Waimakariri as his report of 21 September 1848 related “their demand was for a tract of country bounded by the Kawari and Waimakariri Rivers, to extend thence, of the same width, across the Island to the West Coast” (L9:20).¹⁶⁷

Although this makes a substantial difference to the area of the requested reserve, as the Kowai lies approximately 15 kilometres north of the Kawari, the issues involved in the above grievance are unchanged. Bearing the alteration of the boundary in mind, we continue to consider the grievance.

- 8.8.15 Although the claimants do not specify the western boundary of this reserve in their grievance, maps produced by Mr Evison suggest that in their view this request was only to extend to the foothills. Given Mantell’s repeated assertions that Ngai Tahu asked for a coast to coast reserve, it would appear that Ngai Tahu wanted to reserve a very substantial strip of land right across the island. We are unable now to determine just how this reserve would have stretched across the island. We think it likely that it would have followed Ngai Tahu’s traditional trails to their mahinga kai in the interior and to the pounamu resources of Arahura.

Mantell refused to agree to set aside a reserve of these dimensions. The following testimony to the Smith–Nairn commission outlines Mantell’s justification for not acceding to Ngai Tahu’s request:

I submitted to the Lieut-Governor that if that reserve were made, it would be necessary to reserve similar belts at every kainga I came to down the coast, and inasmuch as the Government pledged itself to make ample provision for the future wants of the natives, it would be better to allow me to try what was the limit, the extent, within which I could induce them to take reserves in the first instance, than at once to concede a point of that sort, which might really be of more harm than good to them. (L9:112)¹⁶⁸

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Mantell here appears to be proposing to Eyre that he should be left to try to get Ngai Tahu to agree to as small an area as he could persuade them to accept.

We will let Mantell describe for himself (as recorded in his *Outline Journal*) the course of events. In his entry for 2 September 1848, after noting the above request for a reserve from Waimakariri to Kaiapoi (pa) across the island, he continued:

. . . Having combatted this notion I set out with them for the sandhills to shew what I would consent to give them arrived at the sandhills I led them on till the N. point of the bush bore N W from me and pointed out the limits of the reserve almost as it was eventually settled.

A great consultation followed ending in their declaring themselves content. On this I called several times on any dissentient and none appearing requested Mr Wills to commence the survey. I remained with the natives till they returned to the camp.

3 Sept. Sunday. Camp.
In camp.

4 Sept. Monday. Surveying towards Waituери.
The Survey proceeds. Two or three old men not understanding the erection of a pole at their huts at Waituери threw it away with the others which the man carried. I went down lectured them explained the use of the pole and remained there.
Very excited speeches all night.

5 Sept. Tuesday. Surveying towds. Kawari.
Stopped by Hau.
Surveying on the North Boundary towards the Kawari. Fixed the remaining boundaries and returned with natives to the Camp. Metehau set fire to the men's hut attempted to pull the tent down and was about to attack me with a tomahawk but was prevented by the other natives. In the course of the Night's talk he succeeded in winning many to his side.
Midnight. Wrote to the Private Secretary.

6 Sept. Wednesday. Port Levy natives left.
Survey completed.
Most of the Port Levy natives left. Metehau went early in the morning leaving an anonymous letter demanding ten thousand pounds for the land and a promise that unless I extended the limits of the Reserve to some point on the Kawai [sic] he would return and throw down all the poles.

The Survey completed – I told the natives this morning that Kaiapoi [pa] should be a Govt. reserve as I could not wait to survey it. They were perfectly satisfied. (M3:137–138)¹⁶⁹

In his sketchbook of the same time, Mantell noted their demand for a tract of land to run right across the island:

About ½ past 10 set out for the sand hills. The natives demanded a block from K. North to the Domett S. to run right across the island and stated themselves [resolved] to take nothing less. [Arrived] on the sand hills they demanded from the Kawari to the Domett right across.

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

the second te Wera for them the S. Pa – Kiaka[sic] contains Maras – these for the maoris the [rest] of the bush for [him].

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

K. to be also reserved.(X12(b):141)¹⁷⁰

- 8.8.16 It is apparent from Mantell's own record that the area surveyed off as a reserve at Kaiapoi met strong opposition from the Ngai Tahu people concerned. Their request for a very extensive reserve was summarily dismissed. Instead they were allocated a reserve of 2640 acres for a population, estimated by Mantell, of 229, averaging 11.53 acres per person. Ironically it was a similar area as that awarded and later set aside by Mantell in three separate blocks for one man, John Jones, at Waikouaiti. The Kaiapoi reserve was to be the largest set aside by Mantell under Kemp's deed.

As Mr Temm submitted, Mantell's refusal to grant the reserves Ngai Tahu were asking for was a major cause of their protests at the time. Evidence before us showed that the land between the Waimakariri and Ashley Rivers back as far as the source of the Ashley in the foothills, contained some 220,000 acres. This land, much of it being that requested by Ngai Tahu as a reserve, was later initially divided among just 13 European runholders. Mr Evison summarised the holdings from information in L G D Acland, *The Early Canterbury Runs*, (4th ed 1975) as follows:

View Hill (1851) 20,000 acres, Burnt Hill (1851) 7,400 acres, Ashley Gorge (2 runs, 1852 and 1859) 15,000 acres, Carleton (1851) 8,000 acres, The Warren (1852) 12,000 acres, Dagnam (1854) 9,000 acres, Worlingham (2 runs 1852 & 1853) 16,000 acres, Murphy's (1851) 14,000 acres, Eyrewell (1853, 2 runs) approximately 15,000 acres; and in addition, adjoining the 2,560-acres Tuahiwi Maori reserve, were the Wai-iti Run of 11,000 acres with two runholders (Acland p 65), Springbank of 23,000 acres (Acland p 75–6), and Fernside of 20,000 acres (Acland p 77–8), Torlesse's station. (S24:3)

Finding on grievance no 3

- 8.8.17 When, in pursuance of the Kemp deed, Mantell came to set aside reserves, Ngai Tahu made it very clear that they wished to retain a block of land between the Waimakariri and the Kawari. Kemp had promised them that they would be able to retain ample reserves for their present and future needs. Mantell was instructed by Eyre to

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make a “liberal provision . . . both for their present & future wants & due regard shewn to secure their interests & meet their wishes” (M3:95).¹⁷¹ In our view Mantell was obliged to respect and give effect to the Ngai Tahu wish to retain the block of land indicated. It was in no way an unreasonable request. Mantell failed to do so. Instead he arbitrarily allocated them a mere 2640 acres for the Tuahiwi reserve at Kaiapoi. Article 2 of the Maori version of the Treaty preserved to Ngai Tahu tino rangatiratanga over their land. The English version of the same article confirmed and guaranteed to Ngai Tahu the full exclusive and undisturbed possession of their land so long as they wished to retain it. Ngai Tahu made it abundantly clear to Mantell that they wished to maintain rangatiratanga over this land; they wished to retain it. Mantell, as the Crown’s agent, was obliged to respect Ngai Tahu’s wishes. But he failed to act in accordance with the Crown’s obligations under the Treaty and his superiors Eyre and Grey, who endorsed his actions, failed likewise.

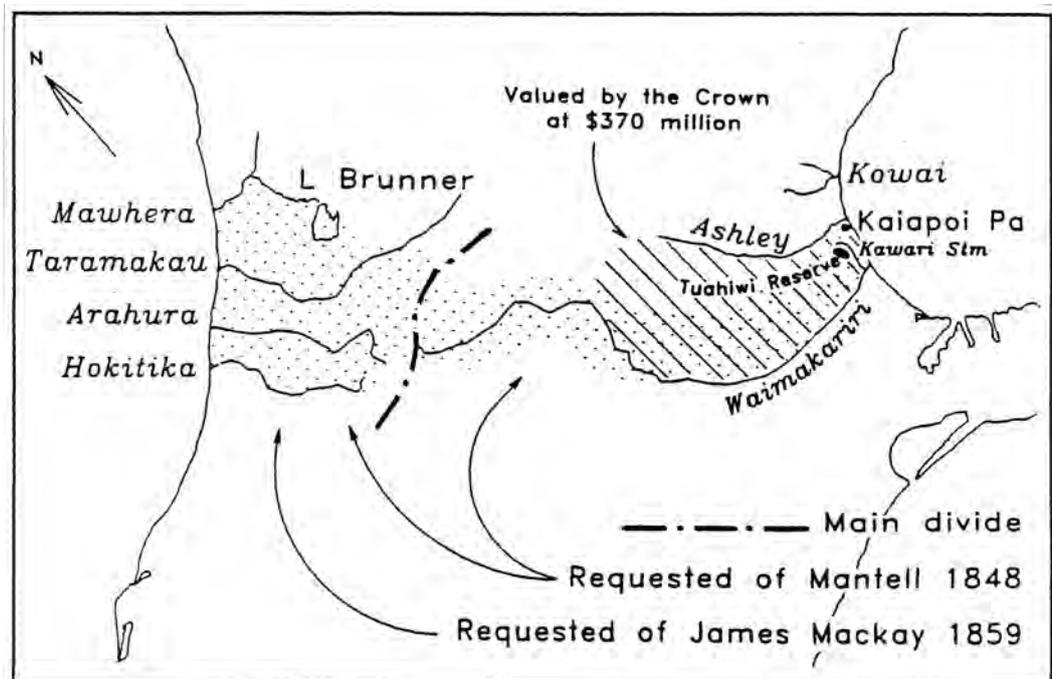


Figure 8.6: The possible area of the land Ngai Tuahuriri wished to exclude from the Kemp purchase. The boundaries are now impossible to determine, but the area appears to have crossed from coast to coast to preserve Ngai Tahu access to mahinga kai and pounamu. The reserve could have swung further south to include other important mahinga kai, such as that at Lake Coleridge.

*Kemp's Purchase****Finding on breach of Treaty principle***

- 8.8.18 The tribunal upholds the claimants' grievance no 3, that a larger reserve was denied Ngai Tahu, to be a breach of article 2 of the Treaty. However, the width of this reserve was determined by the Waimakariri and the Kawari, north of Tuahiwi, not the Kowhai as identified by the claimants. Although the exact boundaries of this reserve cannot be identified, it clearly was intended to run from coast to coast. It was likely that this strip was to be reserved to preserve Ngai Tahu's access to mahinga kai in the interior and to pounamu on the west coast. It is also possible that the request by Poutini Ngai Tahu to reserve some 220,000 acres between the Grey, Kotukuwakaoka and Hokitika Rivers in 1859 was related to this request. Clearly Ngai Tahu have been detrimentally affected by the Crown's breach.
- 8.8.19 The Crown called evidence from Mr D J Armstrong, a registered valuer. Mr Armstrong was asked by the Crown to value an area of land between the Waimakariri and Ashley Rivers, the western boundary being defined as a line running from the downstream end of the Waimakariri gorge to a similar point on the Ashley gorge. Although the area of land requested by Ngai Tahu was a great deal larger than this, it included a good part of this block. The area valued was stated by Mr Armstrong to encompass some 220,000 acres. It was valued by him at £205,000 as at 1848 (Q14:23–26). In answer to a question by Mr Temm, Mr Armstrong expressed the opinion that the present value of the 220,000 acres is \$370 million. This calculation is based on "prairie" value, that is the value of the land in its natural state without improvements of any kind, such as clearing, grazing, fencing, subdivision and roading or community provided assets.

Mantell's reserves

- 8.8.20 Following the laying out of the Tuahiwi reserve at Kaiapoi Mantell and the surveyor Alfred Wills travelled southwards. Between 1 September and 9 December 1848 they set out 15 reserves or sets of reserves along the eastern coast within Kemp's block. The table on the following page is derived from Mantell's own "Table of Population, Reserves, Payment, &c., Ngaitahu Block August, 1848 to January, 1849".
- 8.8.21 In addition to the large reserve between the Waimakariri and Kawari sought by Ngai Tahu and declined by Mantell, other requests for reserves were declined. Thus in a sketchbook Mantell referred to:

Their wanting grounds reserved for Kauru & forests for cooking it – other forests for weka hunting-whole districts for pig runs,

Kaiapoi, 2 of Greenwoods sheep [] lambs Natives wanted a run of some thousand acres for them. (X12(a); sheet 25)¹⁷²

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These various examples are a clear indication that Ngai Tahu were seeking extensive reserves for foraging and hunting (mahinga kai) almost certainly in the interior. In addition “some thousand acres” were wanted for grazing sheep. All this was denied them by Mantell.

Mantell's Reserves				
Reserve No(s).	Reserve Name(s)	Pop.	Acres Res.	ac. per person
1	Kaiapoi-Tuahiwi	229*	2640	11.53
2	Kaikainui	10	5	0.50
3&4	Te Taumutu	16	80	5.00
5,6,7&8	Arowhenua	86	600	6.98
9&10	Waitaki	31	389	12.55
11	Kakanui	12	75	6.25
12	Moeraki	87	500	5.75
13	Waikouaiti	121	1800	14.88
14&15	Purakaunui	45	270	6.00
Totals		637	6359	9.98

(* Estimated belonging to district) (M3:68–69)¹⁷³

8.8.22 In the end Ngai Tahu were left with a mere 6359 acres or 9.98 acres per head out of the 20 million acres involved in the Kemp purchase. What was the reason for such a disastrous outcome? The primary responsibility was that of Mantell. Let him explain how it happened in his own words:

(a) In evidence to the Native Land Court Mantell commented on various reserves:

As to reserves generally (27 April 1868)

I consulted their wishes as to an arrangement as to locality. In quantity, I contended with them. I was instructed to abandon outstanding cultivations, and consolidate them. (A9: 9:34)¹⁷⁴

Arowhenua reserve (6 May 1868)

133. [By the Court] What do you mean by “sufficient”? – At that time my estimate was Colonel McCleverty’s, whom I consulted. *The idea was enough to furnish a bare subsistence by their own labour.*

134. When a man became old and could not work? – I am not prepared to justify McCleverty’s estimate or defend it.

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135. On what ground do you think the reserve made by you sufficient (under second clause) to satisfy the honour of the Crown? – I have not said that I thought the reserve sufficient to satisfy the honour of the Crown, but, according to McCleverty's opinion, sufficient to live upon. Colonel McCleverty held a high official position. (A9: 9:36)¹⁷⁵ (emphasis added)

Purakaunui reserve (15 May 1868)

I found a certain number of Natives resident at Purakaunui, and then fixed the reserve at the smallest number I could induce the Natives to accept. There were 45 Natives, men, women, and children, just 6 acres a head . . .

The reserve at Purakaunui was sufficient for their immediate wants; I left their future wants to be provided for. I was not then able to make an estimate, and I took McCleverty's opinion. He said 10 acres, and I gladly embraced that standard. The reserve was made, not so much as fulfilling either clause of the deed, as the smallest quantity I could get the Natives to agree to. (A9: 9:37)¹⁷⁶

Mantell then referred to his promise that the government would make schools, build hospitals, and appoint officers to communicate between them and the government. "I found these promises of great weight in inducing the Natives to come in – but these promises have not yet been fulfilled."¹⁷⁷ A little later Mantell said:

The reserves may be looked upon as the result of a struggle, in which I got the land reduced as much as possible. I used to tell the people that if they were dissatisfied they must appeal to the Governor, and in one case (Waikouaiti) this was done, and they got an immediate increase. (A9: 9:37)¹⁷⁸

(b) In evidence before the Smith–Nairn commission on 15 May 1879 Mantell was asked if he had some principle on which he made the selection of reserves, to which he replied:

At that time it was what I considered a principle – that was to get them to accept as little as they possibly could, to leave a considerable area for the benevolence of the Government hereafter. (L9:120)¹⁷⁹

In later evidence given to the Smith–Nairn commission on 19 January 1880, Mantell confirmed his reliance on McCleverty's notion of 10 acres per person and that he "had commenced by giving them as little as they were contented with for the moment" (L9:367).¹⁸⁰ Another reason he gave for such a minimal allocation was that it would place as few obstacles as possible on the surveying and laying out of the remainder of the land for settlement by Europeans. He also pointed out that while he persuaded Ngai Tahu to give up outside cultivations after they got their crops in, Ngai Tahu "complained of the reserves as being too circumscribed" (L9:365–368).¹⁸¹ This is inconsistent with the earlier suggestions that he obtained their agreement to his reserve allocations. Agreement in Mantell's terms appears to have been no

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more than Ngai Tahu's restraint in not attacking Wills or himself and preventing the surveys from taking place.

- 8.8.23 It is labouring the obvious for us to point out that Mantell, throughout his mission, acted in a manner totally inconsistent with good faith and completely at odds with the Crown's duty under the Treaty to ensure that Ngai Tahu retained the land they did not wish to sell, and had reserved to them on a liberal basis sufficient lands for their present and future needs. The Crown must accept responsibility for the actions of its commissioner even though, as we will show, his reports to his superiors may well have been misleading if not false in some material particulars.

Eyre further varies his instructions to Mantell

- 8.8.24 On 4 October 1848 the lieutenant-governor wrote to Mantell on Grey's instructions. Mantell was told first that the governor no longer wished him to have a new deed signed by Ngai Tahu (substituting the Crown for the New Zealand Company); secondly not to disturb the arrangements made by Kemp for future payments of the purchase money to be made half-yearly and, thirdly:

You are only to mark out Reserves around (and including) Pah's, residences or cultivations, to the extent that may be necessary for the resident Natives, but you may inform them that the Crown will hereafter mark out for them such additional Reserves as may be considered necessary for their future wants.

In reference to the last clause, I need hardly remark that it cannot be applicable to any Reserves you may have already defined, such will of course remain undisturbed & final, but in all Reserves you have yet to make after receiving this communication you should confine the extent to such limits as are comprehended in the terms of the Clause above given. (M3:116–117)¹⁸²

Mantell did not receive this letter until after he had completed laying out all the reserves and had returned to Akaroa from Otago late in December 1848. In his lengthy report of 30 January 1849 Mantell noted that, on his arrival at Akaroa on 23 December, he had received the lieutenant-governor's letter of 4 October 1848 "altering in some points the instructions on which I had previously been acting" (M3:57).¹⁸³

- 8.8.25 Mantell replied to Eyre's letter of 4 October the day he received it – 23 December 1848. After acknowledging receipt of the letter and noting the first and second clauses, he said:

As all the reserves are now defined it is unfortunately out of my power to carry out His Excellency's wishes as expressed in the last clause yet I trust that it will be found that I have in every case given such consideration to the present and prospective necessities of the Natives that the Lieutenant Governor will see little cause to regret that the reserves

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should have been finally arranged prior to my receipt of His Excellency's letter. (M3:32-33)¹⁸⁴

Eyre could only have concluded from this letter that Mantell had set aside not only Ngai Tahu's kainga and associated cultivations, but also ample reserves for their future needs. Yet it is abundantly clear from Mantell's later admissions that this was not what he had done. On the contrary he had allocated the absolute minimum quantity of land he could get away with. He fended off complaints from Ngai Tahu with promises of further provision of land and of schools and hospitals by the governor. It was simply not true, as he led Lieutenant-Governor Eyre to believe, that he had provided for their "present and prospective necessities". Had Mantell been frank, he would have informed Eyre that he had not in fact made any provision for additional land, but confined the reserves to less than 10 acres per person in most cases.

On 30 January 1849 Mantell submitted a lengthy report to Eyre detailing his travel and laying off the various reserves (A8:I:216-220). With his report he enclosed a table of population and reserves and other details. He also enclosed plans of the reserves. He noted the total population at 637 and the total area of reserves at 6359 acres. At this point Eyre should have realised that, in fact, Mantell had provided no more than nominal reserves. Whether Eyre was deceived by Mantell's earlier assurances that he had laid off sufficient reserves for the "present and prospective" needs of Ngai Tahu, and that these were acceptable to them, we do not know. Had Eyre, or subsequently Grey, given any real consideration to Mantell's report of 30 January 1849 it would have been obvious that Mantell had not in fact complied with his instructions.

Eyre reports to Governor Grey

- 8.8.26 On 10 March 1849 Eyre reported to the governor that Mantell had accomplished his southern mission. He enclosed copies of Mantell's reports and correspondence:

From those reports your Excellency will gather that Mr Mantell met with considerable difficulty in consequence of the incomplete manner in which Mr Kemp's arrangements relative to the purchase were made, and with some opposition from the two chiefs who under those arrangements had been the recipients of the whole of the first instalment, but who, under the more equitable plan adopted by Mr Mantell, would only receive such amounts as they were respectively entitled to from a consideration of their rank and claims, the number of Natives within the block purchased whom they represented, and other similar points bearing upon the equity of the case. (A8:I:213)¹⁸⁵

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Eyre found it unnecessary to make any comment on the reserves allocated by Mantell to Ngai Tahu whether as to location, number or area. Evidently he approved Mantell's actions.

Governor Grey reports to the colonial secretary

- 8.8.27 On 10 February 1849, anticipating Eyre's report, Grey sent a despatch to Earl Grey in which he advised the colonial secretary in relation to Kemp's purchase that:

although official information has not yet reached me regarding the final adjustment of those details of this purchase which relate to the survey, and defining the reserves kept for the use of the Natives, yet I have received information, which I believe to be authentic, that the whole of these details have now been conclusively and satisfactorily adjusted, so that the land question, in as far as nearly the whole of the Middle Island is concerned, has been set at rest; and with respect to that portion of the Middle Island which is not yet purchased, I will take care that at the earliest possible period arrangements are made for the final settlement of the Native claims in relation to that tract of country, as well as of those which are connected with Stewart's Island. I think it will be a source of great satisfaction to your Lordship to find that so large a tract of country of the most fertile description is thus unrestrictedly open to British enterprise, without any possibility of any of those embarrassing questions arising in relation to it between the European and Native population, in reference to titles to land, which have been a source of such loss and embarrassment to the settlers in the North Island (A8:I:212)¹⁸⁶

On receiving Eyre's report of 10 March, he forwarded a copy, with enclosures, to Earl Grey on 26 March 1849 (A8:I:212). In a letter to Eyre, also of 26 March, a copy of which he sent to Earl Grey, he said:

The arrangements made by your Excellency appear to me to have been in every respect judicious, and it is very fortunate that so satisfactory a settlement of this important affair should have been arrived at. I think also that Mr Mantell appears fully to have merited the encomiums you have bestowed upon the careful and zealous manner in which he has executed the duties intrusted to him. (A8:I:222)¹⁸⁷

Clearly Grey approved of Mantell's actions in setting aside just 6359 acres, or 9.98 acres per person, out of the 20 million acres acquired by Kemp.

Ngai Tahu complain about the inadequacy of their reserves

- 8.8.28 As we have seen from Mantell's evidence given years later, Ngai Tahu complained at the time about Mantell's niggardly approach to their requests for reserves. We recall that Tiramorehu, in his Smith–Nairn evidence, related that after Mantell had marked off the reserves there was a lengthy discussion at Akaroa (which Mantell had reached on 23 December 1848). In the course of these discussions, Tiramorehu said they told him that "the native reserves were not made so large or so numerous as they should have been" (L9:208).¹⁸⁸ The point was

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reiterated a little later in his evidence when he said, again speaking of the meeting at Akaroa:

We reminded Mr Mantell that Kemp had promised that when the land came to be surveyed a large portion of land would be returned to us. We found after Mr Mantell had gone down and laid off these reserves that these promises remained unfulfilled.

Did you complain to Mr Mantell that the land he had laid off was not sufficient? – Yes; I complained to Mantell, and so did others in the course of the remarks they made to him. (L9:217)¹⁸⁹

Yet we find Mantell, in his 30 January 1849 report to Eyre, recording that on arriving at Moeraki on 14 November 1848 he received a request from one Raitu that the reserves should “include all the valuable part of the beach & all the Europeans houses and cultivations” (M3:47).¹⁹⁰ But, he wrote, because Raitu was “a quiet and rather well disposed native with much of the chief about him”, Mantell succeeded in bringing him round to his views. The next day the survey was completed. After observing that most of the inhabitants came from Kaiapoi and the Waipara country he described his contact with Matiaha Tiramorehu:

From one of them, the Wesleyan teacher and principal man of the place, “Matiaha Tiramorehu” I received the greatest support and assistance. Their cultivations are very extensive and very well managed. On my offering them their choice whether to remain or go to the Kaiapoi reserve they preferred to stay as they had buried so many of their relations at Moeraki. (M3:48)¹⁹¹

8.8.29 We have difficulty in reconciling Mantell’s account of Tiramorehu’s apparently complaisant attitude with Tiramorehu’s Smith–Nairn evidence, to which we have referred, and with the letter to Lieutenant-Governor Eyre from Moeraki of 22 October 1849. In this letter Tiramorehu said:

Listen to these my words relative to the part (of land) which was made sacred to yourself and Governor Grey by Mr Mantell, also to the part which was reserved for the Maoris: The owners of the land are discontented with the portions allotted to them by Mr Mantell.

You are aware when Mantell first commenced his work in this place, his first mistake was at Kaiapoi, viz., he would not listen to what the owners of the land wished to say to him; they strenuously urged that the part that should be reserved for the Maoris ought to be large, but Mantell paid no attention to their wishes; it was thus he did wrong in the commencement of his work, and continued to do so in all his arrangements in regard to the portions which were reserved for the Maoris. (L9:23)¹⁹²

Tiramorehu then went on to say that the principal cause of all the disputes in the South Island was that payment for part of their land had gone to Ngati Toa. Next he went on to say:

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These are my reasons for writing to request of you that the boundaries of Moeraki may be extended, that we may have plenty of land to cultivate wheat and potatoes, also land where our pigs, cattle, and sheep can run at large; it will not be long before we purchase both cattle and sheep, and what land have we now in the small pieces which are reserved by Mantell for us fit for such a purpose; each allotment which Mantell has set aside for the Maoris is about as large as one white man's residence. We are conjecturing who could have given Mantell his instructions so to act; do you, Governor Eyre, think that I should tell him to reserve for the multitude a piece of land only large enough for one man? No; moreover the Natives will never consent to it. There are many people, and but a small quantity of land for them. (L9:23)¹⁹³

And later in his letter Tiramorehu returned to the topic:

The white man's transactions are bad,—there are in consequence great disturbances already amongst the Natives of this Island; therefore I earnestly request that some person may be sent here directly to alter all the boundaries, Moeraki included; that there may be a large block reserved for us, is the constant topic of our conversation. Extend the boundaries at Moeraki. (L9:24)¹⁹⁴

Tiramorehu's letter was referred to Mantell for his comments. In his reply to the New Zealand colonial secretary he enclosed a table showing the reserves made at Tuahiwi, Moeraki and a timber allotment at Te Kuri. By aggregating these reserves and dividing them between the 200 Ngai Tahu at Tuahiwi and the 87 at Moeraki, Mantell was able to claim an average of "nearly eleven acres to each individual . . . By this", he wrote, "you will perceive that the wants of the Natives are amply provided for in the reserves which I made" (L9:24).¹⁹⁵ Yet he had, on his own admission, been told that the Ngai Tahu people at Moeraki wished to remain there. The table of reserves showed that at Moeraki he allocated a mere 500 acres for 87 people, or 5.7 acres per individual. This for their present and future needs.

8.8.30 Eyre, nearly six months after Mantell's report of 24 January 1850, instructed Kemp to reply to Tiramorehu:

that the question raised by them was long since settled by Governor Grey, who told them, on their applying to him at Wellington, that he could not disturb or reopen the arrangement made relative to the purchase of Wairau, Kaiapoi, &c., from the Ngatitoas. Neither can I now consent to reopen or alter any arrangement relative to the reserves at Moeraki. I have examined into the matter, and find that the reserve made there contains 500 acres, which is considerable for the very few Natives resident there.

Questions relating to land and arrangements made relative to reserves, &c., cannot be reopened or altered when once they have been settled; otherwise no end of confusion would take place, and the land would be of no value, because there would be no knowing what arrangements were to be the final ones. Therefore I cannot consent to disturb those which have been made relative to Moeraki. (A8:I:229)¹⁹⁶

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Kemp informed Tiramorehu accordingly. Whether or not Kemp protested to Eyre at the total inadequacy of this reserve we do not know. But Eyre clearly was unconcerned that Ngai Tahu at Moeraki had been left with a purely nominal allocation of 5.7 acres per person. How Eyre could characterise such an allocation as “considerable for the very few [87] natives there” is beyond our comprehension. His refusal to meet Tiramorehu’s request clearly constitutes a breach of the Treaty. We are unable to reconcile it with the exercise of good faith required of the lieutenant-governor towards the Crown’s Treaty partner.

8.9. **Mahinga Kai***The meaning of “mahinga kai”*

8.9.1 The Maori version of Kemp’s deed reserved Ngai Tahu residences and mahinga kai by providing:

Ko o matou kainga nohoanga ko o matou mahinga kai me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou . . . (appendix 2.2)

We have in our record at least three translations of Kemp’s deed. The first part of the above expression in the Maori version has been variously translated as:

- “our places of residence and plantations”
Kemp’s own translation of his Maori deed (L9:48)¹⁹⁷
- “Our places of residence and our cultivations”
translator not stated (L9:18)¹⁹⁸
- “our places of residence and cultivations”
translator not stated (L9:25)¹⁹⁹

One of the claimants’ grievances is that the Crown failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of the purchase, in particular that “their numerous mahinga kai were not reserved and protected for their use”.

The claimants strongly disputed the rendering of “mahinga kai” in the deed as having the limited meaning of plantations or cultivations. Mr Temm stated:

The Ngai Tahu have always asserted that it means “a place where food is gathered”. (W1:280)

This would extend for instance to the right to harvest aruhe and ti, and the right to forage for weka and all other birds and animals. It would include the claim for eel-weirs, estuarine fisheries, and other places inland and at sea where kai moana could be gathered.

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Before we discuss whether provision was made for mahinga kai under Kemp's deed it is necessary for us to determine the meaning and scope of the term as used in the deed.

- 8.9.2 Professor Atholl Anderson, an archaeologist called by the claimants, discussed the meaning of 'mahinga kai' (H1:2). He was somewhat equivocal about its meaning, especially in the 1840s. He said he took "mahinga kai" to be a general term for "all places at which food was obtained". This, he said, seemed to be its accepted modern interpretation, although "past opinions have differed". He quoted Chief Judge Fenton in a judgment of 6 May 1868 as stating:

[mahinga] kai does not include Weka preserves, or any hunting rights, but local and fixed works and operations. (A8:II:217)²⁰⁰

We note, however, that in a judgment delivered on the preceding day Fenton said:

the Court will recognise the fisheries (included in the phrase mahinga kai) as the most highly prized and valuable of all their possessions. (A8:II:216)²⁰¹

Professor Anderson proceeded to say that:

Discrimination amongst food-gathering places is also implied in Te Uki's phrase "... my mahinga kai; also my eel-weirs ..." (L9:259)²⁰², and other witnesses at the time used a similar form of words.

The witness continued:

On the other hand, evidence given in 1891 (AJHR, G-7) consistently appears to adopt the view that all traditional food gathering places were mahinga kai: eg. H K Kahu said "all the old kinds of food are lost through the loss of our mahinga kai".

Professor Anderson concluded by saying that Kahu's definition "has at least the virtue that it does not beg the question, which I have nowhere seen answered, of what collective term was used for food-gathering places which were not defined as mahinga kai".

- 8.9.3 The Crown historian, Tony Walzl, gave lengthy historical evidence from which he came to the conclusion that from 1880 on the term mahinga kai came to mean, as a matter of common usage by both Maori and European, all food-gathering. But he also concluded that at the time of the Kemp purchase the term had a definite limited meaning of "cultivations" to Europeans. And further, that circumstantial evidence shows that the modern meaning could not have been understood by Ngai Tahu in 1848 and, in Walzl's opinion, "it is probable Ngai Tahu understood it to have the same meaning as that given by the Europeans" (P10:92).
- 8.9.4 By way of rebuttal of Mr Walzl's evidence the claimants put in evidence a paper by Dr Raymond Harlow, senior lecturer in linguistics

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tics at the University of Otago (Q21:29–31). The issue discussed by Dr Harlow was whether the expression “mahinga kai” had a narrow meaning as “cultivations” or a broader one as “places where food is produced or procured”, at the relevant time – 1848. Like Mr Walzl, Dr Harlow was able to find only one occurrence of the expression “mahinga kai” in a document of southern provenance at the period in question, that being the contentious one in Kemp’s deed. He suggested the tribunal would need to weigh a variety of types of indirect evidence to arrive at the most plausible construction. He restricted his comments to purely linguistic evidence of two kinds: etymology, and contemporary and later usage. He then discussed the etymological evidence:

Etymology: mahinga kai is the derived nominal of the verbal expression mahi kai, which is itself composed of the verb mahi ‘make, produce’, and its incorporated object kai ‘food’. Nominals derived by means of the suffix -nga and its cognates typically have as one of their meanings ‘the place where . . .’ Accordingly, the etymological meaning of the expression, its ‘original’ meaning, is the broader one referred to above. (Q21:29)

Dr Harlow went on to point out that Ngai Tahu spoke a southern dialect of Maori which showed considerable divergence from its northern congeners. Thus the specialised meaning “cultivations” learned by Kemp in the north would not necessarily apply in the south. He warned against applying northern construction to the southern dialect. In referring to Mr Walzl’s evidence that mahinga kai had by the 1880s acquired the broader meaning, Dr Harlow persuasively argued that it is contrary to normal word development for a word to change from a specialized narrow meaning to a more literal broader meaning. Further, for the word to change its meaning among an older generation in their own lifetime would, Dr Harlow considered, be improbable.

The proposed scenario however postulates two changes of meaning, an earlier restriction from the etymological meaning before 1848, and a subsequent very fast re-extension of meaning, for neither of which direct evidence can be found. (Q21:30)

Dr Harlow concluded that the most plausible view is that for Ngai Tahu “mahinga kai” had, in 1848, the broader meaning of “places where food is produced or procured”.

- 8.9.5 The Crown produced further evidence on the question in the form of a paper by Mr Patrick King, a recognised translator. We record here his main conclusions on how Ngai Tahu understood the term “mahinga kai”, as used in Kemp’s deed. He suggested that Ngai Tahu would not have been familiar with the words “mahinga kai” as an “unambiguous translation of cultivations”:

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They would most likely have identified their cultivated plots as “mara” and would therefore have regarded “mahinga kai” as having a broader sense than just plots of land. Their linguistic instinct would probably have suggested to them that the familiar term “mahi kai” was being used here in the sense of the whole range of activities (mahinga) related to obtaining food. (S22:11)

Mr King concluded that:

when the Ngai Tahu were offered the right to their ‘Kainga nohoanga’ and ‘Mahinga kai’ . . . they would logically conclude that they were able to retain their settlements, homes, inhabited areas (Kainga nohoanga) and their right to carry on food production and food gathering (Mahinga kai). (S22:11)

Thus Mr King broadly supported Dr Harlow’s conclusion.

8.9.6 That Ngai Tahu in fact interpreted mahinga kai in the broader sense, we believe is indicated by certain requests which they made to Mantell, to which we have earlier referred in our discussion of the boundary question. We recall the following note by Mantell in his sketchbook while at Timaru in 1848:

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

Their wanting grounds reserved for Kauru & forests for cooking it – other forests for weka hunting-whole districts for pig runs. (X12(b))²⁰³

Two important points emerge from these somewhat cryptic notes. In his general observation he is noting, no doubt as a consequence of the requests by Ngai Tahu for kauru, for forests for weka hunting and pig-runs, that Ngai Tahu were assuming they would continue in their traditional “habits of life, foods etc”. That is, that notwithstanding the purchase by Kemp, they would be able to hunt and forage for food including wildlife as before. This strongly suggests to us that in requesting the various reserves indicated by Mantell, they were doing so in the light of the reservation to them under the deed of their mahinga kai. That reservation reflected their clear understanding at the time of the sale that they were not thereby parting with their traditional rights of food gathering. Mantell, as we have seen, refused their requests.

8.9.7 It was made clear by Ngai Tahu witnesses before the Smith–Nairn commission in 1879 that mahinga kai included at least all land based resources. We cite one example only by way of illustration. Natanahira Waruwarutu was asked what he understood by the expression “mahinga kai” in Kemp’s deed:

“Mahinga kai” is not exclusively confined to the cultivation. That is called “Ngakinga kai”. “Mahinga kai” is not confined to land cultivated but it refers to places from which we obtain the natural products of the soil

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without cultivating, you know, the plants that grow without being cultivated by man. (L9:168–9)²⁰⁴

Waruwarutu then amplified this statement by listing cabbage trees, fernroot, weka and berries as being forms of mahinga kai.

We have earlier referred to Kemp's evidence before the Smith–Nairn commission. There he indicated he had promised Ngai Tahu their right to use their eel-weirs and landing places for their sea fishing expeditions. He also included under the rubric of mahinga kai, not only existing lands used for cultivation, but additional lands for cultivation in future years. He made no reference however, to other food sources such as ti, fern root, weka and other birds or animals.

- 8.9.8 Alexander Mackay in his comprehensive and illuminating royal commission report of 5 May 1887 discussed “mahinga kai” in the context of Kemp's deed. He pointed out that Ngai Tahu contended that the phrase “mahinga kai” used in the deed had a much wider interpretation than the translation into English gave it. He referred to the Native Land Court ruling in 1868 that the phrase included, besides cultivations, such things as “pipi grounds, eel-weirs and fisheries, excluding merely hunting grounds and similar things which were never made property in the sense of appropriation by labour”.(B3:7/1:2)²⁰⁵ Mackay said the Maori view of the phrase is that it includes, besides their cultivations, the right of fishing, catching birds and rats, procuring berries and fern-roots, over any portion of the lands within the block. Mackay observed that:

Under this interpretation they would be entitled to roam at will over the whole country – a state of affairs that could not have been contemplated. (B3: 7/1:2)²⁰⁶

Nevertheless Mackay recognised that the traditional food gathering practices of Ngai Tahu should have been provided for. By way of indicating the injustice that Mackay said “was perpetrated on the Ngaitahu owners of Kemp's Block through being deprived of their former mode of subsistence without any equivalent being given them when setting apart their reserves” (B3:7/1:4)²⁰⁷, Mackay cited from a despatch of 7 April 1847 from Governor Grey to Earl Grey. The governor pointed out that Maori:

do not support themselves solely by cultivation, but from fern-root, from fishing, from eel ponds (weirs), from catching birds, from hunting wild pigs, *for which they require extensive runs* and by such like pursuits. (B3: 7/1:4)²⁰⁸ (emphasis added)

He went on to say that:

To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is, in fact, to cut off from them some of the most important means of subsistence. As they cannot be readily and abruptly

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forced into becoming a solely agricultural people, such an attempt would be unjust and it must for the present fail (B3: 7/1:4)²⁰⁹

In this passage Governor Grey clearly recognised that extensive provision needed to be made to enable Maori, for a time at least, to continue with their practice of hunting and foraging for food.

Mackay followed the citation from this despatch with a reference to a letter of 13 April 1848 from Earl Grey to the Wesleyan Missionary Committee, in which, after referring to the provisions in the Treaty as to the proprietary rights of the Maori, he observed that it would have been the duty of the governor, as the Crown representative, to take care that Maori were secured in the enjoyment of an ample extent of land to meet all their real wants. Immediately after this passage, Mackay commented as follows:

In taking measures for this purpose their habits would have been considered, and, though it certainly would not have been held that the cultivation and appropriation of tracts of land capable of supporting a large population must be forborne because an inconsiderable number of Natives had been accustomed to derive some part of their subsistence from hunting and fishing on them on the other hand the settlement of such lands would not have been allowed to deprive the Natives even of these resources without providing for them in some other way, advantages fully equal to those they might lose. (B3: 7/1:4)²¹⁰

Mackay then observed that, “In acquiring the land from the Natives in the Middle Island the instructions issued by the Imperial Government appear to have been entirely disregarded” (B3:7/1:4).²¹¹ He referred in particular to Lord Normanby’s instructions to Governor Hobson, including the injunction that the governor would not, for example, “purchase from [Maori] any territory, the retention of which by them would be essential or highly conducive to their own comfort, safety, or subsistence” (B3: 7/1:4).²¹²

Mackay made several important points in the passages referred to:

- (a) He pointed to the Ngai Tahu understanding of “mahinga kai” as having a much broader meaning than simply cultivations.
- (b) Only a year before Kemp’s purchase Governor Grey had recorded his opinion that the Maori were and would remain, for a time at least, dependent on being able to hunt and gather food in their traditional way.
- (c) That the Crown was under a duty to ensure that the Maori “were secured in the enjoyment of an ample extent of land to meet all their real wants”.
- (d) That the object in purchasing land from the Maori was to facilitate settlement by Europeans. Mackay considered it could not

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have been contemplated that the Maori would continue to be free to hunt and forage for food over land purchased for settlement. But while he says the settlement of tracts of land capable of supporting a large population should not be lost because a (relatively) small number of Maori were accustomed to derive a part of their subsistence from it, at the same time such settlement should not have been permitted without the Crown first providing Maori “in some other way advantages fully equal to those they might lose”.

- 8.9.9 We return now to Kemp’s deed and the provision reserving to Ngai Tahu their “mahinga kai”. In the absence of any adequate contemporary record of the discussion between Kemp and Ngai Tahu as to what was intended to be encompassed by the expression “mahinga kai”, we must make our findings on the basis of the linguistic evidence presented to us, Mantell’s 1848 accounts of what food resources Ngai Tahu considered they were entitled to, and the later evidence from Ngai Tahu and Kemp. We conclude that it is highly likely that the expression meant two very different things to the respective parties to the deed.

Ngai Tahu perspective on mahinga kai

- 8.9.10 Given the then mode of life of Ngai Tahu and their dependence, on a seasonal basis, on a wide variety of land and water based food resources, we find it inconceivable that in agreeing to sell to Kemp they also agreed to forfeit their future right to important food resources. We believe that the phrase “mahinga kai” would in their minds have encompassed their traditional food resources. We do not accept that Ngai Tahu contemplated that, as a result of this deed, they were agreeing to be confined and closeted (as subsequently proved to be the case) in minuscule reservations scarcely affording them a bare subsistence. We believe they entered into this deed in good faith and in reliance on Kemp’s assurances that ample provision would be made for their needs, which in their minds would have included access to traditional food resources. They may well have recognised that when Europeans arrived and settled amongst them their previously unrestricted access to their former food resources would, over time, be modified. But clearly they did not agree to forfeit, at one stroke, all access to them. We reiterate our earlier findings (8.9.6) that, in signing Kemp’s deed, Ngai Tahu were not agreeing to part with their mahinga kai. They did not contemplate the possibility that the Crown, by its agents, would deny them their mahinga kai or would fail to leave them with ample additional land for their wider needs.

*The Ngai Tahu Report 1991****Kemp's perspective on mabinga kai***

- 8.9.11 Kemp, on the other hand, almost certainly had a different perspective. He employed the term “mahinga kai” in the Maori version of the deed, which he personally drew up. And he translated it, no doubt in accordance with his own understanding, as “plantations”. But many years later he conceded that he had also promised Ngai Tahu at least access to, if not exclusive ownership of, their eel-weirs. He envisaged extended areas of land for future cultivations. But he does not appear, by the use of the expression “mahinga kai”, to have intended to preserve to them access to their traditional food resources. However even Kemp must have known Ngai Tahu could not, overnight, be expected to forego all access to such resources. It may well be, although we have no record of him saying so, that in promising that ample additional reserves would be made for Ngai Tahu after survey, their access to traditional food sources would be secured as settlement occurred.

We recall Governor Grey's advice to Earl Grey only the previous year, 1847, that extensive provision needed to be made to enable Maori, for a time at least, to continue with their practice of hunting and foraging for their traditional foods.

The tribunal's conclusion on the meaning of “mabinga kai”

- 8.9.12 That this tribunal, 142 years after the event, is required, in order to do justice to Ngai Tahu's claim, to hear lengthy testimony and come to a conclusion on a question of such critical importance, is surely a serious indictment of the failure of Kemp, the Crown's agent, to make appropriate provision for Ngai Tahu's very real needs at the time of his negotiations with them. The Crown, in our opinion, cannot now be heard to rely on a narrow or restricted interpretation of a term, the strict application of which would have an effect so contrary to the provisions of article 2 of the Treaty. We find that the expression “mahinga kai” should be interpreted as having the meaning which we are confident was attributed to it by Ngai Tahu at the time, that is, those places where food was produced or procured by them. We further find that Ngai Tahu, who were well aware that the land being sold would be settled by Europeans, would have accepted reasonable provision in the form of ample, that is to say, extensive reserves capable of being used for agricultural or pastoral purposes and as appropriate for maintaining access to food resources such as birding, berries, ti and fern-root, together with those valued sources of inland fish (including eels), such as Waihora, which they wished to retain. The tragedy is that the Crown's agents failed to make such provision for Ngai Tahu. The Crown derived immense advantage from Kemp's purchase; Ngai Tahu suffered grievous loss.

*Kemp's Purchase****Mahinga kai: what the Crown did***

- 8.9.13 What provision was made by the Crown for mahinga kai under Kemp's deed? Virtually none. As we have seen, Mantell ensured that the land reserved to Ngai Tahu in the locality of their residences was the irreducible minimum: a mere 10 acres or so per person. As to provision for mahinga kai, in the broader sense of that term Mantell conceded nothing. We have already referred to his arbitrary rejection of requests for kauru (from ti) and forests for cooking it, other forests for weka hunting, and whole districts for pig runs. In another context we have earlier quoted from a letter to Native Under-Secretary Rolleston, of 12 April 1866, in which Mantell frankly described his policy in dealing with the "eel-fishing question" at the time he was laying off reserves. Because it so graphically illustrates Mantell's attitude to making provision for mahinga kai we repeat it here:

Bound as I then felt, pending the execution of the new deed which the Government deemed absolutely necessary, to maintain the validity of that under comment, I treated with the Natives in all matters connected with their reserves with a high hand, and as if I possessed the unquestionable right to do so. At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no case would I give way upon this point, although unfortunately my difficulty was much increased by their knowledge that at a sale then recently made in this Island, a general reservation of this right to the Natives had been conceded.

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

All that I promised at any place to the Maoris on this subject was, that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans; and this promise I hope the Government may for a time permit to hold good. (A8:I:242)²¹³

Consistent with this attitude the Crown commissioner for the extinction of native title made no significant provision of mahinga kai for Ngai Tahu under Kemp's deed. As Royal Commissioner Mackay observed in his 1887 report after citing various statements by Mantell as to his policy in setting aside reserves for Ngai Tahu:

Sufficient evidence has been adduced . . . to show that the Natives, instead of being consulted in respect of the land they desired to retain, were coerced into accepting as little as they could be induced to receive. (B3:7/1:3)²¹⁴

It might be thought from Mackay's concluding words that Ngai Tahu, however reluctantly, in fact agreed to the reserves laid down by

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Mantell. We do not believe this to be the case. Mantell, acting as he said, with a high hand and as if he possessed the unquestionable right to do so, gave them no option but to accept what little he granted them and, so far as Mantell was concerned, left them to come to terms with the virtual confiscation of their mahinga kai.

Counsel for the claimants, Mr Temm, in his final address, referred us to a passage from Professor Ward's report:

Responsibility lies with other government officers besides Kemp for not clarifying the whole question. Mantell said in 1868 that Kemp's deed was in his instructions but that he was not to be guided by it . . . For much of the time he was expecting a new deed listing specific reserves. Hence he ignored the wording of the deed, not to consider or clarify its ambiguities, refused to reserve eel weirs, and tried to put limits on the time frame over which food-gathering could be exercised informally. Responsibility lay also with Eyre and, above all, with Grey. Grey, as we have seen, knew full well the importance of a wide range of hunting and gathering areas to the Maori; he knew that a sudden reduction to a cultivating economy alone would involve hardship and loss. Perhaps the terms of the deed, construed liberally, would have reassured him that the Maori right was covered—for the time being. But Eyre had meanwhile instructed Mantell to consolidate reserves, not have them scattered over the country. That, and Mantell's view that the Ngai Tahu could use mahinga kai only until the government required the land, undermined the apparent liberality of the deed. If Eyre or Grey had any anxiety that this unduly circumscribed Ngai Tahu they did not make it known. Grey's general drive to get the Maori to abandon a traditional lifestyle for participation in the new one would probably have led him to favour Mantell's stand anyway. (T1:176–177)

We unreservedly adopt Professor Ward's statement. The Crown cannot rely on Mantell as scapegoat. Responsibility for the Crown's failure to honour the terms of the deed providing for the reservation of mahinga kai must rest ultimately with Governor Grey. We recall his satisfaction with "the careful and zealous manner" in which Mantell "has executed the duties intrusted to him" (8.8.26).

Finding on grievance no 2(b)

- 8.9.14 We have said enough to justify a clear finding, which we now make, that the Crown, through the bad faith of its accredited agent Mantell, with the subsequent acquiescence of Lieutenant-Governor Eyre and Governor Grey, almost entirely failed to honour the contractual obligation under Kemp's deed to reserve to Ngai Tahu their mahinga kai.

Mahinga kai: what the Crown should have done

- 8.9.15 What then should the Crown have done consistent with its objective of obtaining land through Kemp's purchase for settlement by

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Europeans? Before answering this question we refer again to Royal Commissioner Mackay's 1887 findings:

The extent of land ultimately reserved for the Natives in 1848 was 6,359 acres, a quantity that can hardly be considered to come within the meaning of ample reserves for the present and future wants of a population of 637 individuals, the number of Natives then to be provided for within the block. The Governor was empowered under the terms of the deed of purchase to set apart additional lands for the Natives when the country was surveyed; but even that condition was only partially fulfilled in 1868, a period of twenty years after the date of the engagement. The Natives were under the impression that under the terms of the deed they were entitled to the use of all their "mahinga kai" (food-producing places); but they found, as the country got occupied by the Europeans, they became gradually restricted to narrower limits, until they no longer possessed the freedom adapted to their mode of life. Every year as the settlement of the country progressed the privilege of roaming in any direction they pleased in search of food-supplies became more limited. Their means of obtaining subsistence in this way was also lessened through the settlers destroying, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, draining the swamps, lagoons, and watercourses from which they obtained their supplies of fish. Their ordinary subsistence failing them through these causes, and lacking the energy or ability of supplementing their means of livelihood by labour, they led a life of misery and semi-starvation on the few acres set apart for them. (B3:7/1:4)²¹⁵

The Crown was obliged under Kemp's deed to reserve to Ngai Tahu their homes, their mahinga kai, and to provide additional ample reserves. In our view these three obligations are inter-related. They should not be viewed in isolation. Crown counsel, Mrs Kenderdine, in her closing address reminded us of Lieutenant-Governor Eyre's instructions to Mantell that Ngai Tahu were "strictly and literally entitled" to reserves encompassing "their places of residence & plantations", as was said to be stated in Kemp's deed (M2:23). Above and beyond this "a liberal provision" was, as Eyre said, to be "made both for their present and future wants & due regard shewn to secure their interests & meet their wishes" (M2:24).²¹⁶ Mrs Kenderdine agreed that Mantell was under instructions to make provision for three categories of reserves, but she considered, in our view incorrectly, that mahinga kai was defined by Kemp's translation of "plantations".

8.9.16 We record here certain issues put to the claimants and the Crown in relation to Kemp's purchase, and the Crown's answers to those issues:

Issue 8: What reserves were to be made, according to the agreement?

Crown Answer: Those described in the Deed.

Issue 9: Were the reserves actually made in accordance with the agreement?

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Crown Answer: No.

Issue 10: Was the agreement made fairly?

Crown Answer: Yes, the agreement with H T Kemp in June of 1848 was made fairly. It was not implemented fairly by Mantell.

Issue 11: Was the outcome in accordance with Ngai Tahu rights under the Treaty?

Crown Answer: No. They received inadequate reserves. (X11)

We have then a frank admission by the Crown that Mantell, in providing for reserves under the deed, failed to act fairly and, further, that the outcome was not in accordance with Ngai Tahu rights under the Treaty of Waitangi in that they received inadequate reserves. In view of these admissions by the Crown, in our opinion fully justified by the evidence before us, we could perhaps complete our findings without further discussion. We pause however, briefly to refer to the evidence of Mr Walzl and Professor Pool.

- 8.9.17 Dealing first with reserves made in Otago by Mantell under Kemp's deed, Mr Walzl said that, soon after purchase, Ngai Tahu were keen to take advantage of their proximity to European settlement and develop their market further through increased crop production and pastoralism. But the limited size of their reserves prevented them from developing large-scale agriculture and hence from generating the capital necessary to engage in pastoral activities. By 1861, Mr Walzl said, "their agriculture seems to have hardly developed beyond subsistence" (Q8:46). We recall Matiaha Tiramorehu's plea in 1849 for enlarged reserves at Moeraki, where they had only 5.7 acres per person, so that he and his hapu could run sheep, a request which was summarily rejected by the Crown.

As to the Canterbury reserves, Mr Walzl stated that after a brief boom in the 1850s Canterbury Ngai Tahu, because of the small size of their reserves, were unable to compete with Europeans. Moreover, the size and characteristics of their land rendered it unsuitable for pastoralism, nor were they able to generate the necessary capital to acquire additional land. So Canterbury Ngai Tahu became locked into the same subsistence economy as did the east Otago Ngai Tahu (Q8:47).

Professor Pool's statistics for Canterbury have earlier been referred to in our discussion of the Otakou purchase (6.9.10). In considering "present needs" the crude density figure (number of acres divided by the number of people) for Canterbury in 1848 was 15 acres per person, while the relative density (which has regard to the relative quality of the land whether good, medium or poor) was only 13 (O15:23-24). As to "future needs", Mackay's 1891 assessment of the sufficiency of land for Canterbury showed 12.9 per cent of Ngai Tahu

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as having “sufficient”, while 49.7 per cent had insufficient, and 37.4 per cent had none. We cite these figures as indicative and repeat our comments made when considering the corresponding data for the Otakou purchase, that in separately discussing “present” and “future” needs there is a very real danger that the outcome is distorted. It is manifestly evident that the reserves set aside by the Crown under Kemp’s deed were seriously inadequate for the present and the future needs of Ngai Tahu.

Findings on reserves and mahinga kai provided under Kemp’s deed

8.9.18 We uphold the claimants’ grievances that:

the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemp’s Purchase, in particular–

- (a) Ample reserves for their present and future benefit were not provided and
- (b) Their numerous mahinga kai were not reserved and protected for their use.

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

We do not believe that it would have been necessary for the Crown to reserve to Ngai Tahu unrestricted access on a permanent basis to all foraging and hunting, to all ti or fernroot, to all birds, to all inland fisheries, in the extensive areas which they sold. But had the Crown first ensured that in addition to their residences and existing cultivations adequate land was provided Ngai Tahu for future cultivations (as envisaged by Kemp); secondly, reserved all eel-weirs and other inland fisheries sought by Ngai Tahu; and thirdly, also reserved extensive areas of good quality land in appropriate locations, which would remain as a plentiful source of mahinga kai and would enable

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Ngai Tahu to engage fully in both agricultural and pastoral farming pursuits, then we believe the Crown's obligations under Kemp's deed would have been substantially met. More especially would this have been so had the Crown complied, as it should have, with Ngai Tahu's request for a very substantial reserve between the Waimakariri and Kawari and crossing the island.

- 8.9.19 The tribunal finds that the Crown's failure to fulfil its contractual obligations under Kemp's deed in respect of reserves and mahinga kai, as summarised above was in breach of the Treaty principle which required the Crown to act with the utmost good faith towards Ngai Tahu. The Crown failed to so act.
- 8.9.20 The tribunal further finds that the Crown failed to preserve and protect Ngai Tahu's rangatiratanga over their land and valued possessions in breach of article 2 of the Treaty. We recall the first Treaty principle, which we have found relevant to the Crown's dealings with Ngai Tahu. This is that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. In our earlier discussion of the Treaty (4.6.6) we reiterated the finding of the Orakei tribunal, that in recognising the tino rangatiratanga over their lands the Crown was acknowledging the right of Maori, for as long as they wished, to hold their lands in accordance with longstanding custom, on a tribal and communal basis. It is clear that Ngai Tahu had no intention of surrendering their pa, their cultivations, their valued mahinga kai and that, in addition, they wished to retain extensive areas of land for their future well-being-all this on a tribal or communal basis. The Crown, through its agents, rode roughshod over Ngai Tahu's rangatiratanga, over their right to retain land they wished to keep, over their authority to maintain access to their mahinga kai. Instead of respecting, indeed protecting, Ngai Tahu's rangatiratanga, the Crown chose largely to ignore it. In so doing it acted in breach of an important Treaty obligation, and has continued to so act down to the present time.
- 8.9.21 The tribunal further finds that the Crown acted in breach of the Treaty principle which requires that in exercising its right of pre-emption the Crown was obliged to ensure that Ngai Tahu were left with a sufficient endowment for their own needs, both present and future. This the Crown patently failed to do at the time of the purchase. Such failure has continued down to the present time.

As will be shown, Ngai Tahu suffered grievously as a result, while the Crown, for a nominal payment of £2000 obtained title to 20 million acres of land. The outcome, while obviously highly satisfactory to the Crown's senior officials, was nothing short of disastrous for Ngai Tahu who, when in good faith they negotiated with Kemp and

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listened to his assurances, could never have contemplated that they would in fact be rendered virtually landless. They would have expected, given the provisions in the deed, that they would be left with their homes, their mahinga kai and ample land on which to develop agricultural and pastoral activities alongside, and on an equal basis with, the new European settlers. We are convinced that had they foreseen an outcome so different they would never have agreed to the sale.

We recall that Lord Normanby instructed Governor Hobson that the land should be bought extremely cheaply from the Maori as this would facilitate development and assist in bringing out more settlers. But the spin-off for Maori would be that the land they retained would, over time, increase greatly in value. As we have indicated, this would occur only if the Crown ensured that it left Maori with ample land. This the Crown failed to do. And so Ngai Tahu suffered severely in two ways. They were paid a mere £2000 for 20 million acres, a substantial part of the South Island and almost a third of the total area of the country. In no way were they compensated for receiving such a nominal payment, as they were left with totally inadequate land.

8.9.22 As we will relate in a subsequent chapter, some slight relief was granted in the way of additional reserves by the Native Land Court in 1868 and under the Landless Natives Act 1906. In addition some financial relief has been granted under the Ngaitahu Claim Settlement Act 1944. But the tribunal is satisfied that Kemp's purchase is yet to be completed. The Crown, as a matter of honour, is under a compelling duty to act generously and speedily in repairing this longstanding injustice to a gravely disadvantaged people.

8.10. **Post-purchase Challenges to the Western Boundary**

8.10.1 We indicated in 8.6.8 that before stating our conclusions on the questions of the boundaries of the Kemp purchase, and in particular the question of the "hole in the middle", we would discuss the Crown's actions in the provision of reserves under the deed and, having done this, we would examine how, when, and in what circumstances, the claims in respect of Kemp's purchase came to be brought by Ngai Tahu. This we now proceed to do, in the hope that it will assist us in coming to a conclusion on the disputed western boundary question. In the course of this discussion we will also consider other grievances of Ngai Tahu relating to the Kemp purchase.

New Zealand Company Land Claimants Ordinance 1851

8.10.2 The claimants' fifth grievance was:

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That the Crown failed to ensure that a claim was lodged on behalf of Ngai Tahu to protect their interests under the New Zealand Company Land Claimants Ordinance of 2nd August 1851. (W4)

The purpose of this ordinance, as its long title indicated, was to ascertain what contracts and engagements had been entered into by the New Zealand Company for the disposal of certain lands vested in it, and to provide for the completion of those contracts, by the New Zealand government, which had not been completed by the New Zealand Company. This ordinance followed the surrender by the New Zealand Company of its charters and the reversion to and vesting of its lands in the Crown.

The claimants said that Ngai Tahu, by virtue of unfulfilled provisions of Kemp's purchase, had a valid claim to reserve lands and mahinga kai. They asserted that the Crown was under a duty to protect Ngai Tahu by ensuring that a claim on behalf of Ngai Tahu was lodged under the ordinance.

Finding on grievance no 5

- 8.10.3 The short answer to this grievance is that the ordinance related to land sold or contracted to be sold by the New Zealand Company to which no legal title had been given by the company.²¹⁷ It did not apply to land purchased by or vested in the New Zealand Company by the Crown or other legislative provision. Ngai Tahu were vendors not purchasers. The ordinance had no application to them. Accordingly, we cannot sustain this grievance.

Canterbury Association Lands Settlement Amendment Act 1851

- 8.10.4 The claimants' sixth grievance was:

That the Crown on 7th August 1851 passed the Canterbury Association Amendment Act without providing for the protection of Ngai Tahu interests derived from the unfulfilled promises of the Crown under Kemp's Purchase. (W4)

The 1851 Act amended the Canterbury Association Lands Settlement Act 1850. Both were enactments of the United Kingdom Parliament. The 1850 Act vested some two and a half million acres of land in Canterbury, which had been included in the Kemp purchase, in the Canterbury Association, following the surrender by the New Zealand Company of its charter. The Canterbury Association had been empowered to sell the land over a period of 10 years, subject to certain conditions laid down in the 1850 Act. The 1851 Amendment, of which complaint is made, enabled the association, throughout that part of Kemp's block over which they had authority, to cut timber, fell forests, construct roads, railroads, canals, drains, and to alter, divert and deepen channels of rivers and streams, and make locks,

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dams and weirs. These activities, the claimants said, could be exercised to the detriment or destruction of Ngai Tahu mahinga kai and otherwise adversely affect the lands to which Ngai Tahu were still entitled under Kemp's deed. The claimants said that since no provision was made in the Act to protect their interests under Kemp's deed, this was an act of bad faith and was contrary to article 2 of the Treaty of Waitangi.

Finding on grievance no 6

- 8.10.5 No specific details of detriment which ensued as a result of the exercise of its powers by the Canterbury Association were given in connection with this particular grievance. It was, however, common ground that over a period of years following Kemp's purchase timber was cut, swamps were drained and other development work designed to facilitate settlement was carried out. We have no doubt that certain valued mahinga kai resources were detrimentally affected as a result. This topic is more fully discussed in our later chapter on mahinga kai. The 1850 Act and its 1851 amendment were no doubt passed by the Imperial legislature on the assumption that, following Kemp's purchase and Mantell's provision for reserves, Kemp's purchase had been completed. We have no evidence that the Imperial Parliament acted in bad faith. However, there can be little doubt that the statutes complained of did result in Ngai Tahu's enjoyment of certain of its mahinga kai resources being detrimentally affected. The basic fault was of course that of the Crown's New Zealand officials, in failing to ensure that the provisions of Kemp's agreement were fully and faithfully implemented. Had this been done Ngai Tahu mahinga kai, and other lands which should have been reserved to them, would not have been vested in the Canterbury Association. The British legislation can be viewed as a consequence of this failure by the Crown's New Zealand representatives. In the result its enactment aggravated the pre-existing breaches of the Treaty which we have earlier found. We accordingly find this grievance to be substantiated.

Ngai Tahu reaction to the Kemp purchase

- 8.10.6 We turn now to Ngai Tahu's reaction to the Kemp purchase over the ensuing three decades during which Te Kerema, the claim, took shape. This topic was the subject of lengthy evidence by Professor Ward. At this point we propose to refer only to the main points which emerge from this detailed discussion. Ngai Tahu's deep sense of disillusionment, culminating in the formation of its claim, is graphically encapsulated by the introductory comments on the aftermath of the purchases:

During the 1840s Ngai Tahu had embarked upon the complex task of establishing a satisfactory relationship with the British Crown. Ngai Tahu

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chiefs signed the Treaty of Waitangi, entered into purchase negotiations with the Crown and established personal contacts with officers of the new administration. The adjustment to the new economic order, begun well before 1840, likewise proceeded. Following the government land purchases, this process of adjustment and realignment of traditional patterns of political and economic organisation continued in the expectation, not that it was the first step in the tribe's subjugation to European political and economic realities, but that the promises conveyed by the Treaty, the purchase deeds and the words of government agents would be interpreted in a liberal spirit and provide for the tribe's future welfare. As the passage of time made it clear that Ngai Tahu expectations far exceeded the Crown's willingness to preserve or provide resources, a deep sense of grievance developed. Settlers had over run the country, draining the swamps, burning off the native plants, fencing, stocking and otherwise altering the landscape to the detriment of Ngai Tahu's traditional lifestyle. The tribe had lost its land – but to what purpose? Notions about unfulfilled promises and dissatisfaction with the size of the reserves became the nucleus of a tribal claim against the Crown. In the latter half of the nineteenth century Ngai Tahu vigorously pressed their claim against the Crown, demanding a place in the new world. The Crown responded with a series of investigations into the condition of the tribe and the allegations of unfulfilled promises, none of which served to assuage the sense of grievance or substantially increase the amount of land and resources with which the tribe was endowed. Te Kerema, the claim, became a rallying point for Ngai Tahu and a persistent problem for the Crown. (T1:331)

The period 1848–1868

- 8.10.7 As we have seen in our consideration of the reserves provided in the Otakou and Kemp blocks, Ngai Tahu failed to prosper following the purchases. The reserves were grossly inadequate, providing no more than a bare subsistence, and not always that. European settlement increasingly impinged on Ngai Tahu's mahinga kai and progressively confined them to their reserves. They had no prospect, following the decline in agriculture, of diversifying into sheep and cattle farming, as the European settlers had done with excellent results.

There were serious communication problems at a local level due to their lack of proficiency in English and the lack of interpreters. Hamilton reported in 1859 that it was almost impossible to find a competent interpreter in the whole of Canterbury province. But as Professor Ward pointed out:

These early problems of communication, however, relate much more to the frustration of Ngai Tahu's forward-looking aspirations and to day to day problems than to the stifling of any complaints arising from the purchase. For there were channels of communication to lay specific complaints. These included the writing of letters to the Governor and other senior officials. Many of these survive from the 1850s. There were also formal meetings with officials visiting the south, such as the meeting of Ngai Tahu rangatira with Governor Browne in 1856 and with the

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Premier Stafford, and Native Minister, C. W. Richmond, in 1858. Grievances were then stated publicly.

Professor Ward recorded, for example, that after Governor Browne visited Dunedin, Matiaha Tiramorehu wrote to Mantell, then in England:

I spoke to that Gov. Browne about powder, about guns, about the price fixed by Captain Cargill on the [10 acres at the] Kuri [Hampden], and about the rule of the Customs House [Officer] Logie for the Maori boats.²¹⁸

Professor Ward commented on the variety of complaints being made and noted the absence of any reference to tenths:

He also spoke about a block of land for himself at the Bluff and about wanting Mantell as 'Governor' of Otago. But in this, as in all such addresses of the time, there is no mention of 'tenths' or major boundaries or mahinga kai – the main legs of the subsequent claim. (T1(e):337)

And so during these early years there was little evidence, apart from the immediate and persistent protest at the northern boundary of the purchase being fixed at Kaiapoi pa, of a tribal claim against the Crown in the terms articulated before the Smith–Nairn commission in 1879–1880. However, in the mid-1850s Walter Mantell publicly protested at the failure of the Crown to honour the promises which he had made during the Kemp purchase reserve negotiations and the Murihiku purchase. These were that, in compensation for the almost nominal purchase monies paid by the Crown, there would be “valuable recompense in schools, in hospitals for their sick, and in constant solicitude for their welfare and general protection on the part of the Imperial Government” (O21:25).²¹⁹ This topic is fully discussed in chapter 19. Mantell by this time had undergone a marked change in attitude to Ngai Tahu and undertook a vigorous campaign both in London and New Zealand in support of Ngai Tahu. As will be seen, Ngai Tahu pursued Mantell's claim that the Crown should meet the unfulfilled promises made in its name.

The 1868 Native Land Court sittings

- 8.10.8 In April 1868 the Native Land Court sat for the first time in the South Island. Chief Judge Fenton presided. The hearing was held in the Christchurch town hall and followed British legal procedures. For most Ngai Tahu participants this was a novel and strange experience. Proceedings were in English with one interpreter present. A variety of claims were heard by the court. Mantell gave evidence about the Rapaki and Kaiapoi reserves. As indicated elsewhere, he told the court that he had tried to restrict their size to an absolute minimum. Of the Port Levy purchase, his instructions had been to carry matters with a “high hand”. He was “not prepared to say whether any single

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step taken by me on the part of the Government, or by them, through anybody else, in respect to these people, was fair” (A8:II:199).²²⁰

As Professor Ward pointed out, after Mantell’s testimony there was little the court could do. The Crown’s lawyer conceded that Ngai Tahu were entitled to more land than they had been given. Fenton decided to make a settlement which would release the Crown from the provision in Kemp’s deed requiring further reserves and finalise the transaction (A8:II:202).²²¹

Following the Rapaki judgment the court heard a claim from Heremaia Mautai and others to Kaitorete Spit. This had the unexpected outcome that Kemp’s deed was referred to the court as an order of reference under the provisions of section 83 of the Native Lands Act 1865 and section 38 of the 1867 amendment. These provisions enabled the governor to refer to the Native Land Court any agreement made by Maori owners to sell land to the Crown for an investigation into the title and interests in the land. The order was signed by Sir John Hall, a member of the Executive Council, and was produced to the court against the objection of Ngai Tahu’s lawyer, Cowlshaw, who claimed the governor had not authorised the reference to the court. Cowlshaw went further and questioned the legality of Kemp’s deed, submitting there was no valid European title in Canterbury (A8:II:210).²²²

The order of reference gave the court power to determine what reserves should have been made under Kemp’s deed. In the result, the chief judge ordered a series of additions to the reserves and also delivered a judgment on the meaning of “mahinga kai”. The reserves were increased from an average of 10 acres per person to 14 acres. This resulted in some 5000 acres of new reserves in Canterbury and Otago, including a number of fishing reserves. As Professor Ward commented:

The finality of the 1868 allocations was pressed home to the tribe . . . Where up to 1868 Ngai Tahu had been able to look forward to and make application for further reserves under the terms of the deed, after 1868 the Crown considered that its obligations had been effectively discharged and the tribe was forced to face the reality of survival on the reserves. By forcing this realisation on the tribe, the events of 1868 became a turning point and materially affected the development of a claim against the Crown.(T1:357)

Professor Ward cited the Reverend J Stack’s 1871 warning to Rolleston that poverty was leading to disillusionment and disaffection among his parishioners:

They now find themselves placed in a situation they never contemplated when disposing of their land for the purposes of colonisation and consider themselves the victims of deception and boldly charge the

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government with having purposely misled them. They are bequeathing to their children a legacy of wrongs for which they charge them to seek redress-this will serve to perpetuate the spirit of discontent which has for some time prevailed. (T1:357)²²³

Grievance no 7

8.10.9 Included in the claimants' grievances are two matters associated with or arising out of the Native Land Court decisions in 1868. The seventh grievance is:

That the Crown under the Native Land Act 1865 failed to provide for adequate protection for Ngai Tahu in the conduct of the Native Land Court.

The claimants relied on certain statements made in Mr Evison's evidence that:

(a) Alexander Mackay was appointed agent for the Crown at Canterbury. He referred to a memorandum by one T H Hamilton of the Native Secretary's Office. But the document is notice of Mackay's appointment as agent for the Crown at the approaching sittings of the Native Land Court at Otago not Canterbury (B3: 6/2).²²⁴ In fact Mackay was appointed to appear at the Native Land Court sitting at Christchurch in April 1868 "on behalf of the Natives" (A8:II:182).

(b) The chief judge admitted Kemp's deed as an order of reference in terms of the Native Lands Acts of 1865 and 1867 and that Ngai Tahu's counsel, Cowlshaw, then withdrew in protest on the ground that Ngai Tahu had no proper forewarning or time to prepare to argue the question, and on the ground that the court's acceptance of the order of reference was improper when the Ngai Tahu case was still pending.

In support of his contention that Cowlshaw withdrew in protest Mr Evison referred to a statement to this effect by one of the commissioners in the Smith-Nairn commission hearing. But this statement is plainly mistaken as the printed record clearly shows. The order of reference in question was admitted in evidence by Fenton during the hearing of a claim by Heremaia Mautai and others to ownership of Kaitorete Spit. Mr Cowlshaw appeared for the claimants, not the whole of Ngai Tahu. At the conclusion of evidence of various witnesses, including Mantell, Cowlshaw sought and obtained an adjournment until the next morning (A8:II:204-205).²²⁵ The hearing resumed the following morning, 29 April 1868. Mr Cowlshaw was present. The Crown lawyer sought leave to introduce the order of reference pursuant to section 38 of the Native Lands Act 1867 whereby certain questions as to reserves still outstanding under Kemp's deed could be settled and the agreement for the purchase of the lands concluded. Mr Cowlshaw did object as suggested by

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Mr Evison, but his objections were not upheld by the court, which admitted the order of reference and the deed.

Far from withdrawing, Cowlshaw called evidence about Maori pa in the vicinity of Kaitorete Spit. He then made submissions as to the illegality of Kemp's deed. After further argument, the chief judge indicated he would take time to consider his decision. On 5 May 1868 the chief judge delivered what the record appropriately described as a very lengthy and elaborate judgment. In it he referred to certain submissions made by Cowlshaw. The court held that, given all the facts, there was sufficient ground to cause a court of equity to compel specific performance of the deed. It would be the duty of the Native Land Court, under the order of reference, to ascertain all the terms of the contract. In the result the court disallowed the claimants' claim to ownership of the spit.

Finding on grievance no 7

- 8.10.10 It is clear from the record that Cowlshaw was present throughout the whole of the argument on the admissibility of the order of reference. While he had little time to prepare argument, there is nothing in the record to indicate that he sought more time. In any event it was the Native Land Court, not the Crown, which was conducting the proceedings to which the Crown was a party. Any defects in the court proceedings were the responsibility not of the Crown, but the court. Accordingly we find that the claimants' grievance, that the Crown failed to provide adequate protection for Ngai Tahu in the conduct of the Native Land Court, is not sustained.

Grievance no 8

- 8.10.11 We turn to the eighth grievance of the claimants:

That the Crown passed the Ngai Tahu Reference Validation Act of 1868 to the detriment of Ngai Tahu.

No submission was made to us on this grievance by counsel for Ngai Tahu. But the grievance referred to our record at B2:37-43, which is a passage from Mr Evison's evidence. Mr Evison stated that Ngai Tahu took a case to the Supreme Court at Christchurch to challenge the proceedings of the Native Land Court and the validity of the order of reference that had been admitted. But, Mr Evison said:

the Ngaitahu Reference Validation Act of 1868 was then promptly enacted. This codified Fenton's erroneous judgment and removed the matter out of the jurisdiction of the Courts for ever. (B2:43)

Mr Evison submitted that the Crown thereby committed an act of fraud, and failed in its duty under article 2 as the ultimate protector of Maori.

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- 8.10.12 We would agree at once that the Crown acted reprehensibly in foreclosing by legislative act all access to the courts by Ngai Tahu to test the legality of the Kemp deed. But we have no evidence to suggest that it was a fraudulent act. The principal motivation, we believe, was to cure a possible procedural defect, in that the order of reference was signed by Sir John Hall, a minister of the Crown, it not being shown that this was with the express authority of the governor, as the Native Lands Court Act appears to have required. Mr Evison moreover, begged the question when he characterised Fenton's judgment as "erroneous". He gave no reasons. Nor did we hear any argument on the point from the claimants' counsel. We are accordingly unable to find it proved that Ngai Tahu have been prejudicially affected by the passing of the Validation Act. We should record that the Validation Act expressly provided that nothing in the Native Land Court orders or in the Act should be deemed to extinguish the claims of any Ngai Tahu in respect of promises made to them by any officer of the government of schools, hospitals and other advantages to induce Ngai Tahu to consent to the sale of Kemp's block.

The development of Te Kerema: 1868 onwards

- 8.10.13 We now resume our narrative of the development of Te Kerema, the claim, following the Native Land Court hearings in 1868 and the passage of the Ngaitahu Reference Validation Act. While the passage of the Act precluded further legal challenges to the Crown's title to the block, at the same time the well publicised proceedings raised the consciousness of Ngai Tahu. Professor Ward commented on the situation in the early 1870s:

As Stack observed in 1873, the claim was passing to a new generation. Several of the kaumatua who had signed the deeds, notably Matiaha Tiramorehu and John Topi Patuki, would remain active in the battles of the 1870s, but much of the work would be undertaken by younger men. Part of the process which was shaping the claim in the 1860s and early seventies was an attempt by the older generation to explain the loss of the land to their heirs and justify their actions. (T1:360)

One of the most dramatic instances of this was Matenga Taiaroa's statement to his people which begins:

To all my Tribe, to my Hapu, and to my Son.
Let me bring these word to your remembrance, that they may be impressed upon your memory in the future, after I am dead and gone, that you may understand and judge for yourselves respecting the lands I sold to the Europeans.(C2:21:9)²²⁶

In this document Taiaroa, after referring to his journey to Sydney and covenant with the governor of New South Wales, the Treaty of

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Waitangi, the Otakou purchase and the tenths, next referred to Kemp's deed:

After that was Mr Kemp's deed of purchase with Ngaitahu, on the 12th of June, 1848. We asked a large price of Mr Kemp, to which he did not agree. Mr Kemp said to us that we should give up all the land, and that he would take charge of it; this £2,000 was an advance on the land. Mr Kemp said after that Government would make payment and return some land to us. We said to Mr Kemp, "What about our settlements, cultivations, sacred places, fishing grounds, and so forth?" Mr Kemp's answer was, "The Government will agree to all those requests; your cultivations will not be taken from you." Besides which, there were many statements made by the land purchasers. Mr Kemp also said to us, "If you do not agree to give up your land, soldiers will be sent to take possession of it", and on that we gave our final consent to the sale; and on account of all these words we concluded that sale; and it was left for the Government to protect the Natives of this island. But there were other words referring to schools, hospitals, and other words on account of which the land was given. (C2: 21:9)²²⁷

We note that Taiaroa, a leading Ngai Tahu chief, here makes no reference to any differences over the boundaries of the purchase. The reference to the promises of schools and hospitals which, as we later show, were long unfulfilled, was significant. The theme of unfulfilled promises came to be increasingly emphasised by Ngai Tahu.

It seems clear that the Native Land Court sittings in 1868 forced Ngai Tahu to take stock, or as Professor Ward said, "to confront the totality of what had been done" (T1:365). They were now faced with an apparently binding decision that, with the addition of a mere four acres per person and a few fishery reserves, they had now received all the Crown was prepared to concede. The vast difference between their expectations of the extent of land they would retain after the Kemp purchase, and the depressing and confining reality, impelled them to rethink the whole transaction. As the Ward report said:

One of the products of this process was a realisation that the boundaries defined in the deeds did not always correspond with the Maori understanding of the sum total of what had been sold. (T1:365)

For Ngai Tahu had been promised ample reserves, their kainga and cultivations and their mahinga kai, yet they had been left with so little. They had sought a very substantial area running from coast to coast and this had been denied them. The older generation were, as Professor Ward indicated, called on to explain the loss of their land and to justify their actions. Whatever the legal niceties, they had not agreed to part with all but a few thousand acres of land as the Crown now insisted they had.

- 8.10.14 It is not unlikely that, in reflecting on their discussions with the governor and his officials some 20 or more years earlier, those Ngai

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Tahu who were involved may have revived memories which seemed to indicate the sale of a smaller area of land. We recall our earlier discussion of Governor Grey's negotiations with Ngai Tahu chiefs at Akaroa and Otakou early in 1848 before Kemp went south. We concluded from the limited contemporary evidence that although Colonel Wakefield, who accompanied Grey, was under the impression that Ngai Tahu had indicated a willingness to sell "the level country back to the central mountains", Grey very probably thought he had a broad agreement with the Ngai Tahu people to sell their land between the Wairau and Otakou blocks. But, we also concluded that the contemporary evidence was such that no firm conclusion could be drawn as to the Ngai Tahu state of mind at the time.

We also recall our earlier reference to Commissioner Nairn's questioning of Mantell about his decision to set the north-eastern boundary of Kemp's purchase at Kaiapoi pa. Mantell told the commission that, on arriving at the pa, he pointed out to Ngai Tahu a line in a north-westerly direction by compass "as being 'te rohe a Ngatitua' and as being the boundary to the northwest . . .". Mr Commissioner Nairn then asked:

I cannot see how the Maoris should recognise the line by your merely pointing out a line in a north-west direction, unless there was some particular point or feature to which their attention was drawn? – I think the line went near to Maungatere (Mount Grey).

Was that mentioned at the time as being on the boundary do you think? . . . – No; it certainly was not mentioned as being on the boundary. Nothing was mentioned. We all saw the direction. The Natives came to my standpoint, and looked in that direction.

Mr Smith – That was done when you were at Kaiapoi? – Yes at Kaiapoi. (L9:359)²²⁸

We commented then that we thought this passage might offer a clue as to how Ngai Tahu came to regard the north-western boundary as commencing at Maungatere.

If Ngai Tahu's recollection of boundary discussions focused more on these incidents and less on those with Kemp, then we can see how, in an effort to formulate their claim in terms Europeans would understand, they came to claim an inland boundary running from Maungatere to Maungaatua. This, if recognised, would provide them with plenty of land and access to mahinga kai, now being denied them. This and associated claims they now advanced, greatly aided by the parliamentary efforts of H K Taiaroa, who finally secured the appointment of the Smith–Nairn commission in 1879. These events we discuss later in our report.

*The Ngai Tahu Report 1991***8.11. The Western Boundary**

8.11.1 We have related how in the 1870s Ngai Tahu came to publicly dispute the western boundary. This followed the apparent finality of the Native Land Court's 1868 restrictive decision over reserves. It became clear to Ngai Tahu that the basis on which they had agreed to sell to Kemp—that they would retain their kainga, their mahinga kai and ample lands for future development had only been honoured by the Crown in respect of their kainga. Now, following the court's decision, it appeared the Crown considered it had fulfilled its obligations under the deed. It must have seemed to Ngai Tahu that the Crown had redrawn the terms of the sale, for clearly the outcome was radically different from the terms of the deed and from all that Kemp had orally assured them would be done following further discussions and consequential surveys.

We have earlier discussed Ngai Tahu's perception of Kemp's purchase (8.6). In agreeing to the sale they would have been greatly influenced by Kemp's promises about what they would retain, namely:

- their kainga;
- additional land beyond that presently cultivated, for future cultivation;
- eel-weirs and certain landing-places "in a more or less fair proportion"; and
- additional land constituting "an endowment of very large proportions and dimensions".

No doubt on the basis of these assurances, which would have been given, in part at least, at the insistence of Ngai Tahu, the tribe was willing to sign the deed. Ngai Tahu would have had no reason to believe the assurances would not be honoured. They were, after all, dealing with the governor's representative, and the assurances were the outcome of various discussions, including a lengthy negotiation on 10 June 1848. It is clear from the deed and deed map and contemporary records, that both Kemp and Kettle understood Ngai Tahu were willing to part with their land and interests in land from coast to coast – that is to say, the land which remained after Ngai Tahu's requirements had been fully met.

8.11.2 We have earlier indicated our view, particularly in our discussion of mahinga kai, that it is inconceivable that Ngai Tahu, in agreeing to sell to Kemp, agreed to forfeit their future access to important food resources. We are convinced they entered into this deed in good faith and in reliance on Kemp's assurances that ample provision would be made for their needs, including access to traditional food resources.

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It was not in their minds that they would be confined to reservations so small as to be barely capable of sustaining them at subsistence level. They fully expected to retain extensive areas of land, which would provide them with continued access to mahinga kai and enable them to engage in the same farming practices as the European settlers, some of whom already were engaged in extensive pastoral activities to the north. In these circumstances, and given their lack of familiarity with English legal conveyancing practice, we accept they would not have placed the same reliance on the precise terms of the deed of purchase itself, as on the totality of the arrangement, oral and written, which they had come to with Kemp after prolonged discussion.

We do not believe that Ngai Tahu in 1848, given the vast area involved in the sale, would have focused as sharply on the boundaries referred to in the deed and deed map as on the verbal promises from Kemp as to what they would retain. On the assumption that all they sought and needed for their immediate needs and their future involvement in the new economy would be left in their possession and control, we believe they were prepared to part with the remainder, including such interests as at least some of them had on the west coast. That they expected to retain extensive areas of land is proved by their well documented request, made only two months after the deed was signed, for a reserve of several hundred thousand acres between the Waimakariri and Kawari Rivers, and running from the east coast to the west coast. Other requests, almost certainly involving substantial areas of land in the interior, were also made to, but rejected by, Mantell in 1848.

- 8.11.3 As settlement progressed Ngai Tahu saw pastoral runs, each of thousands of acres, occupied by settler families while they were forced to subsist on a few acres. Steadily their access to mahinga kai was curtailed. They fretted at their inability either to maintain their earlier mode of living, free to forage and hunt at will, or to emulate the new settlers by grazing sheep and cattle on the extensive lands they had expected to retain. They came to realise by 1868, if not earlier, that the Crown did not intend to honour its obligations under Kemp's deed. By the early 1870s they were forced to reassess the parlous situation in which, through no fault of their own, they now found themselves. Those who had participated in the sale were called on to justify and explain how Ngai Tahu, in so short a time, had been reduced to circumstances of poverty and virtual landlessness. In the knowledge that they had not agreed to part with almost all their land, and reflecting on the discussions with Grey and his officials in 1848, they concluded the western boundary was not that contended for by the Crown but should be redefined as running from Maungatere to

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Maungaatua. In this way substantial areas of land would be restored to them. And so Te Kerema evolved.

- 8.11.4 Kemp was seriously at fault for asking Ngai Tahu to sign a deed which in itself did not fully describe the boundaries of the land and interests in land being sold. Nor was the deficiency fully rectified in the deed map, prepared by the surveyor Kettle and attached to the deed. Only Wakatipu-Waitai or Milford Haven was marked on the west coast. While the north-western boundary on the map came out at Cape Foulwind by the Kawatiri, it was not named. Regrettably we lack any detailed contemporary record of the discussions between the Ngai Tahu chiefs and Kemp on the boundaries agreed on. We know, however, that the deed and accompanying map were drawn up on the morning of 12 June at the conclusion of discussions with the chiefs, this being the day the deed was signed. We have no reason to believe that Kemp and Kettle conspired to misrepresent the outcome of the discussions with Ngai Tahu as to boundaries by preparing a deed and associated map which falsely described the extent of the sale. But nor do we accept as justified the interpretation subsequently placed on the deed by the Crown's representatives which resulted in the expropriation of extensive areas of land and valuable food resources with which Ngai Tahu had no intention of parting. It must have seemed to Ngai Tahu by the late 1860s, if not earlier, that they had been deliberately tricked and deceived by the Crown's agents, who had arbitrarily confiscated much of the land they wished to retain.

Finding in respect of grievance no 4(a)

- 8.11.5 And so the tribunal finds that while Ngai Tahu agreed with Kemp to give up a substantial part of the land they owned, or in which they had an interest, from coast to coast, they did not agree to part with their kainga, their mahinga kai, or the extensive areas required to enable them to adapt and prosper in the new settler society. Ngai Tahu hoped and expected by this arrangement with Kemp to fully participate in, and share with the new settlers, the benefits accruing from the new economy which the sale to Kemp would make possible. Instead, 58 years later, while the settlers prospered, after decades of procrastination by the Crown, a half-hearted effort was made to alleviate the poverty and distress of many Ngai Tahu by the passing of the South Island Landless Natives Act 1906. The title of the Act says it all.

The claim of Ngai Tahu regarding the western boundary was not dismissed lightly. However after a full, frank and lengthy discussion the tribunal finds that it does not uphold the claimants' grievance no 4(a), that on the matter of boundaries the Crown enforced an

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interpretation which had not been agreed to by Ngai Tahu in respect of the western boundary.

The Remaining Grievances

- 8.11.6 There remain three grievances relating to Kemp's purchase which we have yet to consider. Grievance no 9 is discussed in chapter 21 and grievance no 11 in chapter 20. We reach the same conclusion on grievance no 10 as on similar grievances in relation to the Banks Peninsula, North Canterbury and Kaikoura purchases. We refer to these at 9.7.6, 11.5.10 and 12.5.14.

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- 226 M Taiaroa's statement (translation) 13 February 1863, presented by H K Taiaroa to Committee on Middle Island Native Affairs 1872, H-no 9, pp 8–9. M Taiaroa's statement in Maori held MA 67/9, NA, Wellington

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227 *ibid*

228 *see n 49, p 683*

Chapter 9

Banks Peninsula

9.1. Introduction

This claim involves a consideration of:

- (a) French claims to have purchased land at Banks Peninsula between 1838 and 1845; and
- (b) subsequent purchases by the Crown of the peninsula in three parts. The first of these was the Port Cooper block, purchased by W Mantell on 10 August 1849, closely followed by the Port Levy block on 25 September 1849. The final purchase was the Akaroa block bought by W J W Hamilton on 10 December 1856.

The French purchases related to efforts by the French government to establish a colony on the peninsula and eventually in much of the remainder of the South Island. Because some important documentation is to be found only in France, it did not prove easy for the claimants to establish the full facts from New Zealand based records. The tribunal learned that Dr Peter J Tremewan, a senior lecturer in French at the University of Canterbury, has over the last five or more years been engaged on a major study of the French attempt to annex and colonise the South Island. His research has included a lengthy period on study leave in France where he had access to the official French naval and colonial ministry records. While in England he inspected the relevant British Colonial Office and Foreign Office records. Dr Tremewan is recognised as the leading authority on the French involvement in Banks Peninsula. Accordingly, the tribunal decided to commission him as an independent consultant to furnish a full report on matters relevant to our inquiries. Dr Tremewan presented a detailed 126 page report on Ngai Tahu land sales to Captain Langlois and the French Nanto-Bordelaise Company on Banks Peninsula (T3). As part of Professor Ward's overview evidence, Dr Tremewan prepared a condensed version of his full report (T1:61–72). Apart from some matters of detail there appears to be general agreement among the parties on the correctness of Dr Tremewan's account. In view of this, and his obvious grasp on the whole complex series of events, we have decided to adopt Dr Tremewan's condensed version and reproduce it as an authoritative and independent state-

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ment of the facts. We will of course be commenting on it and elaborating some aspects in the light of other evidence and counsel's submissions.

9.2. **Statement of Grievances**

The claimants have set out their grievances in respect of Banks Peninsula as follows:

1. That Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu.
2. That Ngai Tahu were not compensated for Lord Stanley's award.
3. That no reserves were provided for Ngai Tahu out of Lord Stanley's award.
4. That the Crown failed to protect Ngai Tahu against the land-purchasing pretensions of the French: that although Belligny's 1845 "deeds" were illegal and were not proved to be supported by the customary owners of the land, the Crown allowed these transactions to be used against Ngai Tahu by Commissioner Mantell in 1849 and subsequently by the Canterbury Association in denying Ngai Tahu their continued rights of occupation on Banks Peninsula.
5. That the Crown sent Commissioner Mantell in 1849 to falsely assert that Banks Peninsula was already the property of the Crown, and to "carry matters with a high hand": or alternatively that Mantell having done these things the Crown did nothing to rectify them.
6. That at Port Cooper and Port Levy in 1849 Commissioner Mantell conducted his proceedings as an award under which the matters of payment and Maori reserves were not negotiable; and that consequently Ngai Tahu were denied a fair price and an adequate provision of land and other economic resources (including kai moana and fisheries) for their continued sustenance and prosperity.
7. That consequently Ngai Tahu had to abandon the Port Levy and Port Cooper blocks with the exception of the Port Levy, Purau and Rapaki reserves which were quite inadequate for their needs.
8. That at the Port Levy proceedings with Mantell Ngai Tahu expressed their unwillingness to sell Okains Bay, Kaituna Valley, and part of Pigeon Bay, and expressed a wish for a larger reserve at Port Levy; but these were denied to them.
9. That although Mantell's Port Levy deed was signed by only a minority of the chiefs present at the proceedings, and Mantell did not visit all the settlements in the block to ascertain the residents' wishes, the Crown enforced the deed as a legal conveyance of the block.
10. That the Crown under the Canterbury Association Lands Settlement Act of 14 August 1850 assigned the whole peninsula to the Canterbury Association, although it had been clearly excluded from Kemp's purchase and had not been otherwise properly purchased from Ngai Tahu.
11. That consequently Ngai Tahu had to suffer European settlers moving on to their lands, for which they have never received adequate compensation.

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12. That at Mantell's 1849 Akaroa block proceedings Ngai Tahu asked to retain for their own use a substantial part of the block comprising some 30,000 acres or more, including the southern part of the peninsula and the whole Wairewa (Little River) basin, and in 1856 made a similar request to Hamilton, to which under Article 3 of the Treaty they were entitled; but this was wrongfully denied to them.

13. That under the terms of Hamilton's 1856 deed only the "places (or areas) in dispute at Akaroa" were sold; but the Crown nevertheless with the exception of 1200 acres reserves enforced the forfeiture of the whole block.

14. That Hamilton's 1200 acres reserves and £150 payment were manifestly inadequate as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa Block together with the absentees, and that Ngai Tahu suffered as a result.

15. That the Crown under the terms of Hamilton's Akaroa deed unreasonably required the Ngai Tahu residents of the block to provide for returning absentees as well as themselves from the £150 and 1200 acres Hamilton had provided, and that both residents and returning absentees suffered privation as a result.

16. That under the Land for Settlements Acts the Crown at Wairewa (Little River) resumed the Morice Estate of 912 hectares on 16 December 1905 at a cost of £40,633 for the settlement of 29 landless Europeans, and on Banks Peninsula resumed the Kinloch Estate of 5275 hectares on 19th February 1906 at a cost of £116,382 for the settlement of 30 landless Europeans, which land could instead have been provided for the relief of landless Ngai Tahu; instead of which the Crown offered landless Ngai Tahu only the very inferior and remote land provided under the South Island Landless Natives Act of 1906, none of which was on Banks Peninsula.

17. That as the result of these acts of the Crown most Ngai Tahu of Banks Peninsula were driven off the land and lost their turangawaewae.

18. That the Crown has failed to ensure the adequate protection of the natural resources of Banks Peninsula; that it has allowed the wholesale destruction of the forests and other natural vegetation to the detriment of native fauna, water quality and soil conservation, and that the resulting siltation of stream beds and tidal waters has been to the detriment of fish and birdlife; that the Crown has allowed excessive pollution of Wairewa (Lake Forsyth) so that this great inland fishery and eel resource is now almost extinguished; and that it has allowed the depletion of kaimoana in the bays, harbours and coasts through pollution and excessive exploitation. (W3)

9.3. **The French Purchases**

We now set out Dr Tremewan's condensed version in the form in which he presented it (T1:61-72).¹

Langlois' 1838 "land purchase"

- 9.3.1 At the end of the 1830s and the beginning of the 1840s, the French whaling fleet of some sixty ships was spending long periods in New Zealand waters. One of these ships, the *Cachalot*, under Captain Jean

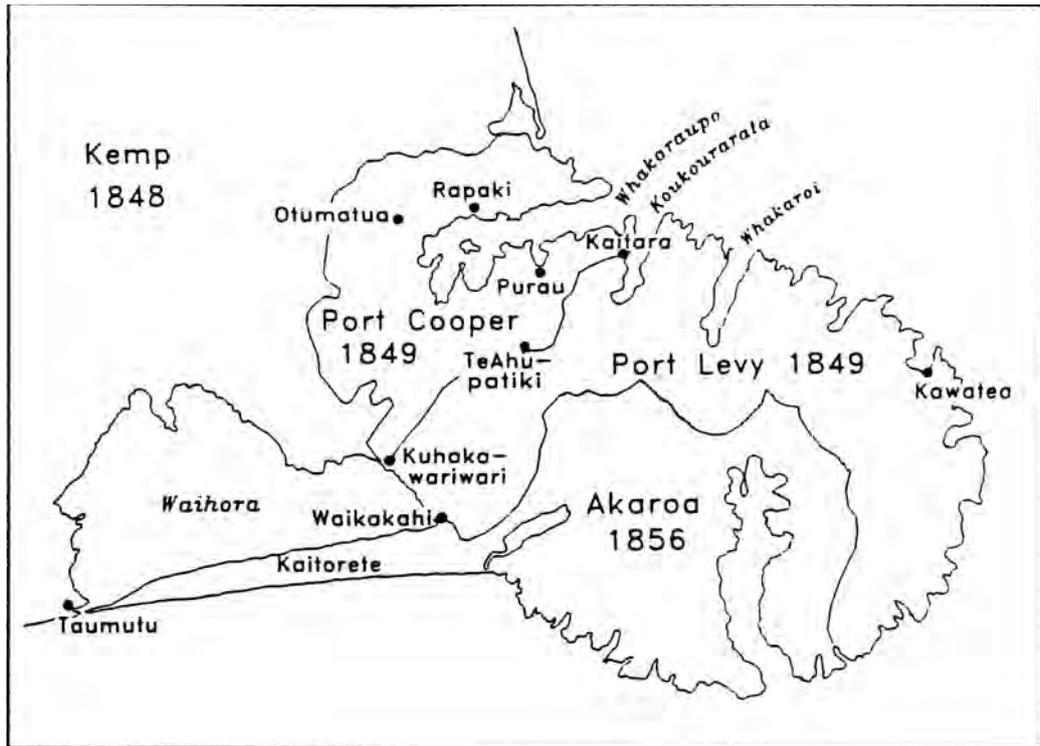
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Figure 9.1: The Banks Peninsula purchases 1849–1856.

Francois Langlois, was whaling out of Whakaraupo/Port Cooper (now known as Lyttelton Harbour) from 13 May to 16 August 1838. The importance of New Zealand to the French whaling fleet is shown by the amount of time spent in New Zealand waters by the French man-of-war, the *Heroine*, Captain J B Cecille, as part of its task of maintaining order and providing logistic support for the French whaling fleet. The *Heroine* was present in Port Cooper from 10 July to 4 August 1838. A number of other French, American and Australian whaling ships also spent some of the winter operating out of the same port. During the bay whaling season, the presence of the whaling ships attracted a number of Maori to Port Cooper from Port Levy and from further afield. Even so, the Maori population of Banks Peninsula was probably well under 200 at this time, largely as a result of the deaths, captivity and migration that resulted from Te Rauparaha's attacks of 1830–1832. The European population of the peninsula in 1838 was even smaller, being limited to a few dozen men engaged in the whaling trade. They were established mainly at Peraki, on the south coast, where George Hempelman ran the peninsula's only shore station. There were no European families, missionaries, farmers or traders in the area in 1838. Meaningful land sales to Europeans

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were confined to a sequence of negotiations made in connection with Hempelman's shore station.

The transaction of 2 August 1838

- 9.3.2 Just before leaving Port Cooper, Captain Langlois of the *Cachalot* entered into some sort of negotiations with local Maori. According to a deed dated 2 August 1838 and written in French, Langlois bought all of Banks Peninsula except tapu land or cemeteries from the leading Maori chiefs he found at Port Cooper. The original of this deed seems no longer to be extant, but copies were made.²

The deed states that Langlois paid a deposit of 150 francs (£6) in goods and promised to pay the remainder of the total price of 1000 francs (£40) on taking up possession. The signatories of the deed are hard to identify, as their names were not recorded very accurately. "Chégary", described in the deed and elsewhere as the king of the district, was known to British whalers as Jacky Lynx. He is described as one of the two principal men of Port Cooper in 1838 in Hempelman's *Piraki Log*, along with Tommy, who was probably the person who is recorded on the deed as "Repouinéi called Thomy". Because of the difficulties in identifying the Maori signatories, it is not possible to assert that they were the Maori who, in 1838, had the right to sell Banks Peninsula. Certainly, the whaling activities at Port Cooper attracted people from a wide area. However, those living in Akaroa in 1840 said that they had not been a party to the deed. And it seems very unlikely that the senior Ngai Tahu chiefs – Tuhawaiki, Patuki, Karetai and Taiaroa, for example – who lived further to the south, but who had rights to at least parts of Banks Peninsula, were consulted.

European versions of what took place when the deed was signed are dependent on Langlois' own testimony. There were no independent witnesses. The deed itself can be taken as representing Langlois' point of view. The Maori participants would not have been able to read a deed written in French and they never subsequently acknowledged this "sale". Iwikau, a leading chief and a refugee from Kaiapoi who was living on the peninsula after returning from captivity, stated categorically before a land commissioner in 1843 that he remembered Langlois being at Port Cooper in 1838 and that there had been no talk with Langlois of selling land at that time. In 1840, the Port Cooper chiefs also denied any such sale. At most, statements by Akaroa Maori can be interpreted as indicating that they thought the Port Cooper Maori had sold a small amount of land within Port Cooper to Langlois in 1838.³ Some intelligent and responsible Frenchmen who were present on Banks Peninsula in 1840 were more sceptical: they felt that Langlois' "purchase" was very dubious indeed.⁴ The deed

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existed, but whether it was a true record of an oral negotiation is unproved. Moreover, the deed indicated that the conveyance was not completed until payment of the balance of the price was made on taking up possession of the land.

French authority to buy: Maori authority to sell

9.3.3 When Langlois returned to France in May 1839, he sold his Banks Peninsula land rights to a group of French businessmen from the cities of Nantes and Bordeaux who formed a company known variously as the Nanto-Bordelaise Company or the French New Zealand Company. Langlois retained a substantial shareholding in the company. It was the company's aim to colonise the South Island of New Zealand and to undertake commercial activities there. The company had the active support of the French government, which undertook to add the supervision of the new colony to the duties of the new man-of-war that was being sent out to New Zealand to oversee the French whaling fleet. Langlois was to return to New Zealand with the first settlers to complete his earlier sale and to buy up the rest of the South Island. The Nanto-Bordelaise Company, which found weaknesses in the 1838 deed, supplied Langlois with model deeds for the purchases he was to make on their behalf. The French businessmen and politicians hoped that these sales would lead to French sovereignty over the South Island.

9.3.4 By the time Langlois had obtained this financial and political backing in France, the Maori population of Banks Peninsula had increased, largely as the result of the return of Ngai Tahu captives from the North Island. By 1842, when the first detailed census took place, there were 339 Maori living on Banks Peninsula, including 212 at Port Levy, 72 at Akaroa, 40 at Port Cooper and 15 at Pigeon Bay. A number of these, particularly those at Port Levy, were members of Ngai Tuahuriri hapu from the abandoned settlement of Kaiapoi on the North Canterbury plains. On the peninsula itself, Whakaraupo was the traditional territory of Ngati Te Rakiwhakaputa and its sub-hapu, Ngati Wheke. Koukourarata was the home of Ngati Huikai and its sub-hapu, Ngai Tutehuarewa. Ngati Mako were centred on Wairewa, while Ngati Te Ruahikihiki territory extended from Taumutu across the southern part of the peninsula to the western side of Akaroa Harbour. The descendants of Te Raki Taurewa, Te Ake and Tutakahikura were to be found on Akaroa Harbour's northern and eastern shores.

Among the principal inhabitants of Banks Peninsula whose names one would expect to find on a valid land conveyance in 1840 were Hoani Papita Akaroa, Hakopa Te Ataotu, Pita Te Hori, Te Ikawera, Iwikau, Katata, Te Kauamo, Apetera Kautuanui, Arapata Koti, Moihi Manunuiakarae, Maopo, Heremaia Mautai, Tiemi Nohomutu, Parure,

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Piripi Te Puehu, Apera Pukenui, Hone Wetere Te Ruaparae, Werahiko Tamakeke, Hoani Timaru Tiakikai, Hone Tikao, Paora Taki, Paora Tau, Tuauau and Hoani Tukutuku. Of these chiefs, Iwikau was acknowledged to be the most influential, even though he was from Kaiapoi and not from Banks Peninsula itself. Important Ngai Tahu chiefs who lived further to the south also had claims to at least parts of Banks Peninsula. These included Tuhawaiki, Te Matenga Taiaroa, Karetai, Patuki, Kahupatiti, Matiaha Te Morehu [Tiramorehu] and Te Rehe.

The August 1840 land deals

- 9.3.5 Langlois left the French port of Rochefort in March 1840 and sailed for New Zealand in the *Comte de Paris*, a new French naval ship which was specially fitted out and leased to the Nanto-Bordelaise Company. On board were some 57 prospective colonists. The *Comte de Paris* reached Banks Peninsula in August 1840, coming to anchor in Pigeon Bay on 9 August. He was unaware that British sovereignty had been proclaimed over the South Island, that leading Ngai Tahu chiefs had signed the Treaty of Waitangi and that the British administration had declared that new European land purchases from the Maori were invalid. Langlois invited a number of Maori on board his ship, the *Comte de Paris*, to negotiate the sale of land. Both the French and the Maori later agreed that a land sale had been negotiated and that the Maori had signed a deed and received payment. Langlois explained his terms in English. A Nga Puhi named Tommy, who understood a little English, acted as interpreter.

Subsequent French and Maori interpretations of the amount of land paid for and sold as a result of these negotiations differed considerably. The Maori view – expressed by Iwikau, Tikao, Parure and Nga Mana – was that small areas of land had been paid for and sold in the northern bays of the peninsula: Te Pohue (Camp Bay) in Port Cooper, Kaihope in Port Levy, and Kokakongutungutu (Holmes Bay) in Pigeon Bay. Further land around these same harbours was also promised to the French on receipt of further payment. In addition, some land around the north-east shoreline of Akaroa Harbour was acknowledged by the Maori to have been sold by Iwikau. This land extended from Te Wharekakaho (Piper's Stream) to Takapuneke (Red House Bay). However, this was done without the participation of the leading inhabitants of this southern part of the peninsula who were angry at the deal reached by the chiefs who had assembled at Pigeon Bay. This part of the sale, then, was not conducted by the chiefs who had primary rights to the land in question.⁵

Deeds dated 11 and 12 August 1840

- 9.3.6 One French view of the negotiations is represented by two deeds which were signed by a wide range of leading Banks Peninsula chiefs

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from both the north (eg Nohomutu, Pukenui, Iwikau, Te Puehu, Te Kauamo, Te Hori, Te Ao, Jacky Lynx) and the south (eg Tuauau, Tikao, Parure, Mautai, Tamakeke) of the peninsula. These deeds were dated 11 and 12 August at Pigeon Bay.⁶ The first of these documents conveyed the whole of Banks Peninsula to the French in return for a payment in goods. These goods are not listed, nor is their value specified, although it was acknowledged to be greater than the 850 francs (£34) required for completion of the 1838 deal. The western boundary of the area sold was said to be from Double Corner (the mouth of the Waipara River) southwards to Sandy Corner. The 160 Maori (men, women and children) with land rights to Banks Peninsula are each guaranteed 10 acres of land near a French settlement and 20 square metres within a settlement. The second document conveyed a much greater area of land, extending from the latitude of Kaikoura in the north (given as 42° 20' S) to that of Te Waiteruati (present-day Temuka, 44° 45' S.), and from the east coast to the west coast. The price was given as 120,000 francs (£4800), payable in five instalments. The first instalment of 8000 francs (£320), in specified goods, is to be paid at Akaroa. The balance is to be paid, in specified goods, at two-year intervals and in equal amounts over a period of 10 years (ie five payments of 22,400 francs or £896 each). A receipt for the payment of the first instalment is dated 24 August 1840 at Akaroa. Reserves in perpetuity for the Maori are to be not less than six acres per person and must be within one league of the French settlements.

These two deeds were witnessed by members of the crew of Langlois' ship, the *Comte de Paris*. However, it is certain that the Maori signed blank sheets of paper, leaving it to Langlois to write down what was agreed upon.⁷ Langlois wrote the deeds up at Akaroa some days later, but back-dated them to the time and place when he was still unaware of the declaration of British sovereignty and of the invalidity, in British eyes, of new land purchases from the Maori. At least one of the witnesses, Aimable Langlois, signed at a much later date than the one that features on the deed, for he was not at Pigeon Bay at that time. The same applies to at least one of the Maori signatories, Tuauau. It is not only Maori statements about the extent of the land which they acknowledged as paid for and sold that throw serious doubt on the faithfulness with which Langlois recorded the oral agreements. The two deeds provide for Maori reserves in the immediate vicinity of, or even within, French settlements. On this point of detail, Iwikau was quite adamant: Langlois proposed such an arrangement, but it was rejected by the Maori negotiators.

- 9.3.7 Meanwhile, the naval ship which the French government had sent out to oversee the establishment of a colony and to supervise the French whaling fleet had reached New Zealand. The *Aube*, under

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Captain C F Lavaud, called first at the Bay of Islands, where it was discovered that the South Island had been placed under British sovereignty, that new European land purchases were not recognised by the British colonial authorities and earlier purchases were subject to confirmation by land commissioners. Lavaud sailed on to Banks Peninsula, preceded by a British warship, the *Britomart*, under Captain O Stanley. When Langlois received news that Lavaud and the *Aube* were at Akaroa, he left Pigeon Bay and sailed round to join him. Now that he was on the spot, Lavaud saw the original 1838 deed as deficient, in that it was not signed by any of the Akaroa Maori, whom he saw as belonging to a different tribe from those at Port Cooper. He was also aware of rival European land claims. Knowing that land deeds signed in August 1840 would not be seen as valid by the British authorities, Lavaud advised Langlois to draw up a new deed, back-dated to 1838.⁸ Land negotiations were now being conducted to satisfy the British authorities rather than the Maori landowners. Lavaud and the Nanto-Bordelaise Company's representative, P J Belligny, in consultation with Lieutenant-Governor Hobson's representative, Captain Stanley, and two British magistrates, selected 3000 acres in Paka Ariki Bay and Takamatua, where the 57 colonists would live.

The 1838 deed renegotiated and back-dated

- 9.3.8 Langlois followed Lavaud's advice and obtained Maori signatures on a renegotiated back-dated 1838 deed of conveyance.⁹ The signatories included leading chiefs from both the northern part of the peninsula (Te Kauamo, Te Puehu, Pukenui, Iwikau, Jacky Lynx, Pita Te Hori) and from Akaroa (Tikao, Tuauau, Mautai, Akaroa, Tamakeke, Parure). The senior members of the tribe from Otakou and Murihiku (eg Tuhawaiki, Taiaroa, Karetai) were not present and did not sign. During the negotiations at Akaroa, Father Comte, a French Catholic missionary, acted as interpreter. Witnesses included three officers from Lavaud's ship, the *Aube*. This back-dated deed purports to convey all of Banks Peninsula to Langlois, without specifying any boundary on the western side. Probably as a result of Maori objections to living next to French settlements, an area of land was set aside as a Maori reserve. The reserve was to lie between the two shore whaling stations of Peraki and Oyshore (Goashore) on the southern coast of the peninsula, extending three miles inland. This was Ngati Te Ruahikihiki territory. The original purchase price of 1000 francs (£40) has now become 6000 francs (£240), and the goods to be paid over to the northern and southern peninsula Maori are itemised.

Despite the wording of the deed, other Frenchmen indicated that the negotiations which led to the back-dated deed involved the con-

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veyance of rather less than the whole of Banks Peninsula. In addition to the land sold or promised to the French in Ports Cooper and Levy and Pigeon Bay, the Akaroa Maori now agreed to sell some land around Akaroa Harbour. According to Belligny, this meant “all the harbour apart from the tapu lands in which the properties owned by British people are included”.¹⁰ The Akaroa Maori view was that they had sold “the land at Akaroa, situated between Point Te Kau and a stream called Kaitangatu [Kaitangata], and extending back to the tops of the mountains at Akaroa”.¹¹ Kaitangata is the mouth of Pakaiariki (Aylmer’s Stream). Point Te Kau is now unknown, but was perhaps a point between Takamatua and Kakakaiau (Robinson’s Bay). This was the land initially occupied by the French colonists. The difference between this Maori view and Belligny’s can be accounted for in terms of the French pattern of occupation. While more land around the harbour might be seen as promised to the French, occupation as well as payment would be needed, in Maori eyes, for the sale to be complete. And further occupation of land might well require further payment.

Akaroa, 1841–1845

- 9.3.9 When the Nanto-Bordelaise Company discovered that British sovereignty had been declared over the South Island, it sent out no more settlers. Its agent and its colonists at Akaroa were virtually abandoned. Belligny’s bills of exchange were not honoured by the company back in France, where one of its main shareholders, Balguerie and Company, went into liquidation. Through the protection of the French naval officer at Akaroa and good relations with the British colonial administration, Belligny was nevertheless able to promote the Nanto-Bordelaise Company’s interests on Banks Peninsula at the expense of those of rival European land claimants, notably Hempelman. At some point, the Nanto-Bordelaise Company came to terms with E Cafler and J Rateau, two Frenchmen who had also “bought” Banks Peninsula.¹² Cafler and Rateau bought the title of Captain G T Clayton, who had made his purchases from the leading Onuku (Akaroa) chief, Tuauau, in 1837. Rateau was given a one-tenth share in the Nanto-Bordelaise Company’s land, while Cafler’s interest seems to have been bought out, at least in part, through a land deal in the Bay of Islands. Although claims based on Clayton’s purchases were not allowed by the land commissioners, the combination of Langlois’ 1838 “purchase” from the Port Cooper Maori and of Clayton’s 1837 “purchases” from the principal chief of Onuku presented a stronger case that was never tested in court: the combined Maori sellers were more representative of those with land rights to Banks Peninsula at that time.

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In September 1841, Governor Hobson visited Akaroa and held discussions with Lavaud and Belligny. He then wrote to London, to Lord Stanley, secretary of state for the colonies, suggesting that the French be given the same privileges as the New Zealand Company. After consulting widely, Lord Stanley agreed to this proposal in July 1842.¹³ This meant that, provided its land claims were substantiated, the Nanto-Bordelaise Company would be awarded a Crown grant of four acres of land for every pound sterling spent, not only on land purchases from the Maori, but also on sending out its settlers, erecting public buildings, surveying and other tasks required by a colonising venture.¹⁴ Belligny was invited to substantiate the Nanto-Bordelaise Company's land claim.

Belligny presented the company's case before Land Commissioner E L Godfrey at a hearing at Akaroa in August 1843.¹⁵ Depositions were taken at Akaroa from Tikao, Parure, Nga Mana, Tuauau and Iwikau, as well as from two French settlers, J Cébert and G Fleuret. Godfrey then went on to Otakou where Tuhawaiki told him that he had not been a party to the sale of Banks Peninsula to the French and would not give his consent until he received payment. The land commission report concluded from all the evidence that no sale had been proved in 1838. The Maori had admitted the sale to Langlois in August 1840 of specific areas of land (Te Pohue at Port Cooper, Kokaihope at Port Levy, Kokakongutungutu at Pigeon Bay and about 400 acres at Akaroa between Te Kau Point and Kaitangata Stream) and had promised more land around these four harbours on receipt of further payment. Because this deal was undertaken after Governor Gipps' proclamation of 14 January 1840, the commissioners would have dismissed the case if it had been made by a private individual. But, because it was a company claim, they made no recommendation but simply recapitulated the evidence.

Like Godfrey, Belligny seems to have accepted on pragmatic grounds the Maori view of what had been effectively sold to the French. Captain A Bérard, who had replaced Lavaud at Akaroa as the commander of the French naval station, asked Edward Shortland to draw up a model deed of purchase in Maori and to provide him with a list of Maori with land rights on Banks Peninsula. Belligny asked Iwikau to provide him with a list of goods to be purchased by the French at Sydney and to be paid over to the Maori. The goods were bought in Sydney by Captain Bérard for 6000 francs (£240) at the end of 1843. Payment was delayed by Belligny in the hope that the governor would come and give his official sanction to it. When there seemed to be no chance of this, Belligny decided to go ahead independently. Maori demands for more payments and threats to pillage Akaroa showed the weakness of the French colonists' position on the peninsula.

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Belligny hoped to make it more secure before his own departure and before that of Bérard's warship, the *Rhin*.

- 9.3.10 Some 400 Maori assembled at Akaroa in March in 1845. Two separate deeds were signed, in Maori, with accompanying maps, between Belligny and the Maori from the northern half of the peninsula and those from the southern half.¹⁶ There is evidence that a show of force by the *Rhin* contributed to Maori acquiescence.¹⁷ According to Bérard, the goods given in payment for the peninsula were substantial: those paid across for the northern half of the peninsula had a value of 15,000 francs (£600), while those given for the southern half were valued at 23,000 francs (£920), which roughly matches Belligny's total valuation of £1485. In addition to the articles which Bérard had bought in Sydney, the remaining exchange items brought out by Langlois in 1840 were also distributed. Payment for the southern half of the peninsula included an 11 ton schooner built at Pigeon Bay. Cattle, a horse, agricultural tools, saws, guns and pistols were included among the items paid. In addition to the payments made in March 1845, Belligny promised further payments of £100 per year for two years and £50 per year for five years, making a total of £450 promised but not paid.

Three very important Akaroa Maori declined to sign Belligny's deed on the grounds that it did not exclude from the sale the land being farmed by Rhodes, with whom they were associated. Because Belligny's deeds do not seem to have survived, it is difficult to be sure about some details of these negotiations. Nevertheless, it is clear that agreement was reached that the Maori would continue to live in the villages which they then occupied and that reserves of some sort were set aside. Belligny told Ngai Tahu that adjustments would be made if an official government investigation decided that the price or the reserves were insufficient. Belligny left Akaroa in April 1845 to return to France. According to the agreement he had just reached with Ngai Tahu, £450 remained to be paid to them by the Nanto-Bordelaise Company.

British government intervention 1841–1849

- 9.3.11 As soon as it heard of the declaration of British sovereignty over New Zealand and of the consequent plight of its own nationals, the French government asked the British government to protect the rights of French landowners in New Zealand and received a reassuring reply early in 1841. Preliminary inquiries were made by the Nanto-Bordelaise Company to see if it could sell its land rights to the British New Zealand Company. But firstly it had to have those rights recognised by the British government. It was not, however, until 1844 that the Nanto-Bordelaise Company sent an official representative,

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G N Maillères, to London to establish its rights to Banks Peninsula (mistakenly believed to have an area of 30,000 acres) on the basis of total company expenditure on its colonisation project. At the Colonial Office, Lord Stanley proved sympathetic to the French company's claim.

The various documents produced by Maillères were examined by the Land and Emigration Office and by Lieutenant-Colonel Godfrey, the man who had examined the French claim as a land commissioner in New Zealand and who was now back in London. Godfrey reported that Ngai Tahu agreed that small quantities of land were already sold to the French and paid for, and that they would be very willing to sell most of Banks Peninsula (excluding their villages and cultivation grounds) for a small sum. Godfrey, of course, was unaware that Belligny had conducted further negotiations with Ngai Tahu in March 1845. The Land and Emigration Office was satisfied that the French company had spent £11,685 (L3:II:93–108, 121–123).¹⁸ At five shillings per acre, this would entitle the company to a maximum of 46,740 acres, but only 30,000 had been requested. On receiving these reports, Lord Stanley wrote to the incoming governor of New Zealand, Grey, instructing him to confirm any valid land purchases which the French had already made and to waive the Crown's right of pre-emption over any land on Banks Peninsula that was needed to bring the French company's validly purchased land up to 30,000 acres.¹⁹ The Maori, who were seen as willing sellers, were, of course, to be paid compensation for any extra land which the French acquired through negotiation with them.

Grey, who was by no means a francophile, may well have deliberately prevaricated when he received these instructions, but he certainly encountered a real problem when he eventually went to Akaroa in 1848 and found that there was no longer a representative of the Nanto-Bordelaise Company there to negotiate with. In the meantime, and even though a Crown grant had not been issued, the Nanto-Bordelaise Company succeeded in selling its interests in Banks Peninsula land to the New Zealand Company. The final conveyance was made in London on 30 June 1849 for £4500.²⁰ Land already sold or given by the Nanto-Bordelaise Company to individual settlers was excluded from the sale. Any further payments that needed to be made to the Maori became, according to the deed of conveyance, the responsibility of the New Zealand Company, as did any fees or expenses incurred in acquiring a Crown grant. The deed left open the possibility that the French company had a valid claim to more than 30,000 acres, for the French negotiators had discovered their error concerning the area of Banks Peninsula. The British colonial secretary had declined to go beyond this figure, however.

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Ngai Tahu's record of signing deeds with the French and accepting payment undoubtedly contributed to the impression formed among British officials that Ngai Tahu had gone quite some way towards relinquishing their rights over much of the peninsula. Just how far they had done so, and over what area, was not known.

Principal issues which emerge from the French purchases

- 9.3.12 That concludes Dr Tremewan's condensed version of the 1838, 1840 and 1845 French purchases. We now discuss the principal points which emerge, together with comments on them by the claimants and the Crown.

The 1838 and 1840 deeds

- 9.3.13 In our view these "agreements" were all fatally flawed.

(a) The original 2 August 1838 deed, prepared by Langlois in French, purported to purchase the whole of Banks Peninsula, except tapu land or urupa, from the leading chiefs he found at Port Cooper. How much, if any, of a deed in French the Ngai Tahu signatories understood must be very questionable. The principal chiefs at Akaroa in 1840 denied they were parties to the deed. Nor, it appears, were other leading chiefs such as Tuhawaiki, Patuki, Karetai and Taiaroa, who lived elsewhere but who claimed rights to parts of the peninsula, consulted. Belligny in 1840 accepted that it was defective.

(b) The first 1840 deed, dated 11 August, purported to sell the whole of Banks Peninsula and the second, of 12 August, a much greater area from Kaikoura in the north to present-day Temuka in the south, and from east to west coast. In fact Langlois obtained Ngai Tahu signatures to blank sheets of paper. He apparently undertook to later record what had been agreed. This he did several days later but back-dated the agreements. No reliance can be placed on documents so prepared and executed.

(c) The third document prepared by Langlois at Lavaud's instigation was a renegotiated version of the original 1838 agreement. It was negotiated with the Maori at Akaroa at the end of August or the beginning of September 1840, and back-dated 2 August 1838. As Dr Tremewan related:

Undertaken by Langlois on Lavaud's initiative and not his own, it was meant to bring the Akaroa Maori into the land purchase agreement and to convince the British authorities of the validity of the French claim to have bought Banks Peninsula in 1838. (T3:34)

That Lavaud felt uncomfortable about his initiative is evident from his letter of 3 September 1840 to the Nanto-Bordelaise Company, in which he said:

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I confess to my shame, for it is dishonest, that it was necessary in order that in the eyes of the British authorities we have at least a semblance of right to the ownership of the land at Akaroa, for me to make Mr Langlois understand that it was absolutely necessary to draw up a contract with the native chiefs of this area and to date it 2 August 1838. (T3:33)²¹

Crown counsel submitted that the back-dating of the document, though deceptive, was not in breach of any law, citing in support an ancient 1584 English decision in *Goddard's Case* (1584) 2 Co Rep 4b: 76 ER 396, in which it was said:

A date is not of the substance of the deed. For although it want a date, or have a false date, or an impossible date such as the 30th of February, yet the deed is good.

Crown counsel, on the strength of this statement, submitted that if the deed were otherwise regular this factor would not vitiate it; but the rights of the French company would depend upon the application of the doctrine of pre-emption. As the back-dated deed was executed after the acquisition of British sovereignty over New Zealand it might not be recognised by the Crown, but Crown counsel claimed it was not an illegal transaction or nullity. It could therefore transfer title away from Ngai Tahu.

Mr Temm, for the claimants, submitted that the Crown had already conceded the making of the false date was for the purpose of deceiving the British authorities. As we have seen, Lavaud conceded to his superiors in France that his action was dishonest and intended to deceive the British authorities. Mr Temm characterised the document as a forgery, which he rightly defined as a false document known to the maker of the document to be false in any material particular and for the purpose that it shall be acted upon as genuine. As Mr Temm pointed out, in the deed in question the date was material because if the transaction took place before the proclamation of sovereignty the consequences would be very different from those that would flow if it had been made after that proclamation.

- 9.3.14 We agree with Mr Temm that the alteration was made for the purposes of deceiving the British authorities and it was made also with the intention that it be acted upon as genuine. The fact that a forgery fails in its purpose does not make it any less a forgery. While, as Mr Temm agreed, a deed which lacks a date can be effective, or a deed which has a mistaken date wrongly recorded without any intention to deceive can also be effective, a forgery is a nullity and any transaction that is based upon a forgery is invalid. Nothing that was said in *Goddard's Case* would suggest otherwise. In that case it appears that by mistake a deed was dated later than it was executed and delivered. It was not a case of deliberate falsification of the document for ulterior purposes. We have a clear view that the

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back-dated French deed was a legal nullity. It was procured and back-dated for the express purpose of deceiving the Crown officials, who it was hoped would accept and act on the document as genuine and correct on its face. In our opinion it cannot be invoked or relied on, as the Crown contended, as in some way passing title away from Ngai Tahu.

The Godfrey commission, 1843

- 9.3.15 At a hearing in Akaroa before Land Commissioner Colonel Godfrey in August 1843, Belligny presented the Nanto-Bordelaise case for its claim to all of Banks Peninsula with the “exception of the Bay of Hikuraki. Oihoa on the South and Sandy Beach, north of Port Cooper on the north” (L3:I:86)²², the “supposed contents” being 30,000 acres. In support of the company’s claim Belligny submitted a copy of the back-dated 1838 deed. A copy of the deed is annexed to the commissioner’s report (A31:5/A). As Dr Tremewan pointed out, the land commission report concluded from all the evidence, both Ngai Tahu and French, that no sale had been proved in 1838. But the commissioner found that various Ngai Tahu chiefs, whom he named, had admitted the sale to Captain Langlois in August 1840 of certain specific areas of land, being “about 400 acres” from “Point Tikau to a stream called Kaitangata and extending backwards to the top of the adjacent mountains” (L3:I:87)²³, and in addition land (area unknown) at Te Pohue at Port Cooper, Kokaihope at Port Levy and Kokakongutungutu at Pigeon Bay, and, that they had received goods worth £234 in exchange. Despite these admissions by the Ngai Tahu chiefs who gave evidence, the commissioner would have found the transaction null and void because the purchase was made after the proclamation of 14 January 1840 forbidding such direct purchases. But because the British government had decided that the claim should be dealt with on the same basis as a British company claim, the commissioner made no recommendation but simply recapitulated the evidence (L3:I:87).²⁴

The claimants’ historian, Mr Evison, estimated that 150 acres, or perhaps more, was “sold” to the French at Pigeon Bay; an undefined area, perhaps 400 acres, at Port Levy, and at Port Cooper at most 600 acres—these being in addition to the 400 acres referred to by the Godfrey commission as being sold at Akaroa. Later, after considering Dr Tremewan’s evidence (T3:44–46) of the probable location of “Point Tikau” (or “Te Kau”) referred to in the commission report, Mr Evison agreed that a small prominence near the junction of French Bay and Children’s Bay, referred to as Te Keo on an Akaroa museum map, was the likely location of Point Tikao. This location, he said, would give a foreshore length to the French block of some 1200

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metres, and not about 500 metres as he had earlier suggested. This would mean, Mr Evison agreed, that Godfrey, in assessing the probable area at 400 acres, had underestimated the area (U10(d):1–9). We agree with this conclusion and have estimated on the basis of a plan included by Mr Evison (U10(d):4), that the more likely area was in the vicinity of 1700 acres. If this is added to the estimated areas for the three other locations at Pigeon Bay, and Ports Levy and Cooper of 1150 acres, we have a total estimate of some 2850 acres, say 3000 acres in round figures. We doubt if a more precise estimate can be made so long after the event.

We note that Commissioner Godfrey, while in London in 1845, had referred to him a variety of papers. These included the deeds of 11 and 12 August 1840, submitted to Lord Stanley by the Nanto-Bordelaise Company. After examining the dossier, Godfrey still came to the same conclusion he had in 1843, that the only authentic sale had occurred in August 1840, when specific pieces were sold and paid for. Godfrey was at the time unaware of the 1845 transactions which had taken place between Belligny and Ngai Tahu (T3:66).

The 1845 French “purchases”

- 9.3.16 These have been described by Dr Tremewan (9.3.10). It appears the French handed over goods worth about £1485 in exchange for some Ngai Tahu signing two separate deeds, one for the northern half of the peninsula and the other for the southern half. As Dr Tremewan noted, Belligny was perfectly aware that the payments might not satisfy the British authorities (T3:60). It is apparent that Belligny’s 1845 purchases were made from mixed motives. In a letter dated 23 April 1845 from the Akaroa police magistrate, Robinson, to the superintendent at Wellington, Robinson wrote:

In reference to the land purchases of the Nanto Bordelaise Company, I am happy to inform you, that I have anticipated your wishes, both with respect to taking no official notice of the payment made by M. Belligny to the Natives, and also by cautioning him, that it would very probably prove a useless expenditure but that M. Belligny informed me, his only object was to redeem the promise, that he had made the natives, & to ensure the tranquillity of the French Settlers, after his departure, and that he was probably aware that it was not a final payment, but subject to the approval of the Governor. (T3:116)²⁵

In another letter to the superintendent on the same day Robinson stated:

M. Belligny admitted to me, as did the Commandant [Bérard], that the purchase was not according to the terms of the Proclamation, but said their only object was to ensure the safety and Tranquillity of the settlers, after the Departure of the Corvette, and M. Belligny – that the goods had been purchased & might as well be given to the natives, & that they had promised it and wished to keep their word. (T3:118)²⁶

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The Crown submitted that Belligny's purchases in 1845 could reasonably be regarded by the Crown as valid in that it was effective to divest title from Ngai Tahu in respect of the lands to which they related. Under the doctrine of pre-emption, it was argued, title passed not to the French but to the Crown. But the Crown went on to say that the critical question – and one almost impossible to answer at the time – is how much land Ngai Tahu really agreed to sell in 1845 (X2:36). In view of this admission, it is difficult to see how the transaction could have the effect contended for by the Crown. But there are other compelling reasons for us finding, as we do, that the deeds cannot be relied on as having divested Ngai Tahu of ownership of Banks Peninsula:

- the deeds do not appear to have survived. No copy was produced to us and no one can say with any certainty what they contained;
- they lacked legal effect because they were made without any waiver by the Crown of its right of pre-emption;
- the sum of £450 was to be paid by annual instalments over five years. These payments were never made; and
- at least three very important chiefs – Te Ruaparae and Akaroa of Ngati Irakehu and Mautai of Ngati Mako – refused to be parties to the transaction. (T3:55)

Despite these major impediments the Crown still felt able to submit to us that by 1845, the French had surely done enough to justify a substantial grant-perhaps more than 30,000 acres. The difficulty with this argument is that the 1838 and 1840 dealings in themselves did not confer any title or rights in the French, while the 1845 transactions are not evidenced by the deeds and, as we have indicated, were seriously, indeed fatally, flawed. We are left with the very limited sales of August 1840 which the Godfrey commission found to have been admitted by Ngai Tahu. Godfrey's estimate of 400 acres for the land at Akaroa sold to the French should be revised, as we have indicated, to some 1700 acres.

Lord Stanley awards 30,000 acres to the French

- 9.3.17 As Dr Tremewan explained, when France accepted the fact of British sovereignty over New Zealand it sought to obtain an assurance from London that the rights of the French settlers in New Zealand would be protected. It received a reassuring reply in 1841. Lord Stanley agreed in 1842 that, provided its claims were substantiated, the Nanto-Bordelaise Company would be awarded a Crown grant of four acres of land for every pound sterling spent, not only on land purchases from the Maori, but on sending out settlers and colonising expenditure incurred in New Zealand.

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The Nanto-Bordelaise Company offered to sell its South Island interests to the New Zealand Company. It also appealed to the British government in 1844 to have its claims to Banks Peninsula recognised, erroneously estimating the size of the peninsula at 30,000 acres, when the real figure was more like 250,000 acres.

The Land and Emigration Office in London reported on 12 December 1844 that it was satisfied the French company had spent £11,685 on its Banks Peninsula venture (L3:II:121–123).²⁷ At five shillings an acre this would entitle the company to a maximum of 46,740 acres, but only 30,000 had been requested. Colonel Godfrey's report came to hand on 2 July 1845. Five days later, 7 July 1845, Lord Stanley wrote to the incoming governor of New Zealand, George Grey, instructing him:

- to send Edward Shortland or another officer to Akaroa to confirm any valid land purchases made by the French;
- to waive the right of pre-emption over such additional land required to make up 30,000 acres after allowing for the land already purchased; and
- although not expressly stated, it is to be implied from Lord Stanley's instructions that Ngai Tahu were to be paid for any additional land required to be purchased to make up the 30,000 acres (L3:II:1–14).²⁸ This is accepted by Crown counsel, who added that the French could complete a purchase of up to 30,000 acres, but the British government did not assume that it had already occurred (X2:20).

Governor Grey did not act on these instructions. When he went to Akaroa three years later, in 1848, he found there was no longer a representative of the Nanto-Bordelaise Company with whom he could negotiate.

In 1849, although no Crown grant had been issued, the Nanto-Bordelaise Company succeeded in selling its interests in its now recognised claim to 30,000 acres at Banks Peninsula to the New Zealand Company. The colonial secretary, Earl Grey, had previously denied an application to extend the award when the company realised that the peninsula consisted of more than 250,000 acres (L3:III:16).²⁹ Under the deed of conveyance of 30 June 1849, land already sold or given by the French company to individual settlers was excluded from the sale (T3:123–126).³⁰ The deed also provided that any further payment that needed to be made to Maori in respect of the land being sold became the responsibility of the New Zealand Company. With the signing of this deed the interest of the French company in Banks Peninsula was extinguished.

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Findings on grievances nos 1, 2 and 3

9.3.18 We now consider the claimants' first three grievances which related to Lord Stanley's award of 30,000 acres to the French company. The grievances are:

1. That Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu.
2. That Ngai Tahu were not compensated for Lord Stanley's award.
3. That no reserves were provided for Ngai Tahu out of Lord Stanley's award. (W3)

The first grievance is clearly made out. There is no evidence before us that the Crown consulted Ngai Tahu before deciding to award 30,000 acres at Banks Peninsula to the French company. The British colonial secretary, Lord Stanley, did, however, instruct Governor Grey to send Shortland or another officer without delay to Akaroa to identify the land already purchased by the French and to facilitate the purchase of the balance required to make up the 30,000 acres. Grey failed to comply with these instructions. No representative was sent until Mantell unsuccessfully sought to purchase the Akaroa block in 1849. We have earlier estimated that the land the Godfrey commission found to have been purchased by the French company at Akaroa in August 1840 was probably of the order of 1700 acres, not 400 as estimated by Godfrey. Assuming this to be a reasonable estimate, some 28,300 acres remained to be purchased.

The tribunal is disposed to agree with the Crown historian Mr Armstrong's comment that Lord Stanley's award should be viewed as a solution to the political problems associated with the French presence on Banks Peninsula (R8:6/30:42).

As to the second grievance, there is no evidence that Ngai Tahu were ever paid for the 28,300 acres. We agree with Mr Armstrong that Belligny's payments in goods in 1845 cannot be viewed as having any relation to the "compensation" alluded to by Lord Stanley in his instructions to Grey. It had no relationship to the arrangement agreed upon in London (R8:42). Nor is there any evidence that any reserves were provided for Ngai Tahu out of Lord Stanley's award. The second and third grievances are accordingly also made out. We discuss the purchase of the Akaroa block later in this chapter (9.6) and will defer our formal findings until then.

9.4. **The Crown Purchases**

9.4.1 As we have seen (8.4.7), on 10 June 1848 around 500 Ngai Tahu gathered at Akaroa to negotiate a purchase with Kemp. Charles Kettle, Kemp's surveyor, noted that:

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Tikao, a native who lives on the western side of Akaroa and who appears to be an influential person from his superior intelligence . . . (was interrogated by Kemp) with regard to the claim of the French company, and he very clearly stated that they (the natives) had sold the *whole* of the Peninsula to them and among all the natives present there was not a dissident. (L3:I:77–78)³¹

Kemp subsequently reported to Eyre that:

The Natives clearly admit to have sold the whole of Bank's Peninsula to the French company . . . I did not think it advisable on this account to enter into any arrangements with regard to the Reserves &tc, knowing also that the question was one at present pending between the English and French Govts. My impression is that no definite Reserves were made for them by the French Agent at the time of Sale, & that they continue to occupy the Cultivation Grounds they formerly did. (L9:II:424)³²

As we have seen, Kemp's deed map showed Banks Peninsula coloured green and bore the legend "The land coloured green is that acknowledged by the natives to have been sold to the French Co". See fig 8.3

Mantell appeared to gather the same impression when he went south to lay out reserves for Ngai Tahu following the Kemp purchase.

Other evidence suggests that Kemp and Kettle may have gained the wrong impression from their discussions with Ngai Tahu. For instance William Fox, in a letter to Grey of 9 April 1849, said:

The Natives though they admit some sales, deny having received the stipulated payments, and profess to be in expectation of still receiving a large sum of money (£5000) from the French Company. (L3:III:23)³³

Mantell reported on 28 November 1849 that Ngai Tahu were:

actuated partly by prejudice against the English . . . and partly by a confident hope that M. de Belligny will still return and make them some enormous payment. (L3:III:29)³⁴

Certainly in 1843, as Commissioner Godfrey found, Ngai Tahu admitted to having sold no more than 3000 acres. In evidence before the Godfrey commission, Iwikau said that Ngai Tahu:

considered that the lands about Port Levy, Port Cooper and Akaroa and Pigeon Bay were Wakatapu'd, made sacred, to Captain Langlois, who promised to complete the purchase by payment of property and cattle to us upon his return, but we have not since received any payment. (L3:I:89)³⁵

We have no doubt that Kemp and Kettle genuinely believed they were being told by Ngai Tahu that they had sold the peninsula to the French. It is more likely Ngai Tahu were intending to convey the notion that some land had been provisionally sold and was set apart pending payment in full by the French.

*The Ngai Tahu Report 1991****Plans for a Canterbury settlement***

9.4.2 In a letter of 9 April 1849 the New Zealand Company agent William Fox told Governor Grey of the Canterbury Association's plans to found a settlement around Port Cooper and the adjacent country. Some concern was expressed over the uncertainty surrounding the allocation of the 30,000 acres to the French. To facilitate the aspirations of the Canterbury Association, Fox requested the governor to issue a Crown grant for a block including the harbours of Port Cooper and Port Levy. He suggested that there was some doubt as to whether Banks Peninsula had been excluded from Kemp's purchase, and that Ngai Tahu now claimed that the peninsula had not been sold and that Port Cooper and Port Levy did not belong to the government. Fox advised the governor that there would be no great difficulty in providing a small additional payment for the peninsula, but he hoped Grey would:

be able to feel satisfied that Port Cooper and Port Levy, as well as the rest of Banks Peninsula, are comprised in the late purchase from the Natives. If your Excellency should think otherwise, I have then to request that the necessary steps may be taken to extinguish the Native title to the district in question. (L3:III:24)³⁶

On 27 April 1849 the civil secretary, Dillon, advised Fox that Governor Grey would facilitate the Canterbury Association by directing Lieutenant-Governor Eyre to procure such land as the association required at Port Cooper and Port Levy. As to whether Banks Peninsula was included in Kemp's purchase, Grey's:

own intention was that all the Native claims to land, with the exception of the reserves made to them, should be extinguished by the payment of £2000; but if the lieutenant-governor should think that some small payment should, upon account of any misunderstanding, be still made to the Natives for the land now required at Port Cooper and Port Levy, I will direct him to consider the land so required as having been a reserve made upon behalf of the Natives, which they dispose of to the Government for the use of the new settlement about to be established. (L3:III:25)³⁷

Grey was here saying that his *intention* was that Banks Peninsula should have been included in the purchase, but if there was thought to be some misunderstanding then the land required should be treated as being a Maori reserve and a small payment made for it. Grey was refusing to recognise that Ngai Tahu had not sold the land. By some fiction the Ngai Tahu land was to be treated as a Maori reserve which Ngai Tahu were to agree to dispose of to the government.

Eyre instructs Mantell to purchase the peninsula

9.4.3 On 9 June 1849 Eyre instructed Domett to write to Mantell about his going down to Akaroa to decide on the reserves required for the

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Maori on Banks Peninsula and to extinguish their claims to the residue of the peninsula:

So far as they may not have been extinguished by the late purchase in the Middle Island. (L3:III:25).³⁸

On 12 June Eyre gave Domett more detailed instructions to be conveyed to Mantell. Domett duly wrote to Mantell the following day, 13 June 1849. In this letter Mantell was told that:

You are aware that throughout the negotiations for the Tract of Country recently acquired in the Middle Island, that portion of Banks' Peninsula sold to the French was intentionally left out of consideration, because the Natives admitted that they had made a Sale to the French, and because the extent and position of the land thus sold was not defined for the same reasons no Reserves were set apart for the Natives on the occasion of your last visit within the limits of the Peninsula.

At the same time, however, the late Purchase included the whole of the Native right and title between the Ngatitooa Boundary and the Otago block excepting as regarded their own Reserves and the Block sold to the French. Now therefore that the Government are sending down a Surveyor to mark off the 30,000 acres which have been awarded to the French Company it will be necessary to set apart under your directions such Reserves within the limits of the Peninsula as may be necessary for the present or future wants of the Natives.

In making these Reserves you will be guided by the Instructions which were given to you when sent down to set apart the Reserves required for the Natives in the late purchase in the Middle Island. (G2:316)³⁹

Against the middle paragraph above Mantell noted:

The whole peninsula marked green on map accompanying Kemps deed was excepted. (G2:317)⁴⁰

Domett went on to say that as a result of the 30,000 acre block being assigned to the French and Mantell setting aside reserves for Ngai Tahu, there would then be three classes of land on the peninsula:

The Block assigned to the French – the Native Reserves, and the residue of the Peninsula which would come under the terms and conditions of the [Kemp] Deed of Sale. (G2:319)⁴¹

Domett then went on to justify the payment of “some additional payment” to Ngai Tahu:

as it is possible that the Natives may have supposed that they had disposed of a larger block of land to the French than is awarded to them, and that on their arriving to take possession of it some additional payments might be made to them. His Excellency considers it will be only right to consider the extra quantity of land which will be acquired in the Peninsula by the limitation of the of the French Claim in the light of a Native Reserve which not being required by the natives themselves may be given up for the purposes of colonization upon a moderate compensation being given to the Native owners. (G2:318)⁴²

Mantell made the following marginal note against this passage:

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Believe they consider the whole Peninsula to have been disposed of to the French & sold on rect. [receipt] of further payment. (G2:318)⁴³

As to the “moderate compensation” that was to be given to Ngai Tahu, Mantell was told:

it will be your duty to determine and award upon a full enquiry into the merits of the case upon the spot, and you will be furnished with funds by the New Zealand Company’s principal agent for this purpose. (G2:319)⁴⁴

We have certain marginal notes which Mantell made on his copy of his instructions which we believe record verbal advice he received from Eyre. It is of interest that Mantell notes the belief that Ngai Tahu considered the whole peninsula to have been disposed of to the French and sold, subject to the receipt of further payment.

At the foot of page 4 of the letter Mantell recorded cryptic notes of queries addressed to Eyre and Eyre’s replies:

Query:

In case of disturbance – Mr Watson (i.e. Police Magistrate at Akaroa)
In event of suspension of Negotiations shall I return? – By no means.
Godfrey’s report – Given me for perusal
Lord Stanley’s paper – ditto
What deeds or receipts for money? – As giving up lands reserved for them . . . as completing purchase. (G2:319)⁴⁵

It is apparent that Mantell was well-briefed. He saw Commissioner Godfrey’s report from which he would have learned that Godfrey had recognised very limited sales to the French in 1840. Indeed he had full notes of Godfrey’s report in his notebook (G2:398).⁴⁶ He also saw Lord Stanley’s 1845 instructions to Grey concerning the 30,000 acre award to the French. An extract is recorded in his notebook (G2:400).⁴⁷

In addition to making notes on Domett’s letter of instructions, Mantell made further notes summarising certain instructions from Eyre in his private memorandum book:

Verbal Inst:

Memorandum of Verbal Instructions from H E L G *in answer to enquiries relative to Written Inst.* of June 13, 49. (G2:321)⁴⁸ (emphasis in original)

Included are the following entries:

I believe they (the Natives) consider the whole Peninsula to have been disposed of to the French, and sold *on receipt* of further payment . . . On this view compensation is equally due everywhere. (G2:321)⁴⁹ (emphasis in original)

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It appears from this passage that it is being recognised that “compensation” should be paid for all land acquired, that is, land sold to the French but for which Ngai Tahu had not been fully paid:

Have I [Mantell] anything to do with marking off the French claim.

‘No’.

Survey of French Block? To commence when my business is done. (G2:322)⁵⁰

It seems clear from these notes that the surveying of the 30,000 acre block for the French was to be done by the surveyor independently of Mantell, and after he had finished his business. The surveyor’s instructions were not produced in evidence. Nor, so far as we are aware, was the survey of the 30,000 acre block ever completed.

When I have fixed on a reserve the natives are not unlikely to prevent Survey &c? Perhaps when I have fixed the amt to be paid they thinking it too small may refuse to take it-? (G2:322)⁵¹

Immediately following this passage is his note of the lieutenant-governor’s instructions, written by Mantell in the Greek script:

Let them leave it. I must carry matters with a high hand. (G2:322-323)⁵²

This perhaps speaks for itself.

- 9.4.4 Mantell could be forgiven if he found difficulty with his instructions. Eyre, reflecting Grey’s attitude, was reluctant to concede that Ngai Tahu had not sold all their land on the peninsula. Like Grey he resorted to the fiction that after provision was made for the 30,000 acres for the French, and reserves were set aside for Ngai Tahu, the balance (being most of the 260,000 acres) was to be treated as a fictional Maori reserve which “not being required by the natives themselves, may be given up for the purposes of colonization upon a moderate compensation being given to the Native owners”. Eyre is at pains to avoid any suggestion that Mantell is to actually engage in the *purchase* from Ngai Tahu of their unsold lands on the peninsula.

Mantell was to say much later, in evidence before Chief Judge Fenton in 1868, that:

An inchoate title existed in a French Company and I was instructed to press this upon the Natives, and show them that the whole of their land was in peril. (A9:9:32)⁵³

And a little later he told the court of his instructions “to carry matters with a high hand”, which he did, and to use:

the previous purchase of the Nanto-Bordelaise Company . . . to carry out my duty – that is, to get the land. The effect of this was the Natives were willing to sell, but the price to be paid was reduced. I succeeded in bringing them down towards the price fixed by the Government. (A9:9:33)⁵⁴

*The Ngai Tahu Report 1991****The Port Cooper block is purchased***

9.4.5 Mantell, accompanied by the surveyor Thomas, arrived at Port Cooper on 2 July 1848. More than five weeks elapsed before Mantell succeeded in obtaining “signatures” to the Port Cooper deed. The only contemporary records of what took place during his negotiations are those of Mantell, principally his diary entries.

Mantell held a korero with Ngai Tahu at Port Cooper on 7 July. He noted in his diary that:

Old Jim & Co & Tukaha & Company from Rapaki came. Went on the hill by the tent with Thomas & an umbrella & held a korero. Jacky Leek Chigary & Tiakikai present. Old Jim demanded two millions in money & large reserves. Mr Tukaha 3 ships 3 small vessels 10 longboats 30 whaleboats 100 horses &c. I told them that I had no intention of discussing amount of payment, that when I had set apart reserves for them I should allot & distribute to them what additional payment to that already received I thought just. Of course after much more of this sort the froth of such negotiations nothing was done on this occasion. (G2:329)⁵⁵

We note that Mantell here refers to his payment being “additional” to that already received. This can only be a reference to earlier payments by the French and strongly suggests he was invoking earlier transactions between Ngai Tahu and the French as a bargaining factor.

On the following Monday, 9 July, Mantell met Ngai Tahu at Rapaki, where there was “the usual talk about two millions & so on and the usual answer” (G2:331).⁵⁶ At a meeting at Purau on 11 July there was again “the usual talk and answer”. The next day, 12 July, he was present at a further meeting at Rapaki:

At their urgent request told them that giving a small reserve at Purau and a large one at Rapaki I would give £160 as final payment: of course this was rejected. Gave them time to consider. (G2:332)⁵⁷

Nohumutu indicated his intention of going round the peninsula to consult all the Maori.

Few, if any, discussions were held by Mantell with any Ngai Tahu over the next 12 days. Then on 25 July 1849 Mantell’s diary records:

Natives Nohumutu &c came. After a little talk set out with Thomas & Carrington for Purau. After some disagreeable difficulties resolved to cut the knot so set Carrington to survey the reserve which he finished by sundown. reached Cav. bay shortly after dark. All gardens beyond reserve to be abandoned after harvesting the present crop. (G2:335–336)⁵⁸

We infer from this entry that Mantell failed to resolve the difficulties and went ahead without reaching agreement on the Purau reserve. Not even all gardens were reserved. The following day Mantell agreed to a firewood reserve – a detached bush called Motuhikarehu.

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On 27 July Mantell was at Rapaki “with all the natives”. There he marked out a reserve. He does not record whether this was done with the agreement of Ngai Tahu. Bad weather, including snow and hail, was experienced over the next few days. Carrington surveyed the reserve at Rapaki on 2 and 3 August 1849. Mantell arranged with Ngai Tahu for a visit to settle the day for payment of the purchase price and to see the boundaries the following Monday. On Saturday 4 August Mantell noted that his writing was “interrupted by Te Uki & Co who camped near the men’s house & wasted my whole day” (G2:337–338).⁵⁹

On 6 August Mantell returned to Rapaki where a reserve was marked off. Three days later, on 9 August, the local Ngai Tahu held a korero at which recipients were appointed for the five divisions of the block as the purchase money of £200 was to be paid over the next day.

- 9.4.6 On 10 August 1849 the deed of purchase for Port Cooper was signed, but not before some opposition was encountered. The previous evening “Old Pokene” endeavoured to discuss his claims with Mantell, but Mantell told him he would hear him the next day in the presence of the assembled Ngai Tahu. Accordingly he called on Pokene to speak at the meeting on Friday. Pokene “tried to establish a claim to many places but failing began to threaten”. (G2:339–340)⁶⁰ At this point “Jim and the rest” went to Mantell and suggested that he:

Keep your money the land is yours but we cannot take the money now or a disturbance will ensue – Send for Mr Watson said one For a man of war said another Wait till the Governor comes said a third till December said another. (G2:340)⁶¹

Purporting to take up the December suggestion Mantell records that he wrote a codicil to the deed, which he had previously read twice to Ngai Tahu, to the effect that the money should be distributed in December. This, he noted, they did not like at all. At this point he left them, promising to return after lunch. On his return from lunch:

Old Jim soon came up & seemed rather fidgetty; presently he said When are you going to begin its getting late; Presently when Ive done my pipe; have you done quarrelling? Yes make haste the sun will be down soon: after a few whiffs lounged in & brought out the deed – assembled the natives – Read the deed Got the signatures and those of the witnesses took the deed in . . . Called in the elected receivers . . . and handed over the money . . . Everyone was satisfied & before night Every man woman & child claimant or not had got some portion of the spoil. (G2:341)⁶²

The terms of the deed of sale

- 9.4.7 Mantell had finally succeeded, after what he described as “long and tedious negotiations”, in obtaining signatures to a deed of sale of Port Cooper and adjoining territory amounting to some 59,000 acres

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(appendix 2.3). The purchase price was £200. In a report of 11 August 1849 to the colonial secretary he noted:

I have reserved for the Natives two portions of land; the first, 10 acres, more or less, at Purau, Acheron Bay; the second, 856 acres, more or less, at Rapaki and Taukahara. As this would at first sight, appear excessive, I may state that Mr Carrington estimates the extent of arable land in it at less than sixty acres. I have further reserved for them the right of firewood in an isolated wood inland of the Purau Reserve, called Motuhikarehu. (L3:III:26)⁶³

In a further letter to the colonial secretary, also written on 11 August, Mantell again referred to the negotiations as being most protracted and tedious and went on to say:

I proceed next week to Port Levy.

It will be necessary to extinguish the Native title over the whole peninsula in the same manner as this place before the survey of the proposed grant to the Nanto-Bordelaise Company can be commenced; the balance, therefore, of the sum originally placed at my disposal will be far from adequate, and I would suggest that the Principal Agent of the New Zealand Company be requested to remit an additional amount of about £300. (L3:III:27)⁶⁴

It is apparent from this passage that Mantell, in the light of his experience in the field, acknowledged that the Maori title was still in existence and that he would require additional funds to extinguish their title.

It is also apparent from Mantell's correspondence with his father that he had found the assignment a difficult one. Writing from Banks Peninsula on 16 August 1849, he told his father:

I have encountered great difficulties in my negotiations there [Port Cooper] partly from the difficulty of making the natives comprehend what I could not understand myself. (T2:24)⁶⁵

This is an illuminating observation. It suggests to us that Mantell experienced difficulty with the instructions he received from Eyre that he was to regard the interest of Ngai Tahu as being one in "reserves" only, which were to be handed over in exchange for modest "compensation". It is apparent that at his first meeting on 7 July he took a rigid stand, indicating he did not intend to discuss the amount of payment and that he would be taking into account their payments from the French. He appears, by his own account, to have acted arbitrarily and unreasonably in marking off a mere nine or ten acres at Purau and requiring all gardens beyond the reserve to be abandoned after the crop was harvested. But by the end of his lengthy discussions with Ngai Tahu he had come to accept that they still had title to the land and it would have to be purchased, for which additional funds would be required. While he was delayed by unusual-

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ly severe wintry conditions, nevertheless it took some five weeks to obtain Ngai Tahu signatures to the deed. It appears they bargained vigorously and at length, but finally agreed to accept what Mantell proposed.

9.4.8 On 5 September 1849 Domett wrote to Mantell on instructions from Lieutenant-Governor Eyre (G2:396).⁶⁶ Mantell was told:

- that the New Zealand Company was prepared to advance a further £300 as requested by Mantell;
- that Governor Grey's "intention" had been that all the Maori claims to the land except their reserves and the land sold to the French should be extinguished by the payment of £2000 for Kemp's purchase;
- that it was only because the Ngai Tahu reserves and the land sold to the French was not at the time (of Kemp's purchase) decided, that the government entertained the question of additional compensation at all;
- the French company after the last (1845) payment made by the French captain, disavowed and endeavoured to impress on Ngai Tahu that no future payment could be expected from them;

(We would comment here that this is contrary to the evidence that an additional £450 would be paid to Ngai Tahu over a five year period.)

- that the English government did not appear to have contemplated that any such further payment would be required on account of their award of 30,000 acres;

(We note that this is also incorrect. It is clear from Lord Stanley's memorandum of 7 July 1845 that the French company was expected to purchase any additional land required to make up the 30,000 acres.)

- that Carrington the surveyor was not to be kept unemployed but should proceed to mark out the 30,000 acres according to the instructions he had received and which, it was said, had no reference to Ngai Tahu or to their reserves; and
- that he was to act upon his instructions and:

discard altogether any statement or application of the Natives, having reference to the Governor-in-Chief or causing delay in the adjustment, as Sir George Grey has given full directions on the subject. (G2:396)⁶⁷

It appears from this final directive that Mantell was being required to ignore any representation which Ngai Tahu might wish to make to the governor or which might delay the "adjustment". Grey, it appears, had given his final word.

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Domett wrote a further letter to Mantell on behalf of Eyre on 19 September 1849. He stressed the lieutenant-governor's concern that Mantell should procure the necessary cession from Ngai Tahu as economically as possible as:

the Natives have already been so well compensated for their claims generally that they could only anticipate the additional payments now making as a matter of grace, arising out of the unsettled state in which the French claim was, at the time the purchase was made by Mr Kemp, and in satisfaction of any equitable claims, upon their resigning those portions of the Peninsula required by the Company, but not included in Mr Kemp's purchase or in the French Claim. (A31:6/c:3)⁶⁸

We would observe that, apart from some of these instructions from Eyre being plainly wrong, they were designed to reinforce Eyre's earlier instructions setting up the fiction that the lands on Banks Peninsula not sold to the French were in some way to be regarded as Maori "reserves".

Moreover, it was said that because Ngai Tahu had already been so well compensated, the additional payments were being made as a matter of grace only. In short, Ngai Tahu had no right to be paid for their land not sold to the French. Perhaps the most disturbing feature was Eyre's injunction to Mantell that he disregard entirely any representations which Ngai Tahu might wish to make to Governor Grey, or indeed which might delay Mantell in completing his acquisition of the land.

The Port Levy block is purchased

9.4.9 As a result of these further instructions from Eyre, Mantell was acting under even tighter constraints (and certain false premises) than he had been at Port Cooper. These were reflected in the dictatorial stance which he assumed in his dealings with Ngai Tahu. As a consequence, as the Ward report noted, the "proceedings were at least as acrimonious and even more devisive than at Port Cooper" (T1:187).

Mantell moved to Koukourarata (Port Levy) on 15 August 1849. That evening a party of Ngai Tahu, including Apera Pukenui who claimed to be the principal chief there, had a long talk with Mantell about the land from Kaituna to Flea Bay. They demanded:

Reserves at P. Levi, Pigeon Bay & Kawatea, commonly called Okain's bay & £500 for Eastern & £500 for Western part of block. (G2:348)⁶⁹

On 21 August the party set out in the rain to see where a reserve was wanted at Pigeon Bay:

Reaching the grave of Tikao's child Puke. [Apera Pukenui] said a piece there might be resd of according to what he pointed out about 80 acres the other cultivations & kaikas to be abandoned in 2 or 4 years time – He

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then requested to know what wd be the amount of final payment, from Kaituna to Fly Bay – I said £300. Of course he was dissatisfied having demanded £1000. (G2:351–352)⁷⁰

At Apera’s request Mantell went to his kaika on 25 August to hear from Tamakeke. According to Mantell, Tamakeke spoke for some two hours:

mostly in abuse of my award of £300. praising the French & abusing the English. (G2:356)⁷¹

Mantell noted Tamakeke as also saying:

About the boundaries. because formerly sold to French now you take all. I intend to keep some for the French, if they do return (?) for myself & my children–

This side for you that for the French or me.

Because you are here you say that you have the tikaka of the ground

Not so–

£1000 or none.

Explained again French payment. (G1:394)⁷²

It is clear from these passages that Mantell had been relying heavily on the French purchases in his bargaining with Ngai Tahu.

That evening Apera Pukenui and Pohata saw Mantell and tried to induce him to “accede to their terms 1000” (G2:358).⁷³

Four days later, on 29 August, further discussions took place. Mantell was told that:

the people generally are anxious to close the business lest Topi and Taiaroa should come & seize all. (G2:361)⁷⁴

In the evening Mantell talked further with Pukenui, who said he wished to see Sir George Grey to bind him to his promises of February 1848. To which Mantell responded:

The money is an after consideration – you imagine it will be increased, I can assure you that I expect no such result. As to the land that is already the property of the Govt. owing to my having made an award. If you like to return the money the Govr. will praise your conscientiousness &c. He seemed rather astonished & wished to call the rest in to hear me – this I deferred. (G2:362)⁷⁵

Mantell’s reference to his having “made an award” is presumably a reference to his earlier advice to Ngai Tahu that £300 only would be paid for the Port Levy block. His statement that the land was “already the property of the Govt.” was false. Even if it was officially regarded as a fictional “reserve” it was nonetheless Ngai Tahu property. It is difficult to construe these comments of Mantell as other than intimidatory.

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The next day the discussion continued and Mantell repeated his reliance on the French purchases and stressed the non-negotiability of his “award”:

Abel [Apera Pukenui] then spoke & next Tamakeke who again said that unless the sum demanded were given he would keep his land & so forth. After he had done I asked if anyone else had anything to say. Replied that they all agreed with Tamakeke. I then told them to listen to me. You talk about pupuri te wenua how can such language apply to land for which payment has already been given. When I came here my first care was to set apart & have surveyed reserves for you that you might not be driven out of the land. As to the money which I have awarded, I shall not increase it because it is what I think just so I see no reason for exceeding the amount of £300 on which I have decided. This money you can take or not the title to the land will none the less belong to the Governor. Never mind the money let me take care of you. If tomorrow is a fine day I shall direct Mr Carrington to begin the survey of your reserve. You have said the survey shall not proceed until I have assented to your terms. This is foolish, if you really prevent the survey the boundaries of your land will be vague & undefined and will most probably be narrowed. (G2:362–363)⁷⁶

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

Shortly thereafter Tamakeke, Maopo and Pohau of Ngati Irakehu and Ngati Moki hapu left. They had an interest in the southern part of the Port Levy block, south of the main line of the hills. Ngai Tuahuriri, from Kaiapoi, had already withdrawn from the proceedings (T1:189).

By now, however, Pukenui was worn down and prepared to accede to Mantell’s terms. His dispirited remarks to Mantell are revealing of his state of mind:

he said this is my tikaka – if you will consent let the survey commence tomorrow morning. I accede to your terms. I wanted the other 200 to distribute to those people to enable them to pay their debts but now I trouble myself no more about them. They say they will stop the survey. If they do theirs is the sin it can be surveyed at any time. We now care for no reserve at Pigeon Bay the grave can be combined with the churchyard or the bodies removed there when there is one there. I have no children to inherit from me nor have most of us. (G2:356)⁷⁷

The terms of the deed of sale

- 9.4.10 A deed was signed on 25 September 1849 and the purchase price of £300 paid over. The Port Levy block thus acquired by the Crown was extensive. It went around the coast from Koukourata (Port Levy) to Pohatupa (Flea Bay) and then in an arc following the hill tops behind Akaroa Harbour to Waihora (Lake Ellesmere). Out of the 104,700 acres acquired by the Crown (as determined by DOSLI) one reserve only, containing 1361 acres at Port Levy, was agreed to by Mantell (appendix 2.4). In 1880, 300 acres was described as good arable land,

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the rest being rocky hillsides (M15:23).⁷⁸ In a brief letter of 27 September 1849, reporting the conclusion of his Port Levy negotiations, Mantell advised the colonial secretary he had guaranteed that a small grave at the head of Pigeon Bay, where an infant child of John Tikao was buried, should be undisturbed until a cemetery was consecrated there (L3:III:29).⁷⁹ We understand this was not subsequently respected (T1:190).

Some 21 chiefs signed the deed. In addition there were four proxy signatures, including known opponents such as Tamakeke. A significant number of those who participated in the earlier discussions and who had interests in the Port Levy block were not parties to the deed, having earlier withdrawn from the negotiations. Indeed, of the 28 chiefs named by Mantell in his journal in the course of his operations in Port Levy, only eight signed the deed (M26:39). But those eight included seven out of the nine principal claimants acknowledged by Mantell. The two principal chiefs who did not sign were Pohata Motunau and Tamakeke. (Mantell had Pukenui sign as proxy for them.) So the total of twenty one who signed the deed included seven out of the nine principal claimants, the balance of fourteen being signatures of those Mantell presumably considered minor claimants. Included among those who withdrew from the discussions were a number of legitimate claimants having interests in the Port Levy block (M26:53).

9.5. **Grievances Concerning the Purchase of the Port Cooper and Port Levy Blocks**

Grievance no 4

9.5.1 We now consider the claimants' grievance no 4 which is:

That the Crown failed to protect Ngai Tahu against the land-purchasing pretensions of the French: that although Belligny's 1845 "deeds" were illegal and were not proved to be supported by the customary owners of the land, the Crown allowed these transactions to be used against Ngai Tahu by Commissioner Mantell in 1849 and subsequently by the Canterbury Association in denying Ngai Tahu their continued rights of occupation on Banks Peninsula. (W3)

We deal first with the complaint that the Crown failed to protect Ngai Tahu against the land purchasing pretensions of the French. Clearly the Crown could have done nothing about Captain Langlois' 1838 purchase as it took place before the Crown obtained sovereignty over New Zealand. Nor, in the circumstances surrounding the arrival of the French in July 1840, could it realistically have been expected to prevent the further transactions which took place that year. But it had taken action in January 1840, through Governor Gipps' proclamation, proscribing purchases direct from the Maori. Moreover, it appointed

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commissioners to investigate pre-1840 purchases and Commissioner Godfrey duly carried out an investigation in 1843 into the 1838 and 1840 transactions. It is apparent then that the Crown did in fact take steps to protect Ngai Tahu in respect of the early French transactions.

As to the 1845 French purchases, we have seen (9.3.16) that Robinson, the police magistrate, cautioned Belligny that his payments would “very probably prove a useless expenditure”, and Belligny accepted that the purchase was not according to the proclamation but was done to secure the safety and tranquillity of the French settlers after the departure of the French corvette.

It is, however, correct, as the claimants alleged, that the Crown subsequently allowed these transactions to be used against Ngai Tahu by Mantell in 1849, and subsequently by the Canterbury Association, in denying Ngai Tahu their continued rights of occupation on Banks Peninsula.

Grievance no 5

9.5.2 In their fifth grievance the claimants said:

That the Crown sent Commissioner Mantell in 1849 to falsely assert that Banks Peninsula was already the property of the Crown, and to “carry matters with a high hand”: or alternatively that Mantell having done these things the Crown did nothing to rectify them. (W3)

We have seen that Grey and Eyre, reflecting Grey’s instructions, created a fiction that Ngai Tahu, following the Kemp purchase, held such land on the peninsula as had not been sold to the French or purchased by Kemp as Maori reserves. This device was resorted to because Governor Grey was unwilling to admit that Ngai Tahu still retained unextinguished customary title to land on Banks Peninsula. Mantell was placed in a difficult position by his instructions. He came to realise that Ngai Tahu still retained ownership of much of the peninsula. While Ngai Tahu may have agreed to sell much, if not all, of it to the French in 1845, Mantell was told they had yet to be paid fully for it. It is clear from the note he made at the time of his interview with Eyre that Mantell was told to “carry matters with a high hand”. Mantell was later to confirm what his contemporaneous journal entries had already made clear, that he acted high-handedly, as if ownership had already passed to the Crown. At the same time he was to report after the Port Cooper transaction was completed that it would be necessary to extinguish Maori title over the whole peninsula, thereby conceding that Ngai Tahu still held customary title to part at least.

*Banks Peninsula****Finding on grievance no 5***

- 9.5.3 The tribunal sustains the claimants' grievance no 5 that the Crown, in 1849, sent Mantell to Banks Peninsula to falsely assert that the peninsula was already the property of the Crown and to "carry matters with a high hand".

Grievances nos 6, 7 and 8

- 9.5.4 These are inter-related. The complaint in grievance no 6 is that at Port Cooper and Port Levy in 1849, Mantell conducted his proceedings as an award, under which matters of payment and Maori reserves were not negotiable. As a consequence, it is said that Ngai Tahu were denied a fair price and an adequate provision of land and other economic resources (including kai moana and fisheries) for their continued sustenance and prosperity.

As to the payment for Port Cooper

- 9.5.5 Mantell, as we have seen (9.4.5), made it clear early in his discussions that he had "no intention of discussing amount of payment" and when he had set aside reserves he would "allot and distribute to them what additional payment to that already received" (from the French) he "thought just". On 12 July he told Ngai Tahu he would give £160 as a final payment; this he later increased to £200. It is difficult to find that the purchase price was freely negotiated. Crown counsel conceded in his closing address that Mantell's negotiating stance on Banks Peninsula was to dictate terms to Ngai Tahu, and that he tried to use previous Ngai Tahu dealings with the French and the cloud on their title, as a means of reducing their asking price. But Mr Blanchard went on to suggest that whether this plan actually had that effect was debatable – at least in respect of Port Cooper (X2:24–25).

The tribunal has no doubt that, as the Crown conceded, Mantell adopted a dictatorial stance in his negotiations. This is apparent from his comments early in the discussions on 7 July. We do not believe the purchase price for the 59,000 acres was freely negotiated. For that reason it bore more the character of an award.

As to reserves at Port Cooper

- 9.5.6 It is clear from Mantell's diary record of 25 July 1849 (9.4.5) that Mantell fixed the reserve at Purau, "after some disagreeable difficulties", by arbitrarily instructing Carrington to lay off a mere nine acres, and to insist that all gardens beyond the reserve were to be abandoned. We infer that the disagreeable difficulties experienced by Mantell arose from the fact that Ngai Tahu sought a more extensive reserve than Mantell was prepared to concede.

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On 27 July Mantell was present at Rapaki “with all the natives” and there marked out a reserve of 856 acres. But, as he later explained in case this should seem excessive, the surveyor Carrington estimated the extent of arable land at less than 60 acres. In addition he reserved a right to firewood in an isolated wood inland of the Purau reserve.

We do not have accurate information of how many Ngai Tahu were living in the Port Cooper block in 1849. In 1857 a full census of the Canterbury Maori reserves was taken. This showed a population of 72 at Rapaki, with 120 acres out of the 856 acres under cultivation – an area of less than two acres per person (Q8:35).⁸⁰ On a notional basis, if the steep rocky hillside country is taken into account, there were 11.8 acres available for the 72 Ngai Tahu. This was grossly inadequate, especially given the poor quality of most of the land.

As to payment for Port Levy

9.5.7 Apera Pukenui, the principal Port Levy chief, saw Mantell along with other Ngai Tahu on the evening of Mantell’s arrival at Port Levy on 15 August. They requested reserves at Port Levy, Pigeon Bay and Kawatea (Okains Bay). They sought £500 for each of the eastern and western parts of the Port Levy block (9.4.9).

Six days later, at Pigeon Bay, Mantell told Pukenui that the final payment for the block would be £300. Pukenui was disappointed, having sought £1000.

On 25 August Tamakeke spoke at length, mostly in criticism of Mantell’s “award of £300”. Mantell justified his price on the basis of earlier French payments to Ngai Tahu. The same evening Pukenui and Pohata again tried without success to persuade Mantell to pay £1000 (9.4.9).

When on 29 August Pukenui again raised the question of the purchase price and said he wanted to see Sir George Grey, Mantell told him he did not expect this to get them any increase. He claimed the land was already government property “owing to my having made an award [of £300]” (G2:362).⁸¹

The following day, 30 August, Mantell, in response to Tamakeke’s protests at Mantell’s failure to agree to £1000, again referred to the block as land for which payment had already been given (presumably by the French). He continued:

As to the money which I have awarded, I shall not increase . . . the amount of £300 on which I have decided. (G2:363)⁸²

In the light of Mantell’s totally uncompromising attitude, his reliance on previous payments, his characterisation of his payment as being no more than an award, it is not surprising the Crown has conceded

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that Mantell's stance was to dictate terms to Ngai Tahu. Indeed Crown counsel freely conceded that to the extent that Mantell succeeded in beating Ngai Tahu down in respect of price by unfair means, his actions were not consistent with the Crown's Treaty obligations (X2:25). This was clearly the case. Despite repeated efforts by Ngai Tahu, Mantell refused to move from the figure of £300, which he and he alone had decided was all that should be paid. The purchase price was not freely negotiated. As he was later to tell Fenton's Native Land Court in 1868, "an inchoate title existed in a French Company, and I was instructed to press this upon the Natives, and show them that the whole of their land was in peril" (A9:9:32).⁸³ We are in no doubt that Mantell succeeded in beating Ngai Tahu down in respect of price by unfair means, to the extent that they were given no real choice as to the price.

As to reserves at Port Levy

- 9.5.8 The claimants said in their grievance no 7 that as a further consequence of the way in which Mantell conducted his proceedings as an award, Ngai Tahu had to abandon the Port Levy and Port Cooper blocks with the exception of the Port Levy, Purau and Rapaki reserves, which were quite inadequate for their needs. And in grievance no 8, that at the Port Levy proceedings Ngai Tahu expressed their unwillingness to sell Okains Bay, Kaituna Valley and part of Pigeon Bay, and expressed a wish for a larger reserve at Port Levy, but these were denied them by Mantell.

There is no dispute that Mantell unjustifiably declined the request of Ngai Tahu for reserves at Okains Bay and Pigeon Bay. While Pukenui purported to relinquish the claim for the Pigeon Bay reserve, it had in fact been made by Tikao who certainly did not withdraw it. Indeed, he was subsequently to complain direct to Grey on the matter. As to whether Mantell agreed to all that Ngai Tahu requested at Port Levy, the evidence is unclear. But he did admit in the Native Land Court in 1868 that:

This reserve (Port Levy) was lived upon at this time, and I marked off the smallest piece possible. (A9:9:32)⁸⁴

Nor is it disputed that the single reserve of 1361 acres granted out of the 120,000 acres acquired by the Crown was grossly inadequate. The 1857 census accorded a population of 97 at Port Levy, with 160 out of the 1361 acres under cultivation. An 1880 survey described the 1361 acres as having 300 acres of good arable land, "the rest being rocky hillside" (M15:23).⁸⁵ Thus there was a mere three acres of cultivatable land available per person, while the whole, if apportioned among 97, amounted to 14 acres per person. Having regard to

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the largely poor nature of the land this reserve would be unlikely to provide even subsistence living.

In the light of the foregoing discussion we find that the claimants' grievances numbered 6, 7 and 8 are made out.

Grievance no 9

- 9.5.9 The complaint is that although Mantell's Port Levy deed was signed by only a minority of the chiefs present at the proceedings, and Mantell did not visit all the settlements in the block to ascertain the residents' wishes, the Crown enforced the deed as a legal conveyance of the whole block.

As we have seen, seven out of the nine principal chiefs on the Port Levy block signed the deed of purchase. In addition to the two leading chiefs who did not sign were a significant number of other chiefs of Ngai Tuahuriri, principally based at Kaiapoi, who withdrew from the discussions at a relatively early stage, and three (including Tamakeke) from the southern part of the Port Levy block. It is apparent that the leading chief, Pukenui, played a dominant role in the protracted discussions with Mantell. It was he who finally acceded to Mantell's terms. Clearly the Ngai Tahu people with interests in the block were divided among themselves as to whether they should accept Mantell's virtually non-negotiable conditions. However, all but two of the leading Port Levy chiefs chose to sign. That there was this divergence of opinion is a reflection of the fact that some interested Ngai Tahu were not prepared to bow to Mantell's unbending and dictatorial stance, while Pukenui and his fellow principal chiefs felt sufficiently under duress as to agree to sign. The basic flaw in the Port Levy deed was that there was no true agreement between the Crown and Ngai Tahu. There is, accordingly, much force in the claimants' grievance that the Crown enforced the deed as a legal conveyance against the residents' wishes.

9.6. **The Akaroa Purchase**

Mantell attempts to purchase the Akaroa block

- 9.6.1 On 27 September 1849 Mantell went to Akaroa to open discussions for the purchase of the Akaroa block. He had copies of reports by both Colonel Godfrey and Edward Shortland which indicated the limited nature of the French purchases. He also had copies of Robinson's letter reporting on the unofficial payments by the French. But in addition he had been told, as we have seen, in a letter from Domett of 5 September 1849, that it was understood that since the last payment made by the captain of the French man-of-war (in 1845), the French company had disavowed and attempted to persuade Ngai Tahu that no future payment could be expected from them. Nor, the

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letter went on to say, did the English government appear to have contemplated any further payments would be required in respect of Lord Stanley's award of 30,000 acres (9.4.8). Both these assertions were plainly wrong. The French had agreed (but failed) to pay a further £450. And Lord Stanley clearly envisaged that the French would have to purchase and pay for such part of the 30,000 acres not already acquired by them from Ngai Tahu.

Mantell also had a further letter from Domett of 19 September, which we have earlier cited, in which he stressed that Ngai Tahu had already been "so well compensated for their claims generally" that they could only expect the additional payments now being made "as a matter of grace" arising out of the unsettled state of the French claim at the time of Kemp's purchase.

We have no contemporary account of Mantell's negotiations apart from his report of 28 November 1849 to the colonial secretary, Domett (L3:III:29).⁸⁶ This report made the following points:

- he had felt obliged to discontinue his negotiations for the extinction of Ngai Tahu's claims in the Akaroa and Wairewa district of Banks Peninsula;
- throughout the negotiations Ngai Tahu had "conducted themselves, as usual, in the most insolent and turbulent manner". (We note that he seemed unaware of his own dictatorial stance);
- Ngai Tahu were unwilling to sell an area on the south of the block which he identified in an accompanying sketch as comprising at least 15,000 acres (L3:III:28).⁸⁷ This land, they asserted, had always been excluded from previous purchases. But Mantell, after a careful review, felt impelled to deny their claims to such a block, as the only exceptions from former sales he considered to have been were their residences and gardens;
- the award he made and communicated to Ngai Tahu was as follows:

Reserves

1. At Akaroa, at Onuku, say 350 acres
2. At Wainui and Ohae, say 1200 acres
3. At Wairewa, at the Kaika, say 30 acres
4. At Wairewa, in one or two blocks around their gardens 300 acres

Making a total of, say 1880 acres

Payment.

A sum of £150. (L3:III:29)⁸⁸

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- on Ngai Tahu's rejection of his award he decided the prudent course was to return to Wellington. Had he attempted a survey it would have been stopped by Ngai Tahu, and Carrington, who was engaged on the eastern boundary of the French company grant, would have been stopped had he tried to resume his survey; and
- the principal instigators were said to be Tikao, Tapu and Tamakeke who were actuated by a confident hope that Belligny would still return and make them some "enormous payment".

No further action was taken by the Crown to purchase Ngai Tahu's interest in the Akaroa block for some years. The immediate needs of the New Zealand Company, and in particular the Canterbury Association, had been met by the Port Cooper and Port Levy block purchases. Moreover, it transpired that the New Zealand Company in England had acquired all the rights and interests of the French company. It was now liable for any compensation to Ngai Tahu.

***Canterbury Association activities on Banks Peninsula
1850–1856***

- 9.6.2 The claimants had two grievances concerning the Canterbury Association. Their grievance no 10 was:

That the Crown under the Canterbury Association Lands Settlement Act 1850 assigned the whole of the peninsula to the Canterbury Association, although it had been clearly excluded from Kemp's purchase and had not been otherwise properly purchased from Ngai Tahu.

As a consequence, the claimants said in their grievance no 11:

That Ngai Tahu had to suffer European settlers moving on to their lands, for which they have never received adequate compensation. (W3)

- 9.6.3 In the course of our chapter on Kemp's purchase we have discussed the Canterbury Association Lands Settlement Act 1850 and its 1851 amendment (8.10.4). Under the 1850 Act the Canterbury Association was empowered, over a period of 10 years, to sell an area of some two and a half million acres of land in Canterbury, including the whole of Banks Peninsula with certain limited exceptions. By 1850 the Crown, albeit by dubious methods, had acquired the Port Cooper and Port Levy blocks, but not the Akaroa block. The 1850 Act therefore most seriously affected the Akaroa block, most of which remained vested in Ngai Tahu. But it also extended to the Port Cooper and Port Levy blocks in that it affected land which should have been, but was not, reserved to Ngai Tahu either because the reserves granted were insufficient, or because certain reserves requested had been wrongly refused by Mantell.

In 1851 Godley, the agent for the Canterbury Association, expressed surprise in a letter of 8 January, when told by the resident magistrate

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at Akaroa that a block of land at Akaroa and Wairewa was claimed by Ngai Tahu. He said it had always been understood that the Crown was in possession of the whole peninsula and the Canterbury Settlement Act was founded on that assumption (L3:III:55).⁸⁹

In a further letter, Godley relied on the two deeds of purchase which the French obtained in 1845, the originals of which in 1851 he held. On the basis of these alleged sales he asserted that “the natives have no moral claim to what they have already disposed of for tolerable consideration” (T2:44).⁹⁰ He appeared unaware that these deeds were of no legal effect, nor that the balance of the purchase money was unpaid. He asserted his company’s right to sell or let the land under the terms of the 1850 Imperial Act.

That others were equally ignorant is graphically demonstrated by a comment of Henry Sewell in his journal of 7 July 1853:

That the Native Policy (if policy it can be called) is contemptible I can bear witness from the little I see of it here . . . Simeon as Resident Magistrate is a sort of Native Protector, and all bargains with them should pass through his hands. When we were at Wellington together the other day Simeon asked for some instructions how to proceed. ‘Oh’, said the Civil Secretary, ‘you can do whatever you like’ – a pleasant responsibility.⁹¹

Earlier in the year Simeon had written to the colonial secretary stating that Ngai Tahu were in the habit of visiting him about money owing to them. Simeon confessed he could never understand what their enquiries were about (T2:47).⁹²

In the meantime the Canterbury Association went ahead and granted licences over some of the land for stock-runs. Part of the land was sold. As we will see, W J W Hamilton found when he went to effect the purchase of the Akaroa block in 1856, the whole of the land he acquired from Ngai Tahu had:

long been let by the Crown, and occupied by cattle and sheep runs, and part of it positively sold as freehold. (L3:III:64)⁹³

9.6.4 We find then that the claimants’ grievances regarding the effect of the Canterbury Lands Settlement Act 1850 are clearly made out in respect to the Akaroa block and to a much lesser extent in respect of the Port Cooper and Port Levy blocks. Their complaint that Ngai Tahu had to suffer Europeans moving on to such lands without any compensation to Ngai Tahu is also well founded.

9.6.5 When provincial government was established, W G Brittan became the commissioner of Crown land for the Canterbury province. He wrote to Mantell on 18 January 1854 saying that two parties of Maori, one living near Wainui, opposite the town of Akaroa, and the other near the head of Little River, had been to see him. They claimed the

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areas where they were living had never been bought from them and they refused to leave. They had a copy of the plan which Mantell prepared in 1849 which showed the land they wished to retain. Brittan sought Mantell's assistance (T2:53).⁹⁴ In his reply Mantell said that Ngai Tahu had no right to any land in the Akaroa and Wairewa block beyond that "awarded" by him (and marked on maps and reported at the time) but they had a right to the "awarded" sum of £150 (T2:56).⁹⁵ It is clear that Mantell considered he had, subject to the payment of £150, extinguished Ngai Tahu's title to the Akaroa block.

But a year later Mantell underwent a complete change of heart. Writing to Symonds on 21 August 1855 he referred to his having written to Symonds concerning "the yet unpurchased Block of Land at Akaroa & Wairewa" for which some five years earlier he had "made an offer . . . which the natives refused". After referring to the promises he made to Ngai Tahu, that schools and hospitals would be provided for them, he went on to say that "Of course the Akaroa natives are not bound by my award". He then proceeded to denounce the "sham of paternalism" and to suggest that Ngai Tahu were the victims of a government whose policy was one of selective morality based on the relative strength of the tribe rather than on justice (G2:408–413)⁹⁶ Mantell also referred to news that, within the boundaries unsold, Ngai Tahu at Wainui and Wairewa had been turned off by people who had bought the land from the commissioner of Crown lands.

Commissioner Johnson's 1856 investigation

- 9.6.6 In 1856 the new governor, Browne, visited Akaroa as part of a tour of the southern settlements. There he met the local Maori. Some months after the governor's visit local Ngai Tahu reported to Commissioner J G Johnson that they had been threatened by the governor that they would, if necessary, be dispossessed by force. Johnson, deputy native commissioner in the Whangarei district, was fluent in Maori having lived for many years in Maori regions in the North Island. On 25 April 1856 he was instructed by Donald McLean, the chief land commissioner, to proceed to Port Cooper to implement Mantell's award for Akaroa. He was to "use the utmost firmness with the Natives in carrying out this award" (L3:III:56)⁹⁷ The extent and nature of Mantell's award he was to obtain from the provincial land commissioner, Brittan. But Brittan was not well informed, as he appears to have told Johnson that Ngai Tahu should, in terms of the "award", relinquish all their lands in Akaroa, receiving one reserve only of 500 acres at Onuku and £150. This fell considerably short of Mantell's 1849 proposal to reserve 1880 acres at several locations. Not surprisingly Ngai Tahu at Akaroa rejected such a limited offer. This caused

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Johnson to more thoroughly research the background. As a result of his investigations and discussions with Ngai Tahu, he advised McLean on 7 June 1856:

The instructions which you furnished me with, are based upon the supposition that the Natives are in the occupation of land which they have ceded to the Crown, whereas upon a careful investigation of the case, it does not appear clear that the Crown has acquired any title to the land which it is sought to dispossess the Natives of, and their statements are so clear and satisfactory that they have never with their knowledge and consent sold all their possessions, that I am unable to adopt the course which I would under other circumstances feel it my duty to pursue, of compelling them to quit those lands, or in the event of their not doing so, abide the alternative which has been intimated to them. [forcible eviction] (L3:III:58)⁹⁸

9.6.7 McLean was impressed by Johnson's report. In a memorandum of 13 August 1856 he accepted that the question "had never been fairly settled" and that Ngai Tahu were "only demanding their just rights" (L3:III:61)⁹⁹ At last a senior Crown official had come to recognise that Ngai Tahu retained "unquestionable rights . . . to the land over which their claims have not been extinguished" (L3:III:61).¹⁰⁰ He considered that an appropriate settlement would provide for reserves of 400 acres each at Onuku and between Tekau Bay and Wainui on the opposite side of the harbour together with a payment of £150 to be paid to those Maori who did not participate in the "first" sale.

It will be noted that McLean was suggesting two reserves only amounting to 800 acres whereas Mantell had proposed 1880 acres in 1849.

Hamilton is instructed to purchase the Akaroa block

9.6.8 On 16 August 1856 McLean wrote to Hamilton, the collector of customs at Lyttelton (L3:III:62).¹⁰¹ It is not entirely clear what instructions and information Hamilton received. He was requested to settle certain unextinguished claims at Akaroa and Kaiapoi. He appears to have been given a copy of McLean's memorandum of 13 August. A memorandum by Johnson of 14 August was also supplied. Unfortunately this has not so far been found. It undoubtedly contained views which influenced Hamilton when he came to negotiate the purchase. But we do know that Hamilton had Johnson's map with him (L3:III:59).¹⁰²

Johnson's map is especially important as Hamilton failed either to describe in the deed of purchase the boundaries of the land sold by Ngai Tahu or to attach a map showing the boundaries. Mantell's Port Cooper and Port Levy purchases were marked off leaving three categories of land within the remaining block. These are described in the Ward report as follows:

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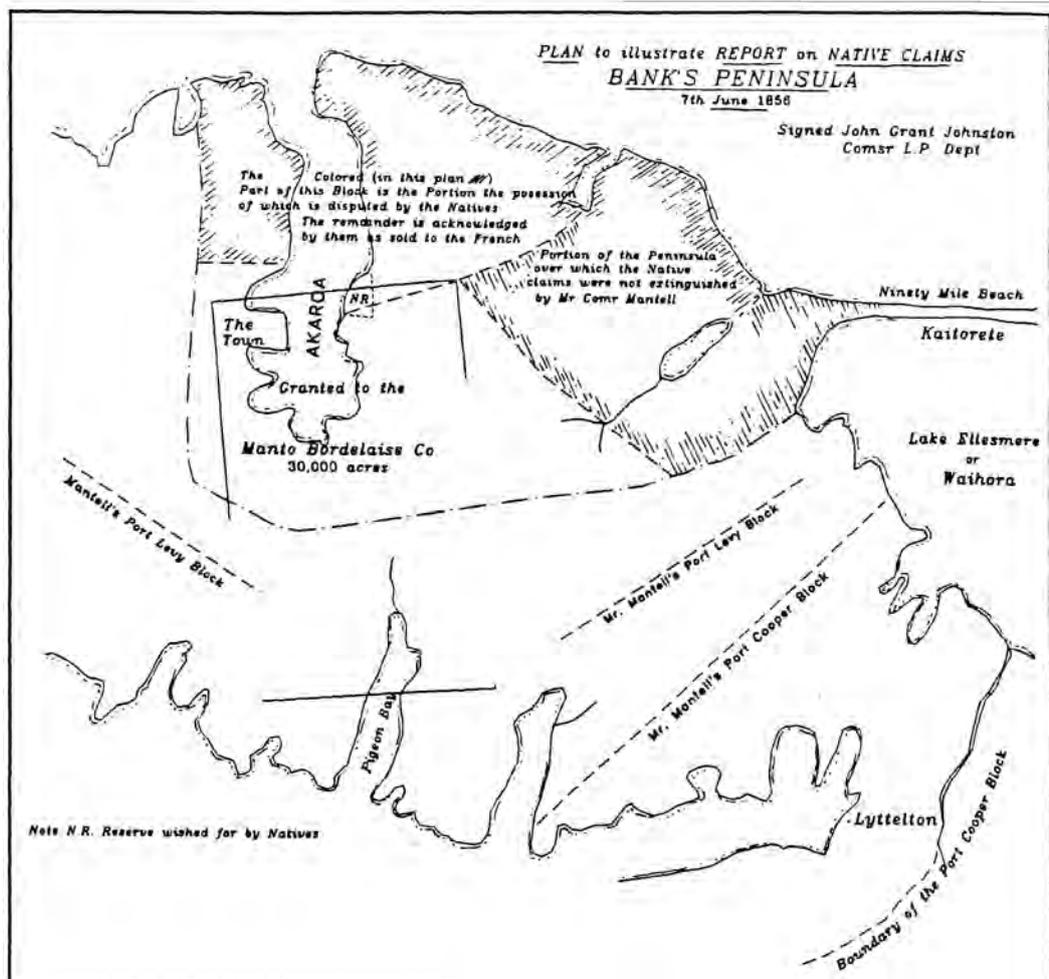


Figure 9.2: A copy of Johnson's map showing Ngai Tahu's understanding of the lands which Mantell had not purchased in 1849.

(I)The former French claim. There is an incomplete rectangle indicating its earlier intended location running back in a long block from the top of Akaroa Harbour to take in part of Pigeon Bay. On Johnson's map, it has been conveniently reshaped to take up more land around Akaroa Harbour. This portion is labelled "Granted to the Nanto Bordelaise Co. 30,000 acres". It is referred to elsewhere on the map as "acknowledged by them [i.e. Ngai Tahu] as sold to the French".

(II)Both sides of the harbour at the heads were included in a portion "the possession of which is disputed by the Natives".

(III)The land beyond the hills to the south west, and out to the coast, though away from Akaroa Harbour itself, had clearly been within the block that Mantell had unsuccessfully tried to acquire in 1849. This was now labelled "Portion of the Peninsula over which the native claims were not extinguished by Mr Commr. Mantell".

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Though the native reserve which Johnson proposed should be recognised on the south side was drawn in, the less contentious one on the north was not (L3:III:59). This map is of critical importance because the Deed that was subsequently drawn up for the transfer of the Akaroa Block to the Crown makes sense only if read in conjunction with the information the map contains. (T1:199)

We will be referring to this map (figure 9.2) when we discuss the boundaries of Hamilton's purchase.

- 9.6.9 Hamilton was examined at some length on his purchase of the Akaroa block 23 years after the event. The following account is drawn from his evidence to the Smith–Nairn commission on 20 May 1879 (A31:7A).¹⁰³ Hamilton arrived at Akaroa on 8 December 1856 accompanied by the Reverend Aldred as interpreter, as Hamilton had only a limited familiarity with the Maori language. On Tuesday some Ngai Tahu from Kaiapoi had not arrived so the korero was deferred until the next day. Early on at the meeting that day Ngai Tahu requested an additional reserve at Wairewa equal in size to the two reserves at Onuku and Wainui already agreed. Hamilton agreed to that immediately. Asked whether there was any discussion or bargaining about the price he responded:

No; there was no discussion. From the moment I said I would agree to the Little River Reserve there was no discussion. (A31:7A:62–63)¹⁰⁴

It appears the deed which he had signed was based on a draft supplied with his instructions from Auckland.

Asked whether the Europeans were occupying much, if not the whole, of the land before the government had bought it, he agreed they were there “before the final extinction of the claims had been made” (A31:7A:45).¹⁰⁵

- 9.6.10 Hamilton was also examined in detail about the boundaries of his purchase. It was put to him that earlier in the day a Ngai Tahu witness Paurini:

has been telling us that Akaroa mentioned the boundaries to you, and that on that occasion, following the dotted line to the left side of the harbour & nearly parallel to the coast, he pointed out that what was on the north of that line was Europeans' land, and what was on the South belonged to natives. Have you any recollection of that? – None whatever.

All the Maoris, I may say, state that was mentioned by Akaroa. Are you prepared to say, as a matter of fact, that their recollection is wrong? – I have no recollection of any discussion whatever at Akaroa from the moment I conceded at once to their demand, that there should be a reserve at Little River. (A31:7A:50–51)¹⁰⁶

It is, however, clear that before the question of the Wairewa reserve was raised by Ngai Tahu that boundaries were discussed with Hamilton. On the very day the deed was signed (10 December 1856)

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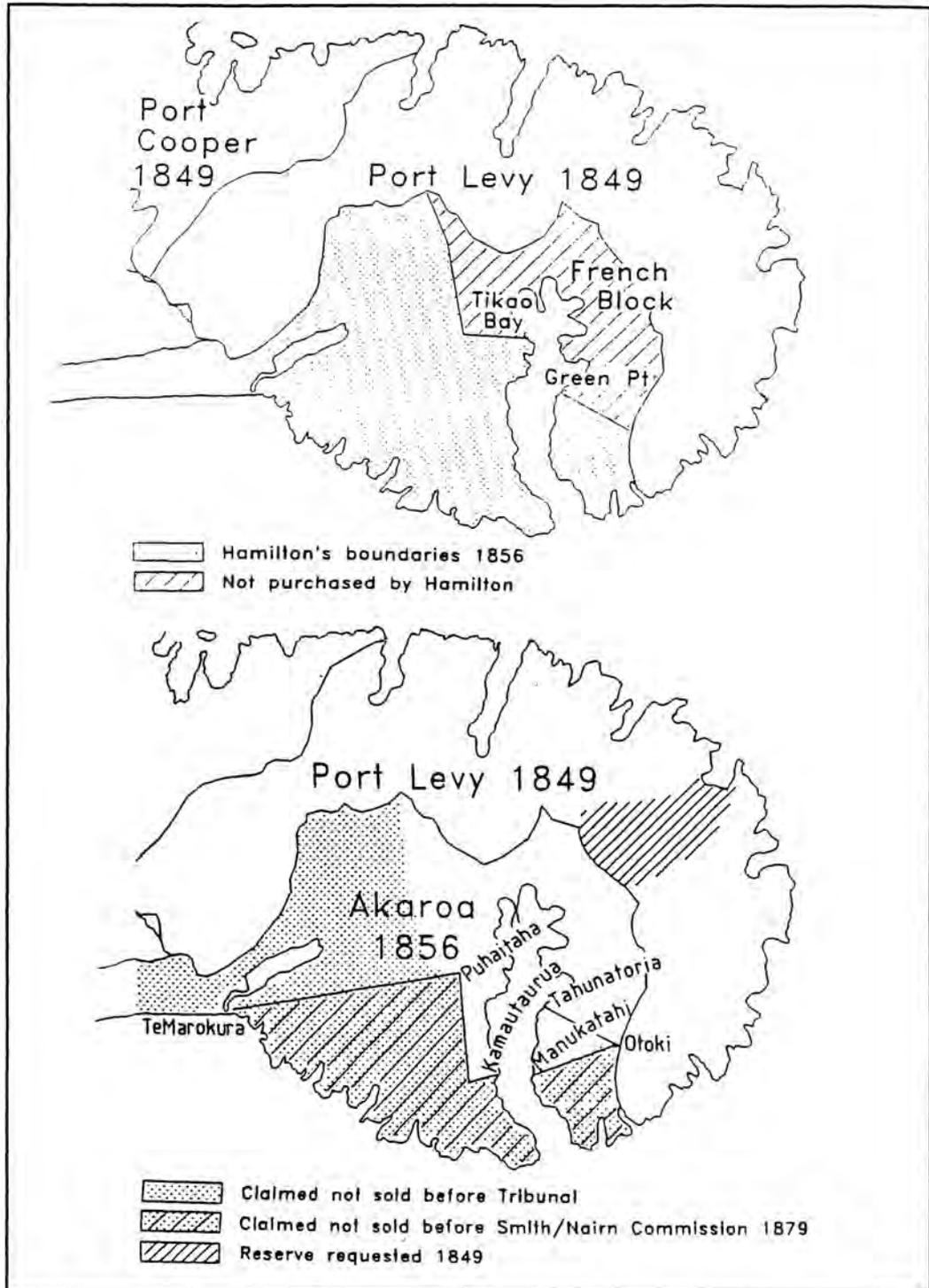


Figure 9.3: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this Tribunal.

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Hamilton wrote a letter to the Canterbury Provincial Association secretary. He described a number of points on a boundary which he evidently understood divided the French block from the land he had purchased:

The Block extends from Waikakahi Stream (where Mr Mantells Port Levy purchase ends) running up to and along the main ridge on the S W side of Akaroa Harbour to Tikao Bay, thence by the coast line round to the commencement of the ninety mile beach. It also includes on the East side of Akaroa Harbour a tract running up from near Mr Carrington's survey pole somewhere about Green Point to and along the Main ridges Southwards to the Coast. (T1:203)¹⁰⁷

Hamilton's understanding of his purchase as reflected by this description is shown on figure 9.3.

It is clear from Hamilton's evidence before the Smith–Nairn commission that these boundaries were given to him by Ngai Tahu in the course of negotiations on the day of the sale. The following account is taken from Hamilton's evidence:

With reference to what Akaroa has stated, I feel confident that there was no discussion between him and me about boundaries from a letter I wrote to the Provincial Secretary the day the purchase was completed (Letter from witness to the Provincial Secretary, dated Akaroa, Wednesday, Decr. 10, 1856, produced.) I take this description of the boundaries, which I could only have had from the natives on the spot on the very day the deed was signed, and then the reservation of these three only pieces of their land being made to them, I take that as showing what the meaning of the rest of the deed is: that they have transferred all their lands; and at the time I would have been perfectly willing to have made any other reserves they named. (A31:7A:56–58)¹⁰⁸

By way of amplification Hamilton went on to say that the moment after the deed was signed they asked him to apply to the Wastelands Board for 400 acres of pasture at Wairewa in addition to the reserve he had set aside. He expressed his regret that they had not made that demand to him at the time, because if they had made it before the deed was signed he would have been willing to agree to that also, but the moment they signed the deed the power was taken out of his hands (A31:7A:58).¹⁰⁹

But, as there was no plan put into the deed and Maori were not shown any map or tracing, it is not surprising that there was misunderstanding. Several witnesses before the Smith–Nairn commission made reference to the boundaries. Some believed that extensive lands to the south of the line running from the ridge above Kamautaurua (Cape Three Points) down to the coast between Wairewa and the sea at Otukakou before joining Mantell's Port Levy boundary, remained unsold. It was said by some that this land was excluded from the sale

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to make provision for the numerous hapu members absent at the time.

Figure 9.3 also shows Hoani Papita Akaroa's understanding of the Hamilton purchase. As Dr Tremewan, who prepared this map, observed, the three reserves provided by Hamilton (Onuku, Opukutahi and Wairewa) lie within the area understood to be sold. Hone Taupoki gave Manukatahi; while Henere Te Paro gave Tahunatoria as a boundary point. Dr Tremewan's source for these boundaries was the Smith–Nairn commission evidence 21, 63, 65 and 73.¹¹⁰

- 9.6.11 There is another important feature of the two maps prepared by Dr Tremewan. The first, showing Hamilton's understanding of his purchase, shows the area approximating to that in Johnson's map (figure 9.2) as being the 30,000 acres granted to the French.

According to Johnson's notation, the imprecise rectangular block shown on his map was the portion "granted to the [Nanto] Bordelaise Co., 30,000 acres". And that it was "acknowledged by them (Ngai Tahu) as sold to the French".

This raises many questions.

- Who defined (in so far as it is defined) the 30,000 acres? Johnson? Ngai Tahu? Carrington? We simply do not know.
- How did it come about that Ngai Tahu acknowledged, if in fact they did, that they had sold so great an area to the French? When did they sell it? For years they had been waiting for Belligny to return to complete his purchase. Did Ngai Tahu have any comprehension that they were said to have admitted the sale of as much as 30,000 acres to the French?

We are unaware of any satisfactory answers to these questions.

When Hamilton went to Akaroa he seemed to think his mission was simply to implement the arrangement entered into by Johnson. He agreed to an additional reserve of 400 acres at Wairewa. Otherwise he appears, as figure 9.3 demonstrates, to have understood he was purchasing all the land Ngai Tahu then owned at Akaroa. This did not include the so-called French block, which he assumed, in the light of Johnson's map, was acknowledged by Ngai Tahu to have been sold to the French.

We have earlier discussed Ngai Tahu's grievances as to Lord Stanley's award of 30,000 acres to the French company and found (9.3.18) that the award was made without consulting Ngai Tahu and that, except as to some 1700 acres, it was not paid for.

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- 9.6.12 Before considering the claimants' grievances concerning Hamilton's 1856 deed of purchase we should advert to certain allegations made to the Smith–Nairn commission concerning Hamilton's conduct of his negotiations. While these are not the subject of a formal grievance they were referred to by the claimants' historian Mr Evison.

Several witnesses before the Smith–Nairn commission testified that Hamilton had threatened to bring soldiers and that he put pressure on Ngai Tahu to accept settlement by saying he would take the money to Murihiku. So far as we can ascertain no allegation was put to Hamilton by the Smith–Nairn commissioners that he was alleged to have threatened to bring soldiers (although, as we have noted, some such allegations were made in respect to an earlier visit by Governor Browne). But Hamilton was recalled on 16 March 1880 by the commission and the Maori charges were put to him. Hamilton repeatedly and strenuously denied this allegation saying, among other things, that he “never threatened to take the money to Murihiku, for I never knew where it was until a few months ago” (G2:624).¹¹¹ Whatever may be the truth of the matter, the allegations cannot, in our opinion, be regarded as proved.

9.7. **Grievances Concerning the Akaroa Purchase**

9.7.1 These are as follows

12. That at Mantell's 1849 Akaroa Block proceedings Ngai Tahu asked to retain for their own use a substantial part of the Block comprising some 30,000 acres or more, including the southern part of the Peninsula and the whole Wairewa (Little River) basin, and in 1856 made a similar request to Hamilton, to which under Article 3 of the Treaty they were entitled; but this was wrongfully denied to them.

13. That under the terms of Hamilton's 1856 Deed only the “places (or areas) in dispute at Akaroa” were sold; but the Crown nevertheless with the exception of 1200 acres reserves enforced the forfeiture of the whole block.

14. That Hamilton's 1200 acres reserves and £150 payment were manifestly inadequate as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa Block together with the absentees, and that Ngai Tahu suffered as a result.

15. That the Crown under the terms of Hamilton's Akaroa Deed unreasonably required the Ngai Tahu residents of the Block to provide for returning absentees as well as themselves from the £150 and 1200 acres Hamilton had provided, and that both residents and returning absentees suffered privation as a result. (W3)

Grievance no 12

- 9.7.2 It is clear that in 1849 Ngai Tahu were unwilling to sell to Mantell a substantial part of the block comprising some 30,000 acres or more. This is evident from Mantell's report of his failure to reach agreement,

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and his accompanying map (9.6.1). There was also Ngai Tahu evidence before the Smith–Nairn commission 26 years after the event that they had excepted from the sale an area of some 30,000 acres, as shown in figure 9.3. This evidence must, however, be weighed against the record made by Hamilton on the day of the sale, 10 December 1856, that he had purchased the land shown in the same figure, which clearly includes the land claimed by Ngai Tahu not to have been sold. Given the considerable lapse in time we consider it likely that the Ngai Tahu witnesses in 1879 were confusing what they had told Mantell with their discussions with Hamilton. We find that the Hamilton 1856 purchase did include the southern part of the peninsula and the whole Wairewa (Little River) basin. We are reinforced in this view by the fact that both Ngai Tahu witnesses and Hamilton are agreed that Ngai Tahu requested an additional reserve of 400 acres at Wairewa, to which Hamilton agreed. If the land at Wairewa was not included in the purchase why was a reserve requested there? We have no reason to doubt that the record made on the day of the purchase by Hamilton does other than correctly record the agreement as to the outer boundaries of the purchase.

Grievance no 13

- 9.7.3 It is true that Hamilton’s deed is sadly lacking in precision. It recites the consent “to surrender the pieces (of land) now disputed at Akaroa” to the Queen. It then states that “these only are the places reserved for us”, and refers to the three reserves of 400 acres each at Onuku, Wainui and Wairewa. Had it been agreed that in addition an extensive area of up to 30,000 acres had been excepted from the sale it is difficult to believe that Hamilton would not have made express reference to this, as he did to the three reserves. The deed refers to pieces of land now disputed at Akaroa. The dispute was as to whether land, other than that bought by the French, had been sold to the Crown. It was that land which Hamilton described in his letter of the day of the purchase and which is shown in figure 9.3. For the reasons given earlier we believe this correctly records the land sold by Ngai Tahu to the Crown in Hamilton’s deed of purchase.

But, having found that, the question remains as to whether the 30,000 acres approximately awarded by Lord Stanley had in fact been purchased from Ngai Tahu. We believe it had not except in respect of some 1700 acres purchased by the French. Hamilton, by his own account in his letter of 10 December, did not buy the land which Johnson understood Ngai Tahu to have agreed had been sold to the French. What Hamilton purchased (by his own account rather than the deed) was all the remaining land on Banks Peninsula, with the exception of the reserves. We accordingly find that at least 27,300

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acres in the area shown as not sold to Hamilton on figure 9.3 was not acquired by the Crown and to this day Ngai Tahu have not been paid for it.

Grievances nos 14 and 15

- 9.7.4 It was not disputed by the Crown, nor in our view can it be, that Hamilton's reserves of 1200 acres and £150 purchase price were insufficient as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa block together with the absentees at the time of Hamilton's purchase. No sooner was the sale to Hamilton completed by the signing of the deed than Ngai Tahu were requesting that an additional 400 acres be leased to them by the Waste Lands Board. Hamilton told the Smith–Nairn commission that, had Ngai Tahu requested the additional acreage before the deed was signed, he would willingly have agreed to it (9.6.10). Hamilton himself considered the 1200 acres "barely sufficient", even for the 90 people resident, as he reported to Chief Commissioner McLean on 8 January 1857 (L3:III:66).¹¹² We were not given any precise evidence as to how many Ngai Tahu having an interest in land purchased by Hamilton were absent in 1856 but there seems little doubt that some were. This aggravated the shortage of land remaining to Ngai Tahu in and around Akaroa following Hamilton's purchase. We find the claimants' grievances nos 14 and 15 to be made out.

Grievances nos 16 and 17

- 9.7.5 The claimants gave evidence that under the Land for Settlements Acts the Crown at Wairewa (Little River) resumed the Morice estate of 912 hectares on 16 December 1905 at a cost of £40,633 for the settlement of 29 landless Europeans, and on Banks Peninsula resumed the Kinloch estate of 5275 hectares on 19 February 1906, at a cost of £116,382, for the settlement of 30 landless Europeans.¹¹³ The complaint is that this land could have been provided for the relief of landless Ngai Tahu. Instead the Crown offered landless Ngai Tahu only very inferior and remote land under the South Island Landless Natives Act 1906, none of which was on Banks Peninsula. This is the burden of grievance no 16. The following grievance, no 17, claims that as a result of these acts of the Crown most Ngai Tahu of Banks Peninsula were driven off the land and lost their turangawaewae.

As will be seen in chapter 20, the Mackay Smith commission made a final report to government on 28 September 1905 on setting apart land for landless Maori in the South Island (E2:497).¹¹⁴ This report was preceded by a number of interim reports made in 1897 and later years. The commissioners pointed out that their work had been exceedingly onerous and performed at slight cost to government owing to the work having been done in the commissioners' own time

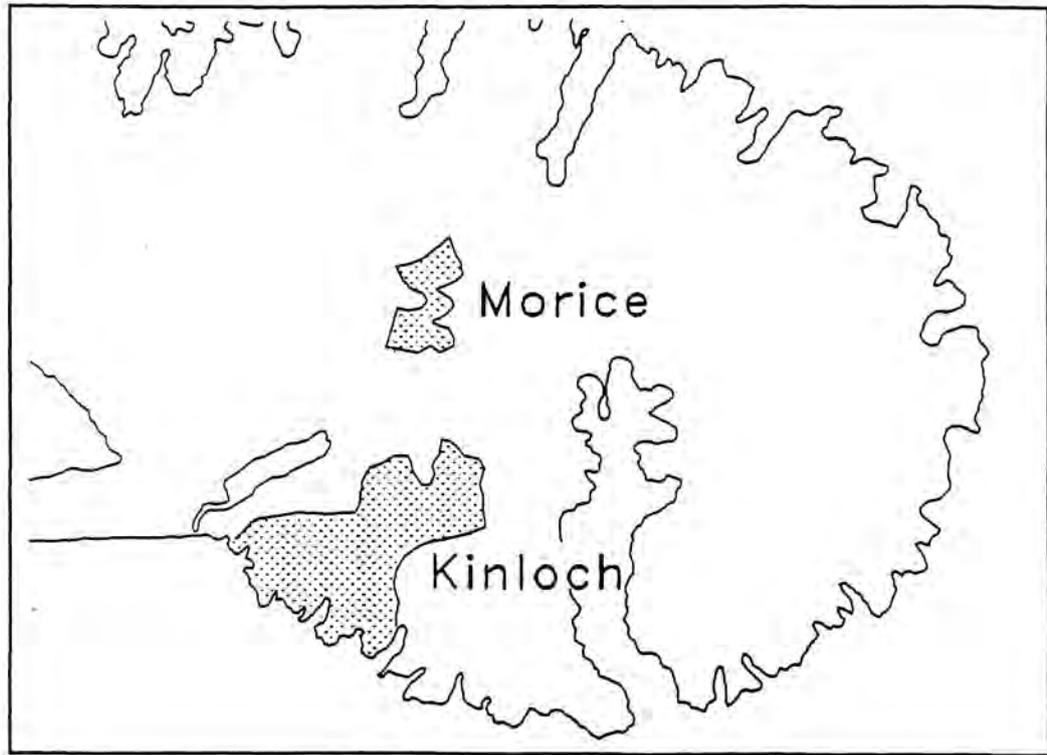
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Figure 9.4: The Morice and Kinloch estates show how extensively the Crown was prepared to re-acquire land for settlement on Banks Peninsula, while making no provision for Ngai Tahu needs.

quite outside official duties. The principal reason for the delay was said to be due to the absence of suitable blocks of land. The commission noted:

In the end, lands have actually been found to meet all requirements as to area, but much of the land is of such a nature that it is doubtful if the people can profitably occupy it as homes. (E2:497)¹¹⁵

The contrast between the Crown's willingness to expend substantial sums to place settlers on Banks Peninsula and its dilatory and minimal efforts to relieve those Ngai Tahu from Banks Peninsula made landless by the paucity of the reserves left them after the various purchases is striking. Not only were Ngai Tahu to be banished from their turangawaewae but they were to be given modest areas in remote locations, in some cases inaccessible other than by sea and of such a nature that it is doubtful, in the words of the Mackay-Smith commission, that they could profitably be occupied as homes. While generous provision was to be made for Europeans on Banks Peninsula, Ngai Tahu were to be offered inadequate land in remote places with which they had no association.

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9.7.6 In our later chapter on the North Canterbury purchase we have examined a similar grievance based on the Land for Settlement Acts (11.5.9). For reasons which we there discuss in some detail we conclude that as a matter of law the Maori enjoyed the same rights under the Land For Settlement Acts as Europeans and that accordingly we are unable to uphold the grievance (11.5.10). For the same reason we cannot uphold that part of grievance no 16 which relates to the Land for Settlement Acts. But in chapter 20 on the Landless Native Grants the tribunal has found that the South Island Landless Natives Act 1906 and its implementation cannot be reconciled with the honour of the Crown (20.7.3). It has further found the Crown's policy and legislative implementation of that policy in relation to landless Ngai Tahu to be a serious breach of the Treaty. It follows that we uphold that part of the claimants' grievance no 16 relating to the Landless Natives Act of 1906.

As to grievance no 17, we do not believe the claimants exaggerated when they complained that as a result of Crown acts many Ngai Tahu were driven off their land and lost their turangawaewae. This grievance is accordingly sustained.

Grievance no 18

9.7.7 The last of the claimants' grievances concerned environmental and natural resource degradation impacting on fish and birdlife on the peninsula. These will be dealt with in chapter 17 in our consideration of mahinga kai and related matters.

9.8. **The Crown's Position as to the Banks Peninsula Purchases**

9.8.1 In his closing address, counsel for the Crown among other matters made the following points.

- Mantell did try to pressure Ngai Tahu into selling and unreasonably cut back on their requests for reserves. That conduct was conceded to have been improper and in breach of the Treaty.
- The prices paid for each block should have been higher, although they were already out of proportion with the Kemp purchase at £2000.

But the Crown did not suggest, as surely it could not, that £2000 was a remotely reasonable price for the Crown to have paid even in 1848 for some 20 million acres. The prices paid for the various Banks Peninsula blocks in 1849 and 1856, although inadequate, serve to highlight the total inadequacy of the £2000 paid for the vast Kemp purchase.

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- The prices in themselves were not the real problem, which was the question of what land Ngai Tahu were left with.

We do not accept that the inadequacy of the prices paid can be dismissed in this way. Admittedly, had generous and completely adequate reserves been left with Ngai Tahu the meagreness of the purchase prices would have been less serious. But this did not happen, and the fact that the purchase prices were no more than nominal is correspondingly more serious. Ngai Tahu were severely maltreated both as to price and as to the land left to them. Crown counsel submitted that Ngai Tahu appeared to have received in goods and cash approximately £1750 from the French and £650 from the Crown for the peninsula.

It is very questionable whether Ngai Tahu received from the French cash or goods to the value of £1750. Much of the 1845 payment in goods was old stock of little value. It was paid as much to secure peace of mind for the French settlers being abandoned by the French company and government. We remain of the opinion that Ngai Tahu were significantly underpaid for the land, the more so as they were left with so little land of their own.

- A fair approach, Crown counsel submitted, would have been the offer of modest sums for the various blocks on the peninsula coupled with the making of adequate reserves, which should have taken into account the possibility that some Ngai Tahu would return to the peninsula in later times. Crown counsel, in discussing Hamilton's purchase in particular, stressed that there the real problem, which even Hamilton conceded, was the inadequacy of the reserves.

This overlooks the fact that Ngai Tahu were never paid for most of the 30,000 acres awarded to the French.

The reserves retained by Ngai Tahu were approximately 900 acres in Port Cooper; 1340 acres in the Port Levy block; and 1200 acres in the Akaroa block – to which a further 100 acres timber reserve at Little River was added by the Native Land Court in 1868. This totals 3540 acres out of some 230,000 acres purchased by the Crown. As we have seen, upwards of 30,000 acres has never been purchased. We agree with the Crown that the Ngai Tahu population on the peninsula at the time is difficult to estimate. Some had yet to return. The Crown suggested a figure of about 300. This is probably reasonably accurate. On that assumption the reserves amounted to some 11.8 acres per person, which is grossly inadequate even if all the reserves were of good quality land which they certainly were not. Substantial areas were largely unproductive steep rock hillsides.

*Banks Peninsula*9.9. **Breaches of Treaty Principles**

9.9.1 In the course of our narrative of the events leading to the acquisition of Banks Peninsula by the Crown we have discussed, and for the most part upheld, 17 grievances of Ngai Tahu. These grievances fall under four main heads:

- relating to Lord Stanley's award of 30,000 acres to the French Nanto-Bordelaise Company;
- relating to Mantell's conduct in acquiring the Port Cooper and Port Levy blocks. In particular his actions in using the earlier French purchases to intimidate Ngai Tahu; his denial of ownership by Ngai Tahu; his overbearing "high-handed" actions which resulted in a failure freely to negotiate over reserves or the purchase price; and his failure to grant reserves requested by Ngai Tahu;
- relating to the Canterbury Association Lands Settlement Act 1850; and
- relating to the failure to set aside reserves requested by Ngai Tahu and to the inadequacy of the reserves made by the Crown.

We will consider each of these broad groups in the light of relevant Treaty principles.

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

9.9.2 We have found that Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu and that Ngai Tahu were not compensated for the award either then or down to the present day. Responsibility for the failure to arrange for the necessary land to be purchased and paid for by the French must, however, rest not with Lord Stanley in London, but with the Crown's representatives in New Zealand. They took no action at the time, and later simply assumed that no such action was necessary.

In short the 30,000 acres were, in effect, confiscated by the Crown. This is in clear breach of article 2 of the Treaty, the English version of which "confirms and guarantees" to the Maori "the full exclusive and undisturbed possession of their Lands and Estates . . ." so long as they wished to retain them. The Crown's action was equally in breach of the Maori version of article 2 of the Treaty which protects "te tino rangatiratanga" of Maori over their land and other property. We have earlier said that the Maori text conveyed an intention that Maori would retain full authority over their land, homes and other taonga. The Crown's unilateral act in arbitrarily depriving Ngai Tahu of their rangatiratanga over the 30,000 acres, and in confiscating it without consultation and without ensuring that it was paid for, constitutes a grave breach of the Treaty. Despite repeated efforts by Ngai Tahu no relief or remedy has ever been granted to them.

*The Ngai Tahu Report 1991****Mantell's conduct in the acquisition of the Port Cooper and Port Levy blocks***

- 9.9.3 While we have largely focused on Mantell's conduct it must not be overlooked that he was acting under instructions from Governor Grey and Lieutenant-Governor Eyre, neither of whom was prepared to recognise that, following the French "purchases" and Kemp's purchase (which clearly excluded Banks Peninsula), Ngai Tahu had an interest any greater than that of a "reserve" in land unpurchased from them. Mantell's instructions were infected by bad faith on the part of his superiors, who required him to treat with Ngai Tahu on transparently false premises. Even Mantell confessed in private correspondence with his father that he did not truly understand the situation. Nevertheless he was not deterred from obeying his instructions from Eyre, to carry matters with a high hand. As we have seen he granted minimal reserves; he refused to grant requests for reserves at Okains Bay and Pigeon Bay; he failed to obtain the signatures of a significant number of Ngai Tahu having an interest in the Port Levy block; he was inflexible over the purchase price; he threatened Ngai Tahu that their earlier transactions with the French had imperilled their title to the land; and he acted as if his function was simply to make an award, rather than freely negotiate a purchase.

All such conduct was in complete disregard of Ngai Tahu's rangatiratanga over their land and was in clear breach of article 2 of the Treaty. The breach was the graver because it resulted from a lack of good faith on the part of the governor and lieutenant-governor in the instructions given to and carried out by Mantell.

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

It is equally plain in relation to the Port Levy block that they sought a substantially higher price – £1000 – for the block, but Mantell, using threats and an overbearing manner, refused to negotiate and awarded £300 only. Again he acted in breach of article 2 by acting without their consent and in the knowledge that a significant number of Ngai Tahu having an interest in the land had withdrawn from the negotiations prior to the completion of the deed.

The effect of the Canterbury Association Lands Settlement Act 1850

- 9.9.4 This Act purported to vest in the Canterbury Association all the land on Banks Peninsula save a few hundred acres, notwithstanding it had not been included in the Kemp purchase and despite the methods

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employed to acquire the Port Cooper and Port Levy blocks, and the failure by the Crown in 1849 to acquire the Akaroa block. The Act was passed by the British Parliament without reference to the New Zealand authorities or, needless to say, Ngai Tahu.

Once again we have a failure by the Crown in breach of article 2 to respect Ngai Tahu rangatiratanga over their land, especially the Akaroa block. The effect of the Act was to vest legal ownership of the land which the Crown had not acquired from Ngai Tahu in the Canterbury Association in breach of article 2, which required the consent of Ngai Tahu. Only the previous year Ngai Tahu had made clear their refusal to sell the Akaroa block to the Crown. Moreover, we have recounted the dubious methods employed by the Crown to acquire the Port Cooper and Port Levy blocks. We have also seen that as a result of this Act land was leased or even sold by the association and the Crown before it had been lawfully acquired from Ngai Tahu. This was in total disregard of te tino rangatiratanga of Ngai Tahu over the Akaroa block in particular, and in breach of article 2 of the Treaty.

Failure of the Crown to set aside adequate reserves

- 9.9.5 The Crown does not now dispute that, in setting aside 3540 acres out of 230,000 acquired from Ngai Tahu, it failed to provide adequate reserves. At around 11.8 acres per person this was insufficient for bare subsistence. It fell far short of providing for the long-term future needs of the Ngai Tahu people whose traditional home was on Banks Peninsula and for those other Ngai Tahu who had interests in land there. No provision was made for the mahinga kai requirements of Ngai Tahu. The possibility of Ngai Tahu developing pastoral farming was effectively foreclosed by the minimal size and the poor quality of much of the reserve land. No allowance was made for Ngai Tahu who were expected to return. As a consequence we find that the Treaty principle requiring the Crown to ensure that an adequate endowment of land for the present and future needs of Ngai Tahu on Banks Peninsula was plainly breached and that Ngai Tahu were very detrimentally affected. Equally significant was the failure of the Crown, in reducing Ngai Tahu to a near state of landlessness, to respect as article 2 required, Ngai Tahu rangatiratanga in and over Banks Peninsula. This failure is a common thread to all major Crown dealings with Ngai Tahu on the peninsula and resulted in many having to abandon their turangawaewae. Instead of recognising this in subsequent years and taking action to make good the serious lack of land available to Ngai Tahu, the Crown chose to expend considerable sums on settling even more Europeans on the land. If those Ngai Tahu now made landless wished to have a portion of land it would be

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hundreds of miles away, often of poor quality, difficult of access and uneconomic.

- 9.9.6 We conclude our discussion of the Crown acquisition of Banks Peninsula by recording what must by now be obvious – that the Crown’s actions brought no credit on those involved. Governor Grey and Lieutenant-Governor Eyre must bear much of the responsibility for Mantell’s conduct. A clear duty now rests on the Crown to repair, so far as is now possible, the grave harm done to Ngai Tahu by the serious and numerous breaches of the Treaty and its principles. Good faith and the spirit of partnership require no less.

References

- 1 This is a condensed version of (T3), which is more fully documented. To facilitate ease of reference we have added some headings and substituted our own numbers to topic headings. Endnotes have been altered to conform with the format used in this report.
- 2 Enclosure 1 in Stanley to Grey, 7 July 1845, G1/13, NA, Wellington; C F Lavaud, “Voyage et essai de colonisation à l’île de sud de la Nouvelle-Zélande”, Service Historique de la Marine, Vincennes; GG2 50/3 (o), pp 7–8
- 3 Godfrey, “Report on Nanto-Bordelaise Company, Claimants”, BPP/CNZ (IUP), vol 2, Appendix to Report from Select Committee on New Zealand, pp 433–442
- 4 Lavaud to French Minister of the Navy, 20 August and 6 September 1840, Marine BB4 1011, Archives Nationales, Paris; Mémoires et Documents, Océanie, vol 15, ff 89–120, Archives du Ministère des Affaires Etrangères; Belligny to Nanto-Bordelaise Company, 2 September 1840, D19, Archives du chateau La Grave
- 5 see n 3
- 6 Copy of deed, enclosure no 2 and 3 in Stanley to Grey, 7 July 1845, G1/13, NA, Wellington; enclosures in C Lavaud to Minister of the Navy, 5 January 1842, BB4 1011, Archives Nationales, Paris; Mémoires et Documents, Océanie, vol 4, ff 128–138, Archives du Ministère des Affaires Etrangères, Paris
- 7 Belligny to Nanto-Bordelaise Company, 2 September 1840, 369/D19, Archives du chateau La Grave; Lavaud, *Akaroa* (Christchurch, 1986) pp 29–31
- 8 Lavaud to Nanto-Bordelaise Company, 3 September 1840, 369/D7, Archives du chateau La Grave
- 9 OLC 1/1048, NA, Wellington; Mémoires et Documents, Océanie, vol 13, ff 92–94, Archives du Ministère des Affaires Etrangères, Paris
- 10 Belligny to Nanto-Bordelaise Company, 2 September 1840, 369/D19, Archives du chateau La Grave
- 11 see n 3, pp 435–436
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- 13 Hobson to Stanley, 5 November 1841; J Stephen to H Addington, 14 July 1842; Addington to Stephen, 30 July 1842, BPP/CNZ (IUP), vol 3, Correspondence Respecting the Colonization of New Zealand pp 164–169
- 14 Enclosure in Russell to Hobson, BPP/CNZ (IUP), vol 3, Correspondence Respecting the colonization of New Zealand pp 85–87
- 15 see n 3
- 16 The map has survived (NM 8 1845/183, NA, Wellington) but for the content of the deeds we are mainly reliant on contemporary European correspondence; C B Robinson's reports, 13 March–23 April 1845; Berard to the Minister of the Navy, 4 April 1845, BB4 1011, Archives Nationales, Paris
- 17 Anonymous, 'Voyage de la corvette le *Rhin* aux iles du Pacifique par un homme de l'equipage 1842–1846', ms 332, Museum d'Histoire Naturelle, La Rochelle
- 18 Lefevre and Wood to Stephen, 8 November 1844, CO 209/40, 44/1329, f 213–220; and 12 December 1844, CO 209/40 44/1427, G7/13, NA, Wellington
- 19 Stanley to Grey, 7 July 1845, *Compendium*, vol 1, p 77
- 20 Conveyance from Mr Laurent Raillard to The New Zealand Company of England of the Estates and Effects of the French Company of New Zealand in that Colony, 30 June 1849, original deed NZC 38/1, no 199, NA, Wellington; copy of deed NM 8 49/870 (annotated 52/69, LC 72/34 claim 1048)
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- 22 see n 3, p 433
- 23 see n 3, p 434
- 24 see n 3, p 434
- 25 Robinson to superintendent, Wellington, 23 April 1845, NM 8 45/182, filed with 49/870, NA, Wellington
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- 34 Mantell to colonial secretary, 28 November 1849, *Compendium*, vol 1, p 255
- 35 see n 3
- 36 see n 33, p 251
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- 56 *ibid*, p 8
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- 83 see n 53
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Chapter 10

The Murihiku Purchase

10.1. Introduction

Late in 1851 Walter Mantell was commissioned to purchase from Ngai Tahu the portion of the South Island which lay to the south of the Otago block. Mantell understood from these instructions that he was to negotiate for all the land from coast to coast. He duly arrived in Dunedin on 16 November 1851.

Two days later he held a meeting at Port Chalmers with Topi Patuki, Te Au, Karetai, Taiaroa and many other rangatira. During or following this meeting Mantell prepared a map showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast and thence back around the coastline from Piopiotahi to the Nuggets. The names of various chiefs having an interest in various parts of the block are shown. On the west coast below Piopiotahi the names of Taiaroa, Potiki, Ariaaha Taheke, Whaikai and Karipa appear. The names of Maui, Tikini and Poka appear on the coastline west of the Waiau River. The names of other well-known Ngai Tahu chiefs are shown at various places east of the Waiau almost back to the Nuggets. This map appears to indicate the extent of the land which the Ngai Tahu chiefs were prepared to sell.

Mantell left Dunedin on foot early in December, accompanied by the paramount Murihiku chief Topi Patuki and some other Ngai Tahu. On the way the party was delayed by heavy rain. While so detained Mantell, presumably with Patuki's assistance, prepared a list of some 84 claimants, together with a further plan having the same boundaries. Various areas nominated SE, S, W, N, NW are indicated. Between them they cover the whole area from coast to coast. The names of chiefs having an interest in particular areas are shown. In particular the names of Taiaroa, Potiki, Ariaaha Taheke, Whaikai, Karipa, Pohau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. The names of other Ngai Tahu appear on the coastline west of the Waiau River.

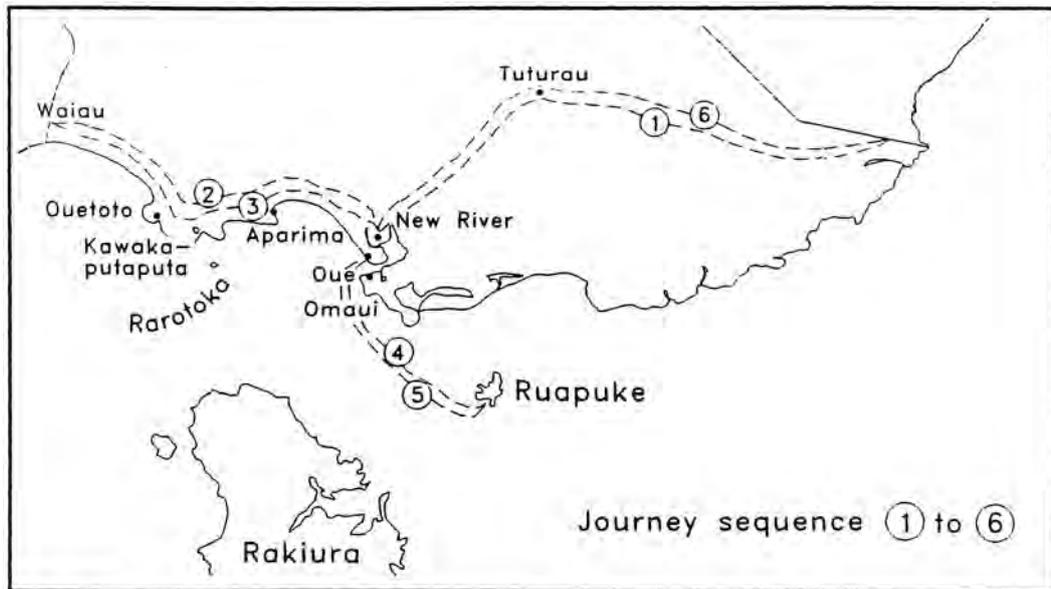
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Figure 10.1: Mantell's journey to Murihiku from December 1851 to February 1852 showing his route and the main settlements he visited.

The party then proceeded to Tukurau, on the Mataura River, where Mantell agreed on a reserve. From there he went south to Oue, on the coast of Foveaux Strait a little to the west of the Bluff. There a large meeting was held on 22 December 1851 with Ngai Tahu from Rakiura (Stewart Island), Ruapuke Island, Aparima, Oraka, and Kawakaputaputa to the west. It seems the Ngai Tahu chiefs present agreed to sell their land, but made it clear they wanted a good price. Mantell was not willing at that time to say how much the Crown would be prepared to pay.

Following this meeting, Mantell arranged for reserves to be provided at Omaui on the New River, Oue, Aparima, Oraka, Kawakaputaputa and Ouetoto. These reserves were surveyed in March–April 1852 by Charles Kettle – unfortunately at a time when many Ngai Tahu were on the annual excursion to the Titi Islands. The claimants say that in some cases Mantell declined to make the reserves as large as Ngai Tahu requested, and in other cases he refused altogether to reserve areas which they wished to keep. Among these was Rarotoka Island in Foveaux Strait. In all, the seven reserves made by Mantell totalled some 4875 acres.

Mantell returned to Dunedin early in 1852 where he was employed as commissioner of Crown lands, having scheduled a meeting with Ngai Tahu for May to finalise the purchase. Although he planned to pay over the purchase price in June, these arrangements fell through as the government failed to make the necessary funds available to

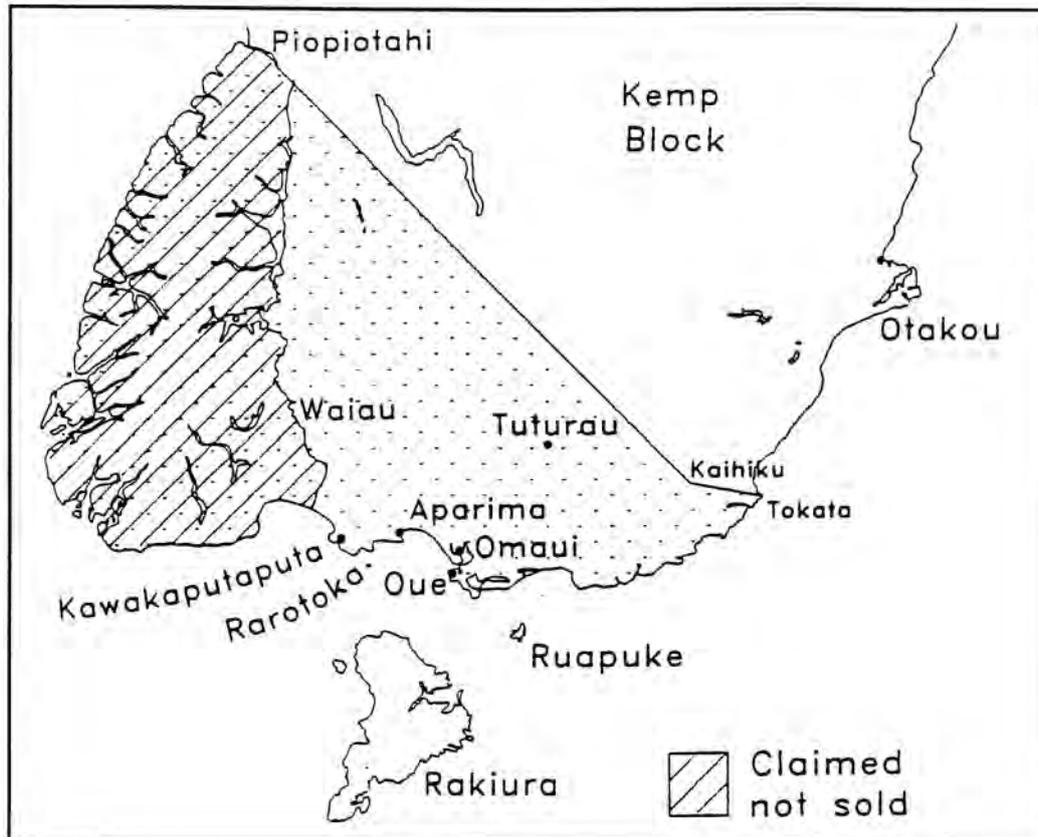
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Figure 10.2: The Murihiku purchase, 1853, showing the land west of the Waiau River which the claimants alleged had not been included in the sale to Mantell.

him. Meanwhile, Topi Patuki and Taiaroa visited Wellington and there confirmed their willingness to finalise the sale. As a result the officials in Wellington felt no need to complete the purchase quickly. Moreover, government was short of funds at the time. And so the matter dragged on until, in August 1853, Mantell decided to act on his own initiative. By this time he had begun to fear, given the apparent indifference on the part of government to completing the sale, that Ngai Tahu might be tempted to sell or lease direct to Europeans who were moving into the district. He took advantage of the presence of a substantial number of Otakou and Murihiku Ngai Tahu in the vicinity of Dunedin at the time and convened a meeting to discuss the sale. After a “long and anxious debate” the deed of purchase was signed on 17 August 1853.

The English translation of the deed makes it clear that the boundary extended from Piopiotahi (Milford Sound) east to Kaihiku and Tokata on the east coast, and right around the west coast from Piopiotahi to Tokata again on the east. That is, the whole of the land south of a line

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from Milford Sound to Tokata or Nugget Point (the southern point of the Otakou purchase). The claimants, relying on a very recent translation of the Maori version of the deed of purchase, contended that the deed is ambiguous. A map attached to the deed clearly shows the coast line etched in blue extending from Milford Sound all the way round to Tokata (the Nuggets).

The purchase price provided for in the deed was £2000, but Mantell orally agreed to seek an increase to £2600 and government agreed to pay the extra £600.

The claimants have a variety of grievances about the Crown purchase. These fall under three main heads:

- 1 The failure of the Crown to ensure that Ngai Tahu retained sufficient land for an economic base. Associated with this are complaints that the Crown failed to set aside either additional land or specific areas of land requested as reserves by Ngai Tahu.
- 2 Failure of the Crown to provide schools and hospitals at each Ngai Tahu village as promised by Mantell.
- 3 The wrongful inclusion by the Crown of land west of the Waiau in the sale. Associated with this is an alleged failure by the Crown to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

10.2. **Statement of Grievances**

The grievances as filed were:

1. The Crown failed to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.
2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.
3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale.
4. The Crown failed to set aside the following lands for the use of Ngai Tahu after the sale:
 - additional land at Aparima to that which Mantell allowed;
 - additional land at Kawakaputaputa to that which Mantell allowed;
 - additional land at Omaui to that which Mantell allowed;
 - a block at Oue;
 - a block of 200 acres at Waimatuku;
 - Rarotoka Island;
 - 300 acres on the Waiau River, which may be at Oetota as a reserve there;
 - a block at Opuaki;

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–the waterfall at Te Aunui on the Mataura River.

5. The Crown failed to provide schools and hospitals at each Ngai Tahu village which provision was part of the price agreed upon by the Crown.

6. The land west of the Waiau was wrongfully included in the sale.

7. The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.

9. The Half-Caste Grants Acts, the Landless Natives Act and other legislation were inadequate to remedy the landlessness caused by the sale to the Crown.

10. The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

We will consider these various grievances at the appropriate points in our narrative of events which follows.

10.3. **Background to the Purchase**

10.3.1 As we have seen, the Otakou purchase was effected in 1844. But it was not until the late 1840s that the Otago settlers began to arrive and settle over the 530,000 acres of land purchased some years earlier. In 1848 the Kemp purchase had been negotiated and in 1849 a substantial part of Banks Peninsula had been acquired by Mantell for the Crown. The land to the south and south-west of Otago remained unpurchased, but the Crown was in no hurry to complete its purchase down to Foveaux Strait and across Fiordland to the west coast. As Professor Ward pointed out, for some years after the Otakou purchase there was no settler pressure. There was also a persistent belief that Ngai Tahu were not only willing, but anxious, to sell to the Crown their lands to the south of the Otakou and Kemp purchases. For instance, Governor Grey in November 1853, after receiving a copy of the Murihiku purchase deed, commented to Domett that about six years previously some of the principal chiefs of the Murihiku district had agreed, while the governor was there, to dispose of the land on terms “nearly the same as those to which they have since adhered” (E2:37(c)).¹

10.3.2 On 12 February 1849 the paramount Murihiku chief, Topi Patuki, wrote to Grey inviting him to come to Parewha on Ruapuke Island to discuss the purchase of land south of the Otakou and Kemp purchase boundaries, but making it clear that “the larger area however must remain with us, the Maori people” (Q3:4-5).²

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A year later, however, attitudes appear to have changed. Captain Stokes of HMS *Acheron* reported to Lieutenant-Governor Eyre on the then disposition of Ngai Tahu, "to sell all that remains to them of the Middle Island" (A8:I:270).³ Many Ngai Tahu visited the *Acheron* hoping that it was part of Captain Stokes' mission to effect a purchase. Stokes was persuaded by Ngai Tahu to make out on a chart the reserves they wished to retain. W J W Hamilton prepared a list now in the Canterbury Museum (013:4.Q).⁴ It records 19 locations, all east of the Waiiau River. Stokes further reported that:

after making out on the charts the reserves they were desirous of retaining, the Maoris, both in Foveaux Strait and at Otago, expressed their desire to sell all the land from Otago to the Western Coast. (A8:I:270)⁵

While we have no clear indication of the size of the various reserves charted by Stokes, or of the precise location of all of them, it is evident that Stokes met their wishes and that in consequence Ngai Tahu were willing to sell the remainder of their land from Otago right across to the western coast. Stokes also indicated in his report that Ngai Tahu would probably accept £2000 as purchase money, which he suggested should be distributed by paying £1000 at Otago and the other £1000 at Awarua (Bluff) (A8:I:270).⁶

Mantell receives his instructions

- 10.3.3 It is against this background that Mantell received instructions from Governor Grey in October 1851. Earlier in the year Grey had evidently discussed with Mantell the possibility of his going south to purchase the southern portion of the South Island. Mantell followed up his conversation with the governor by writing to Domett, the colonial secretary, on 13 March 1851. He made various proposals for submission to the governor. On the question of reserves he said that:

In carrying out the spirit of my instructions on the block purchased by Mr Kemp, I allotted on an average ten acres to each individual, in the belief that the ownership of such an amount of land, though ample for their support, would not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain. (E2:2)⁷

This hardly augured well for Ngai Tahu.

As to the equipment necessary he commented:

it must be borne in mind that in parts, especially toward the West Coast, overland communication is reported to be impracticable; I would therefore recommend the chartering of a serviceable coaster, sufficiently large to carry a useful boat: the vessel, if such a course were sanctioned by Government, might be useful in payment for the territory to be acquired; in such a craft, too, the Natives resident on the western portion of the

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block purchased by Mr Kemp might be visited, and some idea obtained of the nature and value of that country. (E2:2)⁸

It is clear from this proposal that Mantell had in mind a purchase which extended over to the west coast.

On 14 April 1851 Domett advised Mantell that, as he had executed the duties in purchasing a large portion of the South Island “in a very satisfactory manner”, the governor wanted to engage him to purchase “the remaining portion of that Island”. If arrangements could not be made for sending Mantell on the government brig, the governor would endeavour to charter a whaling schooner at present attached to the *Acheron* (E2:2).⁹

- 10.3.4 Subsequently, Mantell was appointed commissioner of Crown lands based at Dunedin. On 17 October 1851 he received firm instructions from Domett, at the behest of Governor Grey, to purchase for the Crown the portion of the South Island which lay to the south of the Otago block. As to the price, Mantell was told that, as the Ngai Tahu had never expressed any expectation of receiving more than £2000 for this land, he should regard that sum as the “extreme limit”. He was to carefully ascertain who were the leading chiefs and the proportionate amount to be paid to each of them (E2:7–10).¹⁰

On the question of reserves Mantell was told that:

His Excellency further directs me to authorise you retaining for the use of the natives out of the lands purchased, such reserves as you think proper; and to acquaint you with reference to such exceptions, that you will be responsible for taking care that ample reserves are kept both for their present and future wants, and that in selecting such reserves, you will, in as far as is consistent with the public interests, consult the wishes and feeling of the Natives both with respect to their position and shape. (E2:10–11)¹¹

Mantell was therefore required to ensure that ample reserves were kept for both the present and future wants of Ngai Tahu, although this would be determined by Mantell himself. Moreover, Mantell was to consult with Ngai Tahu regarding the location and size of such reserves “in as far as it is consistent with the public interests”. It appears that Mantell, not Ngai Tahu, was to be the ultimate arbiter.

In commenting on these instructions and Mantell’s earlier intimation to Domett in March that he envisaged reserves of 10 acres per person to be appropriate, Professor Ward said:

It must be assumed that Domett saw no conflict between such instructions and Mantell’s clearly stated intention of restricting reserves to ten acres per head. In commissioning Mantell, Domett assured him that his actions in completing the Kemp purchase had Grey’s complete confidence. In this exchange there is clear evidence that Grey and Domett were quite content with a policy which combined a stated intention of

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providing for Ngai Tahu's present and future needs, with the practice of confining the tribe on tiny subsistence reserves without any further land being made available for their future endowment. Grey's statement to the Smith–Nairn Commission that he would not knowingly have allowed such a miserly provision to have occurred is shown to be no more than self-serving rhetoric. (T1:216)

The tribunal has no reason to disagree with these conclusions.

Mantell also received instructions to employ a surveyor to layout the reserves, to provide Ngai Tahu with a copy of the plans, to keep a daily journal of his travels and to make a population census of Maori in the country being purchased.

10.4. **The Negotiations**

Mantell meets Ngai Tahu chiefs at Port Chalmers

- 10.4.1 Mantell arrived in Dunedin on 16 November 1851. He lost no time in arranging a meeting with leading Ngai Tahu chiefs having an interest in Murihiku. In a letter of 20 November 1851 to the colonial secretary, he reported on the meeting which took place on 18 November. We reproduce his letter in full:

I have the honor to report to you for the information of H.E the Governor in Chief my arrival at this port on the 16th inst.

On Tuesday the 18th inst. I held at Port Chalmers a preliminary conference with the natives relative to the purchase which I am instructed to effect. Patuki, te Hau, Karetai, Taiaroa and many other Chiefs interested were present and expressed their wish to cede the land to the Government. I have arranged to proceed to the Native Settlement at the Heads in a few days to discuss the matter more fully and to hear any other claimants in this neighbourhood to attend and take part in the proceedings after which I propose to depart at once for the South accompanied by John Topi. (O13:20)¹²

Although Mantell referred to the Ngai Tahu chiefs wishing to cede the land he did not define the area discussed. It appears, however, that during or following the discussions on 18 November Mantell prepared a map (figure 10.3) showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast, and from there back around the coast. On the west coast below Piopiotahi are the names Taiaroa, Potiki, Ariaha Taheke, Whaikai, and Karipa. The names G Maui, Tikini and Poka appear on the coastline west of the Waiau River. The names of other well-known Ngai Tahu chiefs appear at various places east of the Waiau almost back to the Nuggets. Mantell, it seems, obtained this information during his discussions with Ngai Tahu chiefs on 16 November. The map bears the hand-written legend "Korero chart, Nov. 1851 No. 1". The map appears to indicate the

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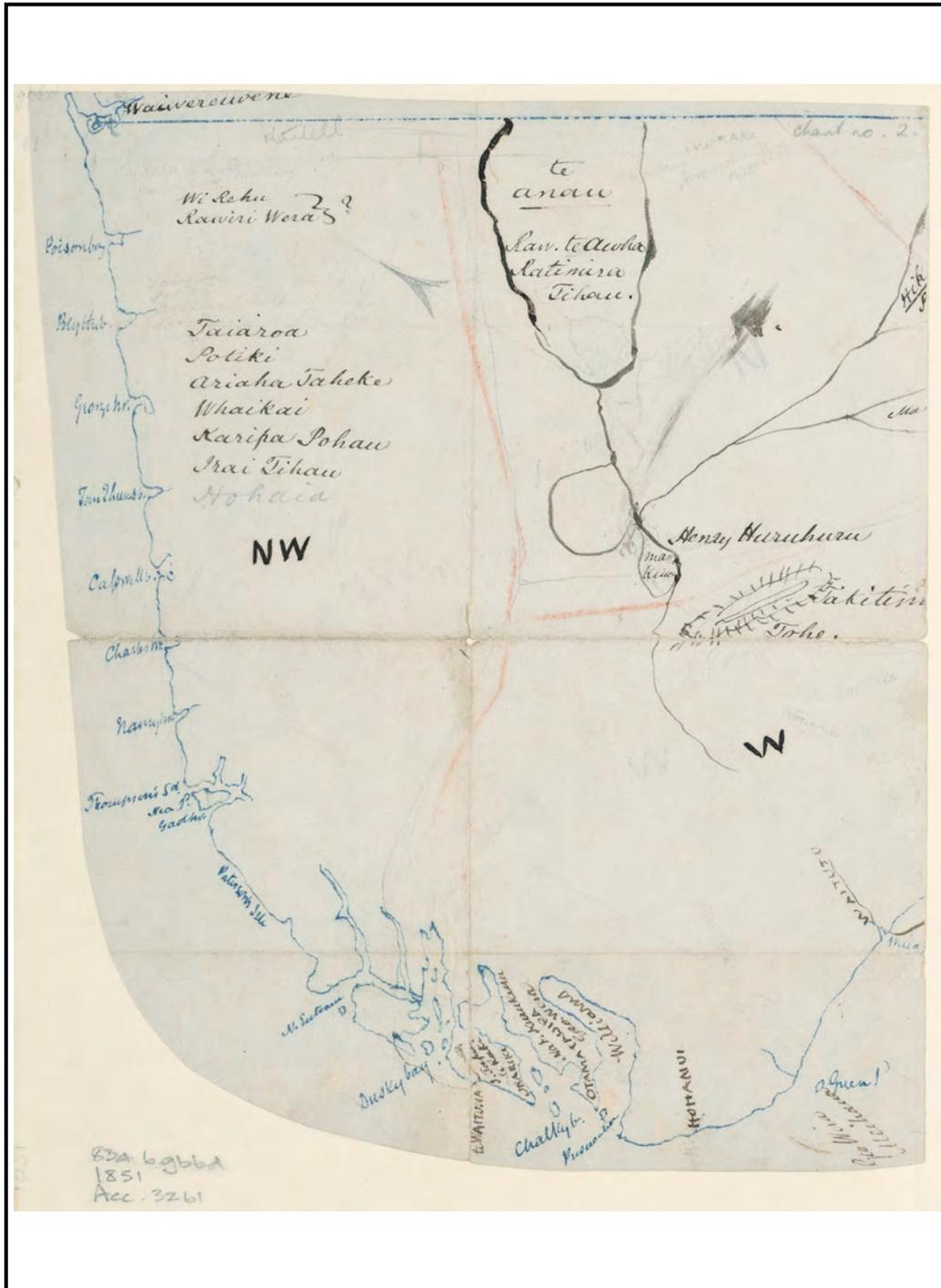


Figure 10.3: One of the “korero charts” prepared by Walter Mantell in November and December 1851 to determine who had rights to the land he was intending to purchase. From Mantell papers, Alexander Turnbull Library, Wellington (MapColl-834.6gbbd/1851/Acc.3261)

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extent of the land which the Ngai Tahu chiefs were prepared to cede and the names of chiefs having an interest in various locations.

We have no evidence as to what transpired at any further discussions Mantell may have had at the heads on the Otago peninsula. We do know, however, that he duly left Dunedin on foot on 3 December 1851 accompanied by Topi Patuki and several other Ngai Tahu.¹³

- 10.4.2 On the way to the Mataura River the party was delayed by heavy rain on 10 December 1851 (E2:20).¹⁴ The Ward report recorded how Mantell made use of his time:

Forced to stay in the tent, Mantell prepared his list of claimants. (O13:83–85) The list consists of 84 individuals, grouped around their places of residence. Those noted as living in Moeraki, Waikouaiti, and Purakaunui are included in the Otakou list. Each claimant has a hapu name; an indication of where the claim lies (W, SE, NE, NW, N, and S); the name of the person under whom the claim is grouped. There is a three level ranking of importance. The first rank of claimants consists of Taiaroa, Karetai, Te Au, Topi Patuki and Paitu. While most claimants of the second and third rank fall in behind the above, a small number have claims in their own right. These include Huruhuru, Tutauira, Haereroa, and Rawiri Taura. The table suggests a sophisticated attempt to determine just who had rights throughout the whole block. For instance, Rawiri te Awha, later identified as a ‘native of Te Anau’, was marked as having rights to the North. (E2:26) Being compiled before Mantell had visited the Foveaux Strait settlements, the schedule is likely to have been created with information provided by Topi Patuki. Although prepared early in the course of events there is clear evidence that Mantell continued to use this table throughout the purchase negotiations: the subsequent deaths of several individuals including Tuhawaiki’s son, Kihau, are recorded. (T1:217–218)

A map bearing the legend “10 Dec. 1851, Korero chart No. 2 (Mantell)” prepared by Mantell presumably the same day, shows how he subdivided the whole block below a line running from Tokata (the Nuggets) in the east to Milford Sound in the west and showing also the complete coastline. The areas nominated SE, S, W, N and NW are all indicated (figure 10.3) and the names of various chiefs having an interest in particular areas are shown. The names of Taiaroa, Potiki, Ariaaha Taheke, Whaikai, Karipa Pohau, Irai Tihau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. As the Ward report indicated, the information in Mantell’s list of claimants and in his chart no 2 is likely to have come from Patuki, the chief of Murihiku, who was with him at the time. It is obvious that Mantell and Patuki were concerned to identify who held interests in the whole of the block running from coast to coast which Mantell was subsequently to purchase.

*The Muribiku Purchase****Tuturau reserve (no 1)***

- 10.4.3 No doubt satisfied by his earlier discussions at Dunedin, Mantell began the task of negotiating the terms of the sale with Ngai Tahu and determining reserves in various locations. He intended that all reserves should be settled prior to any deed being signed or money being paid. On reaching Tuturau on the Maitauru River on 15 December Mantell laid out a reserve for the local people there. Mantell's journal entry for that day notes:

Reko demands a reserve of about fifty square miles. Fine day very warm. Gave reserve as at p 7. Reko quite satisfied. (E2:21)¹⁵

The reserve was surveyed by Kettle in Reko's presence three months later. The area amounted to 287 acres (O13:37–39).¹⁶ No complaint was made of this reserve by the claimants.

On leaving Tuturau the party crossed the Maitauru and on 20 December reached Oue.

The sale discussed

- 10.4.4 Two days later, on 22 December 1851, a hui was held at Huruhuru's boathouse at Oue. At least 60 Ngai Tahu were present (E2:22).¹⁷ Hoani Takurua described to the Smith–Nairn commission how Paitu was brought from Stewart Island. Patuki was present, along with the Ruapuke people; and others from Aparima, Oraka and Kawakaputaputa (E2:324–325).¹⁸ Patuki, in his Smith–Nairn testimony, said that in addition to himself, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs were present. In the morning some individual claims were discussed for a time. Mantell then produced his chart of claims. This too was discussed. It is not clear whether the "chart" was the "korero sheet" prepared on 10 December or the list of claimants, also prepared at that time, or both. Following the arrival of Paitu at noon, discussion of the purchase resumed. Mantell noted that Ngai Tahu wished to have the money distributed there and that the "Final korero" was to be at Otago (E2:22–23).¹⁹

Takurua said that at the meeting at Oue:

Mantell explained about the land. [He] asked them to cede the land to him and to the Queen. They asked him what was the price, and Mantell said he did not know then, that he would tell them at some future time. It was then and there that the land passed into Mantell's possession. The Maoris thought that there would be a large price given. Mantell concealed the price that would be given. By saying the land passed into Mantell's possession I mean that the people agreed to sell it. He obtained our consent to sell the land, and we went away with the impression that he was to pay us a large sum of money. When Mantell came back [in 1853] he told us it was a thousand pounds, and then we complained of the smallness of the money. Then came the promise of schools and hospitals. (E2:324–325)²⁰

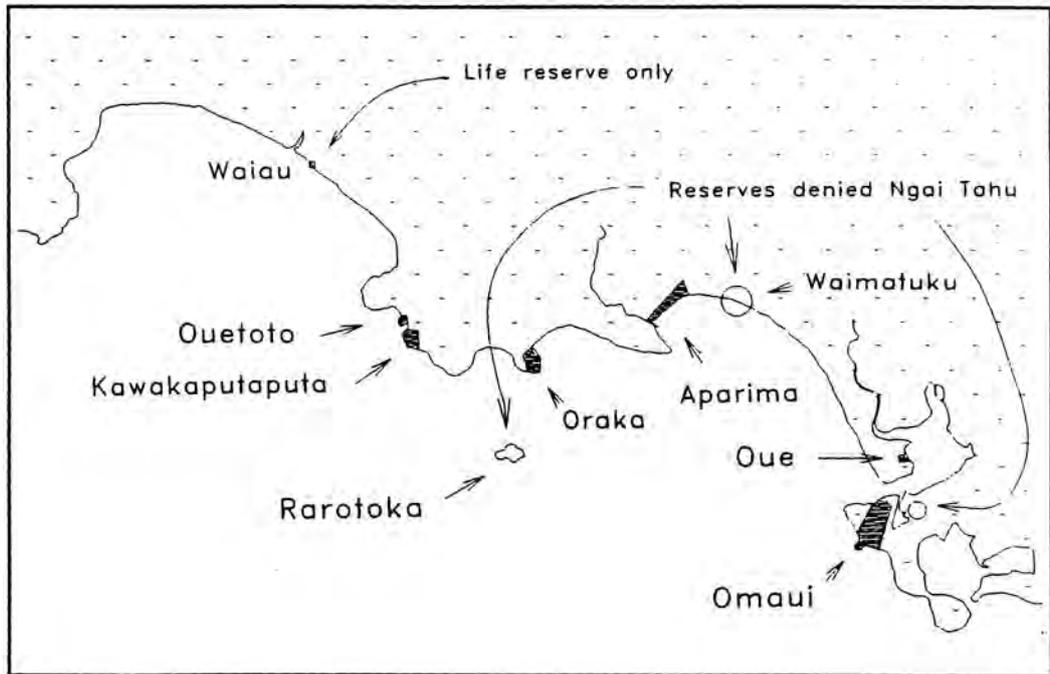
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Figure 10.4: Mantell's Foveaux Strait reserves showing those he granted and those such as Rarotoka, Waimatuku and an additional reserve at Omaui which he denied. There was an additional reserve at Tukurau.

Unfortunately Takurua did not say what land he understood was being bought by Mantell.

While arguing that Rarotoka (Centre Island) was excluded by Ngai Tahu from the sale, he made no such qualification about the land west of the Waiau. Nor did he make any suggestion that such land was not included in the sale which he regarded as having taken place at Oue. On the other hand, as we will see, both Patuki and Horomona Patu were to tell the Smith–Nairn commission that Mantell was told at Oue that the western boundary of the land to be sold was to be the Waiau River.

Additional reserves

- 10.4.5 In addition to the reserve at Tukurau, Mantell made provision for six more reserves, plus a life reserve, following his discussions at Oue. The claimants, in their grievance no 4, complained that Mantell failed to set aside certain lands in addition to those provided by him. We will now discuss each of the reserves in the light of the claimants' grievance. The number following the name of each reserve is that appearing on the map which accompanied the deed of purchase.

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Omaui reserve (no 2)

10.4.6 This reserve of 1686 acres was at the mouth of the New River. Horomona Patu was questioned about the reserves at Omaui and Oue:

The natives pointed out where the boundaries were to be.

They (including Patu) walked round where the boundary was to be? – Yes, and then they put down a peg. (E2:94)²¹

Patu went on to say that the people were not “exactly satisfied” and were not clear as to what was meant by the marking off of reserves (E2:94–95).²²

According to Mantell, on 22 December Patuki demanded a reserve at Omaui which included the whole headland:

from the head of the inlet across to the sea. Went along the sandhills but could not get a good view. I demanded from the houses outward for Europeans. Very dissatisfied. (E2:23)²³

The reserve was not settled by Mantell until 26 December when Mantell noted that, “After the reserve was fixed Patuki set out in his boat for Ruapuke”. Mantell did not say whether or not this reserve met with Patuki’s approval. On balance we think this unlikely and find that there was some shortfall in the provision made by Mantell. We are unable to quantify it. But, as Professor Ward pointed out, Mantell later arranged for Patuki to be compensated with two sections at Aparima totalling 221 acres which Patuki accepted (T1: 224–225). The grievance is therefore not sustained.

Oue reserve (no 3)

10.4.7 A reserve of 176 acres was made on the western side of the New River estuary. Mantell commented that he:

Sent for Huruhuru, Heneri Huruhuru, Poharama & Tutauira about their wish for a reserve here. Set out with them – 3 miles N. over wooded sand hills to a point whence they point out the Kotika [detached portion] they desired at the neck of sand between the river and the beach . . . Defined [sic] consideration of demand till I can converse on it with nat[ive]s at Omaui. (E2:23)²⁴

There is no evidence to suggest that Mantell failed to meet the wishes of Ngai Tahu in making this reserve. The claimants’ grievance cannot be sustained.

Aparima reserve (no 4)

10.4.8 This was a reserve of 527 acres at the mouth of Jacob’s River at Riverton. The following account is taken substantially from the evidence of a Crown witness, Mr D A Armstrong.

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In his evidence to the Smith–Nairn commission Hoani Paororo stated that the site of the present town of Riverton was included in the reserve which the people originally asked for:

Mantell said – “I must have a portion of that land for a town”. The Maoris objected. Mantell said – “It will be better for you to give a portion of this land to have a town here which will be a benefit to you”. Then the Maoris consented. My father was one who agreed to it. Mantell then said – “Where shall the boundary be fixed”. We fixed upon the line of that back street which passes the Marine Hotel . . . If the Maoris had persisted in what they originally asked for, there would be no town where it now stands. (E2:346–347)²⁵

According to Horomona Patu, Ngai Tahu:

told Mantell where they wanted the boundaries, from Reretai to Otaetae, and from Otaetae to Aparima. (E2:100)²⁶

But Mantell did not lay it out as the people wanted it, because, according to Patu:

. . . Mantell was not willing to have it owing to the entrance of the river. The natives would claim it.

Then did the natives want to get on both sides of the river? – No, only on one side.

Then how was it settled? – Mantell told them they had better go across the river to one side of the river, & leave the pakehas the other side. The natives did not want both sides of the river, but Mantell advised them to go on one side of the river, and let him have the other.

What was finally done? – We said, “We shall not go across to the other side of the river (the South side); We will remain on this side where we are” . . .

Was it finally arranged that they should remain where they were? – Yes. Mantell replied, “Well, if you actually want this place, I will mark it off for you”.

Mr Smith – and it was marked off? – Yes, he marked off a similar reserve to that which we wanted, or would have liked to have got. (E2:100–101)²⁷

On 1 January 1852 Mantell noted in his journal:

Shewed the natives the boundary of 500 acres which Hor. Pukeite and the rest will not agree to as it includes no part of Otaitai wood and the E. boundary does not extend to Aparima. (E2:24)²⁸

On 3 January he noted:

Went to see the hapuas [lagoons] in the wood. Evg. offered to exchange that part for an equal quantity at Otaitai. (E2:125)²⁹

On the same day Mantell wrote to the colonial secretary, remarking:

I reached this place on the 27th ultimo, and have not yet succeeded in reducing the demands of the Natives for a reserve of extravagant dimensions sufficiently to justify me in assenting to them. (E2:2)³⁰

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Mantell and his party then proceeded to Oraka on 5 January 1852. The Aparima reserve was left to be settled on his return.

On 23 January Mantell recorded:

Arranged the reserve . . . after great annoyance from those stupid dolts Paroro and Solomon. (E2:30)³¹

It appears that Ngai Tahu succeeded in obtaining their reserve in the preferred location, despite Mantell's fear that this could interfere with further European settlement. But Mantell did succeed, against the wishes of Ngai Tahu, in confining the reserve to just over 500 acres, providing a mere 10 acres per head by Mantell's own census figures. The tribunal finds the claimants' grievance that Mantell refused to reserve additional land at Aparima is made out. We are, however, unable to quantify the deficiency.

Oraka reserve (no 5)

- 10.4.9 This was a reserve of 1132 acres at Colac Bay. Although Mantell at first appeared surprised at the extent of the reserve requested, on 13 January 1852 he noted in his journal that Hau [Te Au] and Matewai agreed with him on the boundaries of the reserve (E2:25).³² This was confirmed by Hoani Paororo, who told the Smith–Nairn commission that their reserve was agreed to as requested:

There was no difference between Mantell and Te Au about Oraka. The reserve there was marked off as Te Au wished it. It was Te Au who asked for a reserve and Mantell at once assented. (E2:347)³³

No complaint was made about this reserve by Ngai Tahu.

Kawakaputaputa reserve (no 6)

- 10.4.10 This was a coastal reserve of 977 acres bordering on Foveaux Strait between Colac Bay and Te Waewae Bay.

On 9 January 1852 Mantell noted a discussion with George Maui, who sought a reserve at Te Awaroa rather than Kawakaputaputa. On 12 January when Te Au arrived, Mantell had a further discussion about reserves with Te Au and George Maui (E2:26). On 13 January Mantell recorded that:

After dinner spoke with George about Wakaputaputa reserve. He wishes it to extend to te Awaroa, about 6 miles off, which I tell him it is useless to demand, begging him to consider the matter till my return from Waiau. (E2:26)³⁴

On the following day Mantell recorded in his journal:

George came in to say that as I objected to it he had given up Awaroa, which he had wanted as a run for his 36 goats now there. He pointed out where he wished the lines to begin. (E2:27)³⁵

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The claimants in their grievance no 4 complained that Mantell failed to set aside additional land requested at Kawakaputaputa. It is clear that George Maui did seek a more extensive area than Mantell provided. But Maui appears to have accepted Mantell's objection to the large area sought. He pointed out a lesser area of nearly 1000 acres which was duly reserved. This resulted in 32 acres being available to each of the 31 Ngai Tahu named in Mantell's census. This was insufficient for the future needs of the people. We uphold the claimants' grievance and find that Mantell should have acceded to George Maui's original request. Again, we have no evidence on which to quantify the shortfall.

Ouetoto reserve (no 7)

- 10.4.11 This reserve of 90 acres lies a little to the west of the Kawakaputaputa reserve. We have little information about it. Mantell simply recorded that on 14 January 1852 he "Set out reserve no. 7" (E2:27).³⁶ The claimants made no grievance as to this reserve.

Reserves allegedly requested and not awarded

- 10.4.12 We now discuss the remaining claims in the claimants' grievance no 4 concerning land not set aside at Waimatuku, Rarotoka Island, 300 acres on the Waiau River and the waterfall at Te Aunui on the Matura River.

Waimatuku

- 10.4.13 This grievance concerns an area of some 200 acres. According to Horomona Patu, in evidence to the Smith-Nairn commission, Ngai Tahu requested a reserve at Waimatuku on the coast near Aparima. Patu told the commission:

The natives pointed out the boundaries they wanted [from Okuera to Otemakirikiri]. Mr Mantell took a note of it in his book, but he did not mark it off.

Did he agree to make the reserve there? – Yes.

Did he go round the boundaries? – No. (E2:98)³⁷

Patu went on to note that Mantell had promised to mark off this reserve of approximately 200 acres on his return from Waiau, but he "did not keep his promise" (E2:99).³⁸

In later evidence by Patu the topic was again raised:

Did you see Mr Mantell when he came back? – Yes, I saw him when he returned from Waiau. Mr Mantell asked – "Where is Matiaha? . . . I thought that Matiaha was here, so that we might all go and mark off the boundaries." . . .

You are quite sure he meant the reserve at Waimatuku? – Yes, I am quite sure it was Waimatuku he was referring to. We have been speaking about that land ever since. (E2:121–122)³⁹

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Although Mantell waited several hours for Matiaha Tiramorehu he did not come and Mantell resumed his journey (E2:123).⁴⁰ It appears that Tiramorehu later returned from his eel fishing and he set off after Mantell. He failed to catch him as Mantell had crossed the river on a ferry boat (E2:124).⁴¹ Waimatuku was a Ngai Tahu kaika at the time the reserve there was requested. Patu said that when Kettle came to survey the reserves they “were all away mutton-birding” (E2:124).⁴²

Mantell made no reference in his journal to a request for a reserve at Waimatuku. However, Horomona Patu’s evidence has a convincing ring about it and we accept that, for whatever reason, Mantell failed to provide for a 200 acre reserve at Waimatuku as requested by the people there. The claimants’ grievance is accordingly upheld.

Rarotoka Island

- 10.4.14 This island is situated some seven kilometres off Oraka Point. It is specifically named in the deed of purchase as being ceded by the owners and is shown on the deed map.

The principal evidence before the Smith–Nairn commission suggesting that Mantell was told Ngai Tahu did not wish to sell this island is that of Horomona Patu. According to Patu, Mantell, while at Oraka, looked over to Rarotoka and said:

“I must have that island.” We replied to Mantell – “we will not let you have that island, and we shall not let you have that island.” . . . Mantell said “Let me have that island to place a powder magazine there, & to have a place for a prison.” The natives said – “We will not let you have that island, Mantell, leave that for ourselves.” (E2:102)⁴³

Evidence was also given to the Smith–Nairn commission by Thomas Pratt Haereroa as to:

the reason why the natives did not care letting the Island of Rarotonga go during the time Mantell was here. Several Maoris lived there for years before Mantell’s time, and several of my ancestors, male and female, are buried there. Their bodies have never been removed. This shews to the Court that this was one reason why the natives did not care to let the island go. (E2:292)⁴⁴

Asked whether he had heard what was said to Mantell about it, the witness admitted that he had not. His statement was in the nature of opinion or hearsay evidence. But he was immediately followed by Horomona Patu who was recalled by the commission. Patu said Mantell was told:

“You shall not have that island; that island shall be kept by us; we cannot sell our graves or burial places.” That is the reason why we claim this island up to the present time. The Govt. say that they bought this island off Te Au. I say that the island was never bought. Neither Mantell nor Te Au ever made any proclamation that the island had been bought. (E2:296)⁴⁵

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Curiously, although Te Au gave evidence before the Smith–Nairn commission he made no reference to any refusal on the part of Ngai Tahu to sell Rarotoka and was not questioned on the matter.

The only other Ngai Tahu witness to advert to Rarotoka before the Smith–Nairn commission was Hoani Takurua. He told the commission that:

While there [at Kawakaputaputa] Mantell looked at Rarotonga. Mantell pointed to the island and said “That island must be given to me”. Te Au and others replied – “That land will not be given to you; we shall keep it”. Mantell said – “You must give it to me for a magazine or a store for powder and guns, and a place for prisoners to be kept”. The Chiefs refused again and said they wished to keep the land for themselves and their children. Neither ceded the point. Mantell held to his, & the Maoris held to theirs. For this reason we say that the island of Rarotonga is still ours and that it is not gone. This took place at Ngawhakaputaputa. (E2:326–327)⁴⁶

In the Mantell papers held at the Alexander Turnbull Library is a memorandum by Mantell dated 1860 concerning the island:

Te Au, Oraka, Aug 5 1860 offers Rarotoka for £500 rec'd Oct 9. Rarotoka was included in the lands ceded by the Murihiku Deed but contrary to the repeated protest of Te Au – the understanding courteously arrived at being that during his lifetime it should be only subject to military occupation if required – he having for that period all civil use of it. (J2:34)⁴⁷

If Mantell recorded this arrangement it has not been found. Mantell here acknowledged that Rarotoka was included in the deed of purchase despite repeated protest by Te Au. He appears to have suggested that Te Au eventually accepted a right of occupancy for his life only, subject to any military requirements of the government.

- 10.4.15 Rarotoka was an island of considerable strategic importance to Ngai Tahu. Not too many years previously it had been a populous refuge. Moreover, as Horomona Patu made clear in his evidence, Ngai Tahu were anxious to reclaim it because it was wahi tapu: there were many graves of Ngai Tahu on the island. The fact that Te Au in 1860 offered Rarotoka for sale indicates that he considered it was still in Ngai Tahu ownership. On the other hand Rarotoka is expressly named in the deed of purchase as passing to the Crown. While the tribunal accepts that it did pass to the Crown in this way we consider this was against Ngai Tahu's wishes and that it should have been set aside as a reserve for Ngai Tahu. It is clear they sought to retain ownership and Mantell's note makes it clear that Te Au made repeated requests for the retention of the island. Accordingly the grievance is sustained.

Three hundred acres on the Waiau River

- 10.4.16 After laying out the Ouetoto reserve (no 7) on 13 January 1852, Mantell proceeded westwards to the Waiau River. The following

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afternoon he embarked in a small moki accompanied by John Matewai, leaving behind Te Au and Irai. Mantell remarked that no one crossed the Waiau except on business. Because of the fragility of the moki and the presence of innumerable snags the crossing was a risky one. On reaching the western side they found a group of grass huts with no inhabitants. After an hour's search Matewai returned to the kaika with two elderly women, "Heko and Popokore and a fine little boy – the entire native population of Waiau" (E2:29).⁴⁸ Heko was the mother of Te Au and Matewai. Mantell recorded:

These poor old women will not be induced to leave the valley, but today they consented at the urgent request of their relations to move to the east side of the river. I have therefore promised them about five acres at Tumutu for their huts and garden during their lives for their occupation only. (E2:29)⁴⁹

Mantell noted in his journal for the following day, 16 January, making a four acre life reserve opposite Tumutu for Heko and Popokore. Perhaps because it was a reserve for life only he did not record it on the deed of purchase or the deed map.

In evidence to the Smith–Nairn commission Horomona Patu claimed that Ngai Tahu asked for 300 acres at Waiau, although he admitted he was not present and other people told him there was a reserve there (E2:111).⁵⁰ However, also in evidence before the commission, Hoani Paororo substantially confirmed Mantell's account:

When Mantell went to Tumutu he found two old women there. Mantell pointed out ten acres which these old women were to occupy during their lives, and after their death it was to return to the Government. The Maoris say that the land was permanently reserved, but what I heard Mantell say was what I have told you. (E2:348)⁵¹

We find that there is no reliable evidence to substantiate the claimants' grievance that a reserve of 300 acres at Waiau was either requested or refused. The grievance is not sustained.

A block at Opuaki

10.4.17 Horomona Patu told the Smith–Nairn commission that after Mantell set aside the reserve at Aparima they told him:

"that this piece of ground is small, you have [not] taken where we wished the boundary to be, our cattle cannot live on that reserve that you have reserved for us". Mr Mantell said "If your cattle increase, if I am away apply to Mr Strode for a piece of land to run your cattle on . . . The natives said this – "let the land that is to be given to us be at Opuaki in the event of our cattle increasing." . . . Mantell said, – "It is all right your desiring that, but Opuaki is in my hands; I shall hold it in my hands." We agreed. (E2:125–126)⁵²

Although the cattle numbers at Aparima did increase the people sold the extra animals rather than make application to Chetham-Strode.

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According to Patu, this was because Mantell's promises were not believed (E2:127).⁵³

It is clear that Mantell declined to grant the land requested at Opuaki, which Patu said was about six miles inland from Aparima. The claimants' grievance is sustained.

A waterfall at Te Aunui on the Mataura River

10.4.18 This grievance appears to rest on the following evidence of Matiaha Tiramorehu before the Smith–Nairn commission:

I want to speak with reference to the waterfall at Mataura. I want the Govt to give it back.

Why? What is your reason for wanting the Govt to return it? Do you mean as a gift, or have you any special reason why the Govt should give it back? – Because I think the £10 was not sufficient for my claims. The fall is called Te Aunui; it is on the Mataura. The reason why I did not mention Te Aunui was because somebody else held it then. The Ngaitahu killed the people who first held it, and that was the reason I did not put in my claim. It had passed by right of conquest. (E2:192–193)⁵⁴

Tiramorehu appears to be making his claim for the return of Te Aunui waterfall for the first time 28 years after the purchase. It is apparent he made no claim at the time. The Crown cannot be held to have failed to set it aside at the time of the purchase as alleged by the claimants. This grievance is accordingly not substantiated.

Summary of findings on grievance no 4

10.4.19 The claims that the Crown failed to set aside the following lands for the use of Ngai Tahu after the sale are sustained:

- additional land at Aparima to that which Mantell allowed (10.4.8);
- additional land at Kawakaputaputa to that which Mantell allowed (10.4.10);
- a block of 200 acres at Waimatuku (10.4.13);
- Rarotoka Island (10.4.14); and
- a block at Opuaki (10.4.17).

The remaining claims in grievance no 4 are not sustained.

Our findings in relation to the Treaty of Waitangi on the grievances upheld are deferred until we have considered grievance no 8, to which they are closely related.

10.5. **The Purchase**

The purchase is delayed

10.5.1 After laying out the reserves and making a trip to Ruapuke, Mantell returned to Dunedin. As Professor Ward put it, Mantell clearly

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regarded the various meetings in the summer of 1851 and 1852 as settling the issue – certainly as it applied to the major concerns of the sale – although he was yet to reveal the price (T1:224–225).

On 19 February 1852 Mantell formally reported to the colonial secretary, Domett, the completion of his overland journey and the setting aside of eight reserves (including the Tumutu life reserve). He asked for the surveyor Kettle to be made available urgently as he wished to have maps of the reserves available for delivery to the chiefs by 24 May 1852, “the day fixed for a final general meeting at Otago to settle all disputes prior to the distribution of the final instalment” (A8:I:273)⁵⁵ He indicated that after the 24 May meeting he intended to go south to distribute the first instalment of £1000. He wished to travel there by sea, taking with him those chiefs living at Dunedin who should be there. Domett authorised Kettle’s engagement but made no arrangements about the purchase money. The May meeting, which was fixed to coincide with the closure of the titi season, took place, but with no response from the government, the Murihiku people returned south still hoping Mantell would bring the payment to them. Eventually they dispersed (T1:225). On 21 June Mantell wrote to Domett suggesting further arrangements for completing the purchase in August:

As indicated in my letter of the 19th February I have awarded the sum of £2000 to be paid for the district: this I have deferred communicating to the natives in order that I might do so in full assembly. The land in the meantime is regarded by them as ceded, the price to be fixed by me. (O13:66)⁵⁶

10.5.2 For more than a year there was no action on the part of the government in providing the funds to enable Mantell to complete the purchase. Domett did not explain the reasons for the delay until after the sale was effected. In a letter of 7 November 1853 he advised Mantell that:

- about six years previously some of the principal chiefs of the district had agreed with the governor to sell the land now sold on certain terms when it might be required;
- those terms were nearly the same as they had since agreed on in the deed of purchase;
- within the last 12 months Patuki and Taiaroa, on a visit to Wellington, had confirmed the earlier agreement; and
- given the agreement, there appeared to Grey no need to hurry the completion of the purchase, especially as at the time the government found it very difficult to find funds for more urgent purchases of land elsewhere. (A8:I:283)⁵⁷

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- 10.5.3 Mantell heard nothing further from the government for over a year. By August 1853 he had become seriously concerned that Ngai Tahu would withdraw from their agreement to cede the land. Tired of waiting for government initiatives, 30 or 40 European families were placing increasing pressure on Ngai Tahu to sell them land directly, despite the Native Land Purchase Ordinance which was intended to prevent such purchases. In particular, Mantell began to fear he would be unable to settle for £2000 (E2:37a)⁵⁸

The deed of purchase is signed

- 10.5.4 In August 1853 Mantell decided to act on his own initiative. He was still without funds from the government. Although lacking authority from Wellington he drew £500 from the land fund, (which held profits from the sale of Crown lands within the Kemp and Otakou blocks), for which he was responsible, and he borrowed £500 on the security of his own property. Finding that many of the principal claimants to the block from both Otakou and Murihiku were in or near Otago, Mantell arranged for them to assemble on 17 August 1853 to settle the sale. After what he described as “a long and anxious debate” some 58 Ngai Tahu chiefs signed or had their names recorded on the deed of purchase that day. These included a substantial number from the Foveaux Strait area to the south and south-west. Of the five chiefs identified by Mantell as representing those with the major rights to the block, Taiaroa, Karetai, and Paitu signed the deed. The remaining two, Te Au and Topi Patuki, were present and had their names recorded on the deed. Of these, all but Taiaroa and Karetai were from the south and south-west, while according to Mantell’s map prepared in consultation with Patuki, Taiaroa had interests in Fiordland on the west coast as well as in the east. Other chiefs having an interest in Fiordland, namely Potiki, Akaripa Pohau and Irai Tihau also signed or were named on the deed.
- 10.5.5 Although the purchase price nominated in the deed was £2000, Mantell explained to Domett in a letter of 18 August 1853, that the Ngai Tahu chiefs only agreed to this on the basis that he would urge the governor, particularly having regard to the long delay, to pay an additional £600, one half of this would be distributed at Otago and the other half at the Bluff (E2:37(b) & (c)).⁵⁹ The governor agreed to this. The deed itself provided for the £2000 to be paid in two equal instalments at Otakou and Awarua (the Bluff). The first instalment was paid at Koputai (Port Chalmers) on 3 October 1853, but it was not until 15 February 1854 that the remaining £1000 was available and distributed at Awarua. The additional payments of £300 each were not made until 4 and 25 November of the same year (E2:37(f)–(h)).⁶⁰ Mantell went to considerable pains to ensure that each

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claimant received a share of the payment. In some cases this was no more than a few pounds, or even less, and there were later complaints that others were not paid at all.

The deed and map

- 10.5.6 The deed states that the chiefs and people of all the lands within the boundaries described in the deed, and more particularly in the accompanying map, entirely give up those lands to the Crown forever. In return, they were to be paid £2000 by two instalments of £1000, as we have earlier indicated. The boundaries of the deed were described as:

Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotahi,) haere atu i reira ki Kaihiku, a i, reira, haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe, me nga Turanga me nga Turanga. me nga awa me nga roto, me nga ngahere, me nga Pakihi, me nga aha noa katoa ki roto ki aua wahi me aua mea katoa e takoto ana; Otira kei te pukapuka ruri kua oti te whakapiri, ki tenei pukapuka te tino tikanga me te tino ahua . . . (see appendix 2.5)

Which was later translated by Alexander Mackay as:

The boundary commences at Milford Haven (the name given to that place in Mr Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the land within these boundaries, with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. A more accurate description and representation of the land is given in the plan hereunto annexed. (E2:37(g))⁶¹

The claimants, in support of their claim that the deed lacked clarity in its description of the boundaries, tendered in evidence a new translation of the Murihiku deed, in which the boundaries of the land alienated are described as follows:

The boundary commences at Piopiotahi (the name given to that place in Kemp's deed of sale is Whakatipu Waitai however the Maori name is Piopiotahi) from there it goes on to Kaihiku then from there to Tokata closely following the old boundaries of Kemp and Symonds to the sea of Piopiotahi then on to Tokata yonder to Tauraka, Rarotoka and Motupiu and all the islands which lie close to shore (but not the Ruapuke group) . . . (R39:3-4)

We note that the Mackay translation has stood unchallenged for over one hundred years until 1989. The essential difference between the

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two translations of the description of the boundaries is that the earlier translation, after reference to “Kemp and Symonds”, says “and by the coast from Milford Haven round to Tokata . . .” where as the new translation says “to the sea of Piopiotahi then on to Tokata yonder . . .”

10.5.7 Those members of the tribunal qualified to do so have considered the two translations and have no hesitation in finding that the older Mackay translation of the disputed passage is correct. The words “ma te moana” mean “by the sea”, and while “coast” is, in the context, an acceptable substitute for “sea”, the most accurate translation would read “and by the sea from Milford Haven round to Tokata”. The tribunal considers that the deed provided a clear, if concise, description of the boundaries which would have made it plain to all Ngai Tahu who heard the deed read out that the land extended from Piopiotahi (Milford Haven) on the west coast, across to Kaihiku and on to Tokata (the Nuggets) on the east coast; and the whole way around the coastline from Piopiotahi to Tokata, including Tauraka, Rarotoka, Motupiu and all the islands lying adjacent to the shore, except the Ruapuke group.

10.5.8 The deed map was also criticised by the claimants on the ground that there is no Green Island in the place indicated on the map. This is a valid criticism. As we have seen, the deed itself refers to “. . . Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (except the Ruapuke group)”. But it makes no reference to Green Island. The map correctly identifies Rarotoka and Motupiu islands, but does not show Tauraka. Presumably the Green Island shown on the map was intended to be Tauraka. In Mantell’s 1852 sketch map Tauraka is shown at the mouth of the Waitutu River, which drains Lake Poteriteri about 60 kilometres west of the Waiau river mouth (J4:76).⁶²

Further enquiries made from the literature reveal references to both Green Island (or Islets) and Tauraka:

- Herries Beattie, *The Maoris of Fiordland*, (Dunedin, 1949), has in chapter IV a list of place names between Waiau and Preservation Inlet. The Green Islets are described as being between Cavendish and Wilson Rivers (p 20).
- W H Sherwood Roberts, *Place Names and Early History of Otago and Southland*, (Invercargill 1913), says “Windsor Point was Tauraka” (p 99). No source for this statement is given.

Windsor Point (previously Tauraka) was shown on a large map, in evidence before us (O40), as being near the south-west corner of the South Island, not far removed from the Green Island shown on the deed map. It seems highly likely, therefore, that the island described

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as Green Island was intended by Kettle, the map draughtsman, to be Tauraka. If so, he appears to have erred in describing it as an island, if in fact it was a point or headland. While to modern readers and viewers the reference to Tauraka may serve only to confuse, it is very likely from Mantell's identification of Tauraka on his 1852 sketch map that to Ngai Tahu, in 1853, the reference would have been perfectly familiar. It comes in the correct sequential order, preceding, as it should, the reference to Rarotoka, which is to its east, and Motupiu, which is further east. Even more convincing is the information recorded on a map made by Edward Halswell and dated 1842. The map was prepared from information provided by Ngai Tahu informants, and has already been reproduced as part of this report (figure 3.2). It shows a place labelled "Toraki" on the coast between the Waiau river mouth and Preservation Inlet. We think it unlikely therefore that the absence of Tauraka on the map and the presence of "Green Island" in the approximate position of Tauraka would have significantly affected Ngai Tahu's appreciation that the boundaries extended the whole way around the coast from Piopiotahi to Tokata.

- 10.5.9 The claimants, through their historian, Mr McAloon, were strongly critical of the absence of any reference to the Waiau River in the deed map. Indeed, Mr McAloon went so far as to allege that it was drawn to deceive (J2:65). It was suggested that the coastline shown on the map might have been confused by Ngai Tahu for the Waiau River. A perusal of the map shows the whole of the block, as delineated in the deed, to be outlined in pink, with a thick blue border clearly indicating the sea coast and various bays and inlets. We see no possibility of any part being confused with the Waiau River.

Mr McAloon conceded that the deed map was present at the time of signing (J2:66). The map is large, judging by the copy produced in evidence (T9) which we understand to be of approximately the same size as the original. It should have been clearly visible to the signatories.

While Milford Haven, not Piopiotahi, is marked on the deed map, the deed itself expressly refers to Piopiotahi. This should have clearly indicated to Ngai Tahu signatories that the purchase extended right across to the west coast. Topi Patuki, while unclear about a number of matters, stated that he signed the deed at Port Chalmers (E2:73)⁶³ and, asked whether it was read over before he signed it, replied – "Yes, it was read over before I signed it" (E2:75).⁶⁴ We will return to Patuki's evidence shortly.

It should also be noted that the deed map shows the seven reserves marked off by Mantell, except for number 3 at Oue, which either

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flaked off the original at an early or was not recorded and hence is not now shown on photocopies. (See P18:appendix A).

Who signed the deed?

10.5.10 Mr Temm, echoing in part at least observations by Mr McAloon, said in paragraphs 4–8 of his reply (Y1:92–94):

4. The Deed was signed once only – at Port Chalmers. It was sent off to Domett on the same day (E.2; p 1). Money was paid over at Port Chalmers in October 1853, at Awarua in February 1854 and in Dunedin on 2 occasions – on 4 November 1854 and 3 weeks later on 25 November. At none of these places was the Deed read out. It had been sent off to Domett on the very day it was signed at Port Chalmers.

5. The main point made by the claimants has not been adequately dealt with by the Crown. That is that the people living near Waiau, in the western part of Southland did not participate in the signing of the Deed and therefore did not hear it read out. The Crown's response to this point is as follows:

“ . . It has been suggested that the Deed was read out near Port Chalmers and no where else and that Mantell spoke one way at that time and a different way at Awarua. But it is for the claimants to prove this allegation; they have produced only unsupported speculations.”

Again this is not correct.

6 Horomona Patu was the paramount chief in the western part of Murihiku and he certainly did not sign the Deed, nor did any of his people. The Smith–Nairn Commission received a letter from 17 of the chiefs of Ngai Tahu at Aparima written on 8 March 1880 urging the Commission to come down to Riverton so that their evidence could be taken (J.4; p 115). The writers of the letter point out that there were 80 or more in their community and that they were not at all clear about the sale “of this side of Murihiku”.

7. On 25 March 1880 Horomona Patu gave evidence and said:

“ . . . The people here south knew nothing of the sale of Wakefield, and as regards the selling of Murihiku Block it was not the people of Murihiku who sold it but the people of Otago . . .” (J.4:p.145)

It is clear from reading his evidence that when Mantell went down to Aparima the year before the sale as part of his negotiations he was obviously concerned only with identifying what reserves should be laid off. At that stage he did [not] disclose what he was prepared to pay and no price was discussed with Horomona Patu or his people near the Waiau River.

8. The fact that the Deed was signed at [Port] Chalmers and thereafter sent off to Domett is clear evidence that it was not taken about and read out to any of the others when the money was paid out in October 1853 and during 1854. It seems an inevitable conclusion to draw from the evidence that Mantell went to Aparima to lay off reserves but never returned there. It is clear that he did not disclose what price he would pay until the final discussions at Port Chalmers in October 1853 and the point made by the claimants is that he failed to get the agreement of all the principal chiefs of Murihiku. In particular he failed to get the

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agreement of those who were most affected by the sale of Fiordland, viz. those who were living near the Waiau River, at Colac Bay and at Aparima – those who had “the biggest interest” of whom Tiramorehu had spoken when he was asked about the boundaries of Murihiku during Mantell’s first round of negotiations.

- 10.5.11 After these submissions had been made, Mr Evison, one of the claimants’ historians, had the opportunity of closely examining the original deed. From this he concluded that the vast majority, 41 out of 58, of those named on the deed, did not actually sign the deed itself, but had their names recorded (Z41). The receipt for the first payment made at Koputai, on 3 October 1853, was written on the back of the deed and was signed by 39 Maori. The Awarua receipt of 15 February 1854 was also signed by all those named. However, Mr Evison suggested that Paitu was the only chief from Murihiku who signed the deed. Since Mantell had this receipt signed on a separate sheet, rather than continue using the back of the deed, Mr Evison argued it was likely that the deed was not taken to Awarua. From all this, Mr Evison concluded that, apart from Paitu, none of the signatories from Murihiku actually signed a document specifying what land, if any, was being conveyed to the Crown. As a result it is possible, he suggested, to argue that the Murihiku people were confused about the sale, and any doubt they may have had about the area of the block would not have been resolved.

Mr Temm erred in claiming that the deed was sent off to Domett on the day it was signed, as Mr Evison’s later comments demonstrated. In fact Mantell sent a copy only to Domett that day (E2:37(b)).⁶⁵ The following year, by letter dated 12 May 1854, he enclosed “the *original Deed of Purchase* of the Murihiku Block, with the receipts for the first two instalments of £1,000” (E2:37(d))⁶⁶ (emphasis added). The second instalment was paid at Awarua on 15 February 1854 (E2:37(g)).⁶⁷ Thus Mr Temm’s claim that on no occasion after its signing on 17 August 1853 was the deed read out, cannot be sustained. Since the deed was used for the first receipt, it is likely that it was read out when the first payment was made. While Mr Evison suggested that it was not taken to Awarua in February 1854, because a separate receipt was on that occasion drawn up, this is not conclusive.

Mr Temm’s main point was that the people living near Waiau in the western part of Southland did not participate in the signing of the deed and therefore did not hear it read out. He said that Horomona Patu, whom he claimed to have been a paramount chief in the western part of Murihiku, did not sign the deed nor did any of his people. It is true that Patu did not sign the deed, but whether he was the “paramount chief in the western part of Murihiku” has not been

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established. The claimants' historian, Mr McAloon, claimed that Patuki had the paramount mana in Murihiku. It is certainly not correct that none from this part of Murihiku (referred to in his paragraph 8 as those living near the Waiau River at Colac Bay (Oraka) and at Aparima) signed the deed. The only chief named by the claimants as not having signed is Horomona Patu. No reference was made to the list of claimants in evidence prepared by Mantell in association with, and no doubt at the direction of, Patuki (O13:84–85).⁶⁸ Out of 59 names on the deed, 41 have been identified. Of the 41, 15 were from Otakou and the remainder—26 in number—were from Murihiku. In his list Mantell names the claimants from various localities. The numbers shown are as follows, with the number from each locality whose names appear on the deed shown in brackets.

Oue	3	(1–Huruhuru)
Aparima	13	(5–Paororo, Matiaha Kukeke, Haimona Pakipaki, Makaia, Akaripa Pohau. Note: Horomona Pukuheti [Patu] is included in Mantell's list of claimants, but he was not a signatory and is therefore not one of the 5)
Oraka	8	(4–Tiare Te Au, Takurua, Pirihiira and Ratamira Te Hau)
Ruapuke	19	(10–John Patuki, John Karako, Ihaia Whaitiri, Tiare Hape, Horomona Mauhe, Wiremu Rehua, Matene Manaia, Teoti Rauparaha, Wi Rehu and Maraitaia)
Rakiura	8	(1–Paitu)
Kawakaputaputa	7	(none)

Including one from Rakiura, there are 21 chiefs from west and south of Otakou. To this number must be added a further five whose names appear on the census compiled by Mantell (O13:22–24), as follows:

Oue	1	(Te Marama)
Aparima	1	(Paororo)
Ruapuke	3	(Manihera Tutaki, Tipene Pepe and Riwai Piharo)

This brings the total of identified participants to the deed from Murihiku to twenty-six. Horomona Patu was not listed as a principal chief by Mantell. The principal men according to Mantell's list were Huruhuru, Te Au, Topi Patuki and Paitu, all of whom are named on the deed.

- 10.5.12 Although, as Mr Evison pointed out, the deed was only signed by a minority of those involved, it has never been suggested that the chiefs

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named did not give their consent. The question remains, since they did not sign the deed, did they understand the boundaries mentioned in the deed and on the deed map? Given the circumstances, it can only be concluded that they did understand these. Topi Patuki commented to the Smith–Nairn commission that, “The document was read out and then my name was written” (J4:2).⁶⁹ If the deed was read out then the boundaries would have been clear to all those present. Although, as Mr Evison also pointed out, the receipts did not specify the nature of the land sold, the payments were the subject of much debate and the amounts made over determined on the basis of rights openly discussed and recorded by Mantell in his charts and rights table.

In the light of what actually happened, it appears difficult to sustain the claimants’ allegation for which they cite Horomona Patu that:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it, but the people of Otago . . . (J4:145)⁷⁰

In fact, the evidence clearly shows, that all the leading Murihiku chiefs consented, as did an appreciable number of lesser rank from Murihiku. It is not correct to say that it was only the people of Otago who sold the land. They appear to have been a minority of those involved.

According to Mantell’s charts and rights table, the area of the west coast owned by those from Foveaux Strait only extended to Dusky Sound. The area from Dusky Sound to Milford was owned by chiefs from Otakou. To this extent it would seem the Otakou chiefs did sell a large portion of Fiordland and since no significant evidence was given to the tribunal to suggest otherwise we can only conclude that it was theirs to sell.

Grievances nos 7 and 10

10.5.13 It is appropriate at this point to consider two further grievances of the claimants, grievance no 7, that:

The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

and grievance no 10, that:

The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

In considering these grievances the following circumstances are relevant:

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- Soon after arriving in Otakou Mantell, on 18 November 1851, had a preliminary conference with Patuki, Te Au, Karetai, Taiaroa and “many other chiefs”. Those present expressed their wish to cede the land to the government. The map prepared by Mantell during or following the discussions demonstrates that the names of chiefs having an interest in various parts of the block, including Fiordland and the west coast, were identified. This map appears to indicate the extent of the land the Ngai Tahu chiefs were prepared to cede.
- On 22 December 1851 at least 60 Ngai Tahu were present at a hui held at Huruhuru’s boathouse at Oue to discuss the purchase with Mantell. Among those present were Patuki, Te Au, Paitu, Huruhuru and Horomona Patu. According to Takurua in 1880, the chiefs agreed to sell, but he did not say what land he understood was being bought by Mantell. Others, as we will soon relate, told the Smith–Nairn commission that Mantell was informed at Oue that the western boundary would be the Waiau River. It is clear that Mantell declined at that time to name the price the Crown was prepared to pay. This was not disclosed until much later. Following this hui Mantell spent the next six weeks visiting various kaika and laying off the reserves. Again we have no contemporary evidence of what he discussed. It is, however, difficult to believe that the purchase was not the subject of discussion and debate.
- Mantell arranged for a final meeting at Otago on 24 May 1852 to, as he put it, “settle all disputes prior to distribution of the first instalment”. Although the meeting took place, nothing was concluded as Mantell had received no advice that the purchase money would be made available. We have no information as to what discussions took place during this meeting. It appears that Mantell again refrained from naming a price. On 21 June he wrote to Domett, advising that he had awarded £2000 for the district, but had deferred informing Ngai Tahu of this so that he might do so “in full assembly”. But, he added, “the land in the meantime is regarded by them as ceded, the price to be fixed by me”.
- On 17 August 1853 Mantell met with many of the principal owners from both Otakou and Murihiku at Port Chalmers. After “a long and anxious debate” some 58 Ngai Tahu chiefs accepted Mantell’s terms. We know from Patuki that the deed was read out before his name was written out. Among those also named, as we have seen, were a substantial number, including all the principal chiefs, from the Foveaux Strait area to the south and south-west. It is apparent there was a debate over the purchase price which led to an understanding that, while £2000 would be named in the deed, Mantell would strongly urge the governor to agree to pay an

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additional £600. This the governor agreed to, and £2600 was duly paid.

- We have no contemporary record of what was said when the first instalment of £1000 was paid out at Port Chalmers on 3 October 1853, or when the second £1000 instalment was paid over at Awarua on 15 February 1854. While Mantell still had the original deed of purchase in his possession, we do not know whether it was read out or again referred to at either of these meetings. No doubt news had travelled fast from the August 1853 meeting when the deed was signed, as to what had been done.

Finding as to grievance nos 7 and 10

- 10.5.14 While it is apparent that not every chief was present at the signing of the deed, it is evident that all the leading chiefs were, along with many others, including a substantial number from or having interest in the south and south-west, including areas west of the Waiau. Many were at Port Chalmers when the terms of the purchase, including the price, were debated at length before the deed was signed. As a result of these discussions, Mantell was obliged to endeavour to obtain the agreement of the governor to pay £2600. In this he was successful. In all the circumstances we are not able to sustain the claimants' grievances no 7 and no 10.

10.6. Land West of the Waiau River

- 10.6.1 The claimants, in their grievance no 6, said that the land west of the Waiau was wrongfully included in the sale. This area covers the largely mountainous region familiarly known as southern Fiordland, and includes Lakes Manapouri and Te Anau. As this grievance was a central issue in the claim we propose to deal with the evidence in some detail. Before doing so, however, we record a submission by the Crown on the relative infrequency with which this grievance has been raised with the Crown over the past 136 years.

Silence as to the western boundaries

- 10.6.2 The Crown, in closing, claimed that prior to the Smith–Nairn commission, the Fiordland question was not raised with the Crown and from that time until now – over 100 years – it again seems not to have been raised in any approach to the Crown. That fact, the Crown claimed, speaks for itself (X2:64). The Ward report put the matter more fully and perhaps in better perspective, as follows:

Whereas in the Kemp purchase a continuous line of protest, and the survival of more contemporary material has allowed us to establish firm links between the Maori view of the transaction in 1879–80 and the events of 1848, for Murihiku we are forced to rely almost entirely on the records of the Smith–Nairn Commission. Many of the concerns about reserves and the provision of schools and hospitals had been raised prior

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to 1879, however the suggestion that the Maori understanding of the boundaries of the Murihiku block differed greatly from that in the deed is recorded almost exclusively in the evidence of that Commission. An 1863 letter from the Superintendent of Southland, J A R Menzies, shows that Ngai Tahu were concerned about the boundaries of the purchase, but is unspecific about the nature of their complaint (Q3:6). There are also the much later statements of two Ngai Tahu kaumatua, Poko Cameron and Thomas Spencer, that Fiordland was to be reserved, or that it had not been included in the sale (J2:54–8; J4:22, 23a). Only Spencer provided a specific boundary, ‘Te Wae Wae to Milford Sound’. (T1:231)

It is apparent from the claimants’ evidence that the Smith–Nairn testimony was the principal basis for their claim that Ngai Tahu did not intend to sell the land beyond the Waiau.

Smith–Nairn evidence 1879–1880

- 10.6.3 Mr McAloon presented evidence which he believed showed that the Murihiku purchase was understood by Ngai Tahu to extend only so far west as the Waiau River. He based this belief particularly on the evidence of Topi Patuki, Horomona Patu, Horomona Pohio, Matiaha Tiramorehu and Wiremu Potiki. Mr McAloon claimed that these five Ngai Tahu stated that the Waiau was the boundary (E1 and E22). In later evidence Mr McAloon indicated that whereas Patuki, Patu and Pohio all explicitly gave the boundaries of the land that was offered to the Crown as “Kaihiku to Hokanui and then to Waiau”, Tiramorehu and Potiki did not. He stressed however, that the importance of Tiramorehu’s evidence is that the traditional boundary of Murihiku was the Waiau River (J2:48). Mr McAloon had certain parts of their evidence retranslated and submitted these in evidence (J4:1–6).

In fact, neither Potiki nor Tiramorehu were definite about the boundaries – see Potiki:

I was not clear about the boundary of the land which was bought by Mantell. (J4:5)

And see Tiramorehu:

I do not know about the boundaries. It is for other men to speak of the boundaries, the people with a big interest. I did not think about the boundaries. (J4:4)

Initially Mr McAloon claimed that five Ngai Tahu said the boundary was at the Waiau. Of nine others, six who were eye-witnesses made no comment, and three who were not also made no comment. These three are said to have included Karetai, who was a signatory to the deed. Following Mr McAloon’s later evidence we are left with three only out of eleven claiming the boundary went only to the Waiau. The others were either vague or silent on the western boundary. We think it surprising that so few appeared to be aware of such an

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important matter if it was indeed the fact that the boundary did not, as the deed and deed map show, extend right across to the west coast.

We would observe that a careful reading of the Ngai Tahu evidence to the Smith–Nairn commission reveals a considerable number of contradictions or inconsistencies. These are no doubt the result of the witnesses attempting to recall events which occurred up to 29 years earlier. We find it difficult to know what evidence can be regarded as reliable when significant parts appear not to be.

It must also be remembered that whereas the Smith–Nairn commission heard from some Ngai Tahu witnesses, they did not hear from Mantell on the Murihiku purchase. The evidence accordingly lacks any statement from one of the principal protagonists. It must, we suggest, for this reason also be viewed with some caution.

Topi Patuki

10.6.4 The following points are from Patuki’s evidence to the commission (E2:60–67).⁷¹

- He recollected Mantell coming down to the south in 1852 and accompanying Mantell on his journey west. In fact this occurred in 1851.
- He could not recollect whether Mantell met with any people at Dunedin and talked about the sale of the land before travelling across towards Murihiku with Patuki. We note that this was the preliminary conference at which Mantell recorded Patuki and many other chiefs being present and agreeing to cede the land.
- Patuki described a meeting at Oue at which he, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs, and the majority of the people living there, were present. Mantell told them he came to buy their land and the Ngai Tahu asked about the price. Mantell spoke about schools and hospitals.
- Patuki said that “He [Mantell] described the boundaries as extending from Kaihiku, Hokanui & Waiiau”. This was retranslated (J4:1) to read that “the land which was mentioned by Mantell began from Kaihiku to Hokanui and extended from there to Waiiau”. The difference between these two versions does not appear to us to be material. In both versions Patuki, shortly after, said it was Ngai Tahu who mentioned the boundaries. In both versions Mantell was described as saying the land was too little and he would be satisfied if all the land were given to him. That was all that was said by Patuki to have passed on the question.
- Patuki recollected Mantell coming to Awarua in 1853.

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We now set out an extensive quotation from Patuki's evidence concerning this visit by Mantell to Awarua:

Was there any conversation then about the land? – The natives asked Mantell questions.

What questions did they ask him? – They asked Mantell “How much money have you brought to pay for the land; what money have you brought wherewith to pay for the land?” Mantell said “I have brought one thousand pounds.” The natives assented to Mr Mantell's terms, because he mentioned hospitals & schools. They yielded to Mr Mantell because he spoke of hospitals and schools.

Do you mean to say that one thousand pounds was all the money Mantell paid for the land? – We thought that this thousand pounds was for the boundary from Kaihiku to the river Waiau.

Did you know nothing about Mantell paying more than one thousand pounds? – No; I did not. I did not know of anything more than one thousand pounds. I have no knowledge of any other payment.

Do you know of any other payment than that £1000 at the Bluff? – No; I do not.

[Murihiku deed produced.]

Did you sign the Deed? – I signed the Deed, but not at Awarua. It was at Port Chalmers I signed the Deed.

Did you get any payment at Awarua? – Yes. (E2:71–73)⁷²

Patuki was confused here.

- He had been a party to the deed at Port Chalmers on 17 August 1853.
- The deed, which he heard read out, clearly stated that the purchase price was £2000.
- Mantell did not go south to Awarua to pay out the £1000 to the Murihiku people until 15 February 1854.
- Mantell had some months previously (3 October 1853) paid out the first £1000 to the Otakou people at Koputai (Port Chalmers).

Here follows further evidence:

Then you [Patuki] went to Port Chalmers, and signed the Deed? Did any other natives go up there from your part to sign it? – I don't know of anyone else. I know of myself. (E2:74)⁷³

In fact the deed was signed in August 1853, some six months before the money was paid out at Awarua. As we have seen, 25 other people from the south and west were present at Port Chalmers in August 1853, when Patuki agreed with them to the purchase. It seems surprising that he could not remember the presence of any of them there.

Later he acknowledged that his name had been placed on the deed which was shown to him. His evidence continued:

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Was it [the deed] read over before you signed it, or not? – Yes; it was read over before I signed it.

You have told us that you had spoken to Mantell about the land from Kaihiku to the River Waiau. Did you notice that in that Deed much more land is included? – We thought it was on our boundary, but we did not know there was anything else taking place about the boundaries at Otakou. I supposed that the boundaries of the land we were selling were the boundaries that we mentioned to Mantell.

Did you understand what was read to you at the time? – I was not quite clear that the boundary was going beyond the boundary mentioned.

You heard it read, and did not understand that it included land beyond Waiau? – Yes. It was written clear enough, but the thing had been done at Otakou, and they could not help themselves.

Was the Deed signed by all the people together at the same time? – Yes, they were all there. Still they did not understand that the other portion of the land was sold. (E2:75–76)⁷⁴

It is interesting to compare the retranslation of this passage, which reads as follows:

The document was read out and then my name was written.

To our knowledge that sale was on our boundary. We did not know that a large land sale had been spoken of at Otakou. To my knowledge the land which was sold was the area described by us to Mantell.

When the deed was read out I was not very clear whether the boundaries were being extended.

I certainly heard it read out, however I do not know whether the lands beyond Waiau were being acquired.

The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed.

All the people were there. There was just one recording of their names. However they did not know that other land had been taken. (J4:2)

We note that Patuki was “not very clear” whether the boundaries were being extended. He certainly heard the deed read out but did not know whether the lands beyond Waiau were being acquired. But he then said, “The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed” (J4:2). Patuki seemed to be implying that the Murihiku people were not at Otakou. But 26 or so, including himself, were in fact there, and no doubt were party to the discussions in the “long and anxious debate” before the deed was read out and signed on 17 August 1853. He admitted the deed was “clear enough” (E2:76), or “quite clear” (J4:2). We recall that Topi Patuki was a major Murihiku chief. It is difficult to believe that he did not play a leading role in the lengthy discussions with Mantell. That he was interested in the sale taking place was evidenced by the special trip which he and Taiaroa had made to Wellington the previous year in the hope of expediting the sale (E2:37(c)).⁷⁵ It appears, however, that the passage of nearly

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30 years before giving this evidence has substantially impaired his recollection of events.

Horomona Patu

- 10.6.5 According to Patu, Mantell, when asked by the people at Oue in 1852 on his first visit, what land he had come to buy replied, “The Murihiku Block; the southern end”. Ngai Tahu gave the boundaries as, “From Kaihiku to Hokanui and to the Waiau River”. Mantell replied, “It is too little”. The Ngai Tahu then asked how much he would give for it (E2:92–93).⁷⁶ The new translation (J4:2–3) is not materially different.

Much of Patu’s evidence was directed to the marking off of reserves by Mantell. Patu said he did not know the words of the deed nor did he sign the deed, although he later received part of the payment at Awarua (E2:106–107).⁷⁷ He was asked:

Was anything said on the second visit about the land that Mr Mantell was to acquire? – The natives, on the second visit of Mantell to Awarua asked “What sum of money have you got?” (E2:107)⁷⁸

As we know, Mantell had £1000, being the instalment due under the deed signed some six months earlier.

It appears from Patu’s evidence that the only mention he heard of the land to be bought by Mantell was at Oue in December 1851, that he was not present at the lengthy discussions on 17 August 1853 when the deed was signed, and that when Mantell arrived in February 1854 to pay over the instalment of £1000, the area of the land being purchased was not discussed. Many of those present had of course been in Port Chalmers when the deed was signed. Given Patu’s very limited involvement in the purchase negotiations we consider his evidence cannot be regarded as definitive or conclusive.

Later on 25 March 1880, Patu made a statement to the Smith–Nairn commission at Riverton which included the following:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it *but the people of Otago*. The inquiry was held at Otago, and Mantell came here only to mark off the reserves here. He went back to Otago, and there a thousand pounds was paid, and Mantell then came South and brought a thousand pounds, which may be said to be money which passed through the hands of the Otago people, and handed to us. This money was brought and paid down as the price of Murihiku; but in my thought, what is this money? (J4:145)⁷⁹ (emphasis added)

He continued by saying he looked on the money as merely clinching a bargain and did not challenge the boundaries in the deed. Nor did any other Ngai Tahu witness at that hearing.

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The statement of Patu that it was not the people of Murihiku who sold it but the people of Otago does not square with the evidence of the deed. He appears to have overlooked or forgotten, or indeed not known, that many of the southern and western Murihiku people including the principal chiefs were named in the deed in August 1853. We believe his evidence suffers from a hazy memory or lack of knowledge or both.

Horomona Pohio

10.6.6 Pohio said he was at Port Chalmers when Mantell went there in 1852. The people from Waikouaiti, Moeraki, and Port Chalmers assembled there. Mantell stood in the midst of the people and said:

that he came to buy the land.

Did he say what land he wanted to buy? – No, people asked him what land, and he replied Murihiku Hokanui and on to Waiau River. And then the Maoris said – “You will have to give us a good price – “Mr Mantell said “I shall give you a good price.” I did not go to Murihiku with Mr Mantell.

Was that all that Mr Mantell said at that time about the land? – The words of Mantell were – “Do not consider what I am giving you now as the large payment, but hereafter I shall establish you schools and hospitals.” (E2:134–135)⁸⁰

In later evidence Pohio said:

Was anything said about reserves at this first time in 1852? – Yes, there was.

What was it? – Mantell said – “I shall set apart reserves for the natives.”

Did he tell them anything about the quantity-the size of the land? – No, I could not say.

Did he say where he would set it apart? – At Murihiku, out of the land that he was buying from Kaihiku to Waiau River.

Do you recollect seeing Mr Mantell again in the following year, or about the land? – Yes, I did see him.

Did Mr Mantell speak to pretty nearly the same people the following year as he spoke to in 1852? – Yes, pretty nearly the same people. He repeated the same words that he first told them in 1852. I and Matiaha Tiramorehu were present listening. Mantell talked to the same people on this second occasion, and I was present, and also Matiaha Tiramorehu.

What did he say to the people about the land on the second occasion? – He spoke of Kaihiku and down to Waiau, taking in the sea coast.

. . . . You told us that he spoke to them about the land. Was anything further said about the benefits to the natives? – Yes. He spoke again of hospitals and schools.

Do you mean to say that he spoke to you on the second occasion to the same effect as on the first occasion? – Yes.

As to schools & hospitals? – Yes. This was the time that they were going to get the money. He spoke of hospitals and schools, and gave them the money.

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How many times did Mr Mantell ask the natives to meet him about Murihiku? – Twice.

Then it was at the second time that you got the money? – Yes. (E2:136–139)⁸¹

Again, given the passage of 28 or so years, Pohio's recollection was shaky. He described a first meeting, between Mantell and the Otakou people only. This meeting took place before Mantell set aside the reserves. It was evidently a reference to the preliminary conference between Mantell and many chiefs at Port Chalmers not in 1852 but on 18 November 1851. Pohio's memory was faulty in suggesting only Otakou chiefs were present. We know that at least Topi Patuki and Te Au, two leading Murihiku chiefs, were present and possibly others. It is also difficult to reconcile Pohio's recollection that at that preliminary meeting Mantell suggested he wanted to buy only to the Waiau River when, as we have seen, he obtained quite detailed information of who held rights in the whole of the area across to the west coast and prepared a plan based on this information.

Pohio also referred to a second meeting at which, as he recalled, Mantell again spoke of the land he wished to buy as being from Kaihiku and down to Waiau, taking in the sea coast. It was on this occasion, Pohio said, that he got the money. Horomona Pohio's name is on the deed and he also signed the first receipt at Awarua in October. The second meeting to which he referred must have been that held not in 1852 but when he received payment at Port Chalmers on 3 October 1853. Pohio appears to have confused the signing of the deed with the signing of the first receipt and the distribution of the first £1000. He was present on both occasions. While it is true that only Otakou people were present when the payment was made, many from Murihiku were present three weeks earlier when the deed was signed.

- 10.6.7 As Mr McAloon conceded, these three witnesses were the only ones to claim the land sold extended no further than the Waiau. Only Pohio suggested that Mantell mentioned the Waiau as the boundary on the day the deed was signed in August 1853. Patuki and Patu both suggested this was said by Mantell in December 1851 at Oue. Their recollections, as we have seen, were clearly faulty on a variety of points. It is surprising, if the Murihiku people really believed they were not selling beyond the Waiau, that more witnesses were not available to give persuasive evidence to that effect. Perhaps that is why, as the Ward report noted, Izard, the claimants' counsel did not push the boundary issue. Counsel made brief reference to the Ngai Tahu understanding at the time that Mantell wanted to buy the land from Waikanui (sic) on to the Waiau River, but when summarising

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the complaints over the purchase at the end of his address no mention was made of boundaries at all (T1:231–232).

The claimants placed some reliance on the evidence of two other Ngai Tahu witnesses before the Smith–Nairn commission. These were Matiaha Tiramorehu and Wiremu Potiki. Tiramorehu’s evidence was invoked principally because of his reputation of being steeped in the history and traditions of his people.

Matiaha Tiramorehu

10.6.8 At the outset of his evidence Tiramorehu was asked:

Where does Murihiku begin? – At Waitaki, and goes on to Waiau.

What is the other side of Waiau? – Te-Whakatakanga-o-te-Karehu-a-Tamatea.

Then how far did this go north? – Up to between Piopiotahi and Whakatipu.

Where is Whakatipu Waitai as compared with Piopiotahi? – Piopiotahi is south of Whakatipu-Waitai.

Mr Izard – Is it far south of it? – I cannot tell you; I was not there. (E2:178–179)⁸²

It is of interest to note that Tiramorehu had apparently not been to Piopiotahi. Shortly after Tiramorehu was asked:

Were you present when Mr Mantell met the people at Port Chalmers? – Yes, I was.

Did you hear what Mr Mantell said to the people? – Yes, I heard Mantell ask Taiaroa and Karetai, on behalf of the natives of Murihiku, to let him have the land on the other side of the boundary of Captain Symonds’ purchase.

Did Mr Mantell ask for the land by any name? – The other side of Kaihiku, round by Tokata.

Did he ask for it by any name? – No, he did not mention, but he said “The whole of Murihiku”. (E2:179)⁸³

Later Tiramorehu was asked about the deed:

Mr Izard – Was the Deed read over to you before you signed anything? – I forget.

Mr Nairn – Did they speak of the boundaries? – I do not know. I could not tell you. It lays with the people who had a greater interest in it. I did not look to the boundaries. (E2:186)⁸⁴

Mr Nairn questioned Tiramorehu further about the deed later in his evidence:

When the natives assembled at Port Chalmers was the Deed brought before them and read out before them? – I was not there.

Did you never hear the Deed read? – No, I never heard it read.

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Then you do not know the boundaries of the land that was sold? – I understood, but yet I did not understand. I heard it, but did not understand it.

Mr Smith – You had part of the money? – Yes.

But you did not sign the deed? – I signed the receipt, but not the deed, when I received a portion of the money. (E2:191–192)⁸⁵

It is not clear from Tiramorehu's evidence whether he was present at the meeting when the deed was signed on 17 August 1853 or only at the later meeting in October 1853 at Port Chalmers when £1000 was dispersed. He signed the receipt in October but neither his name nor his signature are on the deed. As Mr McAloon conceded, Tiramorehu did not know what was agreed about the boundaries. It was not apparently of any great concern to him.

Wiremu Potiki

10.6.9 The following quotation comes from Wiremu Potiki's evidence. He is here giving his recollection of a meeting at Port Chalmers when Mantell first came there. That was in November 1851.

Do you live now at Port Chalmers? – I live at the Otago Heads, upon the large reserve there.

Were you at Port Chalmers when Mr Mantell came there first? – Yes, I was.

Were you present when Mr Mantell met the chiefs and the people? – Yes, I was.

Were Taiaroa, Karetai, Te Au and others present? – When Mr Mantell met the natives first Taiaroa and Karetai were there, but Te Au and the Murihiku natives were not present.

These were Otago natives who were present? – Natives of Otago and the neighbourhood of Otago and Waikouaiti.

It would include the Moeraki natives? – Very likely Moeraki.

But it would not include the Murihiku natives? – No. (E2:220–221)⁸⁶

We pause here to observe that Potiki's recollection was clearly faulty. Both Topi Patuki and Te Au from Murihiku were present at this first meeting with Mantell. Potiki's evidence continues:

Did you hear the conversation between Mr Mantell and the people? – I did.

What did Mr Mantell say to the people? – Mr Mantell said to the people – "I come to buy land".

Where? – The land adjoining Wakefield's purchase, up to Kaihiku.

Did he mention the boundaries of the land he wanted to buy? – No, I don't know; I cannot say that Mantell mentioned any boundaries.

Do I understand that Mr Mantell told them he wanted to buy the land south of Kaihiku? – Adjoining Kaihiku, and towards Murihiku.

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Mr Smith – Do you mean by this “rohe” of Wakefield’s, the boundary of Mr Symonds’ Block? What “rohe” do you mean? Do you mean the “rohe” of the land bought by Mr Symonds? – Yes, I mean the boundary of the Block bought by Mr Symonds.

Then when you said he wanted to buy Murihiku, what land did the natives then understand by Murihiku? – The lands from Mataura down to Oue and adjoining the boundary of Wakefield’s Block.

Did it not extend as far as the Waiau? – Patuki and Te Au extended it to Waiau.

Do I understand you to say that the northern natives claimed no interest in the land beyond Oue, and that Patuki and the others claimed it beyond? – Yes, the Otago people claimed as far as Oue, at the mouth of the Mataura, but myself and Taiaroa went on further south. We went across the River Mataura, and claimed with the Murihiku people.

How far south did you claim? – Right to the far end.

How far did the claim of Taiaroa and yourself and the Murihiku people go beyond Oue? – I am unable to tell you.

Can you tell me what the natives called the land between the Waiau and up to Piopiotahi? – I do not know. (E2:221–223)⁸⁷

Mr Nairn, later in Potiki’s evidence, made a further inquiry about the boundaries:

Did Mr Mantell explain to the maoris the boundaries of the land he had purchased? – I am not clear. (E2:233)⁸⁸

Perhaps Potiki’s evidence is best summed up by the last answer cited – he was not clear about the boundaries. We recall that during or immediately after the preliminary conference held by Mantell at Port Chalmers on 18 November he drew what he called a “Korero chart” (10.4.1). This extended right across to Milford Haven on the west coast. Among the names of those listed by Mantell as having an interest in Fiordland below Milford Haven are Potiki and Taiaroa. This may explain why Wiremu Potiki, when asked how far south he claimed, answered “Right to the far end”. But when further questioned he said he was unable to say how far the claim of Taiaroa and himself and the Murihiku people went beyond Oue. If, as the claimants now contend, it stopped at the Waiau we would have expected him to say so.

- 10.6.10 Essentially then, the evidence that Murihiku Ngai Tahu did not intend to sell the land west of the Waiau rests on the faulty recollection of three only of their number, the rest of those who gave evidence either not knowing or not recalling.

Evidence to the contrary

- 10.6.11 Unfortunately Mantell himself did not give evidence on the question, presumably because of the premature winding up of the commission’s proceedings. We therefore lack any response by the

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Crown agent to a claim first made public nearly 30 years after the purchase. In weighing the claimants' evidence on this question we must also consider the evidence to the contrary. This we now proceed to do.

Mantell's "korero charts" of November and 10 December 1851

- 10.6.12 In the korero chart no 1, prepared by Mantell during or soon after his discussions on 18 November 1851 with Otakou and Murihiku chiefs, the interests of various Ngai Tahu rangatira are shown in all parts of the block south of a line from Tokata (the Nuggets), on the east coast, to Milford Haven on the west. The Waiau River is depicted and the names of various chiefs having an interest on or near the coast to the west of the Waiau are noted. Also noted are those interests of other chiefs, including Taiaroa and Potiki, on the west coast south of the boundary line terminating at Milford Haven. The second chart, dated 10 December 1851, is more elaborate and contains more detailed information as to the location of the various interests of a substantial number of Otakou and Murihiku chiefs around the coastline from Tokata to Milford Haven and at various locations inland. In preparing this, Mantell would appear to have built upon the information he obtained at Port Chalmers when he prepared his November chart, with additional information presumably from Patuki who was with him on 10 December 1851. In considering the significance of these charts we here had regard to comments by the Crown historian, Mr Armstrong (Z11(a)), and Mr McAloon for the claimants (Z13(C)).
- 10.6.13 We believe the preparation of these charts is a clear indication that Mantell, from his very first contact with Otakou and Murihiku rangatira, was discussing with them the purchase of their interests in the land across to the west coast, including Fiordland. The fact that he was able to obtain from them advice as to their interests in the whole of the block suggests they were cooperating with him. When, on 20 November 1851, he reported to Domett on the outcome of his discussions with Topi Patuki, Te Au, Karetai, Taiaroa and the other chiefs present regarding their willingness to cede the land to the government, we believe he was referring to the land illustrated in his "korero chart" no 1.

The deed and deed map

- 10.6.14 These have already been discussed. In our view they clearly demonstrate that the land being sold by Ngai Tahu and purchased by the Crown included all the land west of the Waiau (known as Fiordland) up to Piopiotahi on the west coast. The deed in Maori,

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after being read out by Mantell, was assented to by all the principal Murihiku chiefs, and many others from Murihiku, as well as Otakou.

The request for reserves at Piopiotahi

- 10.6.15 Several Ngai Tahu gave evidence to the Smith–Nairn commission on requests for reserves on the west coast. This raises the question of why, if the land west of the Waiau was not being sold, reserves should have been requested on the west coast. We now consider the evidence of three witnesses, Hoani Paororo, Horomona Patu and H K Taiaroa.

Hoani Paororo

- 10.6.16 After discussing the marking off of certain reserves by Mantell during his 1851–52 visit, Paororo proceeds:

Mantell, Te Au and Poko then went to Waiau. It was then that the reserve at Oetota was made, and at Tumulutu. I heard this from Mantell and Poko on their return. That completed the reserves that Mantell made. It was, as it were, the sort of thing that was spoken of in the clouds. Mantell spoke also of a reserve to be made at Piopiotahi, but he did not go there. It was Te Au who asked Mantell for a reserve there. Mantell did not promise to give this reserve at Piopiotahi, nor did he refuse, but Te Au asked for it, and it was left. It was asked for. Mantell neither refused nor consented. (E2:348)⁸⁹

Mr McAloon, in attempting to explain this incident, claimed Mantell himself raised the possibility of a reserve with Te Au. Paororo's evidence is, however, quite clear. It was Te Au who raised the matter with Mantell. In later evidence Mr McAloon said he did not believe that Te Au, in asking to have his rights at Piopiotahi recognised, necessarily implied that he was consenting to the sale of the rest of Fiordland. Mr McAloon argued that it is entirely possible that he was merely asking to have the Crown confirm his rights at Piopiotahi as distinct from the more general rights of the southern people to Fiordland. While this is an interesting speculation, it does not really answer the question why Te Au should specifically seek a reservation at Piopiotahi if the sale did not extend beyond the Waiau.

Horomona Patu

- 10.6.17 Horomona Patu gave hearsay evidence about Te Au's request for a reserve at Piopiotahi. He was questioned by H K Taiaroa as to whether anything was said to Mantell concerning ground at Waiau, to which he replied that they asked for 300 acres.

Did Mr Mantell agree to it? – I was not present, but other people told me that there was a reserve there, and that there was another at Milford Haven (Piopiotahi). Te Au asked Mr Mantell to make the reserve there. (E2:111)⁹⁰

*The Muribiku Purchase***H K Taiaroa**

- 10.6.18 The Member of Parliament for Southern Maori gave evidence, a significant part of which related to a reserve at Piopiotahi which he claimed Mantell promised his father, Matenga Taiaroa, would be set aside between Piopiotahi and Te Horo. Pounamu was said to be available there. Matenga Taiaroa was present at the Port Chalmers meeting with Mantell and was a signatory to the deed.

We record the following passage from the record of H K Taiaroa's evidence:

Taiaroa questioned Horomona Patu whether there were any reserves made at Piopiotahi. Horomona said there were. Mr Mantell wrote in 1874 or 1875 to Mr McLean to say that a reserve had been made at Piopiotahi, but he did not mention it in the face of the deed of sale. The reason why this came out about this reserve was, that when I spoke to Mackay about the reserve at Aparima Mantell said, "That reserve is not for you, but for the natives at Aparima." Mantell said "Your reserve is at Piopiotahi". A memorandum was made at once by Mantell, and forwarded to the Govt, and the Govt wanted me to go with Mackay to see this reserve. There was no steamer available at the time. I asked Mantell why it did not appear on the face of the deed, and Mantell merely shuffled out of it, and said "Oh, I did not bother about it". He said - "I may, perhaps, have a copy of that memorandum, but the original is in the office." (E2:267-269)⁹¹

It appears the memorandum was to Donald McLean, native minister, and asked that the reserve at Piopiotahi be confirmed. According to Taiaroa, "This land is land adjoining Murphy's, an old whaler" (E1:44).⁹²

Shortly after Taiaroa said:

That reserve was made at Piopiotahi at the time the land was purchased, though there is no mention made of it in the deed. I have got more to say yet. (E2:271)⁹³

Taiaroa's evidence continued the next day:

I must explain about Piopiotahi. The reserve which the natives understand to have been made for them extends from Piopiotahi to a place called Te Horo. The reason why they wanted to have Piopiotahi reserved was on account of the greenstone. Why they called it Te Horo is, that is a land slip, where the greenstone is found. That is all I understand about Piopiotahi.

Mr Smith-Who gave you this information about the reserve extending from Piopiotahi to Te Horo?-Taiaroa, my father. Piopiotahi is the name of the inlet. I am not clear where Te Horo is; it is where they get greenstone from. It is adjoining the land of the person called Murphy. (E2:279-280)⁹⁴

In his later evidence Mr McAloon cited what he described as the strongest evidence of the Taiaroa claim as being a letter written by Mantell to H K Taiaroa on 14 July 1874:

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But I can at once reply to your other enquiry as to the provision in fulfilment of the terms of the Deed made in favour of your father, Taiaroa, as one of the signatories.

Taiaroa excluded, or at least not included as one having an interest in the other reserves in the Block, stipulated for a reserve of 100 (one hundred) acres at Milford Haven, and to this I, on the part of the Government, acceded. But, as there was known to exist a Grant (in satisfaction of an old Land Claim) of 612 acres at Milford Haven to one Murphy & another, this reserve could not be selected before the claimant's land; and it was understood that the survey of the reserve could be made at the same time as that of the claim. (J2:59–60)⁹⁵

Mr McAloon later referred to the evidence of a Royal commission in 1907 which inquired into the Taiaroa claim that H K Taiaroa's father had been promised a reserve at Piopiotahi by Mantell during the Murihiku purchase arrangements. This commission found that:

the late Hon. H K Taiaroa had no legal or valid claim and that any rights that his Father might at any time have had were barred by the deed and the lapse of time between the date of the conveyance and the date the claim was first made on the Government. No doubt some such arrangement was made between Mr Taiaroa and Mr Mantell; but we think it probable that it was abandoned either before or after the completion of the deed of purchase and that Mr Mantell has, after twenty years, forgotten that such was the case. (J2:63)⁹⁶

Mr McAloon correctly commented that the Royal commission did not address the issues raised before the Smith–Nairn commission of whether Fiordland was included in the deed with the agreement of the vendors or not. He argued that even if an agreement was made between Taiaroa and Mantell as suggested by the commissioners, there is no possible way in which that could have bound other vendors to dispose of Fiordland if they did not wish to do so (J2:63). But this comment of Mr McAloon seems to have missed the point. Why would Taiaroa Sr have requested a reserve at Piopiotahi if Mantell was not in fact purchasing the land over to the west coast and up to Piopiotahi?

Finding on grievance no 6

- 10.6.19 We find that the grievance that the land west of the Waiau was wrongfully included in the sale cannot be sustained. In coming to this conclusion we have carefully weighed the evidence of the three Ngai Tahu chiefs who nearly 30 years after the event testified to this effect. Not surprisingly after so great a lapse in time their recollection of events is defective, seriously so, in a number of material respects. Nor are they supported by any other Ngai Tahu witness before the commission. The claims that the southern Murihiku people were not consulted or parties to the deed has not been established. It was not, as was suggested, something done only by Otakou people but included principal Murihiku rangatira as well as many others. The deed

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in Maori was read out before it was agreed to and after protracted debate. It clearly included all the land west of the Waiau up to the northern border referred to in the deed, and clearly shown on the deed map. It seems apparent that from the outset of discussions between Mantell and the leading Ngai Tahu chiefs, a sale across to the west coast was contemplated. Although not definitive, the fact that Te Au and Taiaroa each made requests for reserves on the west coast is consistent with, and serves to reinforce the view, that Ngai Tahu were intending to sell across to the west coast. We recall the Crown's criticism that this claim was not publicly raised until the Smith–Nairn commission hearings some 27 years after the event, and since then has not again been raised until this tribunal began sitting. For the reasons indicated, we find that the land west of the Waiau was not wrongfully included in the sale.

10.7. **The Adequacy of Reserves**

10.7.1 In our consideration of grievance no 4 we have found that the Crown failed to set aside additional land at Aparima and Kawakaputaputa requested by Ngai Tahu. Mantell also failed to reserve a block of 200 acres at Waimatuku and a block at Opuaki and Rarotoka (10.4.19). This grievance was only one of several relating to the setting aside of lands for Ngai Tahu in Murihiku. The principal grievance was:

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.

Other related grievances are:

1. The failure of the Crown to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.
2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.
3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale. (W6)

Grievance no 1: The failure to appoint a protector

10.7.2 As we have indicated in chapter 4 on the Treaty and Treaty principles, the Crown representatives at the time of the signing of the Treaty emphasised that Maori would be protected against land sales and that the Crown would ensure they kept such land as they needed or wished to retain. The third of the Treaty principles articulated by this tribunal concerns the Crown obligation actively to protect Maori Treaty rights. As we have said, the duty of protection imposed on the Crown extends not merely to the use of their lands and waters but to the exercise by the Crown of its Treaty right of pre-emption. Lord

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Normanby, in his instructions to Captain Hobson, contemplated the appointment of an official protector.

As we have shown in our earlier discussion of protectors of aborigines (5.5), the first protector was appointed by Hobson in April 1840. George Clarke's role as the first protector was, however, somewhat compromised by his dual position as land purchaser for the Crown. At his own request Clarke was relieved of this latter duty in 1842. From that time the protectors were not directly responsible for buying land and therefore provided a measure of protection of Maori interests. Grey, however, soon after his arrival in 1845 chose to abolish the Protectorate Department. At the same time he embarked on a massive land purchase programme. The role of land purchase officer was recombined with that of protection of Maori interests. In all the Ngai Tahu purchases after that of Otakou, Ngai Tahu had no official to advise them other than the purchasing officer. The Murihiku purchase was no exception.

In his reply to the Crown's closing address Mr Temm referred to the failure of the Crown to protect the tribal estate of Ngai Tahu (Y1:1-2). The cause of this breach, he claimed, was not hard to identify: "In each transaction there was no Protector of Aborigines".

10.7.3 The Crown, through Mr Blanchard, appeared to minimise the need for a protector. In his closing address on the Murihiku claim, he said:

It is alleged against the Crown that it should have appointed a Protector to supervise the transaction and to ensure that Ngai Tahu were made aware of their rights. But that would not have been necessary if the instructions had been carried out. (X2:49)

The problem with Crown counsel's submission is that it assumes that the various commissioners appointed to purchase land for the Crown were capable of serving two masters. Events surely disproved this.

As will be seen, Mantell saw his primary duty as being to effect a purchase on behalf of the Crown while conceding to Ngai Tahu no more than seemed necessary by way of reserves. He did obtain a modest £600 increase in the purchase price he had been authorised by the Crown to pay for some seven million acres of Ngai Tahu land. We do not consider that Ngai Tahu was in a position to bargain on equal terms with Mantell as the Crown's representative, or that he had sufficient regard for their legitimate interests, particularly in relation to the reservation of adequate lands for their own use. Moreover, the Crown was well aware of Mantell's approach to the provision of reserves in both the Kemp and Banks Peninsula transactions.

*The Muribiku Purchase****Finding on grievance no 1 as to breach of Treaty principles***

- 10.7.4 The tribunal finds that the failure of the Crown to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights was a breach of the principle of the Treaty which requires the Crown actively to protect Maori Treaty rights. As a result of such failure Ngai Tahu were denied the right to retain certain land they wished to retain, and were left with insufficient land for their present and future needs.

Grievance nos 2 and 3: Mantell's instructions regarding reserves

- 10.7.5 Grievances nos 2 and 3 are closely inter-related.

Mantell, as we have seen (10.3.3), gave an early indication to the colonial secretary that he thought an allocation of 10 acres to each individual to be ample for their support. Despite this, Mantell, on the authority of Governor Grey, was given power to set aside such reserves as he might think proper, while taking care that ample provision was made for both Ngai Tahu's present and future wants. Clearly Mantell, not Ngai Tahu, was to be the judge of what constituted "ample provision". As we earlier indicated Mantell was also to be the ultimate arbiter of Ngai Tahu's needs. We accordingly find these grievances are sustained.

Finding on grievances nos 2, 3 and 4 as to breach of Treaty principles

- 10.7.6 Mantell was instructed to limit the land set aside for Ngai Tahu by reserving such land as he (not Ngai Tahu) thought proper. It follows that he, not Ngai Tahu, would ultimately decide what land would be so set aside. As we have found in considering grievance no 4, he refused to reserve to Ngai Tahu certain land they wished to retain (10.4.19). Article 2 of the Maori version of the Treaty preserved to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to Ngai Tahu the full, exclusive and undisturbed possession of their land so long as they wished to retain it. We have earlier found that Ngai Tahu wished to retain rangatiratanga over certain land: they wished to retain it. But Mantell, no doubt conscious of his instructions, failed to respect Ngai Tahu's wishes. In so doing, we find that he failed to act in accordance with the Crown's obligations under article 2 of the Treaty. Clearly Ngai Tahu were detrimentally affected by the loss of the land they wished to retain.

The foregoing group of grievances are, however, in a sense ancillary to the more general grievance no 8, that the Crown failed to ensure

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Ngai Tahu were left with an adequate endowment of land. We now proceed to consider this claim.

Grievance no 8: The Crown failure to provide Ngai Tahu with an economic base

- 10.7.7 Apart perhaps from the western boundary question this is the claimants' principal grievance. The land which was purchased by the Crown encompassed some seven million acres. It included a mix of potentially rich farming land and heavily forested mountainous and lake country of great beauty. According to the census conducted by Mantell on his travels through the region there were 146 Ngai Tahu living in the Murihiku block and a further 127 on Ruapuke (O13:21–23).⁹⁷ We agree with observations made by Mr McAloon that southern Ngai Tahu led a mobile lifestyle and that people living on Ruapuke would have required land in the Murihiku block for their subsistence and trading surplus. Therefore it would be quite unrealistic to exclude the substantial number of Ngai Tahu living on Ruapuke from consideration for reserves on the mainland in which they had an interest. We are concerned then with at least 273 Ngai Tahu at the time, without allowing for absentees.
- 10.7.8 Mantell made provision for seven reserves other than the life reserve of 10 acres as follows:

Tuturau	287 acres
Omaui, New River	1686 acres
Oue, New River	176 acres
Aparima, Jacobs River	527 acres
Oraka	1132 acres
Kawakaputaputa	977 acres
Ouetoto	90 acres
Total	4875 acres⁹⁸

This area, divided among 273 people, averages 17.8 acres each. Given Mantell's earlier record in the provision of reserves in Kemp's purchase and the Ports Cooper and Levy purchases it is not surprising to find yet again that he marked off, out of seven million acres, a mere 4875 acres for Ngai Tahu. By any standard this was a totally inadequate provision for the present, let alone future needs of the Murihiku people. Crown counsel in his closing address told us that in Murihiku, Ngai Tahu gained most of the reserves in the locations they sought, but "these did not prove to be adequate in area or quality" (X2:70). The Crown thus conceded that it failed to ensure that proper provision was made for Ngai Tahu at the time of the purchase. It could scarcely do otherwise given the evidence of its witness Professor Pool. We recorded Professor Pool's views in our discussion of the

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Otakou (6.9.10) purchase and need not repeat them here. In the comparative table 3, taken from Judge Alexander Mackay's assessment of the sufficiency of land available to Maori in 1891, the figures given as percentages for Southland are:

Sufficient	7.7 %
Insufficient	50.6 %
None	41.7 %
Total	100.0 %

(O15:29)

These figures speak for themselves.

- 10.7.9 The immediate reaction to Mantell's allocation of such small reserves is to ask how he expected Ngai Tahu to survive. The Ward report suggested an answer:

It needs to be said that Mantell had a paternalistic motive in leaving Maori with little more than subsistence plots. He did not intend forcing Maori to remain only on these reservations, since he believed that full amalgamation with European ways would lead Maori to acquire land beyond the reserves as they required it. (T1:242)

But as Professor Ward later commented:

Mantell's social economy, his vision for the tribe's future, took little account of the realities of the nineteenth-century, capitalist economy in New Zealand. Economic and social success in New Zealand depended not just on individual effort or capability but on access to capital. In stripping Ngai Tahu of all but a tiny fraction of their lands, Mantell was depriving them of the collateral required to participate effectively in the new world, while at the same time preventing them securing access to their traditional resources. (T1:243–244)

In referring to traditional resources Professor Ward clearly had mahinga kai in mind. We note that Mantell, after describing the boundaries of the land being sold, added that it included, in addition to all the lands within those boundaries:

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

On the face of it therefore, Ngai Tahu had at one stroke alienated all their mahinga kai on which they had previously depended on for their livelihood, save for a small quantity on the land reserved to them. The tribunal cannot accept that Ngai Tahu could have contemplated that in signing the deed they were thereby surrendering all future access to their traditional food resources or indeed to their taonga pounamu. Nor, despite the strict language of the deed, do we believe that Mantell envisaged that, as from the date of signing, Murihiku Ngai

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Tahu would be solely dependent on the extremely limited mahinga kai available on a few thousand scattered acres. As Professor Ward perceptively noted:

Only a cursory reading of Mantell's journal is required to see just how essential such foodstuffs were to existence in Murihiku in the early 1850s. Mantell lived on eels, ducks, fish: all caught as required. (T1:244)

It is, as Professor Ward suggested, conceivable that Mantell promised Ngai Tahu they would still have access to such resources, but in common with Europeans. Whatever may have been said, and on this we can only speculate, we are in no doubt that Ngai Tahu would not have agreed to part with virtually all their vast estate had they known that in so doing they were surrendering all rights of access to the food resources on which they so critically depended.

Had a protector been appointed to ensure that Ngai Tahu were independently advised of their rights, there would have been little likelihood of their agreeing to surrender almost all their mahinga kai.

- 10.7.10 In our discussion of the Treaty principle that the Crown right of pre-emption imposed reciprocal duties on the Crown, we pointed out that Crown officials in New Zealand were aware that hapu maintained a system of shifting cultivations and engaged in seasonal foraging and hunting pursuits in various parts of the interior. We found it to be incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over tribal territory as well as their more permanent kainga, so as to ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs (4.7.10). Mantell clearly failed to take such steps. On the contrary, he provided in the deed for the surrender of virtually all such rights without first ensuring that adequate land had been excepted from the sale or reserved to Ngai Tahu which would preserve reasonable access to traditional food resources.
- 10.7.11 This failure to ensure Ngai Tahu were left with land giving them reasonable access to traditional food resources was not the Crown's only failure. Murihiku Ngai Tahu appear to have welcomed the prospect of more Europeans settling among them and sharing the land. For many years they had experienced European sealers and whalers living and inter-marrying with them. They were aware that the Crown was purchasing land to facilitate settlement but as we have earlier suggested, they probably had only a shadowy notion of the likely magnitude and rate of settlement.

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In our discussion of Treaty principles we found the right of pre-emption granted to the Crown by Maori under article 2 to be a limited right. It was not to extend to land needed by Maori. In the light of the various considerations there discussed, the tribunal found that article 2, read as a whole, imposed on the Crown a duty, first to ensure that Maori people in fact wished to sell and secondly that each tribe maintained a sufficient endowment for its reasonably foreseeable needs.

If, as they clearly desired, Murihiku Ngai Tahu were to fully and effectively engage in the new economy which would result from European settlement and the steady development of agricultural and pastoral farming, or, as later occurred, dairy farming, they needed to retain extensive areas of suitable land. It was the duty of the Crown's purchasing agent, Mantell, to ensure that this happened. But Mantell had no sympathy for such notions. Although instructed by the governor that he was to be responsible "for taking care that ample reserves are kept both for their present and future wants", Mantell paid no regard to this injunction. As a result, they were left with a mere 18 or so acres per person, and without any significant access to traditional mahinga kai resources. Mantell duly reported the outcome of his negotiations and success in having the deed completed. On 7 November 1853 Domett transmitted to Mantell Governor Grey's special commendation on completing the purchase. Grey clearly endorsed all that Mantell had done (E2:37c-d).⁹⁹ Had the Crown, through Mantell, fulfilled its Treaty obligations, it would have ensured that, in addition to their kainga and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might as development occurred be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for. Instead, the Crown's approach virtually denied the rangatiratanga of Ngai Tahu over their land, treated them as supplicants and left them virtually landless.

Finding on grievance no 8

- 10.7.12 The tribunal has no hesitation in finding that the Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base, and so to protect the tribal estate.

We further find that the Crown failed to ensure that Ngai Tahu were left with sufficient land to preserve reasonable access to mahinga kai.

*The Ngai Tahu Report 1991****Finding on breach of Treaty principles***

10.7.13 We find that the Crown's failure to ensure that Murihiku Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. As subsequent events were to show, by 1891 only 7.7 per cent of Murihiku Ngai Tahu had sufficient land, 50.6 per cent had insufficient land, and 41.7 per cent had none. Moreover this denial of Ngai Tahu's rangatiratanga in breach of article 2 of the Treaty was a serious blow to the tribe's social system and resulted in the disintegration of Murihiku Ngai Tahu's traditional life and society, a process later to be hastened by Native Lands Acts of the 1860s. That Ngai Tahu were detrimentally affected by the Crown's Treaty breaches is readily apparent.

10.8. **Events After the Purchase**

10.8.1 In the 1870s the government made some attempt to relieve the parlous condition of many landless "half-caste" Ngai Tahu in Murihiku. In 1906 the Landless Natives Act made further provision for those Ngai Tahu with little or no land. The claimants, in grievance no 9, claimed that both the Half-Caste Grants Acts and the Landless Natives Act 1906 and other (unspecified) legislation were inadequate to remedy the landlessness caused by the sale to the Crown. We will defer to chapter 20 our consideration of the Landless Natives Act. At this point it is appropriate, however, to consider the claimants' grievance concerning the half-caste grants legislation.

Grievance no 9: half-caste land grants 1869–1888

10.8.2 For some time prior to 1840, European sealers and whalers had intermixed with Ngai Tahu in the Foveaux Strait area. There was a considerable amount of intermarriage between Ngai Tahu women and European men. People of this mixed ancestry were regarded as Ngai Tahu, but they were not provided for in the reserves made at the time of the Murihiku purchase.

When Rakiura (Stewart Island) was acquired by the Crown in 1864 the deed of purchase provided that a portion of land at the Neck was to be reserved for the half-castes residing there, and any surplus was to go to two named chiefs (see appendix 2). In 1873 the Stewart Island Grants Act recited that the area of land at the Neck was insufficient to make adequate provision for all the half-castes living there. Accordingly, the governor was given power to grant other land on Rakiura or the neighbouring mainland to those of mixed parentage

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without land. Such grants were not to exceed ten acres for each male and eight acres for each female.

- 10.8.3 In 1869 the Public Petitions Committee of the Legislative Council considered a petition of one Andrew Thompson. In its report the committee said:

Your Committee have the honour to report, that, in connection with this petition, they have necessarily taken into consideration the general question of the obligation on the part of the Crown to make provision out of the lands ceded by the Natives in the Ngaitahu and other Blocks in the southern portion of the Middle Island for the half-caste families resident thereon at the time of cession; and are of opinion that, inasmuch as it has been proved to the Committee that, for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown by the Commissioner for the purchase of these lands, such obligation does exist, and that the honor of the Crown is concerned in its faithful and immediate discharge. (E2:373)¹⁰⁰

The committee's report was referred to Alexander Mackay, as native commissioner familiar with the circumstances of Ngai Tahu. On 6 October 1869 he advised the under-secretary of the Native Department that in addition to landless half-caste Ngai Tahu at Rakiura, there were half-caste families living near the Bluff in Southland. He suggested a block of about, 1000 acres should be selected near Oraka for the Rakiura and mainland half-caste Ngai Tahu(E2:374).¹⁰¹

On 5 September 1871 Alexander Mackay reported again to the under-secretary of the Native Department. He enclosed a return which showed that of 187 half-caste Ngai Tahu, 91 had been born on Rakiura, and 93 at various places on the mainland. On the basis of ten acres for each male and eight acres for each female, 1676 acres would be required (E2:398).¹⁰² A further report by Mackay of 19 November 1874 referred to Mantell's promise that special provision would be made for half-castes (E2:401).¹⁰³

- 10.8.4 On 8 December 1877 the Middle Island Half-Caste Crown Grants Act was passed. It referred to certain promises having been made in favour of certain half-caste families then living in the South Island. Their names were listed in two schedules to the Act. The first schedule named 53 people living in Canterbury and 118 in Otago (which included Southland). The Act authorised a grant of ten acres to be made to each male and eight acres to each female. Such grants were to be deemed to be a final extinguishment of all claims of such people in respect of the promised provision of land. By later amendments various errors and omissions were corrected, the last being in 1888 (E2:383–396).¹⁰⁴

- 10.8.5 Not surprisingly, the claimants said that a grant of 18 acres to a husband and wife in the 1870s did not provide a viable unit. As we

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have earlier indicated, Professor Pool pointed out that, by the 1850s, the relative sufficiency of 50 or even 100 acres was being challenged by European settlers (O15:12). Moreover, much would depend on the quality of the land, its location and accessibility (O16:191–231). Professor Pool quoted from a further report of Alexander Mackay of 6 May 1881:

The small quantity of land also held per individual – viz., fourteen acres, and in some cases the maximum quantity is less – altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a hundred acres too small to be payable . . . (O15:13)¹⁰⁵

Although in 1868 Chief Judge Fenton increased the size of Ngai Tahu reserves from Mantell's average of 10 acres per person to 14 acres, (still a totally inadequate allocation), the New Zealand legislature as late as 1877 restricted the allocation of land to Ngai Tahu of mixed descent to a mere ten acres for males and eight acres for females. This in purported fulfilment of a promise by Mantell. It must have been well known to the Crown that such an allocation would provide, at best, no more than bare subsistence and at worst prove totally inadequate even for that. It is difficult to reconcile its actions with good faith on the part of the Crown.

Finding on grievance no 9

- 10.8.6 The tribunal finds the allocation of ten acres for male half-castes and eight acres for female half-castes in 1877 to have been insufficient to meet their need for land and in breach of the Crown's Treaty obligation to ensure that adequate provision was made for these people. In so doing, it failed to honour the promise which it accepted had been made by the Crown representative Mantell to the Ngai Tahu people. We recall that the Public Petition Committee of the Legislative Council in its 1869 report, to which we have referred, acknowledged that "for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown . . . and that the honor of the Crown is concerned in its faithful and immediate discharge". Once more it is our melancholy duty to report that the Crown failed adequately to honour its obligation to many Ngai Tahu half-caste people, to their detriment and the detriment of successive generations.

Schools and hospitals

- 10.8.7 In their fifth grievance the claimants said that the Crown failed to provide schools and hospitals at each Ngai Tahu village, which provision was part of the price agreed upon by the Crown.

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As we consider this claim in some detail in chapter 19 we say nothing of it here, except to indicate that we find the grievance to be very largely established.

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Chapter 11

The North Canterbury Purchase

11.1. Introduction

It will be recalled that one of the disputed questions in the Kemp purchase of 1848 was the location of the northern boundary. The claimants maintained that the boundary was at Kaiapoi pa. The Crown, that it was at or near the mouth of the Hurunui River. For reasons which we have discussed at length in chapter 8 the tribunal concluded that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui and that Kemp and Kettle also thought the boundary was at or near the Hurunui. That was where it was shown on the deed map. From there it ran in a north-westerly direction to Kawatiri on the west coast.

As we have also seen, Walter Mantell chose to disregard the deed map and fixed the north-eastern boundary some distance further south, at the site of the old Kaiapoi pa on the south side of the Rakahuri (Ashley) River. Ngai Tahu thereby forfeited any right to select reserves in the extensive area between the Rakahuri and Hurunui Rivers.

Despite immediate protests by Ngai Tahu, the Crown chose not to disturb Mantell's action in fixing the boundary at the Kaiapoi pa. As a result, Ngai Tahu title to portions of the Canterbury Association block (created in 1850, with its northern boundary at Motunau) was not extinguished before extensive areas had been sold by the association and the Crown to European settlers.

Ngai Tahu were incensed at the boundary being fixed by Mantell at Kaiapoi pa. They saw it as a totally unjustified recognition by the Crown of Ngati Toa mana over an area which they regarded as theirs. They vigorously disputed the validity of the Wairau purchase in so far as it purported to dispose of land which Ngai Tahu said belonged to them. Very soon after Mantell fixed the boundary a delegation of Ngai Tahu from Kaiapoi went to Wellington and made clear their protest to Lieutenant-Governor Eyre. As will be seen in our later discussion, in the ensuing years they continued to protest and assert their manawhenua over not only North Canterbury but the Kaikoura district also.

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While Governor Grey made some tentative moves to settle the claim nothing positive was done. Lieutenant-Governor Eyre left New Zealand in April 1853 and Governor Grey departed for South Africa at the end of the year. Colonel Wynyard held office as administrator from January 1854 until Governor Browne's arrival in September 1855. In the interim the provincial councils had been established and in the absence of a strong central government became dominant. They had responsibility for land disposal on behalf of the Crown. Nothing further was done by government about Ngai Tahu complaints until Governor Browne visited Lyttelton in 1856. Following representations from Ngai Tahu he instructed the chief land purchase commissioner, Donald McLean, to investigate their grievances.

In the meantime, there was steady and growing encroachment of settlers on the land from the old Kaiapoi pa site northwards to Kaikoura and beyond. Some held extensive areas under pasturage licences, others had acquired the freehold. By the time McLean's agent, J G Johnson, began an investigation early in 1856 following Browne's instructions, the provincial governments of Canterbury and Nelson had already leased or sold large areas between the Rakahuri and Wairau Rivers. In August 1856 W J W Hamilton assumed responsibility for settling the North Canterbury purchase. Because of difficulty in obtaining the services of an interpreter, negotiations were delayed until February 1857. On 4 February 1857 Hamilton and the interpreter, the Reverend J Aldred, met at Kaiapoi with Ngai Tahu from Port Levy, Rapaki and Kaiapoi. Principal rangatira from Kaikoura, Wainui and Wairewa were also there. The following day, 5 February 1857, a deed was signed. Ngai Tahu surrendered to the Queen the lands from Kaiapoi northwards to the Waiau-ua River, and on to the sources of the Waiau-ua, the Hurunui and the Rakahuri Rivers. Hamilton estimated the block at 1,140,000 acres. The purchase price was stated to be £200, but Hamilton undertook to request the governor to increase the price to £500. This was later agreed to. Although Ngai Tahu sought reserves at Hurunui and Motunau these were refused by Hamilton. His ostensible reason (given to Ngai Tahu) was that they had ample reserves elsewhere under Kemp's purchase. The real reason (given to McLean) was that the block was almost entirely occupied by European pastoralists and serious difficulties could arise if he set aside reserves for Ngai Tahu.

The Crown, during the course of our proceedings, conceded that it should have taken steps to clarify the situation arising out of the Kemp purchase and that it should have allocated reserves in North Canterbury before it was overrun by European settlers. The Crown also accepted that it acted in breach of the Treaty in failing to make

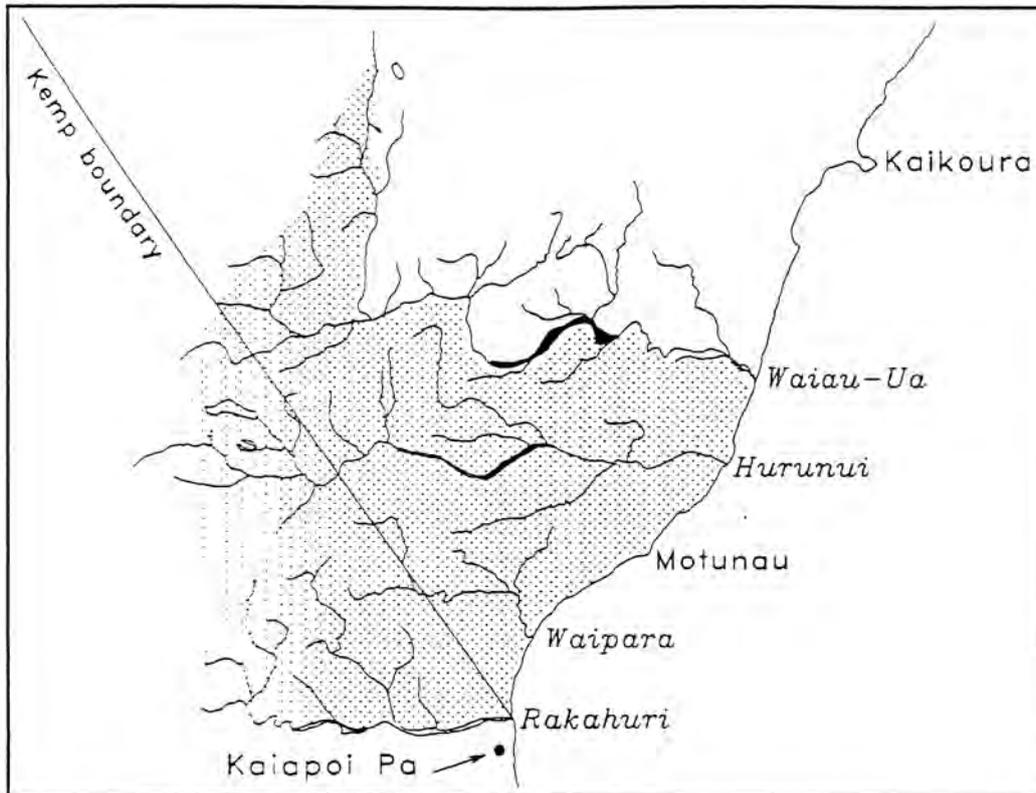
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Figure 11.1: The North Canterbury purchase. Because there were no maps of the purchase the boundaries are an approximation. One interpretation of the deed could have allowed the northern tributaries of the Waiau-Ua to have been included but this would seem unlikely given the estimates of the area of the block given at the time.

provision for adequate reserves when Hamilton purchased the North Canterbury block in February 1857.

11.2. **Statement of Grievances**

The claimants provided a single summary of grievances relating to both the North Canterbury and Kaikoura blocks. We set out here those grievances which relate in whole or in part to North Canterbury. The remainder will appear in our next chapter on the Kaikoura purchase.

1. That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau Purchase of 1847 from Ngatitōa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms.
2. That the Crown allowed these blocks to be sold or leased to European settlers – entirely in the case of the North Canterbury Block [. . .] before they had been purchased from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this.

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3. That the Crown refused to allow lands requested by Ngai Tahu at Hurunui and Motunau in the North Canterbury Block [. . .] to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.
4. That the Crown failed to provide any reserves for Ngai Tahu in the North Canterbury Block.
5. [Relates solely to the Kaikoura block].
6. That the Crown in the North Canterbury Block under the Land for Settlements Acts for the benefit of landless Europeans, from November 1895 to May 1897 resumed the Patoa, Ashley Gorge, and Horsley Downs Estates [. . .] but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

11.3. **Background to the Purchase**

- 11.3.1 As we have seen in our consideration of the Kemp purchase, the true location of the northern boundary gave rise to much controversy. The claimants strongly urged that the north-eastern point was at the old Kaiapoi pa site; the Crown disputed this and contended for the Hurunui river mouth near the 43rd parallel of latitude, as shown on the Kemp deed map. We do not propose to go over this well-trodden ground again. The tribunal concluded that, given their over-riding concern to assert their manawhenua over the Kaiapoi district and further north, Ngai Tahu would not have agreed in their negotiations with Kemp that the Ngati Toa purchase line under the Wairau purchase came to Kaiapoi pa. We believe that Ngai Tahu intended to sell the Kaiapoi district up to the Hurunui (8.5.11). The tribunal considers that it was Mantell's subsequent action, later in 1848, in asserting arbitrarily and categorically that the north-eastern boundary line was at Kaiapoi pa, which immediately triggered Ngai Tahu's strong and concerted objection. They were not prepared to concede that Ngati Toa had manawhenua over the Kaiapoi district. Just as they were not prepared to concede this in their negotiations with Kemp, nor were they prepared to accept Mantell's subsequent unilateral action. That Kemp and Kettle believed that the north-eastern boundary was near the 43rd parallel of latitude and probably at the Hurunui river mouth is demonstrated by the deed map.

Ngai Tahu protests against the Ngati Toa sale of the Wairau

- 11.3.2 Both shortly before and for some years after the Kemp purchase, Ngai Tahu protested to the governor and his officials that Ngati Toa had no right to sell land south of the Wairau valley. We do not propose to record every known instance of their protests but will outline some examples.

The first recorded protest occurred during Grey's visit to Akaroa in February 1848, some three months before the Kemp purchase. As we

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have earlier noted, Matiaha Tiramorehu recorded in his letter of 22 October 1849 to Eyre that in the course of his February meeting with Ngai Tahu, Governor Grey gave assurances that “(the payment for) Kaiapoi should not be given to the Ngatitoas, but that for Kaikoura was already gone to them” (L9:23).¹

Soon after Mantell fixed the north-eastern boundary of Kemp’s purchase at Kaiapoi pa, a Ngai Tahu delegation went to Wellington in September 1848 to protest to Eyre. Mantell also promised he would advise Eyre of their grievance. He told Eyre that Ngai Tahu asserted the land north of Kaiapoi pa was never occupied by Ngati Toa. Secondly, that Ngai Tahu had never ceased to live at or near the disputed land and, thirdly, that subsequent to the last inroad of Ngati Toa, Ngai Tahu had successfully conducted an expedition against them which had not been avenged (M3:24–25).² There appears to be no record of what transpired between Eyre and the Ngai Tahu representatives at the September meeting.

- 11.3.3 In December 1849 Matiaha Tiramorehu again wrote to Governor Grey requesting part of the payment for the land north of Kaiapoi claimed by Ngati Toa (M11:1–2).³ A month later Tikao and others wrote to the governor claiming payment for the land between Kaiapoi and Wairau (A8:II:7).⁴ Tiramorehu’s letter was referred to Mantell, who on 12 March 1850 reported to the colonial secretary that he understood from Eyre that Grey had decided in January 1850 not to compensate Ngai Tahu because the land had already been purchased from Ngati Toa. For his own part Mantell expressed the opinion that Ngai Tahu’s claim was valid against Ngati Toa, who he thought to have no right to the disputed district (M11:3–4).⁵

Eyre did not report to Governor Grey until 4 July 1850, who on receiving it in August instructed the papers to be shown to Lieutenant Servantes. Servantes, who had acted as interpreter at the Wairau purchase, was to explain why the nominal boundary of Ngati Toa had been extended to Kaiapoi (M11:5–6).⁶ As we have seen in our discussion of the Kemp purchase (8.3.6), Servantes noted that doubts were entertained at the time of Ngati Toa having an undisputed title to the land further south than Kaikoura, but it was thought advisable to include the land as far as Kaiapoi in order to extinguish whatever claim Ngati Toa had to it. On 17 October 1850 Grey sent Eyre a copy of Servantes’ memorandum. He concluded that, should Eyre think that Tiramorehu and his people were entitled to some payment for the land to the south of the Kaikoura range, he should arrange, with the advice of his Executive Council, for this to be done (L9:550–551).⁷ Eyre, after consulting Mantell, obtained the concurrence of the Executive Council to £50 being paid to Ngai Tahu “for the relinquish-

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ment of their alleged claims to the country between Kaikoura and Kaiapoi” (M11:7–11).⁸ No record has been found to show this payment was in fact made, although Grey approved the proposal in January 1851 (M11:12).⁹

- 11.3.4 Meanwhile, in January 1850, W J W Hamilton wrote to William Fox, the New Zealand Company principal agent, warning him that Ngai Tahu of Kaiapoi, Amuri, Kaikoura and Port Levy would object to the country north of the Kowai River as far as Kaikoura being occupied by settlers. They claimed the land had not been purchased from them (L9:I:31).¹⁰ James Kelham, the New Zealand Company accountant in Wellington, in April 1850, writing on behalf of Fox to his London superiors reported that:

The assertions of the Natives that some of the country between the Kaikoura Mountains and Port Cooper Plains has not been purchased, may have some foundation. I heard the same story when I was at Kaikoura Peninsula in the “Acheron”; but the district is included in the Nelson grant, which was issued under the purchase made by Sir George Grey, in person, from Rauperaha and Ngatitoas. The few Natives resident in it assert that Rauperaha had no right to sell, having never fully conquered the inhabitants. Into the merits of such an assertion I am not prepared to enter; but the question is of no immediate importance, and may, I have no doubt, be settled at any time for a very small sum of money, if not without. (L9:30)¹¹

He enclosed a copy of Hamilton’s letter to Fox. The London office in turn expressed its concern to Earl Grey, the British colonial secretary, who on 7 October 1850 instructed Governor Grey to take all necessary steps to ensure the Canterbury Association obtained a clear title to the land which had been reserved for their colonising operations (L9:29).¹² We are unaware of any positive action taken by Grey as a consequence of these instructions.

- 11.3.5 In March 1852 Governor Grey visited Canterbury. At Lyttelton he met with a considerable number of Ngai Tahu who claimed compensation from the government for land purchased to the north of the Kemp block. According to the newspaper report, Ngai Tahu were satisfied with Grey’s response (T2:68).¹³ Some years later J G Johnson was to say that Grey had offered Ngai Tahu £100 for their land north of the Ashley on that occasion (A8:II:11).¹⁴ If so, nothing came of it, for on 27 August 1852 Poihipi Te Arorahui, a leading spokesperson for Ngai Tahu at Kaiapoi, wrote to Grey demanding £400 for the land north of Kaiapoi. Failing satisfaction, he threatened that European settlers would be removed from land they were occupying at Kaiapoi, Motunau, Hurunui and elsewhere (T2:76–77).¹⁵ Professor Ward noted that in September 1852 Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau, Te Hurunui, Motunau, Rakahuri and Kaiapoi (T1:263).¹⁶

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11.3.6 The mounting discontent of Ngai Tahu at the failure of the Crown to recognise their claim was revealed by the school teacher at Kaiapoi, Henry Fletcher. He advised that, if they did not receive a satisfactory answer from the governor, Kaiapoi Ngai Tahu intended to take matters into their own hands. They would compel payment by force as they had the necessary ammunition and promises of help from Ngai Tahu on Banks Peninsula and the Ninety Mile Beach. FitzGerald, the provincial superintendent, advised the resident magistrate, Charles Simeon, that additional police might be required. Simeon passed on the reports to George Grey, who gave instructions that any acts of violence should be reported immediately so that “effectual means may be taken for at once crushing such acts of insubordination” (T2:85–86).¹⁷ We have no evidence that Ngai Tahu carried out their threats. They later claimed however that at Grey’s request they had refrained from evicting the Europeans who settled north of Kaiapoi (A8:II:21).¹⁸ A year later Simeon again reported that Ngai Tahu were continuing to agitate their claim and he recommended that something should be done to settle the matter. He added that he had never been able to understand the nature and extent of their grievance (T2:87–88).¹⁹ Henry Tacy Kemp, in his role of native secretary of New Munster, noted that there had been several such applications from members of the Ngai Tahu tribe. In his view, Ngai Tahu could not be recognised as claimants as they had been driven off by Ngati Toa, who had long since sold the land in question to the government (T2:88).²⁰ No further action was taken by the Crown.

11.3.7 The Ward report conveniently summarised the outcome of Ngai Tahu’s repeated protests as follows:

Although the evidence is fragmented and somewhat confused, it does seem that during 1850–2 Ngai Tahu achieved limited government recognition of the fact that they had rights north of Kemp’s purchase but this recognition did not improve their position with regard to the land. Apart from the inquiries made as a result of Tiramorehu and Tikao’s letters the government does not seem to have perceived a need for an inquiry into the extent of these rights. Nor was the validity of the Nelson Crown grant and the later transfer of land claimed by the tribe to the Canterbury Association questioned. That is, this limited official recognition of Ngai Tahu interests does not seem to have translated into any thorough-going investigation of their rights, or halted the process by which they were being dispossessed of their land. No further investigation was undertaken until 1856 when the claim was brought to the attention of John Grant Johnson who was negotiating with the Kaiapoi and Akaroa hapu over their outstanding claims on Banks Peninsula. (T1:265)

The Crown historian Graham Sanders suggested that during the years 1850–1856 there was a “hiatus” in land purchases. He attributed this to what he described as the whole structure of administration and government being in seeming disarray until the mid-1850s (M7:15–

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16). Not surprisingly, this contention was vigorously opposed by the claimants. They correctly pointed out that Grey had three years in which to act on Ngai Tahu protests until his departure at the end of 1853 (O47:5). Instead, European settlement steadily increased. Counsel for the Crown conceded in his final address that the Crown should have taken steps to clarify the Kemp purchase and should have allocated reserves in North Canterbury before it was overrun with European settlers. Instead, as the Crown admitted, the matter was not attended to until the new governor, Browne, visited Lyttelton in January 1856 (X2:75–76).

The Crown's recognition of other claims

- 11.3.8 That Mr Sanders' contention of a hiatus in land purchases was misconceived is made only too clear by the Crown's very considerable activity in relation to claims to the north of Ngai Tahu territory. In our later chapter on the Arahura purchase we recount in some detail the succession of Crown purchases commencing with the purchase of the remaining Ngati Toa rights in Te Wai Pounamu for £5000. This was followed in successive years through to 1856 with other purchases instigated by Donald McLean, purporting to extinguish the interests of Te Atiawa, Ngati Tama, Ngati Rarua and Rangitane in Te Wai Pounamu (13.3.3). The sum of £6200 was paid out. As Professor Ward noted, these purchases show that where the Crown had the commitment to investigate and extinguish particular claims it could find the resources to do so (T1:266). But this commitment fell short of investigating and settling Ngai Tahu's outstanding claims.

Settlers progressively occupy North Canterbury and Kaikoura

- 11.3.9 Valuable evidence commissioned and called by the Crown was given on European settlement north of Kaiapoi by David J Alexander. Mr Alexander described European settlement in the area from the Ashley River northward to Parinui o Whiti (White Bluffs) prior to the North Canterbury purchase in 1857 and the Kaikoura purchase in 1859. We here record, from a wealth of detail, the principal points made by Mr Alexander.

Whalers

- 11.3.10 The first record of shore-based whaling stations on the North Canterbury-Kaikoura coast is in 1842. Between 1842 and 1846 whaling stations were active at Motunau, Amuri Bluff, Ranginui-wai (Riley's Rock), South Bay, Waiopuka and Waipapa. Thereafter only the Riley brothers at Riley's Rock, and Fyffe at Waiopuka continued. Mr Alexander thought it likely that all the European whalers would have

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made a payment to the local Maori people for the use of their station sites (M5:4–7).

Settlers

- 11.3.11 The Nelson settlement was founded by the New Zealand Company in 1842. The company found it had sold more land in advance than was available so it looked beyond the hills into Marlborough. A company surveyor, Cotterell, sent to report, found south of the Awatere River (in an area later to become part of the Flaxbourne run):

a beautiful grassy plain, richly covered with grass, clear of all bushes and fern, running as far as the eye could reach . . . with low undulating hills to the south-east all grass. (M5:8)²¹

Cotterell's enthusiastic report on this country persuaded the New Zealand Company to satisfy its need for more land in the Wairau and Awatere valleys. The attempted survey in this district resulted in the Wairau conflict in which Cotterell and twenty-one Europeans and four Maori died. As a consequence of this tragedy European settlement was suspended in the area for three years. Mr Alexander noted that only after Commissioner Spain's report and the Wairau purchase of March 1847, did the settlement regain its impetus (M5:7–8).

Professor Ward noted that the 1850s and 1860s were to be the years of the pastoralist, not the whaler. But in Kaikoura these two activities were at first combined by Robert Fyffe's operations at Waiopuka (T1:267). Fyffe was engaged in sheep-farming by 1844–45. In March 1851 however, he applied for a pasturage licence to protect his rights in the land he was grazing. When Fyffe was drowned in April 1854 he left assets which included four whaleboats, a dozen wharves and sheds at Waiopuka and 2000 head of stock, including a milking herd of 192 goats (M5:13).²²

In 1847 Charles Clifford and Frederick Weld (later to be premier) negotiated a lease direct with Te Puaha of Ngati Toa and a signatory to the Wairau deed, giving grazing rights to an extensive area at the north end of the subsequent Kaikoura purchase from White Bluffs to Kekerengu. The first 3000 stock arrived at Flaxbourne in 1848. By 1850 there were 11,000 sheep on the property. Clifford and Weld applied for a pasturage licence and received one of the first issued by the New Zealand Company, on 1 January 1849 (M5:14).²³

A third early run was established by three Greenwood brothers at Motunau. They had previously been occupying Purau Bay in Port Cooper. It is thought they built a homestead at Motunau in 1845 and cattle were driven there from Banks Peninsula in September 1847. By January 1850 the property was carrying some 1450 sheep, 140 head of cattle and 40 pigs (M5:14–16).

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These three sheep runs were the only ones in operation before 1848. Following the Wairau purchase and the issue of the Nelson Crown grant, Nelson settlers seeking land found it in the Awatere valley. Some obtained leases, others the freehold. With the founding of the Canterbury settlement in 1850, run-holdings moved into the North Canterbury and Kaikoura blocks (M5:16). By the time of the purchases from Ngai Tahu most of the land, including the valuable coastal areas, had been occupied by European settlers for at least five years in the case of the North Canterbury purchase, and at least three years in the case of the Kaikoura purchase (M5:39–40). A substantial quantity had been freeholded by the time of the respective purchases especially in the North Canterbury block and in the Amuri and Awatere/Flaxbourne districts of the Kaikoura block. Mr Alexander referred to the requests made by Ngai Tahu to Hamilton for reserves at Motunau and Hurunui, presumably at the mouth of each of these rivers. Both areas were within the first runs to be taken up, Motunau mouth being on Greenwood's Motunau run and Hurunui mouth being the site of a proposed township (M5:29–30). A series of maps of the North Canterbury and Kaikoura blocks shows the steady increase in land taken up by European settlers from 1846 to 1859. In 1846 only the Motunau run appears; by 1859 the whole of the North Canterbury block is taken up by settlers and only an area in and adjacent to the Kaikoura peninsula is excepted in the Kaikoura block (M6:14–25). See figure 11.2.

Commissioner Johnson's investigations

- 11.3.12 In January 1856 Governor Thomas Gore Browne visited Lyttelton. On 12 January the governor met the Ngai Tahu people belonging to the district. He was addressed by Paora Tau, who complained that Sir George Grey had recognised the claim of Ngati Toa to land in the Kaiapoi district which belonged to Ngai Tahu. The governor promised that he would arrange for Donald McLean, the chief land purchase commissioner, to investigate the matter and pay them a visit (T2:62).²⁴

In April 1856 McLean sent John Grant Johnson as a special commissioner to Canterbury. But his instructions were to complete Mantell's unfinished purchase of the Akaroa block and nothing was said about the land north of Kaiapoi which Paora Tau had complained about to Governor Browne in January. Whether this was because the governor had failed to carry out his promise or McLean had misunderstood him we do not know (L3:III:56).²⁵ However, Johnson reported to McLean on 11 May 1856 that Ngai Tahu made it clear to him that if the Crown was not prepared to recognise their grievance over North Canterbury they would use their influence to prevent a settlement of the Akaroa

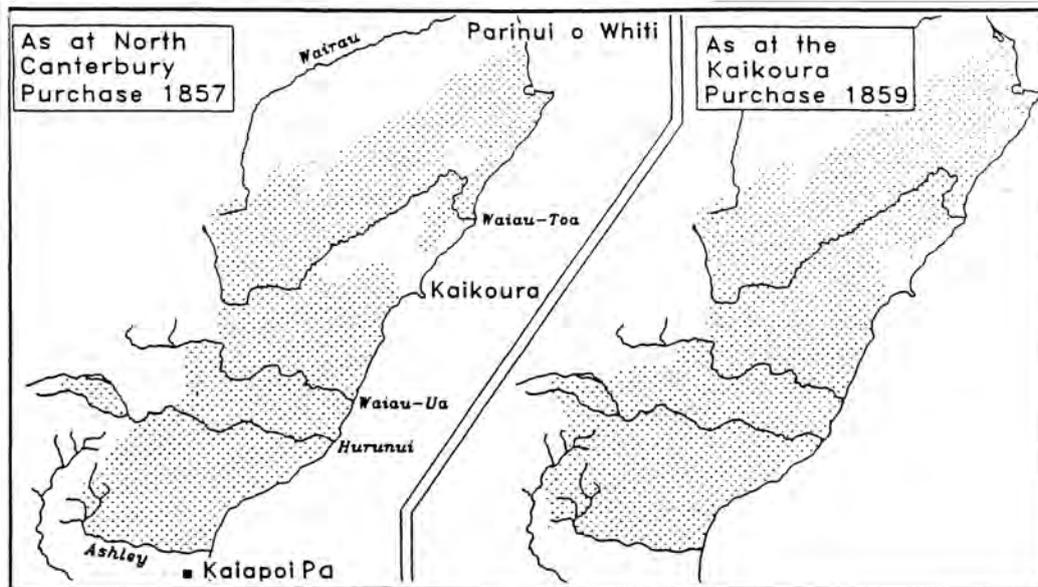
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Figure 11.2: Both the North Canterbury and the Kaikoura purchases were almost completely occupied by pastoralists at the time when the Crown negotiated the sales with Ngai Tahu. By 1859 only the area around the Kaikoura peninsula was not under pastoral license or had not been freeholded.

question. Johnson advised McLean that as far as he could learn Ngai Tahu's claim to be compensated for the land north of Kaiapoi was a just one. He recommended their claim be met by a payment of £150. When, as he put it, justice had been done to the Kaiapoi Ngai Tahu, he could then use their influence in settling the Akaroa block purchase (L3:III:56–57).²⁶

McLean accepted Johnson's advice and obtained the governor's agreement to £150 being paid in settlement of the Ngai Tahu claim for the land north of Kaiapoi. He acknowledged "the merit and nature of the Kaiapoi claim" which he said had "always been a source of discontent" with Ngai Tahu (L3:III:57).²⁷ And so Johnson was authorised to settle with Kaiapoi Ngai Tahu (L3:III:57).²⁸ The Ward report noted in relation to this action by the Crown that:

It cannot be said any new or compelling evidence had been presented for a change of policy by the Crown, yet McLean's decision to act was a turning point. It implicitly called into question the Crown record of inaction on Ngai Tahu representations of the past seven or eight years. (T1:272)

- 11.3.13 As it happened, Johnson returned to Auckland without entering into negotiations over either the North Canterbury or Akaroa blocks. It was left to Hamilton to settle both these purchases. As a result of Johnson's investigations and report, McLean accepted, as we have

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seen in our discussion of the Akaroa block purchase, that Ngai Tahu were entitled to be paid for the Akaroa block. In a memorandum of 13 August 1856 he also noted:

with reference to the unextinguished claims at Kaiapoi, a sum of £150 should be paid to the Natives, conditionally, that they first settle the Akaroa claims. (A8:II:12)²⁹

Hamilton was instructed by McLean on 16 August 1856 to act for the Crown in respect of both the Akaroa and North Canterbury block purchases (A8:II:13)³⁰ As we have seen, he completed the Akaroa block purchase on 11 December 1856.

11.4. **The Purchase**

The negotiations

- 11.4.1 Although Hamilton had clear instructions to allow 800 acres by way of reserves in the Akaroa block purchase, no mention was made of reserves for Ngai Tahu in the North Canterbury block. He was simply instructed to pay the Ngai Tahu claimants £150. Professor Ward commented that:

In this important respect the terms of the transaction appear to have been arrived at by the Crown without reference to the wishes or interests of Ngai Tahu. (T1:272)

When reporting to McLean on 11 December 1856 the successful completion of the Akaroa purchase, Hamilton referred to the forbearance of Ngai Tahu towards the Crown which permitted trespassing by settlers on the Akaroa block. He went on to say:

And it is a fact worthy of notice that so early as the year 1850, when the Canterbury Association's Surveyors first crossed the Ashley (Rakahauri), the Kaiapoi Natives complained to me that the land north of it had never been sold by them. The Kaikoura Maoris had previously asserted the same thing to me. I represented the matter officially to the New Zealand Company's Chief Agent. But until Mr Johnson's arrival here no official enquiry into the case seems ever to have been made. (A8:II:15)³¹

- 11.4.2 Because of difficulties in arranging for the interpreter, the Reverend J Aldred, to be available to go to Kaiapoi, Hamilton was not able to arrange a meeting with Ngai Tahu until 4 February 1857. When reporting to McLean the outcome of his discussions, on the following day, Hamilton enclosed a copy of his "minutes of proceedings". These succinctly record the progress of his negotiations with Ngai Tahu and his misgivings about the deed of purchase which was signed that day.

Hamilton recounts meeting with Ngai Tahu from Port Levy, Rapaki and Kaiapoi. Also present as having some claim to share in the payment, but not as enjoying any positive rights of ownership, were Whakatau, chief of Kaikoura, and some Akaroa chiefs. They took no

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part in the proceedings. Hamilton commenced by offering “from the Governor £150 for the land north of Kaiapoi” (A8:II:20)³² Ngai Tahu responded by requiring reserves at Hurunui and Motunau, to which Hamilton replied:

I had no instructions to entertain any question of reserves in this case. Maoris urged want of room for their increasing stock, insisting on a new reserve, also on the fact of my agreeing to one at Wairewa, without having instructions. Replied: Wairewa was agreed to, because Mautai and his people were in occupation, and would have no other place to reside on and cultivate; but besides their separate reserves at Rapaki, Purau, and Port Levy, all very ample, they had at Kaiapoi about 2640 acres, twice the quantity of all the Akaroa reserves for a population not much larger. After many long speeches, my offer positively and absolutely rejected by acclamation and counter-offer made to settle the matter then and there, first for £500 cash; or second for the £150 named, and an ample reserve. (A8:II:20)³³

Ngai Tahu urged on Hamilton the value and extent of their land. They drew his attention to the price the Crown had been selling it for, which proved the reasonableness of their offer. The land, they said, had been stolen from them. They challenged Hamilton to point out any houses, burying places, pa or any signs of Ngati Toa’s ownership. “South of Kaiapoi”, they said, “all had been fairly bought”. The Crown’s “ownership was unquestioned” (A8:II:20).³⁴

Ngai Tahu then offered to accept £150 as a part payment of the £500, leaving it to the good faith of the governor to pay the remaining £350. Hamilton declined “such a loose transaction, as well on their account as on that of the Government”. But on his own responsibility he added £50 to the £150 previously offered and said he would pay the £200 at once. After some three hours Ngai Tahu rejected this offer. Hamilton suggested they meet the next day when they should let him have their proposal which he would convey to the governor (A8:II:20).³⁵

The next morning, 5 February 1857, Ngai Tahu renewed their offers of the previous day “dwelling strongly on the necessity for their having a large reserve”. Hamilton again declined them. Ngai Tahu then expressed their willingness to accept £200 and no reserves, provided Hamilton would give a written guarantee that he would represent their case strongly to the governor and use his influence to obtain the full sum of £500. Hamilton was at first unwilling to agree to this as he had no assurance that their request would be met. Finally, “Being much pressed”, he gave a guarantee that he would “recommend the distribution of £200 among them all, so soon as the Kaikoura purchase should be completed” (A8:II:21).³⁶ The written guarantee which he gave, dated 5 February 1857, envisaged the £200 being distributed among all Banks Peninsula, Kaiapoi and Kaikoura Ngai Tahu (A8:II:22).³⁷

*The Ngai Tahu Report 1991****The deed is signed***

- 11.4.3 Twenty Ngai Tahu rangatira signed the deed of purchase on 5 February 1857. They gave up their claim “to all the land at Kaiapoi and on to Waiau-ua and on to the sources of the Waiau-ua, Hurunui and Rakahauri [Ashley]” for the sum of £200 (see appendix 2.7). The old pa of Kaiapoi at Te Moture was expressly reserved, (this was to implement Mantell’s promise made at the time of the Kemp purchase). The area of the land sold to the Crown was estimated by T Cass, chief surveyor, at 1,140,000 acres.

After recording the signatories to the deed and the payment of £10 to each of the 20 signatories Hamilton went on to report, in reference to his minutes, that:

I should remark that the country ceded has been for several years past almost entirely occupied by ourselves as freehold or sheepwalk. By reserving any new tract for the Maoris, serious complications might be created, and the necessity for reference to the Land Office would delay the purchase greatly. This was my chief reason (not made known to them) for declining their proposal to accept £150 and a reserve, which otherwise I should have at once agreed to. But, under existing circumstances, it seemed absolutely indispensable to pay a large purchase money and make no reserve. (A8:II:21)³⁸

Hamilton referred to the copy of the guarantee, which he enclosed, saying he should have nominated £300 instead of £200. He urged the governor to agree to pay the additional £300 requested by Ngai Tahu. He attributed the delay of six years or more in obtaining a hearing of their case as the reason why they had been prepared to accept so small a sum as £200, preferring to grasp what was within their reach rather than risk further delay. Hamilton reminded the governor that about two years previously “one block of this land between Waipaoa and the Hurunui, containing 30,000 acres, was sold by the government for £15,000 [10 shillings an acre]” (A8:II:21).³⁹

It will be noted that the ostensible reason given by Hamilton to Ngai Tahu for not granting any reserves was that they had sufficient elsewhere in the Kemp block, especially at Taumutu and on Banks Peninsula. But, as he admitted to McLean, the chief reason (which he did not make known to them) was that the country was almost entirely occupied by European pastoralists either “as freehold or sheepwalk”.

- 11.4.4 When McLean received Hamilton’s report on the purchase he noted that no reserves had been made by Hamilton “inasmuch as the land demanded by the Natives was of great value” (A8:II:25).⁴⁰ But he supported the payment of the additional £300 to Ngai Tahu:

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to whom it must be conceded that great injustice has been done from the fact that their claims were not earlier enquired into and recognised. (A8:II:25)⁴¹

In the event, the additional sum of £200 was paid to Banks Peninsula and Kaiapoi Ngai Tahu on 12 November 1857 and the remaining £100, to make up the total purchase price of £500, on 6 January 1860 (A8:II:381–382).⁴²

11.5. **Ngai Tahu's Grievances**

Grievance no 1: Crown pressure on Ngai Tahu to sell

11.5.1 The claimants' first grievance insofar as it relates to the North Canterbury purchase is:

That the Crown's inclusion of [. . .] Kaiapoi in the Wairau Purchase of 1847 from Ngatitōa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms. (W5)

This grievance is identical with the claimants' first grievance in respect of the Kemp purchase.

For reasons which we gave in 8.5.12 the tribunal was not able to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms. While in relation to the Wairau purchase we accepted that the inclusion of Kaiapoi pa would have been a source of anxiety to Ngai Tahu, the tribunal believes it was substantially mitigated by Governor Grey's 1848 assurances and the arrangement reached by Kemp and Ngai Tahu at the time of the Kemp purchase.

As we earlier recalled, Matiaha Tiramorehu recorded in his letter of October 1849 to Eyre, that the previous year when Grey had discussions with Ngai Tuahuriri at Akaroa, the governor told them that the payment for Kaiapoi should not be given to the Ngati Toa but that the payment for Kaikoura had already gone to them. Tiramorehu complained in his letter that when Kemp came he placed the boundary of Ngati Toa land at Kaiapoi. The tribunal believes this error should be attributed to Mantell, not to Kemp, who believed he was purchasing up to the Hurunui on the 43rd parallel.

When Ngai Tahu in September 1848 vigorously protested at Mantell's action in fixing the Kemp purchase boundary at the Kaiapoi pa site and journeyed to Wellington to protest to Eyre, the matter should have been put right and Grey's assurance given in February of that year honoured. But as we have said (8.5.11), once Mantell had located the pa and fixed it as the boundary, he was forced to doggedly maintain his position. When Ngai Tahu raised the matter in Wel-

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lington with Mantell's superiors, in Kemp's presence, they too saw it as expedient to stand behind Mantell's decision.

As we have seen, Ngai Tahu persisted in their protests but no effective action was taken to correct the situation until the North Canterbury deed of purchase was signed some eight and a half years later. By maintaining that the north-eastern boundary of Kemp's purchase was at Kaiapoi pa after Mantell had erroneously fixed it there, the Crown in effect recognised the mana of Ngati Toa as extending to that point. This caused enormous distress to Kaiapoi Ngai Tahu who did not rest until their mana was restored in February 1857. But they paid a heavy price. Such was their anxiety, due to the pressure of European settlement, that their just rights would never be recognised, they parted with their lands initially for £200, ultimately for £500, but with no reserves whatsoever.

Finding on grievance no 1

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

Grievance no 2: The sale of North Canterbury land to Europeans

- 11.5.3 In their second grievance the claimants stated:

That the Crown allowed these blocks to be sold or leased to European settlers – entirely in the case of the North Canterbury Block [. . .] before they had been purchased from Ngai Tahu and that Ngai Tahu have never been adequately compensated for this. (W5)

It is clear from the evidence before the tribunal that the Crown did allow the whole of the North Canterbury block to be occupied by European settlers before purchasing it from Ngai Tahu. Substantial areas were in fact sold and the freehold granted. The remainder of the block was occupied under pasturage or other licences. The evidence is equally clear that by the time the Crown came, very belatedly, to recognise the legitimacy of Ngai Tahu's claim, the land had increased very considerably in value. We have cited an instance of 30,000 acres being sold for £15,000, or 10 shillings an acre. Mr Alexander explained to us that due to difference in policy between Governor Grey and the Canterbury Association, all land north of the Waipara River which fell outside the Canterbury Association block, could be purchased for ten shillings an acre, or five shillings if it was of poorer quality, while £3 an acre was charged by the Canterbury

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Association for land south of the Waipara. Not surprisingly more sold at the cheaper price. Between 1 July 1853 and 31 December 1854, 61,120 acres of rural land were sold at 10 shillings an acre, while 1178 acres sold at £3 an acre (M5:23–24).⁴³ The stark difference in the price paid by the Crown, of £500 for 1,140,000 acres, is only too apparent.

The Crown's attitude to meeting claims by Ngai Tahu is illustrated by Professor Ward, who in comparing this purchase with the Crown's practice in the North Island said:

The price which Ngai Tahu received was a small fraction of the sums handed over by McLean himself for blocks of pastoral land in the Wairarapa in 1853–54 – a total of roughly 1,500,000 acres for £14,000 – with large reserves granted, and much of the best land withheld from sale. (T1:276)

That Ngai Tahu were interested as early as 1848 in engaging in pastoral activities is apparent from requests made to Mantell. For instance we have earlier noted that in September 1848 they told Mantell they wanted “a run of some thousand acres” for grazing sheep (8.8.20).

Finding on grievance no 2

- 11.5.4 The delay of over eight years in recognising and settling Ngai Tahu's claim to the North Canterbury block saw their land completely occupied by European settlers. The Crown must accept responsibility for this. A consequence of the unjustified delay by the Crown meant that not only had the land, as a result of settlement, considerably increased in value, but also that Ngai Tahu were placed in a greatly weakened bargaining position. For all they knew the Crown would continue to rely on the Wairau purchase as giving it title to the land.

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

Finding on breach of Treaty principles in respect of grievances nos 1 and 2

- 11.5.5 The tribunal was unable to reconcile the Crown's action regarding the inclusion of Ngai Tahu land in the Wairau purchase from Ngati Toa with Ngai Tahu's rangatiratanga over such land. No investigations appear to have been made by the Crown as to Ngai Tahu rights in the North Canterbury block. While Grey in February 1848 recognised Ngai Tahu's rights at least up to the Hurunui River, this was revised by the Crown's subsequent acquiescence in Mantell fixing the boundary of Kemp's purchase at the Kaiapoi pa site. Despite persistent protests by Ngai Tahu from 1848 on, the Crown permitted all the land in the North Canterbury block to be occupied by European settlers

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and alienated substantial areas of the freehold to them. This was in blatant disregard of, or unconcern for, Ngai Tahu's rangatiratanga over this land. Far from consenting to this occupation of their land, Ngai Tahu vigorously objected. When very belatedly the Crown finally consented to recognise the rights of Ngai Tahu in this land, they did so by agreeing to pay no more than a nominal price, far below the then value of the land. This was inconsistent with good faith and the obligation of the Crown to deal fairly and honourably with its Treaty partner. In so doing it clearly acted in breach of article 2 of the Treaty, as equally clearly it did in denying for so long and with such serious consequences the rangatiratanga of Ngai Tahu in the North Canterbury block. Ngai Tahu have not been compensated to this day for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Grievances nos 3 and 4: Crown failure to provide reserves

11.5.6 These grievances may conveniently be considered together:

3. That the Crown refused to allow lands requested by Ngai Tahu at Hurunui and Motunau in the North Canterbury Block [. . .] to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.

4. That the Crown failed to provide any reserves for Ngai Tahu in the North Canterbury Block.(W5)

Finding on grievances nos 3 and 4

11.5.7 It should be said at once that the Crown does not dispute the validity of these grievances. Hamilton noted that Ngai Tahu sought reserves at both Hurunui and Motunau. His ostensible reason for refusing them was that Ngai Tahu had been provided with adequate reserves by the Kemp and various Banks Peninsula purchases. We have already found this to have been far from the case. The real explanation, as we have earlier noted, was that the country was occupied by European pastoralists, or as McLean inferred, the land demanded by Ngai Tahu was of great value. Consequently Hamilton resolutely refused to grant a single acre by way of reserves. The tribunal upholds both grievances nos 3 and 4.

Findings on breach of Treaty principles in respect of grievances nos 3 and 4

11.5.8 In no other purchase of Ngai Tahu land did the Crown fail completely to make any reserves for the tribe or wholly fail to meet their requests for reserves. Much of the North Canterbury block was very well suited to pastoral sheep-farming. Ngai Tahu were anxious to participate in this activity alongside the new settlers. Instead they received a mere £500, and then only after years of protest. The Crown's breach of article 2 of the Treaty is self-evident. It is conceded

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by the Crown. In failing to meet the request for reserves at Hurunui and Motunau the Crown flew in the face of Ngai Tahu's rangatiratanga over the land preserved to them by article 2. There could be no conceivable justification for such arbitrary action so at variance with the Crown's Treaty obligation.

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

In short, the tribunal finds that the Crown acted in breach of article 2 of the Treaty in failing to respect the rangatiratanga of Ngai Tahu by reserving lands the tribe wished to retain, by failing to make any provision by way of reserves for the present and future needs of Ngai Tahu, and by failing to act in good faith and honestly towards its Treaty partner.

Grievance no 6: Land for Settlements Acts

11.5.9 In their sixth grievance that claimants alleged:

That the Crown in the North Canterbury Block under the Land for Settlements Acts for the benefit of landless Europeans, from November 1895 to May 1897 resumed the Patoa, Ashley Gorge, and Horsley Downs Estates [. . .] but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty.(W5)

At the time the three estates referred to in this grievance were resumed, the Land for Settlements Act 1894 was in force. This Act enabled the Crown to acquire either by purchase or compulsorily, land in private ownership, if the landholding exceeded specified acreages. The principal purpose of Crown acquisition was to provide land for settlement under the Land Act 1892. Section 32 of the 1894 Act provided that any land so acquired was to be disposed of under the lease-in-perpetuity system, or, if pastoral, under the small grazing-run system of part V of the Land Act 1892. Section 157 of the Land Act provided for leases-in-perpetuity to have a term of 999 years and a rental equal to 4 per cent of the cash price of the land. Small grazing-runs were regulated by part V of the Land Act. Section 172 provided that a first class small grazing-run should not exceed 5000 acres and a second class grazing-run should not exceed 20,000 acres. The term of the lease was for 21 years with a right of renewal at a rental of 2.5 per cent of a price fixed by the land board.

There was no requirement in either Act that the applicant for land must be either European or landless. Under section 92 of the Land Act any person of the age of 17 years or upwards might be selected

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to take up land under the Act, but section 93 limited the rights of married women. Section 95 of the Land Act limited the right of any person owning 2000 acres or more of freehold land from acquiring land under the Act other than under part V (small grazing-run leases) and part VI (land held for pastoral purposes). No submissions were made by counsel on this grievance. So far as the tribunal is aware there was at the time no legal impediment to any qualified Maori applying for land under the Land for Settlements Acts. We have no information whether any did so, or, if so, with what results.

Finding on grievance no 6

- 11.5.10 On the assumption that Maori enjoyed the same rights under the Land for Settlements Acts as Europeans, the tribunal is unable to sustain the claimants' grievance no 6.

But, having made this finding on the limited information made available to us, we make the following observations. The Crown was prepared to outlay substantial sums of money to enable predominantly, if not only, European settlers, to take up extensive areas of land on favourable terms. Land, moreover, which was fertile and relatively accessible. We note that "small grazing-runs" under part V of the Land Act 1892 could be up to 5000 acres in extent for first class runs and up to 20,000 acres for second class runs.

As we will later see in chapter 20, land assigned to landless Maori under the South Island Landless Natives Act 1906 was often in remote and sometimes inaccessible areas, often of poor or indifferent quality, and always restricted to a maximum of 50 acres per adult and 20 acres for those under 14 years of age. The two Acts stand in stark contrast to each other. While unable to uphold the claimants' grievance, it is not difficult to understand why it was put to us. It takes little imagination to appreciate the sense of deprivation of the North Canterbury Ngai Tahu for whom the Crown refused to set aside a single acre. And yet, the Crown was later prepared, at considerable cost, to resume, either by repurchase or compulsorily, land bought from Ngai Tahu for a pittance, to facilitate closer settlement predominantly by European settlers.

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Chapter 12

The Kaikoura Purchase

12.1. Introduction

This purchase shared many common features with the earlier North Canterbury transaction. In both cases the respective Ngai Tahu hapu strenuously objected to the Wairau purchase from Ngati Toa extending to land which they considered rightly belonged to them.

Thus we find not only the Kaiapoi Ngai Tahu protesting but also the Kaikoura hapu. From as early as the meeting with Governor Grey at Akaroa in February 1848 Ngai Tahu sought payment for both the Kaikoura and Kaiapoi districts. When in September 1848 Mantell, in the presence of Ngai Tahu, fixed the northern boundary of Kemp's purchase at the old Kaiapoi pa site, Paora Tau rose to say that it should be put right back to Te Parinuiowhiti. In 1850 both William Fox and W J W Hamilton reported on Ngai Tahu's claim to Kaikoura along with the claim for the Kaiapoi district.

In December 1850 the New Munster Executive Council went so far as to agree to pay £50 if Ngai Tahu would relinquish their claims to the country between Kaikoura and Kaiapoi. It does not seem that the money was ever paid over. Ngai Tahu continued to protest. For instance Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau and other places to the south.

Meanwhile, the Crown proceeded to recognise the claims of various tribes to the north, including Ngati Toa. And at the same time European settlement was progressing steadily over both the Canterbury and Kaikoura blocks. While Donald McLean was very active in settling claims of the northern South Island tribes in the years 1853 to 1856, he showed no anxiety to investigate Ngai Tahu's repeated claims.

When W J W Hamilton returned to Lyttelton after settling the Akaroa purchase in December 1856 he found Kaikoura Whakatau, the paramount rangatira of Kaikoura, and 20 or more of his principal men awaiting him. They had heard that Hamilton proposed to negotiate with Kaiapoi Ngai Tahu over North Canterbury. Whakatau expressed willingness to negotiate with the Crown over the Kaikoura district.

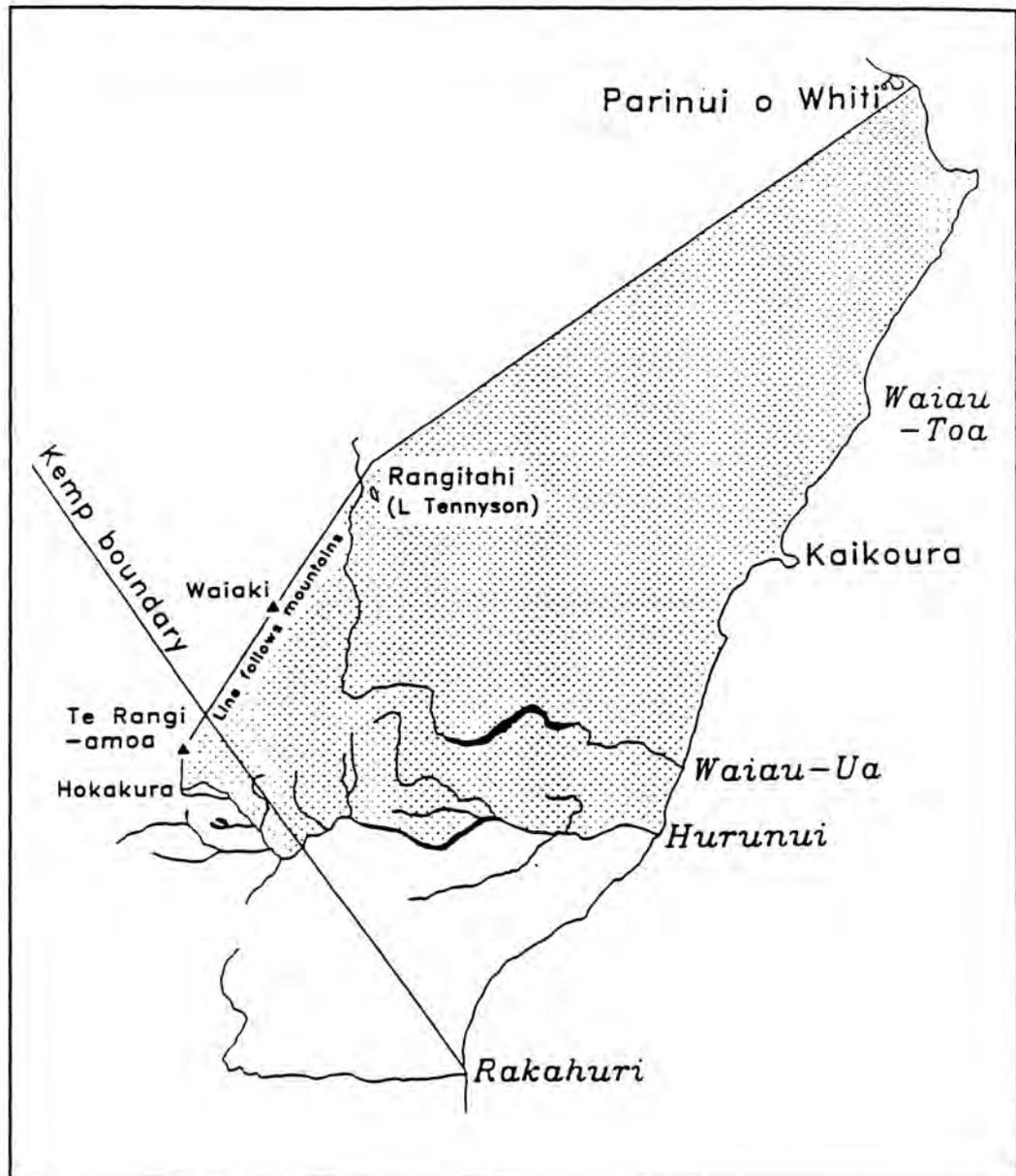
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Figure 12.1: The Kaikoura purchase. The purchase overlapped with the North Canterbury purchase of 1857 which had its northern boundary at the Waiiau-Ua.

He complained that Ngati Toa had no right to sell the country from Wairau to Kaiapoi. Hamilton reported his discussions with Whakatau to McLean early in 1857. McLean undertook to have the matter investigated but again showed no sense of urgency. Not until nearly two years later did McLean finally instruct James Mackay Jr to undertake the negotiations for the purchase of the Kaikoura district.

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Mackay was unable to obtain the services of a surveyor from the Nelson provincial government. He complained bitterly that the provincial council was giving priority to surveying some 64,000 acres at Amuri – land which Mackay reminded McLean had never been properly acquired by the Crown and which the provincial government had no business to sell before the Crown had purchased the title to it.

Mackay's negotiations took place during February–March 1859 and a deed of purchase was signed on 29 March 1859. After weeks of protracted argument Mackay induced Ngai Tahu to accept £300 for 2.5 million acres. He refused to grant them a reserve of 100,000 acres which they requested and instead they were obliged to accept a mere 5558 acres in the remnant of land which had not yet been leased or sold to Europeans.

12.2. **Statement of Grievances**

We set out here from the combined summary of the claimants' grievances relating to both North Canterbury and Kaikoura, those grievances which relate to Kaikoura in whole or in part.

1. That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau Purchase of 1847 from Ngatitōa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms.
2. That the Crown allowed these blocks to be sold or leased to European settlers – [. . .] almost entirely in the case of the Kaikoura Block – before they had been purchased from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this.
3. That the Crown refused to allow lands requested by Ngai Tahu [. . .] between the Kahutara and Tutaepu (Conway) Rivers in the Kaikoura Block to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty.
4. [Relates solely to the North Canterbury block].
5. That the Crown in the Kaikoura Block provided reserves that were inadequate for agricultural purposes and inadequate as an economic basis for the prosperity of Ngai Tahu, and that were unreasonably encumbered with Crown roading and railway rights.
6. That the Crown [. . .] in the Kaikoura Block [under the Land for Settlements Acts for the benefit of landless Europeans] from November 1893 resumed the Cheviot, Blind River, Starborough, Puhipuhi, Richmond Brook, Waipapa, Lyndon No 1 & 2, Rainford, Annan, Flaxbourne No 1 & 2, and Culverden Estates, but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

12.3. **Background to the Purchase**

- 12.3.1 In our discussion of the North Canterbury purchase we outlined in some detail the way in which Ngai Tahu expressed their concern at

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the Crown's failure to recognise their mana over the land north of the Kaiapoi pa site. This concern extended, as we have seen, not just to the North Canterbury block, but to the land up to and beyond Kaikoura as far as Parinui o Whiti, or the White Bluffs, at the northern end of the Kaikoura district.

Without repeating the detailed evidence recorded in the previous chapter, the tribunal briefly notes the following incidents by way of example.

- In February 1848, as Matiaha Tiramorehu later reported, Ngai Tuahuriri sought payment for Kaikoura and Kaiapoi (L9:23).¹
- As soon as Mantell, in September 1848, fixed the northern boundary of the Kemp purchase at the Kaiapoi pa Paora Tau said that it should "be put right back to Te Parinuiowhiti". Later that day Mantell was told a party of Ngai Tahu would go to Wellington to see the Governor "and try and shift the line back to Te Parinui o whiti" (G2:773-775).² A party duly went and saw Lieutenant-Governor Eyre at Wellington.
- On 11 January 1850 Hamilton reported to Fox that it was probable the Ngai Tahu of Kaiapoi, Amuri, Kaikoura and Port Levy would object to the occupancy of the country to the north of the Kowai River as far as Kaikoura (L9:31).³
- On 16 January 1850 John Tikao and 11 other Ngai Tahu chiefs wrote to the governor on behalf of the Tuahuriri people claiming the land between Kaiapoi and the Wairau. (A8:II:7)⁴
- In April 1850 Kelham, on behalf of William Fox, reported that Ngai Tahu assertions that some of the country between the Kaikoura mountains and the Port Cooper plains had not been purchased might have some foundation. Fox himself had heard this when at the Kaikoura peninsula (L9:30).⁵
- On 10 December 1850 the New Munster Executive Council, on Eyre's initiative, agreed to pay £50 for the relinquishment by Ngai Tahu of their claims to the country between Kaikoura and Kaiapoi. Governor Grey approved the proposal in January 1851 (M11:7-12).⁶ It seems the money was never paid over.
- In October 1852 Kemp, the native secretary of New Munster, paid the sum of £60 to the chief Kaikoura Whakatau "by which he relinquishes all claims to the lands in the vicinity of Kaikoura" (T2:66).⁷ Whether this was in fact the payment for Fyffe's whaling station at Waiopuka is not clear (T1:262).
- Governor Grey visited Canterbury in 1852 and was later reported by J G Johnson as having offered the Kaiapoi hapu £100 for their

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rights north of the Ashley. How far this was to have extended is not clear (A8:II:11).⁸

- In September 1852 Paora Tau and Hone Wetere Tahea wrote demanding payment for Waipapa, Kaikoura, Waiau, Te Hurunui, Motunau, Rakahuri and Kaiapoi (T1:263).⁹

12.3.2 Meanwhile, as we have noted (11.3.8), the Crown proceeded to recognise the claims of various other tribes including Ngati Toa. At the same time, European settlement gathered momentum in both the Kaikoura and North Canterbury blocks (11.3.9–11). As Professor Ward noted:

In the 1850s, Maori wrote, and remonstrated, repeatedly. Grey was given ample opportunity to redress the grievance. It was not lack of information that caused the delay. (T1:277)

While Donald McLean, the land purchase commissioner, was very active during this period, he clearly regarded the claims of Ngai Tahu as having little if any need of prompt attention. And so by 1858 the whole of the Kaikoura block of some 2.5 million acres was occupied by European settlers except for three relatively small blocks, including one at the Kaikoura peninsula. By the following year, 1859, only the block at the peninsula had not been leased or sold to settlers (M6:24–25).

Hamilton reports Ngai Tabu's willingness to sell

12.3.3 When Hamilton returned to Lyttelton on 24 December 1856, after laying out reserves following the completion of the Akaroa block purchase earlier that month, he found Kaikoura Whakatau, the paramount Kaikoura chief, and 20 to 30 of his principal people waiting to see him. They had heard that Hamilton was about to commence negotiations with the Kaiapoi people for the purchase of the North Canterbury block.

As Hamilton reported to McLean on 8 January 1857:

Whakatau stated at the interview I had with him, in presence of the principal Maoris of Kaiapoi, Rapaki, Port Levy, &c. (who are all members in common with the Kaikoura people of the Ngaitahu tribe), that Ngaitahu are the lawful owners of the country southwards from Pari-nui-o-whiti (The White Bluffs) between the Wairau and the Awatere (Wakefield); of this tract the Kaikoura Maoris claim the special ownership as far as the Waiau-ua, which was fully admitted by the Kaiapoi and Rapaki Maoris who, on the other hand, claim no special ownership north of the Waiau-ua. (A8:II:16)¹⁰

Hamilton went on to report on the basis of his conversation:

- that Whakatau complained that the Ngati Toa had no right to sell the country from Wairau to Kaiapoi;

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- that the whole of the country from Parinui o Whiti southwards had long been occupied by sheep owners but the Kaikoura people had never received one shilling for it except for £50 in about October 1852 paid to Whakatau for the surrender of Waiopuka, Fyffe's whaling station on the Kaikoura peninsula;
- that by a census recently taken for the Nelson government he "understood them to say" Kaikoura Maori numbered 80. They lived or cultivated at Waipapa, Ohau, Te Hapuku, Maunga, Mahuita, Wainuairara, Kaikoura pa and Mikonui. They owned some cattle and horses; and
- that Whakatau and his people offered to sell all their land to the Crown except for two reserves – one of 400 acres at Waipapa old fishery, the other of 600 acres at the Kahutara River, or such other reserves as might later be agreed upon. Hamilton understood the price to be the same as for Akaroa and that to be offered for North Canterbury, that is, £150. He strongly recommended:

that this opportunity be seized upon of satisfying, for the small sum of £150, a claim over not less than 1,200,000 acres of country, and at the same time of dealing honourably and fairly by the ostensibly rightful owners whose property we have now so long been enjoying. (A8:II:17)¹¹

It was noted in the Ward report that it is not clear from the context whether Hamilton's report of the money necessary to satisfy the claim was his own estimate or was reached in discussion with Ngai Tahu leaders (T1:279). Certainly Kaikoura Whakatau was later to deny making such an offer. Moreover, Hamilton admitted to possessing only "a slight knowledge of the Maori language" (A8:II:29).¹² The possibility of a misunderstanding cannot therefore be eliminated.

- 12.3.4 On 31 March 1857 McLean thanked Hamilton for his report on the unsettled claims of Whakatau and his people to lands between the White Bluffs and the Waiau-ua. He said the New Munster records were being searched. If the rights of the Kaikoura tribe were clearly established the government would pay £150 and make such reserves as might be necessary. McLean suggested that the claim had been inadvertently overlooked because the central government did not have an officer stationed in the South Island to investigate such matters. The commissioner indicated that he hoped to have the matter rectified in the course of the next summer. Again it seems he saw no need for haste (A8:II:25).¹³
- 12.3.5 By August 1857 Hamilton had become further concerned at the Crown's delay in commencing negotiations with "the legitimate owners" at Kaikoura and Arahura. In a letter of 6 August he urged upon McLean:

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the necessity for making early arrangements for sending a competent Maori scholar to Kaikoura and Arahura to obtain the surrender of the remaining Native lands in this Island. The recent gold discoveries at Nelson are so likely to raise the value of the land in the eyes of the Maoris to the most extravagant pitch, that I fear any delay in accepting their proposals to treat may end in totally preventing the acquisition of the land sought for by us. (A8:II:27).¹⁴

Hamilton might have added had he known, that the Kaikoura block was by then almost wholly overrun with European settlers. McLean, on 5 October 1857, replied that the governor would be despatching an officer at an early date to settle the claims (A8:II:27–28).¹⁵ But again, this was an idle assurance. The summer of 1857–58 came and went without any further action by the Crown. Indeed, nothing happened until November 1858.

12.4. **The Purchase**

The Crown finally authorises the Kaikoura purchase

12.4.1 More than 10 years after Ngai Tahu had first raised with Governor Grey, in February 1848, the issue of their title to the land at Kaikoura, the Crown eventually recognised the claim and took action to settle it.

On 3 November 1858 McLean wrote to James Mackay Jr, recently appointed assistant native secretary at the Collingwood goldfields, instructing him to proceed to Kaikoura to settle the claim. Mackay was told:

- to fix reserves “necessary for the maintenance and wants” of Ngai Tahu, “the proportionate area of the reserve for each individual or head of a family to vary from 10 to 100 acres, according to the quality, capabilities, relative value of the land, and rank of the owner”;
- to ensure that a village site required at Kaikoura by the Europeans was not reserved to Ngai Tahu;
- that the Crown would pay £150 for the block;
- that having completed his duties at Kaikoura he was to proceed to Arahura for a similar task;
- that the total sum estimated for the two purchases was £300, to be apportioned as he thought best; and
- that great reliance was placed on Mackay’s judgment in carrying out his duties, including the extent of the necessary reserves (A8:II:33–34).¹⁶

12.4.2 James Mackay was a competent Maori linguist. His father James Mackay Sr, a personal friend of McLean, had successfully sought an official appointment for his son. Mackay Jr became something of a

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protégé of McLean. He considered McLean to be one of his best friends. Not infrequently, when he wrote officially to McLean he also wrote him a separate personal letter. In this way he was better able to explain or justify his actions.

Mackay arrives at Kaikoura

12.4.3 James Mackay Jr set off for Kaikoura on horseback on 15 February 1859. With him was his cousin Alexander Mackay, later to become prominent in Maori affairs and a Native Land Court judge. They reached Kaikoura nine days later on 24 February. With them came all the Ngai Tahu living between the Waiautoa River and the peninsula. Whakatau, the principal chief of the region, was still to arrive.

While awaiting the arrival of Whakatau, Mackay had some general discussion with those Ngai Tahu present. The following day he wrote two letters to McLean, one official, the other private. In his official letter he advised that:

- Ngai Tahu were very exorbitant in their demands and were seeking £5000;
- he had “hinted” to them that the land had been once purchased already and if necessary “the Ngaitoa and Ngatiawa tribes would give possession of it to the Government”;
- the district covered the whole of the Awatere, Tarndale, Clarence (Waiautoa), Amuri and Waiau-ua country, which he estimated to contain about 2.5 million acres;
- the greater part of these districts was now occupied by sheep-farmers, who in many cases had purchased considerable quantities of land from the government; and
- he would “use every means” in his power “to induce the Natives to accede to the terms offered” by him. If unsuccessful he would proceed to Arahura and then await further instructions (A8:II:34–35).¹⁷

12.4.4 In his private letter he was more forthcoming and was particularly critical of the Nelson provincial government.

- He expressed exasperation at being unable to persuade the Nelson provincial officials to make available a surveyor to mark out the reserves they “being all engaged in laying out runs at the Wairau and Amuri”.
- He protested that a surveyor, Clarke, who had been assigned to survey 64,000 acres at Amuri by May should have been placed at his disposal to lay out reserves for Ngai Tahu:

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previous to surveying land which had never been properly acquired from them, and which in fact has no business to be sold until the Native title has been extinguished over it. (M11:18)¹⁸

- He later emphasised that:

if the Nelson Provincial Govt. had before selling an acre of land or letting a single sheep run, laid the case of the Kaikoura Natives before the General Government, and requested its immediate adjustment, the present difficulty would not have arisen. (M11:22)¹⁹

We note that Mackay was evidently unaware that Ngai Tahu had been protesting to the governor and Crown officials since February 1848.

- He explained that the Ngai Tahu present seemed to know the exact sums paid for land at Amuri and Waiau-ua:

when they mention such sums as seven thousand eight hundred pounds being given by one man for land it is rather difficult to persuade them that the whole block is not worth five thousand pounds. (M11:20)²⁰

- The Kaikoura Ngai Tahu were more numerous than he expected “there being altogether about seventy I hear”:

. . . I am terribly afraid that these fellows are too wideawake for me, as to the value of the land—a good many of them are employed on the sheep stations and they know the country well both coast and inland, and seem to know every run and in some instances even the acreage of them. I told them today that they would have plenty of land reserved for their use. (M11:21)²¹

It is apparent from this correspondence that Mackay was somewhat pessimistic about the prospects of a successful outcome to his negotiations. His threat, or “hint”, as he preferred to disguise it, that the Crown might if necessary invoke the Wairau purchase cannot be condoned. It was made before the arrival of Whakatau and so before the negotiations proper began. It does not come well from a government official who was at the same time scathing in his criticism of the provincial government for facilitating the settlement of Ngai Tahu land before title had been obtained.

The deed is signed

- 12.4.5 Although Mackay commenced his discussions with Kaikoura Ngai Tahu on 24 February, a deed of purchase was not signed until 29 March 1859. It is apparent that protracted negotiations took place over the price and that discussions were broken off more than once. During the month all the reserves were identified and a list was signed on 15 March 1859. Mackay followed the practice adopted by Hamilton in keeping minutes of the proceedings. Unfortunately these are no longer available. The only contemporary record is Mackay’s official report to McLean of 19 April 1859 (A8:II:35–36)²² and his personal letter to McLean of 22 April 1859 (M11:23–26).²³ The Smith–Nairn commission did not hear evidence on the Kaikoura purchase.

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The boundaries

- 12.4.6 According to Mackay in his 19 April report the block contained about 2.5 million acres. As described in the deed:

the boundaries of the Land commencing at Karaka (Cape Campbell) and proceeding by the Sea Coast in a Westerly direction to Parinui-o-whiti (Wairau Bluffs) from thence turning inland it runs in a direct line to Rangitahi (Tarndale) at the source of the River Waiautoa (Clarence) whence turning in a South Westerly direction it continues by the mountains to Hikatura (Lake Summer) turning thence in an Easterly direction the boundary is the Hurunui to its confluence with the Sea – Thence turning at the mouth of the Hurunui in a North Easterly direction it goes along the sea beach to Karaka (Cape Campbell). Where the boundaries join. (see appendix 2.8)

Mackay explained that he was aware that the country between the Hurunui and Waiau-ua Rivers had been bought by Hamilton as part of the North Canterbury purchase. But he found that some of the Kaikoura Ngai Tahu denied having received any payment from Hamilton and they disputed the right of the Kaiapoi Ngai Tahu to sole ownership of the district. He thought it prudent therefore to include the whole of the land northward of the Hurunui in the deed. In the result the land between the Hurunui and Waiau-ua Rivers was included in both purchases.

The price paid

- 12.4.7 Mackay was obliged, if he wished to secure a purchase, to increase his earlier offer of £200 to £300. He did so most reluctantly and only after protracted stone-walling:

I set the fellows down so that none of them had anything to say, except that it was no use for them to talk to me as I was as hard as a stone and was Satan and Haukiora – and after all could not get them to take the money. (M11:26)²⁴

Mackay detailed his reasons for being obliged to increase his offer to £300 as follows:

1. That the Natives refused to take the sum of £150 (the sum I was instructed to pay them); and on my offering them £200 (which sum I considered I was justified in tendering, as £400 had been placed at my disposal for completing the Arahura and Kaikoura questions, to be apportioned by me in such a manner as I might deem most desirable for carrying out the duties assigned to me), they would not surrender the whole of their lands, wishing to retain the portion intervening the Rivers Kahutara and Tutai-putu-putu, containing some 100,000 acres, and which is rented from the Government by Messrs. Fyffe, Keene, and Tinline, for sheep runs, and part of which has also been purchased by them from the Crown.

2. That on my refusal to pay £200, unless the whole of the land was surrendered to the Crown, the Natives threatened to eject the settlers from the above-mentioned block.

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3. That I considered if the question was much longer delayed it would probably cost a larger amount to arrange it satisfactorily.

4. That the European settlers did not feel themselves secure unless the purchase was completed, the Natives having, in various ways, annoyed them by driving the sheep off the runs, preventing the settlers cutting timber, and from erecting buildings on their runs, and on several occasions, threatening that if they were not paid for the land, they would turn them off.

5. That although I did not think much of the threats of the Natives about ejecting the European residents, still they might be very troublesome, and should they turn any of them off land which had been purchased from the Crown, the person ejected would have strong claims to compensation, from the Government for selling him land, over which the Native title had not been properly extinguished; and the sum of £100 would be but a small item in comparison with the loss, which would be sustained by the Government in such a case, not to speak of the probable expense of making a future arrangement with the Natives, as in the case of Pirika and Caldwell at Tukurua, Massacre Bay.

6. That the Natives were not willing to defer the payment until I could write to Auckland for instructions, assigning as a reason that they had already been deceived by the Government, and ought to have been paid long before.

7. That on my taxing the Chief Kaikoura (Whakatau) with breach of faith, in now asking £10,000 for land which he had formerly agreed to sell for £150, he repudiated having done so, merely stating that he had expressed his willingness to dispose of it, but had not mentioned the price. That although I produced a copy of Mr Hamilton's report, the whole of them steadfastly denied having ever offered the whole of the land for £150.

8. That the Natives were thoroughly acquainted with the value of the land they were selling, instancing the payment of £7800 to Government by Mr Robinson for a small piece of the block now offered for sale by them, and several others of the same nature.

9. That I felt assured it would be impossible to get them to surrender their claims for less than £300, as I could not advance any more arguments against them than I had done, and although they admitted that I had controverted every argument made by them, they obstinately persisted in refusing to take £200.

10. That it was not without considerable difficulty that I managed to get them to consent to receive even £300, and I had to make a false start to Port Lyttelton before they could be brought to assent to it. (A8:II:35–36)²⁵

12.4.8 While there is no record here of any repetition of the threat made by Mackay during his discussions prior to the arrival of the paramount chief Whakatau, it is apparent that he resorted to the subterfuge of appearing to be willing to depart as a means of inducing Ngai Tahu assent to the sale for £300.

There is a distinct possibility that Hamilton, because of his slight knowledge of Maori, misunderstood Whakatau as having earlier

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agreed to sell for £150. In any event, the question of reserves had been left open and Mackay refused Ngai Tahu's request for a 100,000 acre reserve.

Ngai Tahu were extremely reluctant to accept £300. They well knew how very inadequate such a price was, given the then well-established value of land in the district. The price, although more than contemplated by Mackay, can only be regarded as nominal. It was grossly inadequate.

The reserves

- 12.4.9 Mackay was unable to obtain the services of a surveyor. He laid off and marked the various reserves himself. The deed of purchase which, like the deed later made at Arahura, purported to be made under the "shining sun", made no reference to reserves. These were, however, provided for in an earlier memorandum of 15 March signed by Kaikoura Whakatau, 20 other Ngai Tahu, James and Alexander Mackay and George Fyffe, described as a sheep farmer of Kaikoura. The memorandum reserved for Ngai Tahu the following lands:

Reserve	Acres
Mikonui	450
Te Kiekie	20
Omihi	100
Te Hiku o te Waero (Kaikoura, South Bay)	3
Kaikoura at the Pa	22½
Opokiki	12½
Pukaka	100
Maungamaunu and Waipapa	4800
Kahutara	50

(A8:II:384)²⁶

The memorandum provided that, should the government wish to make roads through these lands, Ngai Tahu agreed to give the portions required without payment.

- 12.4.10 In his letter of 19 April 1859 Mackay commented that the quantity of land provided for reserves might "appear large". But he went on to explain that:

it is of the most useless and worthless description, (especially the block of 4,800 acres), and the total value of it cannot be estimated at more than £450 or £500, in fact it is questionable from the nature of the reserves whether they will be found more than barely sufficient for the wants of the Native population, and for the increase of their horses and cattle, of

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which they now possess considerable numbers, one of the best proofs of which is that they have applied to me to be allowed to purchase land from the Government, to the extent of about 400 acres within the block just ceded by them to the Crown. (A8:II:36)²⁷

This is a disturbing statement. Mackay characterises the larger part of the reserves as of the “most useless and worthless description”. On the plan of the large 4800 acre block officially known as M801, Mackay endorsed the following note:

Plan of the block of land reserved by the Natives of Kaipapa and Maunga Maunu for themselves, at the time of disposal of their claims to land on the East Coast, Province of Nelson.

Estimated contents 4800 acres; nearly the whole of it is utterly worthless for European settlement or cultivation, and is valued by the Natives for the Karaka, which grows on the face of the hills and cliffs. The North and south boundaries have been laid out to the full distance of fifty chains, and it is improbable that the inland boundary will ever require surveying. (M28(f))²⁸

This map is dated 28 March 1859 – the day before the deed was signed. Mackay over-simplified in suggesting that the 4800 acres was attractive to Ngai Tahu principally because of the karaka berries present in considerable quantities. His cousin Alexander Mackay who was present throughout the negotiations some years later noted:

Although the Kaikoura reserve is large, it is very worthless, consisting chiefly of steep hillsides clothed with a small growth of timber. It was given to the Natives at their own request when surrendering their claims to land in that locality, in order to secure to them the right of fishing along the coast. (A8:II:312)²⁹

- 12.4.11 W J Elvy in his history of the Kaikoura coast published in 1949 was cited by Dr Donald Loveridge (M10:47–48). Elvy, in noting that Mackay had made excuses in his report for granting the large reserve at Maungamaunu, said Mackay “would probably be surprised if he could visit it nowadays to find that it carries about 5000 sheep and 500 cattle”. Elvy also commented that when he was surveying on the block in 1908 he:

railed at the Maori for being so foolish as to take his [sic] land in such a rough locality. “Why didn’t you take your land at Bendemere, that lovely strip of good land between Mill and Schoolhouse roads?”, I asked. “That’s all very well for you to talk,” they said. “When the Pakeha came the Maori knew nothing of the cow and the sheep. He only knew the foods of the forest and the sea. At Wai-o-patiki (Bendemere stream) there were no fish and no foods of the land. But at Maungamaunu there were the *paua* (mutton fish), the *pipi* and *pupu* (cockles and whelks), the *kuku* and *kopukopu* (mussels) on the rocks. In the sea there were the *koura* (crayfish), the *kahawai*, the *marari* (butterfish), the *pakirikiri* (rock-cod), the *ngaira* (conger eel) and the *hapuku*. On the land were the *karaka*, the pigeon, *kaka*, and other birds. The Maori says: “that’s the place for me – plenty of kai. Lay my land off there.” (M10:47–48)³⁰

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12.4.12 While the tribunal has no doubt that the mahinga kai available was a major reason why Ngai Tahu requested this reserve it does not accept that in 1859 Kaikoura Ngai Tahu were not anxious to retain land for pastoral purposes. In the passage already quoted from his report Mackay, after referring to the horses and cattle owned by Ngai Tahu, told McLean that they had asked him to be allowed to purchase 400 acres from the government within the block they had just ceded to the Crown. This is the Akaroa purchase situation repeating itself. In the tribunal's view it reveals an appalling attitude on the part of the Crown's agent, who to prove how hard a bargain he has driven, virtually gloats over the fact that to obtain land they want and need Ngai Tahu are driven to seeking permission to buy back 400 acres of their own land. We cannot condemn too strongly such a cynical disregard by the Crown's agent of the rights of its Treaty partner. We turn now to consider the claimants' various grievances.

12.5. Ngai Tahu's Grievances

Grievance no 1: Crown pressure on Ngai Tahu to sell

12.5.1 In their first grievance the claimants stated:

That the Crown's inclusion of Kaikoura and Kaiapoi in the Wairau purchase of 1847 from Ngatitōa exerted unfair pressure on Ngai Tahu to part with these blocks on unfavourable terms. (W5)

We have considered this grievance in relation to the North Canterbury purchase and upheld it. The only material difference between the circumstances of the Wairau purchase, insofar as it impinged on the North Canterbury and Kaikoura purchases, relates to the discussions between Ngai Tahu and Governor Grey at Akaroa in February 1848. As Matiaha Tiramorehu noted in his October 1849 letter to Eyre, Governor Grey told them at Akaroa that the payment for Kaiapoi should not be given to the Ngati Toa "but that the payment for Kaikoura was already gone to them [the Ngati Toa]." Just as Kaiapoi Ngai Tahu continued to protest the recognition of Ngati Toa's right to be paid for the North Canterbury block, so did Kaikoura Ngai Tahu similarly protest the recognition by the Crown of Ngati Toa's right to be paid for the Kaikoura block. Despite these protests the Crown refused or neglected seriously to investigate Ngai Tahu's title to the land until 1856, and further delayed its recognition of their right by not effecting a purchase until March 1859, by which time virtually all the land was held under pasturage licence or had actually been sold to European settlers.

Finding on grievance no 1

12.5.2 The tribunal is satisfied, given all the circumstances leading up to the 1859 purchase which we have related, that the Crown's inclusion of

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the Kaikoura block in the Wairau purchase did exert unfair pressure on Ngai Tahu to part with the block on unfavourable terms both as to price and reserves. The first grievance is accordingly sustained.

Grievance no 2: The sale of Kaikoura land to Europeans

12.5.3 The claimants' second grievance was:

That the Crown allowed these blocks to be sold or leased to European settlers – [. . .] almost entirely in the case of the Kaikoura Block – before they had been purchased from Ngai Tahu, and that Ngai Tahu have never been adequately compensated for this. (W5)

Mr D J Alexander's evidence showed that by the time of the North Canterbury purchase in February 1857 the whole of the block had been either leased or sold to European settlers. Mr Alexander's evidence also showed that by 1859 – the year of the Kaikoura block purchase – all but a relatively small area comprising the Kaikoura peninsula and the hinterland to the north back to the seaward Kaikoura range, had likewise been leased or sold to European settlers (M6:24–25). Just as with the North Canterbury block so in the Kaikoura block the price of land to the settlers was in 1859 at least ten shillings an acre, in the case of good land, or five shillings if of poorer quality. But Ngai Tahu received a mere £300 for 2.5 million acres. At five shillings an acre the price would have been £625,000; at just one shilling an acre £125,000. We cite these figures to indicate the vast disparity between the price at which, after one month's hard bargaining, Ngai Tahu were induced to part with their land, and its established market value in the hands of the Crown. Our comments on the North Canterbury block in respect of this grievance are equally applicable to the Kaikoura block.

Finding on grievance no 2

12.5.4 For substantially the same reasons as we gave for upholding this grievance in respect of the North Canterbury block (11.5.3) we likewise conclude that Ngai Tahu have never been adequately compensated for the Kaikoura block purchase. Grievance no 2 in respect of this purchase is accordingly sustained.

Finding on breach of Treaty principles in respect of grievances nos 1 and 2

12.5.5 In the discussion of grievance no 1 the tribunal pointed out the one material difference between the circumstances of the Wairau purchase insofar as it impinged on the North Canterbury and Kaikoura purchases (12.5.1). That distinction is not, however, material for the purposes of any finding as to breach of Treaty principles. Accordingly, rather than repeat the reasons given in 11.5.5 we simply record that for the same reasons we find the Crown acted in breach of article

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2 of the Treaty in respect of the Kaikoura purchase. We also find that to this day Kaikoura Ngai Tahu have not been compensated for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Grievance no 3: The Crown's refusal to allow requested reserves

12.5.6 In their third grievance the claimants alleged:

That the Crown refused to allow lands requested by Ngai Tahu [. . .] between the Kahutara and Tutaeputaputa (Conway) Rivers in the Kaikoura Block to be excluded from the sale or reserved exclusively for their use, in breach of Article II of the Treaty. (W5)

As we have seen, Mackay in his report to McLean of 19 April 1859 noted that Ngai Tahu refused to accept £150, and on his offering £200:

they would not surrender the whole of their lands, wishing to retain the portion intervening the Rivers Kahutara and Tutai-putu-putu [Conway], containing some 100,000 acres, and which is rented from the Government by Messrs Fyffe, Keene, and Tinline, for sheep runs, and part of which has been purchased by them from the Crown. (A8:II:35)³¹

Later in the same report Mackay advised that it would have been impossible to obtain Ngai Tahu's surrender of their claim for less than £300. Even then he had to resort to making a "false start" to Port Lyttelton before they could be brought to assent.

The area which Ngai Tahu wished to retain was a little south of the Kaikoura peninsula and lay between the Kahutara and Conway Rivers. Ngai Tahu no doubt sought to keep it for pastoral farming. Mackay must have been inhibited from agreeing to the reservation of this land, or any lesser area, because it was entirely occupied by European settlers and part had actually been sold to them. We note that Fyffe, one of the three Europeans concerned, was a witness to the deed of purchase.

12.5.7 The Crown did not seek, in evidence or submissions to us, to justify the refusal by the Crown agent to reserve the 100,000 acres requested by Kaikoura Ngai Tahu on any ground other than that it had been leased or sold to settlers. It was, of course, an area far in excess of the quantity of reserves which McLean had suggested to Mackay might be made. His formula was for reserves for each individual or head of family to vary from 10 to 100 acres according to the quality and relative value of the land and rank of the owner. In laying down such a formula McLean completely overlooked that article 2 of the Maori version of the Treaty guaranteed to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full exclusive and undisturbed possession of

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their land so long as they wished to retain it. It is apparent that Ngai Tahu wished to retain a substantial area of land for pastoral purposes and no doubt for greater access to a variety of mahinga kai resources. Instead their wishes were ignored and they were induced to settle for a mere 5558 acres.

Finding on grievance no 3

- 12.5.8 By imposing on its agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu the Crown acted in clear breach of article 2 of the Treaty. This breach was exacerbated by the action of the Crown in facilitating the leasing and, in part, the sale of land to which Ngai Tahu's title had not been extinguished. The Crown's agent Mackay, as his correspondence to his superior McLean only too clearly revealed, was fully aware of this. Mackay was obliged by the Crown to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they wished and were entitled to retain. It was the Crown's responsibility to respect Ngai Tahu's title to their land and to restore it to them if, as was the case, they wished to retain it.

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

Grievance no 5: The adequacy of reserves

- 12.5.9 In grievance no 5 the claimants stated:

That the Crown in the Kaikoura Block provided reserves that were inadequate for agricultural purposes and inadequate as an economic basis for the prosperity of Ngai Tahu, and that were unreasonably encumbered with Crown roading and railway rights. (W5)

Following protracted negotiations and refusing to set aside the 100,000 acres sought by Ngai Tahu, the Crown agent reserved some 5558 acres, including the 4800 acres at Maungamaunu. To European eyes at the time this land was of little value. This was no doubt why it had not been taken up by them. Mackay knew at the time he was making inadequate reserves. He was asked if the Crown would sell back some 400 acres. At what price he did not say.

In his closing address, Crown counsel conceded both that the Crown had paid insufficient for the land and that it should have reserved more land for Ngai Tahu (X2:88).

- 12.5.10 Counsel for the claimants, in his reply to the Crown's closing address, challenged an estimated Ngai Tahu population of Kaikoura as being approximately 80 persons. This figure comes from a comment by Hamilton, in his letter of 8 January 1857 to McLean, in which he referred to a census taken recently for the Nelson government as numbering the Kaikoura Maori at 78, since increased by two births.

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From the context it appears Hamilton obtained this information from the chief Kaikoura Whakatau.

Mr Temm drew the tribunal's attention to what he called the great danger of making any conclusion on Ngai Tahu population figures, whether in Kaikoura as a result of "Hamilton's estimate" or anywhere else. He criticised some of Mantell's calculations made during the titi season when Ngai Tahu were absent from their kaika.

The tribunal readily accepts that estimates of population must be viewed with caution. It is likely that in many cases they will have been understated. But if the tribunal is to make a finding in any given case, whether reserves set aside for Ngai Tahu were ample for their present and future needs, it is desirable that it should have evidence not of the exact population but of the likely order of the population of the group. Without that information it may be very difficult for the tribunal to make a finding.

In the present case counsel for the claimants submitted that the Crown's observation that there were only 80 people at Kaikoura in January 1857 was "completely wrong". Unfortunately he did not inform the tribunal of the basis for that categorical statement, nor did he refer to any evidence which substantiated it. The claimants called no evidence on the question.

The tribunal accepts that there were at least 80 Kaikoura Ngai Tahu and possibly more at the time of the March 1859 purchase. The question before us is whether the Crown failed to ensure, as it was obliged by Treaty principles to do, that Kaikoura Ngai Tahu retained sufficient land for their present and future needs, or, as the claimants put it, sufficient land for an economic base.

- 12.5.11 The Crown purchased some 2.5 million acres of land for which Ngai Tahu received £300. The 5558 acres by way of reserves were clearly insufficient for their present needs, as Mackay himself conceded in his report to McLean. Had the Crown agent agreed, as he should have, to Ngai Tahu's request to retain 100,000 acres, it is unlikely there would have been any later complaint. While the reserve of 4800 acres did ensure access to valuable marine and other food resources, it was of very small dimension. In subsequent years even this area was seriously eroded by Crown action in taking substantial and valuable areas of land adjacent to the coast for road and railway purposes. This aspect of the claimants' grievance will be further considered by the tribunal in the later report dealing with ancillary claims. It was totally inadequate as a long term base for ensuring that Ngai Tahu in the Kaikoura block could prosper alongside the European settlers who had overrun their land. The Crown, as the tribunal has said on

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numerous earlier occasions, was under an obligation to ensure that Ngai Tahu retained generous areas of land, amply sufficient to secure reasonable access to mahinga kai and to engage in agricultural and pastoral pursuits. Once again the Crown failed to meet its Treaty obligation. In the result, Ngai Tahu suffered and have continued to suffer substantial loss.

Finding on grievance no 5

- 12.5.12 The tribunal finds that grievance no 5 is sustained for the reasons given above (12.5.11).

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

Grievance no 6: Land for Settlements Acts

- 12.5.13 In their final grievance the claimants alleged:

That the Crown [. . .] in the Kaikoura Block [under the Land for Settlements Acts for the benefit of landless Europeans], from November 1893 resumed the Cheviot, Blind River, Starborough, Puhipuhi, Richmond Brook, Waipapa, Lyndon No 1 & 2, Rainford, Annan, Flaxbourne No 1 & 2, and Culverden Estates, but failed to do likewise for Ngai Tahu, in breach of Article III of the Treaty. (W5)

The tribunal has considered an identical grievance in relation to the North Canterbury block. For reasons already given (11.5.9–10) the tribunal was unable to sustain that grievance. The legislation in force during the period when the various estates referred to in this grievance were resumed was not materially different from that applying to the North Canterbury block resumptions.

Finding on grievance no 6

- 12.5.14 As the situation is not materially different to that considered in the North Canterbury purchase, the tribunal is unable to sustain the present grievance no 6.

But the tribunal makes the same observations by way of criticism of the Crown's actions in relation to this grievance as it made in 11.5.10 of the North Canterbury purchase.

References

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- 3 Hamiton to Fox, 11 January 1850, *Compendium*, vol 2, pp 5–6
- 4 Tikao, Te Ao, Pukurau, Tuauau, Te Hau, Mokaikai, Huanoa, Koreko, Tawa, Riri, Tae Tae, Hia Hia to Grey, 16 January 1850, *Compendium*, vol 2, p 7
- 5 Kelham (for Fox) to Harington, 29 April 1850, *Compendium*, vol 2, p 5
- 6 Eyre to Grey (with enclosure), 23 December 1850, G7/13 despatch, NA, Wellington
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- 10 Hamilton to McLean, 8 January 1857, *Compendium*, vol 2, p 16
- 11 *ibid*, p 17
- 12 Hamilton to McLean, 19 November 1857, *Compendium*, vol 2, p 28
- 13 McLean to Hamilton, 31 March 1857; 1 April 1857, *Compendium*, vol 2, p 26
- 14 Hamilton to McLean, 6 August 1857, *Compendium*, vol 2, p 27
- 15 McLean to Hamilton, 5 October 1857, *Compendium*, vol 2, pp 27–28
- 16 McLean to J Mackay Jr, 3 November 1858, *Compendium*, vol 2, pp 33–34
- 17 J Mackay Jr to McLean, 25 February 1859, *Compendium*, vol 2, pp 34–35
- 18 J Mackay Jr to McLean, 25 February 1859, ms papers 32 (McLean) folder 421, ATL, Wellington
- 19 *ibid*, p 7
- 20 *ibid*, p 5
- 21 *ibid*, p 6
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- 23 J Mackay Jr to McLean, 22 April 1859, ms papers 32 (McLean) folder 421, ATL, Wellington
- 24 *ibid*, p 4
- 25 see n 22, p 36
- 26 “Memorandum of Reserves set apart for Natives of Kaikoura”, *Compendium*, vol 2, p 384
- 27 see n 22, p 36
- 28 M801 DOSLI, Blenheim
- 29 A Mackay to native minister, 6 December 1865, *Compendium*, vol 2, p 210
- 30 W J Elvy *Kaikoura Coast: The History, Traditions and Maori Placenames of Kaikoura* (Hundalee Scenic Board, Christchurch, 1949) pp 58–59
- 31 see n 22, p 35